Affirmed and Opinion filed December 13, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01393-CR
NO. 14-99-01394-CR

THOMAS MORGAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause Nos. 809763; 809762

O P I N I O N

This is a consolidated appeal from two convictions for sexual assault of a child. Appellant contends that his guilty pleas were involuntary and that the trial court's failure to appoint appellate counsel deprived him of effective assistance of counsel for timely filing a motion for new trial and timely requesting evidentiary hearing. Finding no merit in these points, we affirm.

I. BACKGROUND

The State charged appellant Thomas Morgan by indictments with two felony offenses of sexual assault of a child. On July 29, 1999, appellant pleaded guilty in both cases without agreed punishment recommendations by the State. The trial court reset the cases pending a presentence investigation ("PSI") hearing. At the PSI hearing on October 29, 1999, the trial court found appellant guilty of the charged offenses and assessed punishment in each case at seventeen years' confinement, to run concurrently, in the Institutional Division of the Texas Department of Criminal Justice. Appellant did not file a motion for new trial but did timely file notice of appeal.

II. ISSUES PRESENTED

In his first point of error, appellant contends the trial court's failure to admonish him regarding registration requirements upon conviction for a sex offense rendered his guilty plea involuntary. In his second point of error, appellant contends his guilty pleas were also involuntary because the trial court failed to order a psychiatric examination to determine appellant's competency to stand trial. In his third and final point of error, appellant contends he was denied effective assistance of counsel on appeal because the trial court failed to appoint appellate counsel to assist him in timely filing a motion for new trial and scheduling an evidentiary hearing.

A. VOLUNTARINESS OF GUILTY PLEAS – ADMONISHMENT

In his first point of error, appellant contends his guilty pleas were involuntary because the trial court failed to admonish him regarding sex offender registration as required in article 26.13(a)(5) of the Code of Criminal Procedure.[1] *See* TEX. CODE CRIM. PROC. ANN. art.

---

[1] The Sexual Offender Registration Program requires a person previously convicted of certain enumerated sex offenses to, among other things, register with local law enforcement authorities in any

(Vernon Supp. 2001). He specifically notes that the written admonishments in the clerks' records include no sex offender registration admonishments but that a judgment addendum in both cases required him to register as a sex offender in compliance with chapter 62 of the Code of Criminal Procedure. In other words, appellant argues, "at the time Appellant was convicted he was ordered to comply with the terms and provisions of a statute mandating sex offender registration for which he was not admonished at the time of his guilty plea." Appellant contends that because he was convicted and sentenced on October 29, 1999, after the amendment to article 26.13 became effective, the trial court was required to admonish him on the registration requirement.[2] The State argues, and we agree, that the pleas were accepted and the cases taken under advisement by the trial court at the conclusion of the plea hearing in July and that the sex offender admonishment was therefore not required when appellant pleaded guilty on July 29, 1999.[3] *See* TEX. CODE CRIM. PROC. ANN. art. 62.01.

---

municipality in which the person expects to reside for longer than seven days. *See* TEX. CODE CRIM. PROC. ANN. art. 62.01 et seq. (Vernon Pamph. 2001).

[2] Appellant likens the trial court's failure to admonish him on the registration requirement to a trial court's failure to admonish an accused (upon a guilty plea) as to the range of punishment applicable to the offense for which he entered his plea. In support, appellant cites *Ex Parte McAtee* for the proposition that a trial court's failure to admonish as to range of punishment is reversible error without regard to harm. *See Ex parte McAtee*, 599 S.W.2d 335, 335–36 (Tex. Crim. App. 1980), *overruled in part by Ex Parte Tovar*, 901 S.W.2d 484, 486 n.2 (Tex. Crim. App. 1995). Appellant contends we should apply —to a trial court's failure to admonish on sex offender registration— the reasoning that governs failure to admonish on range of punishment, which the Court of Criminal Appeals considers reversible error, because "there is no logical nor analytical distinction to be made regarding a mandatory statutory admonishment regarding range of punishment and a mandatory statutory admonishment regarding sex offender registration in a sex case." However, since *McAtee* was decided, the Court of Criminal Appeals has held that harm is no longer presumed when there is a total failure to admonish the defendant of the range of punishment, as previously held in *McAtee*, 599 S.W.2d at 335–36. *Anders v. State*, 973 S.W.2d 682, 684 (Tex. App.—Tyler 1998, pet. ref'd) (citing *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997)); *Ex parte Tovar*, 901 S.W.2d 484, 486 ("However, to the extent that *Cervantes*, and *Ex parte McAtee*, 599 S.W.2d 335 (Tex. Crim. App.1980), indicate that a failure to admonish pursuant to Art. 26.13(a)(4) automatically entitles one to post-conviction collateral relief without a showing of harm, they are overruled.").

