

Affirmed and Opinion filed April 26, 2001.



In The

Fourteenth Court of Appeals

NO. 14-98-01341-CR

WILSON GIRALDO, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 179th Judicial District Court
Harris County, Texas
Trial Court Cause No. 779, 050**

OPINION

After entering a guilty plea and waiving his right to a jury trial, the trial court found Wilson Giraldo, appellant, guilty of possession of cocaine weighing at least 400 grams with intent to manufacture or deliver. In one issue, appellant argues the trial court erred in refusing to set aside his guilty plea because his plea was not voluntarily, knowingly, or intelligently entered. We affirm.

PROCEDURAL BACKGROUND

Appellant was indicted for possession of at least 400 grams of cocaine with intent to deliver. Appellant waived a jury trial and entered a guilty plea to this offense without an agreed punishment recommendation. The trial judge accepted the plea, found the evidence substantiated appellant's guilt, but withheld a finding of guilt pending a pre-sentencing investigation report. One month later, which was five days before the agreed setting for the pre-sentencing investigation report, appellant moved to withdraw his plea and his waiver of jury trial, and to recant his judicial confession. After a hearing, the trial judge denied appellant's motion and sentenced him to 30 years' confinement and a \$250,000 fine.

DISCUSSION AND HOLDINGS

In his sole issue, appellant contends that the trial court erred in refusing to set aside his guilty plea. A defendant may withdraw his guilty or nolo contendere plea as a matter of right without assigning a reason until judgment is pronounced or the case has been taken under advisement. *Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979); *Stone v. State*, 951 S.W.2d 205, 206 (Tex. App.—Houston [14th Dist.] 1997, no pet.). However, once the trial court takes the case “under advisement,” the trial court has discretion in deciding whether to permit the defendant to withdraw his guilty plea. We have previously held that passage of a case for pre-sentence investigation constitutes “taking the case under advisement,” despite the fact that punishment has not been assessed. *Stone*, 951 S.W.2d at 207 (citing *DeVary v. State*, 615 S.W.2d 739, 740 (Tex. Crim. App. 1981)). Thus, a defendant does not have the right to withdraw his guilty plea while awaiting the results of a pre-sentence investigation report. *See Jackson*, 590 S.W.2d at 515; *Stone*, 951 S.W.2d at 207.

Because appellant does not have a right to withdraw his guilty plea while awaiting a pre-sentencing investigation report, we must determine whether the trial court abused its discretion in denying appellant's request to withdraw his guilty plea. The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action; rather, it is a question of whether the court acted without reference to any

guiding rules and principles or acted arbitrarily or unreasonably. *See Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990).

Generally, a request to withdraw a plea is late or untimely if it is made after the case has been taken under advisement or guilt has been adjudicated. *Stone*, 951 S.W.2d at 207. Appellant's request to withdraw his guilty plea was made one month after the guilty plea, during the time the trial court had taken the case under advisement. Also the request to withdraw was made five days before the pre-sentence investigation hearing. Given this delay, we find appellant's attempt to withdraw his plea was not timely, and the trial court did not abuse its discretion by denying his request. *See id.* (citing *Gottson v. State*, 940 S.W.2d 181, 187 (Tex. App.—San Antonio 1996, no pet.); *see also DeVary*, 615 S.W.2d at 740 (trial court did not abuse its discretion by overruling appellant's untimely request to withdraw his plea.).

Accordingly, we overrule appellant's sole point of error and affirm the trial court's judgment.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed April 26, 2001.

Panel consists of Justices Draughn, Hutson-Dunn, and Amidei.

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

* Senior Justices Joe L. Draughn, D. Camille Hutson-Dunn, and Former Justice Maurice Amidei sitting by assignment.