Affirmed and Opinion filed March 8, 2001.

In The

Fourteenth Court of Appeals

NOS. 14-99-00209-CR and 14-99-00210-CR

BRYAN KEITH ZIMMER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause Nos. 777,532 and 777,533

O P I N I O N

Upon a plea of nolo contendere, a trial court found appellant guilty of aggravated sexual assault of two children and assessed punishment at twenty years confinement in the Institutional Division of the Texas Department of Criminal Justice. In two points of error, appellant contends his plea was involuntary and he was denied the effective assistance of counsel. We affirm.

I.
Background

Appellant, an acknowledged pedophile, was charged with sexually assaulting two neighborhood children. Appellant entered a plea of nolo contendere to the charges and signed a written waiver of constitutional rights, agreement to stipulate, judicial confession, and written admonishments for each of the two cases. The trial court accepted appellant's plea but withheld a finding of guilt pending preparation and review of a pre-sentencing investigation (PSI) report.

Before hearing evidence at the sentencing hearing, the trial court informed appellant that it would entertain a motion to withdraw his plea based on appellant's claims in the PSI report that he was innocent of the charges and would like the opportunity to prove his innocence. At the court's urging, appellant's trial counsel talked with him off the record. The trial court then admonished appellant directly about the consequences of entering a no contest plea. Appellant indicated that he understood the allegations against him, what a plea of no contest meant, and the punishment he could receive if convicted. He also indicated that he still would deny the allegations and like the opportunity to prove his innocence, "but I don't know how to." When questioned whether he wanted to proceed, appellant indicated that he wanted to keep his original plea and proceed with the sentencing hearing.

After hearing evidence relevant to punishment, the trial court found appellant guilty of both offenses and assessed punishment. Appellant filed a motion for new trial, which the trial court denied.

II.
Voluntariness of Plea

In his first point of error, appellant contends the trial court erred in accepting his plea of nolo contendere in violation of article 26.13 of the Texas Code of Criminal Procedure, which prohibits a court from accepting a plea of nolo contendere unless "it appears the

defendant is mentally competent and the plea is free and voluntary." TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon 1989). Although appellant received and signed documents stating that his plea was knowing and voluntary, he claims the trial court was on notice that his plea was involuntary because he told the court several times that he was innocent and wished to prove it at trial. In the alternative, appellant argues if his initials and signature on the written admonishments constitute a prima facie showing of voluntariness, the record of the discussion with the trial judge before the punishment hearing establishes that he did not understand the consequences of entering such a plea.

A trial court must ascertain whether a plea is voluntarily and knowingly given in light of the totality of the circumstances. *Gonzales v. State*, 963 S.W.2d 844, 846 (Tex. App.—San Antonio 1998, no pet.). Written admonishments signed by the defendant and the court reporter's record showing that the defendant orally represented to the court that he understood the admonitions constitute a prima facie showing that the plea was voluntary. *Fuentes v. State*, 688 S.W.2d 542, 544 (Tex. Crim. App. 1985); *Gonzales v. State*, 963 S.W.2d 844, 847 (Tex. App—San Antonio 1998, no pet.). The burden then shifts to the defendant to show that he entered his plea without understanding the consequences. *Fuentes* at 544.

To assess whether a plea is voluntary, we consider whether "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 3, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). In making this determination, we consider the entire record. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (per curiam). A defendant who attests that he understands the nature of his plea and that it is voluntary has a heavy burden on appeal to prove otherwise. *Crawford v. State*, 890 S.W.2d 941, 944 (Tex. Crim. App. 1994).

The record here establishes a prima facie showing that appellant entered his plea voluntarily and with knowledge of the consequences of entering such a plea and that appellant did not meet his burden to rebut this showing. In July of 1998, appellant and his trial counsel signed plea documents entitled "Admonishments and Judicial Confession," in

which appellant indicated by his initials that he understood the admonishments of article 26.13(d) of the code of criminal procedure, that he voluntarily executed the statement with the consent and approval of his attorney, and that he requested the trial court to accept his plea. Appellant further indicated that although he read at the third grade level, he consulted fully with his attorney before entering the plea and he understood the admonishments and was aware of the consequences of his plea. Appellant also indicated that he understood the offense he was charged with and that his attorney had discussed with him all defenses to these charges and that he was entering the plea freely and voluntarily.

