Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00532-CR

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ANTHONY WALLER, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 21st District Court
Washington County, Texas
Trial Court Cause No. 12,367

O P I N I O N

Appellant was charged with ten felony counts of engaging in organized criminal activity (burglary) under Tex. Penal Code Sec. 71.02. Following appellant's plea of no contest, the trial court accepted his plea and found him guilty as to all counts, and, after completion of a pre-sentence investigation, sentenced him to fourteen years' confinement.

Under a single point of error, appellant complains that he should have been allowed to withdraw his plea, as the state violated the plea bargaining agreement. We affirm.

Prior to accepting appellant's plea, the trial court obtained both parties' agreement, on the record, that there was no recommendation from the State as to punishment. At the punishment hearing, the trial court inquired whether the State would be presenting evidence; the State responded "No, your Honor, as per our agreement the State's going to stand moot.[1]" The State did not present any evidence at the hearing, and did not argue for any particular type or range of punishment.

The State did however, at the Court's invitation, briefly ask the trial court to consider certain facts appearing in the presentence investigation regarding appellant's denial of involvement in the burglaries and his denial of a chemical dependency which had been found by his probation officer. This, argues appellant, violated the State's agreement to "stand mute".

We are aware of the decisions in Miller v. State, 608 S.W. 2d 931 (Tex. Crim. App. 1980) and Bass v. State, 576 S.W. 2d 400 (Tex. Crim. App. 1979) as cited by appellant, but find them factually inapplicable. In Miller, the State had specifically agreed on the record to stand mute and not oppose probation or make any argument as to punishment. The State then violated that agreement by presenting argument to the trial court prior to assessment of punishment. This, held the Texas Court of Criminal Appeals, raised a question as to the voluntariness of the plea, and required reversal and remand of the judgment. In Bass, the State agreed not to make a recommendation as to the punishment, but then urged the trial court to set the maximum punishment. Again, the Court held this violated the plea bargaining agreement, requiring reversal and remand of the judgment.

In the present case however, the State did nothing more than agree it would not present evidence at the hearing or make a recommendation as to punishment. The record clearly shows that the State neither presented evidence at the hearing nor recommended or argued any particular punishment. Under such circumstances, the State could have argued against

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[1]   Both parties in their respective Briefs reflect the State as having said "stand mute." Under authority of TRAP 34.6 (e) (1), we accept this as an agreed correction of the reporter's record.

appellant's motion for probation without violating the plea bargaining agreement. <u>Carter v. State</u>, 608 S.W. 2d 691,692 (Tex. Crim. App. - 1980).

Contrary to appellant's position, there was no agreement by the State to remain completely silent during the punishment hearing by not opposing probation or presenting any argument. If the State specifically agrees to remain silent as to a motion for probation, such agreement must be honored. <u>Heiligmann v. State</u>, 980 S.W. 2d 713, 714 (Tex. App– San Antonio 1998, no pet.). In absence of these specific agreements in the record, however, we are constrained not to create them. <u>See Ex Parte Williams</u>, 758 S.W. 2d 785, 786 (Tex. Crim. App. 1988); <u>Crider v. State</u>, 848 S.W. 2d 308, 311 (Tex. App. - Corpus Christi 1993, pet. ref'd). We overrule appellant's point of error.

We affirm the trial court's judgment.

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Bill Cannon
Justice

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Sears, Cannon, and Lee.[2]

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

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[2] Senior Justices Ross A. Sears, Bill Cannon, and Norman R. Lee sitting by assignment.