

Affirmed and Opinion filed October 4, 2001.



In The
Fourteenth Court of Appeals

NO. 14-00-00359-CR

TOMMY TAM VU, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 815,552**

OPINION

Appellant Tommy Tam Vu pleaded guilty to the charge of aggravated robbery and waived his right to a trial by jury. The trial court assessed punishment at ten years confinement in the Institutional Division of the Texas Department of Corrections. Appellant now appeals his conviction based upon a single point of error: the trial court failed to weigh the evidence appropriately and take into account evidence that raised the issue of the appellant's innocence in determining whether there was sufficient evidence to substantiate appellant's guilty plea. We affirm.

FACTS

As the result of his participation in a home-invasion type robbery, appellant was charged by indictment with committing the offense of aggravated robbery. On December 8, 1990, appellant filed a motion for probation, entered a plea of guilty, and signed a “Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession” in which appellant admitted the allegations in the indictment were true. The trial court took the case under advisement by admitting the judicial confession and stipulation into evidence and accepting the appellant’s plea of guilty before resetting the case for sentencing.¹

Contrary to the statements in his judicial confession, appellant testified at the sentencing hearing that he did not have or exhibit a semi-automatic weapon during the robbery. At the conclusion of the hearing, the trial court found appellant guilty of the charge of aggravated robbery and affirmatively found that appellant used a deadly weapon in the commission of the robbery. Accordingly, the trial court denied appellant’s motion for probation² and sentenced appellant to not less than five years and not more than ten years confinement in the Department of Corrections.

DISCUSSION

At the conclusion of appellant’s brief, the issue on appeal is brought into sharper focus by the following statement: “[s]ince there is no showing in the record that the trial court took into account the appellant’s testimony that he did not possess a gun, which was

¹ A case is taken under advisement when the trial court accepts a plea of guilty and gives the necessary admonishments, but the issue of punishment remains. *Washington v. State*, 893 S.W.2d 107, 108 (Tex. App.—Dallas 1995, no pet.); *Thompson v. State*, 852 S.W.2d 268, 270 (Tex. App.—Dallas 1993, no pet). Once a plea is taken under advisement, withdrawal of the defendant’s plea is within the sound discretion of the trial court. *Washington*, 893 S.W.2d at 108; *Thompson*, 852 S.W.2d at 270. The trial court must look to the totality of the circumstances in determining whether there is sufficient evidence to require withdrawal of a plea. *Valle v. State*, 963 S.W.2d 904, 908 (Tex App.—Texarkana 1998, pet. ref’d). However, in this case, appellant never sought to withdraw his guilty plea.

² A finding of guilt on the charge of aggravated robbery prevented appellant from being eligible for judge-ordered community supervision. See TEX. CRIM. PROC. ANN. § 42.12(3)(g)(F) (Vernon Supp. 2001).

given prior to the trial court finding him guilty, this cause should be remanded . . .”

There are two reasons, apparent from the record of this case, appellant’s contention is erroneous. First, as we have noted, the trial court took the case under advisement by accepting appellant’s plea of guilty, giving the necessary admonishments, and scheduling a punishment hearing. Prior to the commencement of the punishment hearing, the trial court had only accepted appellant’s guilty plea, but had not pronounced judgment. Thus, during the punishment proceedings that followed, the trial court was still considering appellant’s guilt.³ By not pronouncing judgment as to appellant’s guilt, the trial court extended to appellant the opportunity to both proffer additional evidence on the issue of his guilt, and to request permission from the trial court to withdraw his guilty plea. This record does not reflect any indication the trial court did not consider all of the evidence offered at both stages of the trial regarding the issue of appellant’s guilt.

Second, the trial court engaged appellant in an extensive colloquy during the punishment phase regarding his contention he did not carry a firearm during the robbery. It is at this stage, we believe, the trial court demonstrated its grasp of the evidence and the contradictions between the complainant’s statements and appellant’s new position regarding the level of his participation in the aggravated robbery.

Appellant signed a judicial confession which stipulates appellant intentionally and knowingly, while in the course of committing theft of property, placed the victim in fear of imminent bodily injury while using and exhibiting a deadly weapon. However, appellant testified at the sentencing hearing that he did not carry or exhibit a weapon during the commission of the crime.

³ There is some authority that where a case is in the posture of the case at bar—appellant’s guilt had been established at the initial hearing where appellant signed a Judicial Confession—the fact that the court proceeded to hear testimony at the punishment phase did not reopen the issue of guilt. *Thompson v. State*, 852 S.W.2d 268, 270 (Tex. App.—Dallas 1993, no pet.) (stating that once a case is taken under advisement the only issue left is the appropriate punishment). Although the issue of guilt is not open, the trial court is required, before making a formal finding of guilt, to consider the evidence which raises the issue of a defendant’s innocence. *See Valle*, 963 S.W.2d at 908–09.

The record indicates the complaining witness made statements to the police that all three men who robbed her threatened her with semi-automatic weapons and wore face masks. At the sentencing hearing, the trial judge questioned the appellant about the discrepancy in the complaining witness' statements and appellant's testimony. Specifically, the trial judge asked the appellant if the complaining witness was also wrong about the face masks. The appellant responded that he was wearing a mask, but denied carrying a gun.

Court: Can you explain to me why she indicated to the police that all the individuals had a gun? She just making that up?

Appellant: Honestly, yes.

Court: Why would she make that up?

Appellant: Because she – I understand where she's coming. If I was in her position, I would just do what all – whatever my power to just get everybody, you know.

Court: Were you wearing a face mask?

Appellant: I think I did.

Court: Oh, okay. So she's got the part about the face mask right, but not the gun?

Appellant: Huh-uh, because –

Court: How is it that she gets one right but not the other?

Appellant: Your Honor, the only person that had the gun was Quan, and the – the rest –

Court: But she says that all three of them had guns.

Appellant: I did not have a gun, sir. If – if –

Court: But you had a mask?

Appellant: Yes, I did.

Court: If all you are going to do is stay outside with the pillowcase, what did

you need a mask for?

Appellant: Just – I have no idea, sir. He just told me.

The trial judge also questioned whether any weapons were recovered. The State denied that any weapons were found.

Court: Were there any weapons recovered?

State: There were no weapons recovered, Judge.

Court: Okay. So all I have is a 16-year-old girl saying that she had three guns put to her head.

The trial court's line of questioning directed at the appellant and the State evidence the fact the trial court was considering appellant's testimony regarding appellant's assertion that he did not carry or exhibit a weapon during the commission of the crime.⁴ Therefore, because the trial court did consider the evidence on the issue of whether appellant used or exhibited a deadly weapon, appellant's sole point of error is overruled.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed October 4, 2001.

Panel consists of Justices Anderson, Hudson, and Frost.

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⁴ Although appellant does not challenge the sufficiency of the evidence, we find that the trial court did not abuse its discretion in determining there was sufficient evidence to support appellant's guilty plea. The trial court, as the trier of fact is entitled to judge the credibility of a witness. *Moon v. State*, 572 S.W.2d 681, 682 (Tex. Crim. App. 1978). Accordingly, the trial court could have disbelieved appellant's testimony and thus, given no weight to it and found him guilty of the charged offense.