[3] Effective September 1, 1999, the Texas Legislature amended article 26.13(a) of the Texas Code of Criminal Procedure to add subsection (a)(5), requiring an admonishment regarding sex offender registration. *See* TEX. CODE CRIM. PROC. ANN. art. 62.01, et seq. (Vernon Pamph. 2001). The legislature did not make the requirement retroactive. *See* Act of May 29, 1999, 76th Leg., R.S., ch. 1415, § 1, 1999 Tex.

However, even assuming the amended version of article 26.13 applied to appellant's case, we would nonetheless conclude the trial court's error, if any, in failing to admonish on offender registration was harmless. Article 26.13, as amended, provides the trial court must give an admonishment that substantially complies unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court. TEX. CODE CRIM. PROC. ANN. art. 26.13(c). Under *Carranza v. State*, the trial court does not substantially comply with Article 26.13(a) when it fails to admonish a defendant on one of the statutorily-required admonishments. 980 S.W.2d 653, 655–56 (Tex. Crim. App. 1998) (holding trial court did not substantially comply with Article 26.13(a)(4) when it failed to admonish defendant, either orally or in writing, regarding deportation consequences of plea). The court further held this error was nonconstitutional error, subject to a Rule 44.2(b) harmless error analysis. *Id.* at 656. The court determined that under TEX. R. APP. P. 44.2(b), when there has been no substantial compliance with the admonishment requirements of Article 26.13, a defendant is required to show no more than his unawareness of the consequences of his plea and that he was misled or harmed by the admonishment of the court. *Id.* at 658.

Courts consider whether those consequences are direct or collateral in determining if the voluntariness of the plea was undermined by the failure to admonish. For example, the Texas Court of Criminal Appeals has considered whether the defendant was made fully aware of the direct consequences of a guilty plea when determining the voluntariness of the plea. *State v. Jimenez*, 987 S.W.2d 886, 888–89 (Tex. Crim. App. 1999) (applying *Carranza* to misdemeanor case and holding admonishment on deportation consequences of guilty plea not constitutionally required). Generally, a guilty plea is considered voluntary if the defendant was made fully aware of the *direct* consequences of the plea. *Id.* at 888 (citing

---

Gen. Laws. 4831, 4831–32, 4843 (current version at TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (Vernon Supp. 2001)). "A statute is presumed to be prospective in its operation unless expressly made retrospective." TEX. GOV'T CODE ANN. § 311.022 (Vernon 1998).

Brady v. United States, 397 U.S. 742, 755 (1970)). A guilty plea will not be rendered involuntary by lack of knowledge of some *collateral* consequence. *Id.* Similarly, before article 26.13(a) was amended to include an admonishment on sex offender registration, Texas courts held that sex offender registration was only a collateral consequence of a plea of guilty. *Ruffin v. State*, 3 S.W.3d 140, 144 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (holding requirements to register as sex offender have no impact on range of punishment and, therefore, not a direct consequence of plea of guilty to offense of sexual assault); *Guzman v. State*, 993 S.W.2d 232, 236 (Tex. App.— San Antonio 1999, pet. ref'd), *cert. denied*, 528 U.S. 1161 (2000) (holding failure to admonish defendant on his statutory duty to register as sex offender did not invalidate guilty plea); *In re B.G.M.*, 929 S.W.2d 604, 606–07 (Tex. App.—Texarkana 1996, no writ) (holding possibility of required sex offender registration was not a mandatory admonishment in a juvenile proceeding because registration requirements are remedial and collateral consequence of plea). Although courts are now required to admonish defendants regarding registration requirements, the registration does not impact a defendant's sentence and is meant to be remedial, rather than punitive. *Ducker v. State*, 45 S.W.3d 791, 795 (Tex. App.—Dallas 2001, no pet.); *Ruffin*, 3 S.W.3d at 144; *B.G.M.*, 929 S.W.2d at 606–07.

Applying *Carranza* and the concept of direct versus collateral consequence to the facts of this case, we hold that even if the trial court erred in failing to admonish appellant regarding the registration requirement, appellant has nevertheless failed to show that he was unaware of the consequences of his plea or that he was misled or harmed by the trial court's failure to admonish him pursuant to 26.13(a).

