Affirmed and Opinion filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00503-CR
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LARRY WAYNE LAND, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause Nos. 733,529 and 733,530

O P I N I O N

Appellant entered a plea of *nolo contendere* without an agreed recommendation of punishment to two separate charges of burglary of a habitation with intent to commit aggravated assault. *See* TEX. PEN. CODE ANN. § 30.002 (Vernon 1994 & Supp. 1999). The State consolidated the causes for trial. The trial court found evidence substantiating appellant's guilt on both charges but withheld a finding of guilt, pending the completion of a pre-sentence investigation report. After receiving the report, the trial court found appellant guilty and assessed punishment at five years confinement in the Institutional Division of the Texas Department of Criminal Justice for each offense, to run concurrently. Thereafter, appellant filed a

motion for new trial, which the trial court denied. On appeal appellant contends the trial court erred in entering judgment because his plea was involuntary as a result of the ineffective assistance of his trial counsel. We affirm.

In his first point of error, appellant contends his plea was involuntary because he did not understand the ramifications of entering a plea of nolo contendere. Appellant claims he agreed to the plea because his trial counsel assured him that the trial court would give him probation or deferred adjudication probation.

A trial court shall not accept a plea of guilty or nolo contendere unless the defendant appears to be mentally competent and the plea is free and voluntary. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon 1989); *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex. Crim. App. 1997), *cert. denied*, 119 S.Ct. 40 (1998). The purpose and function of Article 26.13 are to ensure that only a constitutionally valid plea is entered and accepted by the trial court. *Ex parte Morrow*, 952 S.W.2d at 534. A defendant does not voluntarily and knowingly enter a plea of guilty if he bases his election upon the erroneous advice of counsel. *See Ex parte Battle*, 817 S.W.2d 81, 82 (Tex. Crim. App. 1991). However, the voluntariness of a guilty plea is determined by the totality of the circumstances. *Griffin v. State*, 703 S.W.2d 193, 196 (Tex. Crim. App. 1986). When the record shows that the trial court properly admonished the defendant of the consequences of his plea, the record presents a prima facie showing the defendant entered a knowing and voluntary plea. *Ex parte Williams*, 704 S.W.2d 773, 775 (Tex. Crim. App. 1986); *Edwards v. State*, 921 S.W.2d 477, 479 (Tex. App.–Houston [1st Dist.] 1996, no pet.). The burden then shifts to the defendant to show that he entered his plea without understanding the consequences. *Fuentes v. State*, 688 S.W.2d 542, 544 (Tex. Crim. App. 1985); *Edwards*, 921 S.W.2d at 479.[1]

In this case, appellant waived the right to have a court reporter record his plea. Nevertheless, the clerk's record reflects that, in each cause, appellant signed a Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession, in which he stated that he understood the allegations, confessed the

[1] A plea is not involuntary merely because the sentence exceeds what the defendant expected, even if the expectation was raised by his attorney. *See West v. State*, 702 S.W.2d 629, 633 (Tex. Crim. App. 1986).

State's evidence would show that the allegations were true, consented to the stipulation of evidence, and intended to enter pleas of nolo contendere without an agreed recommendation of punishment. Appellant's trial counsel and the trial judge also signed the document, attesting their belief that appellant entered a voluntary plea. The clerk's record further reflects that appellant, his trial counsel, and the trial judge signed written plea admonishments pursuant to Article 26.13 of the code of criminal procedure. Appellant initialed specific admonishments including one which stated that he fully understood the nature of the charges against him, his plea was freely, knowingly, and voluntarily entered, and he was satisfied with his attorney's representation. A defendant's attestation of voluntariness at the original plea hearing imposes a heavy burden on the defendant at a later hearing to show a lack of voluntariness. *See Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.–Houston [1st Dist.] 1996, pet. ref'd).

In spite of evidence in the record indicating that his plea was voluntary, appellant claims evidence in the pre-sentence investigation report establishes that he never intended to enter a guilty plea. In an attachment to the pre-sentence investigation report in which he recounted his version of the incident with complainants, appellant states that he was not guilty of the charges filed.

Appellant also contends the record generated as a result of the motion for new trial establishes that his plea was involuntary. In his motion for new trial appellant alleged that he entered an involuntary plea based on his trial counsel's misrepresentation that he would receive probation or deferred adjudication probation. Appellant attached a short affidavit verifying the allegations in the motion. The day after the trial court denied the motion, appellant filed a second affidavit and the affidavits of two attorneys. Because these affidavits were filed after the denial of the motion for new trial, they did not become part of the record on the motion for new trial. *See* TEX. R. APP. P. 21.4(b); *Farris v. State*, 712 S.W.2d 512, 515 (Tex. Crim. App. 1986) (holding evidence that has been developed subsequent to any proceedings surrounding a defendant's trial does not constitute part of a defendant's record); *Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (holding material outside the record that is improperly included in a party's appellate brief may be stricken). Therefore, we do not consider them on appeal.

Without these affidavits, there is no evidence that appellant's trial counsel advised him to enter a plea of nolo contendere or that appellant relied on his trial counsel's advice in entering his plea. On the other hand, the record reflects affirmative evidence that appellant entered a knowing and voluntary plea. Therefore, we overrule appellant's first point of error.

In his second point of error, appellant maintains his trial counsel rendered ineffective assistance of counsel as guaranteed by the United States and Texas Constitutions by instructing him to enter a plea of nolo contendere with the false assurance that he would received probation or deferred adjudication probation. Appellant also claims that his trial counsel failed to ascertain facts about the case before recommending that appellant enter the nolo contendere plea.

When a defendant enters his plea upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and if not, whether a reasonable probability exists that, but for counsel's errors, the defendant would not have entered a guilty plea and would have insisted on going to trial. *See Ex parte Morrow*, 952 S.W.2d at 536 (citing *Hill v. Lockhart*, 474 U.S. 52 (1985) and *Strickland v. Washington*, 466 U.S. 668 (1984)); *Rodriguez v. State*, 899 S.W.2d 658, 666 (Tex. Crim. App. 1995).

Appellant argues "a blaring indication" of his trial counsel's ineffectiveness to ascertain facts is found in one of the victim impact statements in the pre-sentence investigation report. In that statement, the State notes that it could not locate one complainant, thus, the complainant would not present his testimony to the court. Appellant claims his trial counsel never explained to him that he was entering a plea to a cause "where the complaining witness was unavailable for trial nor [sic] was there a likely hood [sic] that the state might be unable to satisfy its burden of proof at trial with out [sic] such complainant." Appellant contends that it is quite obvious throughout the record and transcript of the entire proceeding that he "at no time wanted to plead to or be found guilty of the allegations in this cause." He claims that entries on the docket sheet and his statement in the pre-sentence investigation report affirmatively show that even after he had plead no contest to the charges, he still claimed to be not guilty of these charges.

The record, however, does not reflect that appellant's trial counsel was unaware that the whereabouts of one complainant was unknown or that his trial counsel failed to convey that information to appellant. Moreover, there is no evidence that appellant's trial counsel advised appellant to enter a nole contendere plea or that appellant entered an involuntary plea. Absent any indication in the record to support his allegations of erroneous advice or failure to ascertain facts, appellant does not establish that he was denied the effective assistance of counsel. Appellant's second point of error is overruled.

Accordingly, we affirm the judgment of the court below.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed October 14, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig. (J. Wittig concurs in the result only).

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