Affirmed and Opinion filed August 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00420-CR

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JOHN GARCIA SOZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 780,419

O P I N I O N

John Garcia Soza appeals his conviction for the attempted murder of his common law wife. *See* TEX. PEN. CODE ANN. § 19.02 (Vernon 1994). Appellant waived trial by jury, and without a plea bargain agreement, pleaded guilty to the offense. The trial court assessed punishment at twenty years confinement in the Texas Department of Criminal Justice, Institutional Division. In two points of error, appellant contends (1) the trial court erred in not *sua sponte* withdrawing his guilty plea or, in the alternative, not granting his motion for new

trial; and (2) the twenty-year sentence for attempted murder constitutes cruel and unusual punishment. For the reasons set forth below, we affirm the judgment of the trial court

POINT OF ERROR ONE

By point of error one, appellant argues that the trial court erred in not *sua sponte* withdrawing his guilty plea or, in the alternative, not granting his motion for new trial. The record reflects that appellant entered a guilty plea and judicially stipulated that the State's witnesses would testify that the allegations of acts committed by him as stated in the indictment were true and correct. Pursuant to TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 2000), the trial court gave an oral admonishment. Below is the relevant portion of the admonishment:

> THE COURT: Are you pleading guilty in your case because you are guilty and not because of any promises, not because of any fear, not because of any persuasion on the part of your attorney or the district attorney, but because you are guilty and for no other reason?
>
> THE DEFENDANT: Yes, sir.

The trial court then ordered a pre-sentence investigation. When appellant later appeared for sentencing, he testified that the shooting was an accident. A similar claim was made in the pre-sentence investigation report.

In *Moon v. State* the Court of Criminal Appeals stated that there seems to be no valid reason for a trial court to withdraw a plea of guilty and enter a plea of not guilty for the defendant "when the defendant enters a plea of guilty before the court after waiving a jury." *Moon v. State*, 572 S.W.2d 681, 682 (Tex. Crim. App. 1978, op. on rehg.). Because it is the duty of the trial court to consider the evidence submitted, the court may find the defendant guilty of a lesser offense and assess the appropriate punishment, or it may find the defendant not guilty. *See id.* It would serve no purpose to withdraw the plea of guilty and enter a not guilty plea. *See id.*

The First Court of Appeals addressed a similar claim in *Solis v. State*, 945 S.W.2d 300 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd). A unanimous court observed:

> A trial court is not required to withdraw a guilty plea *sua sponte* and enter a plea of not guilty for a defendant when the defendant enters a plea of guilty before the court after waiving a jury, even if evidence is adduced that either makes the defendant's innocence evident or reasonably and fairly raises an issue as to guilt. It is the trial court's duty to consider the evidence submitted and, as the trier of fact, the court may find appellant guilty of a lesser offense or it may find the defendant not guilty. Therefore, it would serve no valid purpose for the court to withdraw the guilty plea and enter a not guilty plea when the defendant enters a plea of guilty before the court after waiving a jury.

Id. at 302-03 (citations omitted). Despite having raised this point of error, appellant acknowledges the rationale of these two precedential cases. We see no reason why we should not follow the same reasoning in the present case. The trial court had an opportunity to observe appellant and to weigh his credibility. The trial court fully admonished appellant before receiving his plea of guilty. At the sentencing hearing, appellant acknowledged having three prior assault convictions in which the victims were women. The trial court was in the best position to determine if appellant's plea was voluntary and if he in fact committed the offense to which he pleaded. Thus, the trial court did not abuse its discretion in failing to *sua sponte* withdraw appellant's guilty plea. Point of error one is overruled.

POINT OF ERROR TWO

In his second point of error, appellant contends that his twenty-year sentence for attempted murder constitutes cruel and unusual punishment in violation of the United States and Texas Constitutions. Again, appellant acknowledges that the law is well settled in this area. If the punishment is within the statutory range, it is not cruel and unusual. *See Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983); *Reed v. State*, 894 S.W.2d 806, 811 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd). Appellant's punishment was within the statutory range for the second degree felony of attempted murder. *See* TEX. PEN. CODE ANN. §§ 12.33,

19.02 (Vernon 1994). Taking into account appellant's prior violent criminal history, nothing in the record indicates that the imposed punishment was grossly disproportionate to the crime under either the United States or Texas Constitutions.

We overrule appellant's second point of error and affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed August 10, 2000.

Panel consists of Justices Anderson, Frost, and Lee.[1]

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[1] Senior Justice Norman Lee sitting by assignment.