**Affirmed and Opinion filed January 27, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-97-01271-CR**
**NO. 14-97-01275-CR**

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**JAVIER CORTEZ, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 248th District Court**
**Harris County, Texas**
**Trial Court Cause No. 744,384 & 744,383**

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## O P I N I O N

After entering a guilty plea and waiving his right to a jury trial, the trial court found Javier Cortez, appellant, guilty of two counts of aggravated assault. *See* TEX. PEN. CODE ANN. § 22.02 (Vernon 1994). The trial judge assessed punishment at five years imprisonment in the Texas Department of Criminal Justice, Institutional Division in cause no. 744,383 and ten years probation and a $2,000 dollar fine in cause no. 744,384. Appellant appeals his conviction on four points of error. We affirm the trial court's judgment for three reasons: (1) the trial court did not abuse its discretion in refusing to withdraw appellant's guilty plea; (2)

appellant's prison sentence did not deny him due process; (3) appellant's prison sentence was not cruel and unusual punishment.

## BACKGROUND FACTS

Appellant and Jimmy Hinojosa jumped out of a van and began shooting at Mario Borjan's house. Hinojosa fired two shots from a shotgun, while appellant fired four or five rounds from a .25 caliber semi-automatic pistol. One of the shots hit Mario Borjon and wounded him in the upper left shoulder. Another individual, Luis Borjon, was also inside the house at the time of the shooting.

Appellant was indicted for the offenses of deadly conduct and aggravated assault on Mario and Luis Borjon. Appellant pleaded guilty to aggravated assault and waived a jury trial for both offenses without an agreed recommendation from the state. The trial court deferred a finding of guilt and withheld sentencing pending a pre-sentence investigation.

During the pre-sentence investigation, appellant spoke with a probation officer and denied culpability for his participation in either offense. At the punishment hearing, his attorney asked him to explain this statement, but he did not answer the question. Instead, he denied that he was ever a member of any street gang.

The trial court imposed a five year prison sentence in cause no. 744,383. In cause no. 744,384, the trial court imposed ten years of deferred adjudication and a $2,000 dollar fine. Appellant's co-defendant, Hinojosa, pleaded guilty to his charge of aggravated assault and received deferred adjudication probation.

## DISCUSSION AND HOLDINGS

In his first point of error, appellant contends that the trial court erred in failing to *sua sponte* withdraw his guilty plea. We disagree.

The decision of whether to withdraw the guilty plea is left to the sound discretion of the trial court, and we, therefore, review the trial court's ruling under an abuse of discretion standard . *See Graves v. State,* 803 S.W.2d 342 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd).

When a defendant pleads guilty before a jury, the trial court must *sua sponte* withdraw the plea if evidence fairly raising an issue as to defendant's innocence arises before the defendant is found guilty. *See Griffin v. State,* 703 S.W.2d 193, 2195 (Tex. Crim. App. 1986). A different rule applies, however, when a defendant pleads guilty before a judge. *See Moon v. State,* 572 S.W.2d 681, 682 (Tex. Crim. App. 1978). In this situation, even if the evidence raises an issue of the defendant's innocence, the trial court may find the defendant "guilty of a lesser offense and assess the appropriate punishment, or it may find the appellant not guilty." *Id.*; *see Graves*, 803 S.W.2d at 346. "Thus, because the trial court is the trier of fact, it serves no purpose to require it to withdraw a guilty plea, if the evidence raises an issue regarding defendant's innocence." *See Edwards v. State,* 921 S.W.2d 477, 480 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

Here, appellant waived a jury and entered a guilty plea to two offenses of aggravated assault. During the pre-sentence investigation, appellant denied culpability for his participation in these offenses. However, he also made a judicial confession under oath in which he confessed that he was guilty of these offenses. Moreover, when his attorney asked him to explain his exculpatory statement during the hearing, he did not respond. Consequently, we find that the trial court was not required to withdraw appellant's guilty plea and did not abuse its discretion in refusing to do so. We, therefore, overrule the appellant's first point of error.

In his second point of error, appellant asserts that he was denied due process because he received a five year prison sentence while his co-defendant received deferred adjudication probation for the same offense.

A trial court denies a defendant due process when it arbitrarily refuses to consider the entire range of punishment for an offense. *See McClenan v. State,* 661 S.W.2d 108, 110 (Tex. Crim. App. 1983)(en banc); *Norton v. State,* 755 S.W.2d 522, 524 (Tex. App—Houston [1st Dist.] 1988, pet. ref'd).

Here, the record does not reflect defendant was denied due process. While appellant's five year prison sentence may be disproportionate to that of his co-defendant's sentence, it falls within the statutory range of punishment for aggravated assault. *See* TEX. PEN. CODE ANN. § 12.33 (Vernon 1996). Additionally, because appellant did not show that the trial court acted arbitrarily in considering the evidence or the statutory range of punishment imposed, we hold that appellant was not denied due process. Accordingly, we overrule appellant's second point of error.

In his third and fourth points of error, appellant contends that his sentence was excessive and violated both the state and federal constitutional prohibitions against cruel and unusual punishment. *See* U.S. CONST. amends. VIII & XIV; TEX. CONST. art. I, § 13; TEX. CODE CRIM. PROC. ANN. art. 1.09 (Vernon 1996). We disagree.

When the punishment assessed by the judge or the jury is within statutorily prescribed limits, it is not cruel and unusual punishment. *See Samuel v. State,* 477 S.W.2d 611, 614 (Tex. Crim. App. 1972); *Benjamin v. State,* 874 S.W.2d 132, 135 (Tex. App.—Houston [14th Dist.] 1994, no pet.); *Servin v. State,* 745 S.W.2d 40, 41-42 (Tex. App.—Houston [14th Dist.] 1987, no pet.). An individual convicted of a second degree felony, such as aggravated assault, can be punished by imprisonment for any term of two to twenty years along with an optional fine, not exceeding $10,000 dollar*s*. *See* TEX. PEN. CODE ANN. § 12.33, 22.02 (Vernon 1994) (emphasis added). Appellant received five years imprisonment in the Texas Department of

Criminal Justice, Institutional Divisions in cause no. 744,383. He received ten years probation plus a $2,000 fine in cause no. 744,384. Because the trial court sentenced appellant to a punishment within the range provided for by statute, we hold that the trial court did not assess a cruel and unusual punishment. Appellant's third and fourth points of error are overruled. The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed January 27, 2000.

Panel consists of Justices Yates, Fowler and Draughn.*

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* Senior Justice Joe L. Draughn sitting by assignment.