The record before us does not show that appellant did not understand the consequences of his plea. There is no evidence he would not have pled guilty if the trial court had admonished him on the registration requirements. The registration requirements did not affect the range of punishment. As such, the sex offender registration requirements

were collateral consequences of appellant's plea and did not affect the voluntariness of that plea. *See Ruffin*, 3 S.W.3d at 144. Accordingly, we find that the trial court's failure, if any, to comply with Article 26.13(e) of the Texas Code of Criminal Procedure was harmless error.

Appellant's first point of error is overruled.

B. VOLUNTARINESS OF GUILTY PLEAS – COMPETENCY

In his second point of error, appellant contends his original pleas of guilty were invalid and involuntary because the trial court should have ordered a psychiatric examination to determine his competency to stand trial. Specifically, appellant contends that in his pro se response to prior court-appointed counsel's *Anders* brief, he stated that he "had a mental history and a prior suicide attempt."

Unless an issue is made of an accused's present insanity or mental competency at the time of the plea, the court need not make inquiry into appellant's mental competency, and it is not error to accept appellant's guilty plea. *Kuyava v. State*, 538 S.W.2d 627, 628 (Tex. Crim. App. 1976); *Williams v. State*, 497 S.W.2d 306, 307–08 (Tex. Crim. App. 1973). Because the record does not reveal any evidence or action that raised the issue of appellant's competence when he pleaded guilty, we find that the trial court did not err by failing to order a competency evaluation of appellant.

Appellant's second point of error is overruled.

C. INEFFECTIVE ASSISTANCE DURING TIME TO FILE MOTION FOR NEW TRIAL

In his third and final point of error, appellant contends he is entitled to a new trial for violation of his right to effective assistance of counsel on appeal because the trial court neglected to appoint counsel to assist in timely filing a motion for new trial and schedule an evidentiary hearing on that motion until almost five months after sentencing, when the time

for filing a motion for new trial had long passed. Appellant further contends that the trial court failed to timely inquire as to whether he (1) wanted to pursue an appeal; or (2) desired appointment of appellate counsel. Appellant contends that through his pro-se post-plea filings and pro se response to an *Anders* brief, he clearly attempted to raise the issue and appeal ineffective assistance of his trial counsel but was deprived of an opportunity to develop a record on his motion.

Appellant argues that his filing of the notice of appeal pro se, without any signature by counsel (1) should have prompted the trial court to inquire as to whether appellant was represented for the appeal; and (2) rebuts the presumption he was adequately represented during that critical time when a motion for new trial could have been filed, because a notice of appeal signed only by the defendant indicates trial counsel does not intend to pursue his client's appeal. *See Ex Parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988).

The court of criminal appeals has addressed the scenario at issue in this point of error. *See Smith v. State*, 17 S.W.3d 660, 662–63 (Tex. Crim. App. 2000) (finding appellant was not denied effective assistance of counsel during the time for filing a motion for new trial, when appellant filed a pro se notice of appeal and when the trial court signed an order appointing counsel which was not filed until after the deadline for filing a motion for new trial had passed); *Oldham v. State*, 977 S.W.2d 354, 355–56 (Tex. Crim. App. 1998) (finding appellant was not denied effective assistance of counsel during time for filing a motion for new trial, although appellant filed a pro se notice of appeal, because the facts presented did not rebut the presumption that appellant was represented by counsel and that counsel acted effectively; noting there was no evidence in the record to suggest the attorney did not discuss the merits of a motion for new trial with appellant, which appellant rejected; noting the fact that appellant had filed a pro se notice of appeal indicated she was aware of some of her appellate rights; and presuming appellant was adequately counseled unless the record affirmatively displays otherwise).

Just as in *Smith* and in *Oldham*, we similarly find nothing in the record to suggest appellant was not counseled by his attorney regarding the merits of a motion for new trial. We may, therefore, assume appellant considered this option and rejected it. *See Oldham*, 977 S.W.2d at 363. Also, again as in *Smith* and in *Oldham*, that the appellant filed a pro se notice of appeal is evidence he was informed of at least some of his appellate rights. *Smith*, 17 S.W.3d 662–63. Consequently, we assume, absent a showing in the record to the contrary, that appellant was adequately informed regarding his right to file a motion for new trial. We hold that appellant has failed to overcome the presumption that he was adequately represented by counsel during the time for filing a motion for new trial.

Appellant's third and final point of error is overruled.

All points having been overruled, the judgment of the trial court is affirmed.

/s/ Charles Seymore
Justice

Judgment rendered and Opinion filed December 13, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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