Four months later, appellant appeared before the trial court for sentencing. Before hearing evidence pertinent to punishment, the trial judge expressed concern about appellant's claims in the PSI report. The trial judge acknowledged that he assumed appellant was entering a no contest plea to avoid civil liability but indicated that he would not consider appellant's plea because appellant totally disavowed the charges in the PSI report. At the judge's urging, appellant and his trial counsel discussed the plea off the record. The trial judge assured the parties that appellant "was told that a plea of no contest would be a finding of guilt." The trial judge, appellant, and appellant's trial attorney then engaged in the following exchange:

> THE COURT: In reviewing your pre-sentence investigation, taking into consideration that it took a while to get this plea done – that doesn't necessarily mean anything to me, you understand. How long it was, it was somewhat meaningless to me except that the Court eventually went over the matters contained in the plea papers. I think I went over with you – if I did not, let me do it again. By entering a plea of no contest that simply means – I went over this with you. I'm sure. I do this in every case that's before me. That simply means if the witnesses were present they would testify that you intentionally, knowingly committed this felony offense. By entering a plea of no contest that simply likewise means that you do not contest, if they were present, that that's what they would say.
>
> Have you had an opportunity to read this pre-sentence investigation report?
>
> Did you go over it with him?
>
> MR. JOHNSON: He doesn't read very well.

THE COURT: I understand that. That's one of the reasons it may have taken a long time to go over this plea. Have you gone over the allegations that are contained therein?

MR. JOHNSON: Yes, sir.

THE COURT: So you understand if the witnesses were called to testify that's what they would testify to. You do not contest that if they were present and they testified that's what they would say. You understand that?

THE DEFENDANT: Yes.

THE COURT: Now, further, you tell me – you have a statement that you have made to the pre-sentence investigator. And I will not go over all those save and except the last paragraph that says here that you deny all – you deny the allegations and you state that you would like an opportunity to prove your innocence; is that correct?

THE DEFENDANT: Yes, but I don't know how to.

THE COURT: You also deny the complainants were even ever inside your house whatsoever; is that correct? It's all right. I'm just stating; is that –

THE DEFENDANT: Yes. I never allowed them in my home.

THE COURT: You understand that entering this plea that it will not prevent the Court from making a finding of guilt, if that's what the Court feels should be done with the case. You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You do understand that these are first degree felony offenses?

THE DEFENDANT: Yes.

THE COURT: What's the punishment range?

THE DEFENDANT: Five to 0 to 99 to life, sir.

THE COURT: Since the age of the children are such its an aggravated offense. That if you received time how much time would you have to do?

THE DEFENDANT: I don't know, sir.

THE COURT: If you have got a term of years – say you got ten years. I don't know if you would even get any years or not. Say how much time would you have to serve?

THE DEFENDANT: Ten years, sir.

THE COURT: Now, we'll take up the matter whether we go forward today or not.

* * * * *

THE COURT: You realize, sir, based upon what you're telling me that

> sounds like you feel that you are not guilty and you would like a trial; is that correct?
>
> THE DEFENDANT: Well, I don't – seems that way, sir. But I am innocent, but I don't know how to prove innocence.
>
> THE COURT: It's not up to you to prove your innocence by way of this punishment. It's up to the State of Texas to prove you're guilty beyond a reasonable doubt.
>
> You don't even have to testify.
>
> THE DEFENDANT: Don't make me feel that way.
>
> THE COURT: I understand that. . . . See whether or not we go forward.
>
> * * * * *
>
> THE COURT: You want to go forward, sir?
>
> THE DEFENDANT: Yes.

Appellant claims this exchange and other evidence that he did not read well and had not read the PSI report are clear indications that he entered the no contest plea without knowledge of its consequences. Appellant also claims that the record lacks an affirmative showing that his trial counsel read or explained the admonishments to him. We disagree.

