Affirmed and Opinion filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00512-CR

RONALD GLENN SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 94-27966

O P I N I O N

The trial court sentenced appellant to 25 years in the Texas Department of Criminal Justice, Institutional Division for possession of a controlled substance. Before receiving this sentence, appellant was given five years of community supervision. However, appellant violated several terms of the community supervision order within a short time – and the State moved to adjudicate guilt. Because of two previous felony convictions, appellant was given a 25 year sentence for the possession offense, as a habitual offender. We affirm.

In his sole point of error, appellant argues he is entitled to a new trial because the trial court erred by not conducting a hearing on his motion for new trial. We affirm.

A careful review of the record reveals that, when appellant entered his guilty plea, he was given the following written admonishment:

> You are charged with the felony of [possession of a controlled substance]. . . . If convicted, you face the following range of punishment: HABITUAL OFFENDER: a term of life or any term of not more than 99 years or less than 25 years in the Institutional Division of the Texas Department of Criminal Justice.

This admonishment was signed by appellant, his attorney, the prosecutor and the trial court.

On January 6, 1996, the State filed a motion to adjudicate guilt based on several violations of appellant's probation requirements. On February 20, 1997, the Court appointed appellant legal counsel for the motion to adjudicate hearing. On the same day, appellant signed the following statement:

> I hereby reject the state's offer of 25 years in prison and request this be set for a hearing. I understand this carries a penalty of 25 years minimum and 99 years or life maximum.
>
> /s/ Ronald Smith

After the hearing on the motion to adjudicate guilt, the trial court found appellant guilty of his third felony and sentenced him to 25 years in the Texas Department of Corrections, Institutional Division as a habitual offender.

Appellant timely filed a motion for new trial, with affidavit, arguing he was entitled to a new trial because he was "not informed that the Judge could sentence him to a minimum of 25 years and a maximum of 99 years or life and a fine of $10,000.00 if he violated the terms and conditions of his probation." The trial court set the motion for new trial for oral hearing on May 1, 1997. However, the motion for new trial hearing was not held because instead of bringing appellant to Court for the hearing, the Sheriff's Department sent him to the Texas Department of Corrections.

The purpose of a motion for new trial hearing is to fully develop the issues raised in a motion for new trial. *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994). Appellate Rule 21.6

requires a defendant to present the "motion for new trial to the trial court within 10 days of filing it, unless the trial court in its discretion permits it to be presented and heard within 75 days from the date when the court imposes or suspends sentence in open court." TEX. R. APP. P. 21.6. Seventy-five days after the trial court imposes a sentence, a motion for new trial is overruled by operation of law. *See* TEX. R. APP. P. 21.8. Once the motion for new trial is filed, an attorney is required to take affirmative steps to ensure a hearing or even additional hearings are set on his client's motion for new trial. *See, e.g., Grimes v. State*, 171 Tex. Crim. 298, 299, 349 S.W.2d 598, 599 (1961).

Other appellate districts have decided questions similar to the one here: Whether a trial court committed error by not holding a hearing on a motion for new trial where appellant's attorney did not properly set a timely hearing. *See Ryan v. State*, 937 S.W.2d 93, 96-97 (Tex. App.—Beaumont 1996, pet. ref'd) ("The burden was on appellant, through her appointed counsel, to request and obtain a hearing on her motion prior to the [motion being overruled by operation of law.]"); *Johnson v. State*, 925 S.W.2d 745, 747-49 (Tex. App.—Fort Worth 1996, pet. ref'd) (It was defendant's counsel's burden to request a hearing on a motion for new trial – before the motion would be overruled by operation of law – even though the first hearing was suspended because of a bomb threat.); *Brooks v. State*, 894 S.W.2d 843, 845 (Tex. App.—Tyler 1995, no pet.) (A "trial court is not required to convene a hearing for a motion for new trial absent a request by the movant for such a hearing."). Each of these courts determined it was the duty of counsel to properly request a hearing – even an additional hearing – before the motion for new trial was overruled by operation of law.

Contrary to appellant's argument, the Court of Criminal Appeals has decided that the right to a hearing on a motion for new trial is not an "absolute right." *See Reyes v. State*, 849 S.W.2d 815 (Tex. Crim. App. 1993) (en banc). The Court has also held a "hearing is *not* required when the matters raised in the motion for new trail are subject to being determined from the record." *Id.* at 816 (emphasis in original); *see Bumpers v. State*, 509 S.W.2d 359, 363 (Tex. Crim. App. 1974); *Hubbard v. State*, 912 S.W.2d 842, 844 (Tex. App.—Houston [14th Dist.] 1995, no pet.).

Appellant contends that he requested a new trial because he was not informed the Judge "could sentence him to a minimum of 25 years and a maximum of 99 years or life and a fine of $10,000.00 if he

violated the terms and conditions of his probation." As noted previously, the record reveals appellant was properly informed of the applicable punishment range. *See Darrington v. State*, 623 S.W.2d 414, 416 (Tex. Crim. App. 1981) ("All of the allegations presented in the motion for new trial, except for an allegation of jury misconduct, could be determined based upon the record of appellant's trial."); *Bryant v. State*, 974 S.W.2d 395, 400 (Tex. App.—San Antonio 1998, pet. ref'd) (The record can be examined to determine if the trial judge properly admonished a defendant.). Accordingly, even if the hearing had been denied, appellant was not deprived of an opportunity to offer proof in support of his motion for new trial. *See Bumpers*, 509 S.W.2d at 363.

Although a hearing on the motion was granted – the burden was on appellant to continue to see that a hearing is properly set before the motion for new trial is overruled by operation of law. Thus, any error in not having a hearing was waived by appellant by failing to seek an additional date for the motion for new trial hearing. Further, because appellant's ground for relief in his motion for new trial is determinable from the record, the trial court would not have been required to hold a hearing. Accordingly, the judgment of the trial court is affirmed.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed October 14, 1999.

Panel consists of Justices Draughn, Lee, and Hutson-Dunn.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.