Affirmed and Opinion filed February 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00519-CR

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GARLAND BERNELL HARPER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 782,745

O P I N I O N

Appellant was charged by indictment with the offense of robbery. The indictment also alleged two prior robbery convictions for the purpose of enhancing the punishment range. Appellant pled guilty to the charged offense and true to the enhancement allegations. As there was no plea bargain agreement between the State and appellant as to punishment, the case was rescheduled pending a pre-sentence investigation. At the sentencing hearing, the trial court assessed punishment at forty years confinement in the Texas Department of Criminal Justice—Institutional Division. We affirm.

Appellant's sole point of error contends his plea was involuntarily. Under this point, appellant makes two arguments: first that appellant was denied effective assistance of trial counsel on the issue of his eligibility for community supervision; and, second that trial counsel was ineffective for failing to ask the trial court to withdraw appellant's guilty plea. We will address these arguments seriatim.

I. Effective Assistance of Counsel

To be constitutionally valid, a guilty plea must be knowing and voluntary. *See Ruffin v. State,* 3 S.W.3d 140, 145 (Tex. App.—Houston [14 Dist.] 1999, no pet.) (citing *Brady v. United States*, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). The Sixth Amendment guarantees the effective assistance of counsel at the time the defendant enters a plea to the charging instrument. *See id.* (citing *McMann v. Richardson*, 397 U.S. 759, 770-71, 90 S.Ct. 1441, 1448-49, 25 L.Ed.2d 763 (1970)). The defendant bears the burden of proving an ineffective assistance of counsel claim by a preponderance of the evidence. *See Jackson v. State,* 973 S.W.2d 954, 956 (Tex. Crim. App. 1998); *Riascos v. State,* 792 S.W.2d 754, 758 (Tex. App.—Houston [14th Dist] 1990, pet. ref'd). Allegations of ineffective assistance of counsel will be sustained only if they are firmly founded and affirmatively demonstrated in the appellate record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied,* 519 U.S. 1119, 117 S.Ct. 966, 136 L.Ed.2d 851 (1997); *Jimenez v. State*, 804 S.W.2d 334, 338 (Tex. App.—San Antonio 1991, pet. ref'd).

II. Community Supervision

At the time of his plea, appellant executed a document entitled "Motion for Community Supervision." In this document appellant swore that he had been convicted of robbery in 1990 and again in 1992, and he requested that "the judge presiding place me on community supervision. "Appellant argues this document establishes his claim that counsel was ineffective because his advice led appellant to believe he was eligible for 'probation.'" Appellant concedes, however, that he was eligible for "deferred," meaning deferred adjudication community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § (5).

In addition to filing the aforementioned motion for community supervision, appellant executed other documents. One of these documents, entitled "Admonishments," contains the following paragraphs relevant to deferred adjudication community supervision.

> (7) I understand that if the Court grants me Deferred Adjudication under Article 42.12 Sec. 3d(a) V.A.C.C.P. on violation of any condition I may be arrested and detained as provided by law. I further understand that I am then entitled to a hearing limited to a determination by the Court of whether to proceed with an adjudication of guilt on the original charge. If the Court determines that I violated a condition of probation, no appeal may be taken from the Court's determination and the Court may assess my punishment within the full range of punishment for this offense. After adjudication of guilt, all proceedings including the assessment of punishment and my right to appeal continue as if adjudication of guilt had not been deferred;

Additionally, the document provides the following paragraphs regarding the voluntary nature of the plea and the representation provided by trial counsel.

> (8) I fully understand the consequences of my plea herein, and after having fully consulted with my attorney, request that the trial court accept said plea;
>
> (9) I have freely, knowingly, and voluntarily executed this statement in open court with the consent of and approval of my attorney;
>
> (10) I read and write/understand the English language; the foregoing Admonishments, Statements, and Waivers as well as the attached written waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession, were read by me or were read to me and explained to me in that language by my attorney . . . before I signed them, and I consulted fully with my attorney fully before entering this plea;
>
> (11) Joined by my counsel, I state that I understand the foregoing admonishments and I am aware of the consequences of my plea. . . . I am totally satisfied with the representation provided by my counsel and I received effective and competent representation.

Each of these paragraphs were initialed by appellant

As noted above, appellant bears the burden of proving an ineffective assistance of counsel claim by a preponderance of the evidence. *See Jackson*, 973 S.W.2d at 956; *Riascos*,

792 S.W.2d at 758. The only documentation supporting his claim is the motion for community supervision. However, appellant was eligible for deferred adjudication community supervision. Therefore, the motion relied upon by appellant does not necessarily support his claim. Further, his claim is refuted by the "Admonishments" document wherein appellant specifically referred to deferred adjudication. Moreover, that document states appellant fully understood the consequences of his plea, and that the plea was knowingly and voluntarily entered.

In light of the record before us, we find appellant has not carried his burden of proving by a preponderance of the evidence that he received ineffective assistance of counsel in connection with the request for community supervision.

III. Withdrawal of Plea

Appellant next makes a dual argument. He argues first that the trial court should have ordered the plea withdrawn. Secondly, he argues trial counsel should have requested that the plea be withdrawn. Both arguments are based on appellant's statement in the pre-sentence report.

> I observed a lady walking to her car from the Wal-Greens department store. I ran and she observed me coming and turned and started to run. She attempted to squeeze between a pillar that held the over hang of the building. And her car. She fell, and I picked her purse up and ran to the car and a high speed chase pursued until I got tired of driving in circles.

Appellant contends this statement established that appellant "was not guilty of robbery, merely guilty of theft which was at worst a state jail felony enhanced which is a second degree felony with a maximum punishment of 20 years."

Initially, we note that when a defendant waives a jury trial and pleads guilty before the court, the trial court is not required to withdraw the guilty plea, even if there is some evidence that might reasonably and fairly raise an issue as to the defendant's guilt. *See Thomas v. State*, 599 S.W.2d 823, 824 (Tex. Crim. App. [Panel Op.] 1980); *Moon v. State*, 572 S.W.2d 681, 682 (Tex. Crim. App. 1978) (op. on reh'g); *Solis v. State*, 945 S.W.2d 300, 302-03 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). As fact finder, the trial judge may find the

defendant guilty, not guilty, or guilty of a lesser offense as the facts require. *See Thomas*, 599 S.W.2d at 823.

Additionally, we note that appellant's statement conflicts with the complainant's version of the offense, which is also found in the pre-sentence report.

> The victim, . . . was interviewed. She stated she was in the parking lot of a Walgreens when the defendant approached her and grabbed her purse from her arm. When she tried to resist, she was knocked to the ground and [appellant] fled with her purse.

A claim of ineffective assistance of counsel must be determined upon the particular facts and circumstances of each individual case. *See Jimenez*, 804 S.W.2d at 338. Under the circumstances presented here, we do not find that counsel was ineffective in not requesting that appellant's plea be withdrawn. Additionally, we do not find the trial court erred in not ordering the plea withdrawn.

Appellant's sole point of error is overruled and the judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed February 10, 2000.

Panel consists of Justices Amidei, Anderson and Baird.[1]

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

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