This record indicates the trial judge gave appellant every opportunity to withdraw his plea. Long after appellant entered the plea and signed the written admonishments and waivers, the trial judge urged appellant to discuss the plea with his trial counsel. The trial judge questioned appellant about his understanding of the consequences of entering such a plea and with appellant's acknowledgment that he fully understood what he was doing, the trial judge asked once more whether appellant wanted to go forward with the plea. Appellant indicated that he did. Before hearing evidence relevant to punishment, the trial judge summarized the plea discussion as follows:

> THE COURT: Let the record – I think the record is clear that where we are in this matter. Mr. Zimmer entered a plea of no contest. The Court earlier today felt a little uncomfortable disavowing that he committed a criminal offense. Indicated to Mr. Zimmer's counsel that the Court would entertain a withdrawal of the plea. But since there has been no withdrawal of the plea, we'll go forward full well understanding that a finding could be made if that's

what the Court decided should be done.

Mr. Zimmer, you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The risk involved and you have given up your right to trial by jury. You understand all that?

THE DEFENDANT: Yes, sir.

THE COURT: Very well. Okay. That's all right. Let's proceed.

Ready to proceed?

MR. KEATING: Yes, sir.

This record reflects that appellant made an intelligent choice among the alternative courses of action open to him. The trial court was not required to sua sponte withdraw appellant's plea. *Edwards v. State*, 921 S.W.2d 477, 480 (Tex. App.—Houston [1st Dist.] 1996, no pet.). Accordingly, we overrule appellant's first point of error.

III.
Ineffective Assistance of Counsel

In his second point of error, appellant contends that he was denied the effective assistance of counsel because his trial counsel failed to: (1) read or explain to him the contents of his waiver of constitutional rights, agreements to stipulate and judicial confessions before he signed them; (2) read to him the PSI report; and (3) withdraw his no contest plea.

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the

proceeding would have been different. *Id.*; *Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and we are to indulge the strong presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *overruled on other grounds by Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998).

If the defendant proves his counsel's representation fell below an objective standard of reasonableness, he must still affirmatively prove prejudice as a result of those acts or omissions. *Strickland*, 466 U.S. at 693; *McFarland*, 928 S.W.2d at 500. Counsel's errors, even if professionally unreasonable, do not warrant setting the conviction aside if the errors had no effect on the judgment. *Strickland*, 466 U.S. at 691. The defendant must prove that counsel's errors, judged by the totality of the representation, denied him a fair trial. *McFarland*, 928 S.W.2d at 500. If the defendant fails to make the required showing of either deficient performance or prejudice, his claim fails. *Id.*

The record in this case reflects no evidence that appellant's trial attorney did not read or explain to him the contents of the admonishment and waiver documents before he signed them. In fact, the record reflects that appellant initialed the paragraph that provides that the "admonishments, statements, and waivers as well as the waiver of constitutional rights, agreements to stipulate, and judicial confessions, were read to me and explained to me . . . by my attorney . . . before I signed them, and I consulted fully with my attorney before entering this plea." The record also affirmatively reflects appellant's trial attorney explained to him the allegations in the PSI report. Further, the record reflects the trial court was willing to allow appellant to withdraw his plea of no contest before the punishment hearing,

and defense counsel in accordance with the trial court's urging, left to talk to appellant. Appellant never changed his plea. Subsequently, the trial court questioned appellant regarding his knowledge and understanding of the nature of his plea. Appellant was well informed, knew the requisite information, including the potential jail time involved, and agreed to continue with a no contest plea. Finally, appellant did not contend in his motion for new trial that his counsel was ineffective or that his plea was involuntary.

Trial counsel's performance is presumed effective, and the defendant has the burden to prove by a preponderance of evidence that his assistance was defective. *Patrick v. State,* 906 S.W.2d 481, 495 (Tex. Crim. App. 1995). Allegations of ineffective assistance of counsel must be firmly grounded in the record. *Mercado v. State,* 615 S.W.2d 225, 228 (Tex. Crim. App. 1981). In reviewing the totality of counsel's representation, we find counsel's conduct falls within the range of reasonably professional assistance. *Thompson v. State,* 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). We decline to entertain the notion that one isolated comment by counsel, "[h]e doesn't read very well," renders counsel's assistance ineffective. *See Moore v. State,* 700 S.W.2d 193, 205 (Tex. Crim. App. 1985). In summary, none of the complaints raised with regard to trial counsel's performance, judged by the totality of the representation, satisfies the test set out in *Strickland.* Point of error two is overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed March 8, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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