Affirmed; Opinion of June 22, 2000 Withdrawn and Corrected Opinion filed June 29, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00023-CR

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JOSEPH CACCAMO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 351st District Court
Harris County, Texas
Trial Court Cause No. 764,224

C O R R E C T E D O P I N I O N

The opinion issued in this case on June 22, 2000, is withdrawn and the following opinion is issued in its place. Joseph Caccamo appeals a state jail felony conviction for theft on the grounds that: (1) the evidence is insufficient to support his conviction; (2) the trial court erred in accepting his oral confession for a different offense than was alleged in the indictment; and (3) his nolo contendre plea was involuntary and coerced. We affirm.

Background

Appellant was indicted for unlawfully appropriating an automobile and entered a negotiated plea of nolo contendre. After finding appellant guilty, the trial judge assessed his punishment at two years confinement, probated for four years.

Notice of Appeal

As an initial matter, the State contends that this court lacks jurisdiction over the appeal because appellant's notice of appeal fails to state that he was appealing with the permission of the trial court.

If an appeal is from a judgment rendered on a defendant's plea of guilty or nolo contendre, and the punishment assessed did not exceed the punishment recommended by the prosecutor and agreed to by the defendant, the notice must specify that: (1) the appeal is for a jurisdictional defect; (2) the substance of the appeal was raised by written motion and ruled on before trial; or (3) the trial court granted permission to appeal. *See* TEX. R. APP. P. 25.2(b)(3). However, when a timely notice of appeal is filed and information required to be stated in it is instead reflected in a separate order signed by the trial judge, the notice of appeal and order are sufficient to confer jurisdiction on the appeals court.[1]

In this case, although appellant's general notice of appeal did not state that the trial court had granted permission to appeal, attached to the notice was an order signed by the trial judge which "granted" appellant's "foregoing Motion for Notice of Appeal" and contains a handwritten notation, "Bond set at $50,000." This order adequately reflects that the trial judge granted appellant permission to appeal his conviction and thereby gives us jurisdiction over the appeal. *See Riley*, 825 S.W.2d at 701.

Sufficiency of the Evidence

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[1] *See Riley v. State*, 825 S.W.2d 699, 701 (Tex. Crim. App. 1992) (finding that an order in the record, signed by the trial judge, and reflecting that the trial court had allowed the appeal and that a motion to suppress had been raised before trial, was sufficient to confer jurisdiction on the court of appeals, even though the notice of appeal did not incorporate or refer to the order).

Appellant's first point of error states that the evidence is insufficient to support his guilt of theft as a matter of law. He argues that $8600 was allegedly stolen from Bejjani Khalil and that the only evidence presented regarding this theft was "the court's order concerning restitution of the money to [Khalil] in appellant's conditions of community supervision." Further, appellant states that his "judicial statement" concerned only the money and was thus an insufficient factual basis for his plea. Appellant's second point of error similarly contends that the trial court erred by accepting a judicial confession of theft of money from Khalil rather than for the theft of an automobile from Brad Strapp, as alleged in the indictment.[2] Therefore, appellant claims that the evidence is insufficient to support his guilt of the charged offense.

The offense to which appellant confessed in his judicial confession is the same as that set forth in the indictment, *i.e.*, unlawfully appropriating an automobile owned by Bradd Strapp. Although appellant acknowledges that a written judicial confession will generally support a conviction,[3] he argues that if a "defendant's stipulation is orally taken, the trial court should make sure that the statement is under oath and not just part of the admonishments." However, because appellant waived the presence of a court reporter during the plea proceeding, there is no record of his oral stipulations for our review. We are thus unable to address the merits of appellant's contentions because he has failed to provide a record of the plea proceedings showing whether he confessed at that time to a different offense than that for which he was indicted and gave a judicial confession. *See Franklin v. State*, 693 S.W.2d 420, 431 (Tex.

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[2] Appellant's argument relies in part on the record of a hearing, held on September 8, 1999, in which Khalil acknowledged that appellant had made restitution in accordance with the terms of his community supervision. However, this was a proceeding held roughly ten months after appellant's judgment was entered and at the order of this court to determine whether appellant still wished to pursue his appeal when his brief was not filed on time.

[3] *See Stone v. State*, 919 S.W.2d 424, 426-27 (Tex. Crim. App. 1996).

Crim. App. 1985) (noting that assertions in an appellant's brief which are not supported by the record will not be considered on appeal). Because

appellant's judicial confession is the only evidence we have of his confession and reflects the same offense as charged in the indictment, we overrule his first and second points of error.

Voluntariness of the Plea

Appellant frames his third point of error as:

> THE APPELLANT'S PLEA OF NOLO CONTENDRE WAS INVOLUNTARY AND COERCED; THE [TRIAL] COURT ERRED BY ACCEPTING THE PLEA BASED ON THE TOTALITY OF THE FACTS AND DEFENDANT'S STRATEGIC PLEA.

(Appellant's Brief, p. 15). Appellant argues under this point of error that "the evidence introduced," presumably during the plea proceeding, reflected appellant's innocence and therefore, the trial court was obligated to withdraw appellant's plea or enter a plea of not guilty.[4] According to appellant, the evidence to which he refers is: (1) an affidavit signed by Khalil exonerating appellant; and (2) facts reflecting that his plea was coerced by a "high bond" and "the court date being set so far away."[5]

Again, however, because there was no reporter's record of the plea proceedings, there is nothing to indicate whether any such evidence was before the trial court. The alleged

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[4] When a defendant's guilty plea is entered before a jury and evidence is introduced which establishes the innocence of the accused or reasonably raises an issue as to guilt and such evidence is not withdrawn, the trial court is under a duty to withdraw the defendant's plea and enter a not guilty plea. *See Griffin v. State*, 703 S.W.2d 193, 195 (Tex. Crim. App. 1986). However, this rule does not apply where, as in this case, a defendant waives his right to a jury and enters a guilty plea before the court. *See Moon v. State*, 572 S.W.2d 681, 682 (Tex. Crim. App. 1978); *Graves v. State*, 803 S.W.2d 342, 346 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd). In that event, even if the evidence adduced makes the defendant's innocence evident or fairly raises an issue as to his guilt, it is within the trial court's discretion to decide the fact issue by finding the defendant guilty of the charged or a lesser offense or not guilty as the evidence requires. *See Moon*, 572 S.W.2d at 682; *Graves*, 803 S.W.2d at 346.

[5] Appellant states that although he filed a motion for new trial, the motion was denied without an evidentiary hearing and therefore, he was unable to present this "new" evidence to the trial court. However, appellant does not assign error to the court's denial of his motion for new trial or a hearing on it.

affidavit is not a part of the appellate record, nor is there any other evidence to reflect that appellant's plea was involuntary or coerced. Because the record thus fails to support appellant's third point of error, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed June 29, 2000.

Panel consists of Justices Fowler, Edelman, and Baird.[6]

Do not publish — TEX. R. APP. P. 47.3(b).

[6] Former Judge Charles F. Baird sitting by assignment.