Affirmed and Opinion filed November 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-00-00130-CR

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TERRANCE P. MCGOWEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 818,544

O P I N I O N

Appellant was charged by indictment with the felony offense of possession of less than one gram of cocaine, enhanced with three prior felony convictions. After the State abandoned the first enhancement paragraph, appellant entered a guilty plea pursuant to a plea bargain agreement. The court followed the agreement and assessed punishment at confinement for four years in the Institutional Division of the Texas Department of Criminal Justice.

Appellant's appointed counsel filed a motion to withdraw from representation of appellant along with a supporting brief in which he concludes that the appeal is wholly frivolous and without merit. The

brief meets the requirements of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978).

A copy of counsel's brief was delivered to appellant. Appellant was advised of the right to examine the appellate record and to file a *pro se* response. Appellant has filed a *pro se* response to the *Anders* brief complaining that his plea was involuntary because he did not understand the range of punishment. In support of his argument, appellant notes that the written admonishment paragraph regarding range of punishment does not contain his initials; therefore, he claims his plea could not have been knowing and voluntary. We agree with appellate counsel that the appeal is frivolous and find no arguable grounds of error are presented for review.

Article 26.13(a)(1) of the Texas Code of Criminal Procedure requires a trial court to admonish a defendant about the punishment range attached to an offense before accepting a plea of guilty or nolo contendere. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (Vernon 1989); *Hughes v. State*, 833 S.W.2d 137, 139 (Tex. Crim. App. 1992). An admonishment may be given orally or in writing. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(d) (Vernon 1989). An admonishment that substantially complies with article 26.13(a)(1) is sufficient. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(c) (Vernon 1989). When the record reflects a trial court admonished a defendant under article 26.13(a)(1) and assessed punishment within the actual and stated range for the offense, substantial compliance will be deemed to have occurred, and there is a *prima facie* showing that the defendant's plea was knowing and voluntary. *See Hughes*, 833 S.W.2d at 140; *Robinson v. State*, 739 S.W.2d 795, 801 (Tex. Crim. App. 1987). Once it is shown a trial court substantially complied with article 26.13(a)(1) and that a defendant's plea was *prima facie* knowing and voluntary, the burden shifts to the defendant to show affirmatively both that he was unaware of the consequences of his plea and that he was misled or harmed by the trial court's admonishment. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(c) (Vernon 1989); *Robinson*, 739 S.W.2d at 801.

In this case, appellant waived the right to have a court reporter record his plea. Appellant signed

a document entitled “Admonishments” and acknowledged each article 26.13 admonishment by placing his initials in the space provided on the pre-printed form. The admonishment paragraph regarding the appropriate range of punishment has been circled; however, the space provided for appellant’s initials is blank. The document is signed by appellant, his attorney, the prosecutor and the trial judge. The judgment recites that appellant waived his right of trial by jury, pleaded guilty, and "the Defendant was admonished by the Court as required by law.”

Because the record reflects the trial court admonished appellant under article 26.13(a)(1) and assessed punishment within the range of punishment for the offense charged, the trial court’s admonishment is deemed to have substantially complied with article 26.13, and appellant’s guilty plea was *prima facie* knowing and voluntary. *See Grays v. State*, 888 S.W.2d 876, 878 (Tex. App.–Dallas 1994, no pet.). The burden shifted to appellant to show otherwise.

The issue becomes, therefore, whether appellant has shown affirmatively that, despite the trial court's substantial compliance with article 26.13(a)(1), he was not aware of the consequence of his plea as it related to the correct range of punishment for his offense and was misled or harmed by the court's admonishment. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(c) (Vernon 1989). Before we decide whether appellant has met the requirements of article 26.13(c), we first must determine what his burden is under this statute. An "affirmative" showing requires more than a defendant's unsupported, subjective assertion that he did not know the punishment range for his offense, that he would not have entered the plea in question had he been correctly admonished, or that he was misled or harmed by the trial court's admonishment. *See Ex parte Gibauitch*, 688 S.W.2d 868, 872 (Tex. Crim. App. 1985); *Grays*, 888 S.W.2d at 878-879. To constitute an affirmative showing under article 26.13(c), a defendant must show by evidence grounded in a judicial record subject to review both his lack of knowledge or understanding about the punishment range for his offense and, objectively, the manner in which he was misled or harmed. *See Grays*, 888 S.W.2d at 878-879. Depending on the particular case, the record of the plea hearing itself may provide sufficient evidence to show affirmatively these circumstances. *See id.* Of course, the posture of a case may be such that this burden cannot be met absent an evidentiary record developed independent of the plea hearing. *See id.* at 879.

In considering the voluntariness of a guilty plea, the court should examine the record as a whole. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). Appellant has not brought before this court a complete record of the pertinent hearings. It is quite possible that the trial judge properly admonished appellant during the plea proceeding and that appellant indicated his understanding of the appropriate range of punishment. However, because we have no record before us reflecting what transpired at that hearing, we cannot determine whether appellant was sufficiently admonished and whether his plea was involuntary. *See Anderson v. State*, 930 S.W.2d 179, 182 (Tex. App.–Fort Worth 1996, pet. ref'd); *Wright v. State*, 855 S.W.2d 169, 170 (Tex. App.–Corpus Christi 1993, no pet.). The only support in the record for appellant's contention that his plea was involuntary is the uninitialed admonishment form. There is nothing in the record to indicate that appellant was actually harmed or misled in making his determination to enter a guilty plea.

When, as in the instant case, the defendant waives a court reporter at the plea hearing, the burden is nonetheless on the defendant to see that a sufficient record is presented on appeal to show error. *See Lopez v. State*, 25 S.W.3d 926, 928-929 (Tex. App.–Houston [1st Dist.] 2000, no pet.). Both the "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" and the judgment recite that the judge admonished appellant of the consequences of his plea. There is a presumption of regularity of the judgment and the proceedings, and appellant has not met his burden of overcoming the presumption. *See id.* at *929; Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.–Houston [1st Dist.] 1996, pet ref'd). There is no requirement in article 26.13 that the defendant initial each written admonishment paragraph. (Vernon 1989 and Supp. 2000); *Lopez*, 25 S.W.3d at 929. Appellant has not shown that his failure to initial the range of punishment admonishment paragraph means that he was not fully admonished as required by law. *See Lopez*, 25 S.W.3d at 929. Nor has he shown by evidence in the record that his plea was unknowing or involuntary. Thus, appellant's *pro se* response presents no arguable ground for review.

Accordingly, the motion to withdraw is granted and the judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed November 9, 2000.

Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.

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