Affirmed and Opinion filed April 27, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00545-CR
NO. 14-99-00546-CR

KANARD Q. BAILEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No.798,537 and 798,536

O P I N I O N

Kanard Q. Bailey appeals a conviction for aggravated robbery claiming that the trial court abused its discretion in failing to *sua sponte* order that appellant's pleas of guilty be withdrawn and that pleas of not guilty be entered, after information in the PSI indicated that the weapon used was a capgun and that appellant did not know a robbery was going to occur, raising a substantial fact issue as to whether appellant was guilty of aggravated robbery with a deadly weapon. We affirm.

Background

Appellant[1] was indicted for the aggravated robbery of two complainants. Both indictments alleged that appellant had used and exhibited "a deadly weapon, . . . a capgun." Appellant pled guilty to both charges without an agreed punishment recommendation from the State. The trial court found there was sufficient evidence to substantiate the plea on both charges, but postponed entering a finding of guilt pending the presentence investigation report ("PSI"). After a hearing on the PSI, the trial judge sentenced appellant to six years in prison on each offense, the sentences to run concurrently.

Notice of Appeal

Appellant's first "point of discussion" argues that his general notice of appeal is sufficient to confer jurisdiction on this court despite his guilty plea and the fact that he did not obtain permission to appeal from the trial court.

Previously, a defendant who entered a knowing and voluntary guilty plea without the benefit of a recommendation from the State as to punishment waived all non-jurisdictional errors occurring before the plea. *See Young v. State*, 8 S.W.3d 656, 656 (Tex. Crim. App. 2000); *Helms v. State*, 484 S.W.2d 925, 927 (Tex. Crim. App. 1972).[2] This rule was not applied to errors occurring at or after entry of the plea. *See Jack v. State*, 871 S.W.2d 741, 743 (Tex. Crim. App. 1994). In this case, appellant's point of error alleges mistakes committed during the punishment phase, after his plea was entered. Therefore, we overrule appellant's first point of discussion as moot.

Failure to Withdraw Guilty Plea

Appellant's only actual point of error asserts that the trial court abused its discretion in this case by not *sua sponte* withdrawing appellant's guilty plea when evidence introduced during the punishment phase indicated that: (a) appellant did not know an aggravated robbery was going to occur; and (b) the weapon involved was merely a capgun.

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1 Appellant was a juvenile at the time of the offense, however, the juvenile court waived jurisdiction.

2 Although not directly relevant to this case, the *Helms* rule has recently been abrogated. *See Young v. State*, 8 S.W.3d 656, 666-67 (Tex. Crim. App. 2000). Currently, whether entered with or without an agreed punishment recommendation by the State, a valid plea of guilty or nolo contendre waives the right to appeal a claim of error only when the judgment of guilt was rendered independent of, and is not supported by, the error. *See id*.

When a defendant's guilty plea is entered before a jury and evidence is introduced which establishes the innocence of the accused or reasonably and fairly raises an issue as to guilt and such evidence is not withdrawn, the trial court is under a duty to withdraw the defendant's plea and enter a not guilty plea. *See Griffin v. State*, 703 S.W.2d 193, 195 (Tex. Crim. App. 1986). However, this rule does not apply where a defendant waives his right to a jury and enters a guilty plea before the court. *See Moon v. State*, 572 S.W.2d 681, 682 (Tex. Crim. App. 1978); *Graves v. State*, 803 S.W.2d 342, 346 (Tex. App.–Houston [14th District] 1990, pet. ref'd). In that event, even if the evidence adduced makes the defendant's innocence evident or fairly raises an issue as to his guilt, it is within the trial court's discretion to decide the fact issue by finding the defendant guilty of the charged or a lesser offense or not guilty, as the evidence requires. *See Moon*, 572 S.W.2d at 682; *Graves*, 803 S.W.2d at 346.

In this case, appellant waived his right to trial by jury and confessed to the truth of the allegations in the indictment, signing a "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," for each case. During the plea proceeding, the trial judge properly admonished appellant, questioned him as to his understanding of the waiver of his rights, instructed him that the "capgun" was being described as a deadly weapon[3] and that the offense was an aggravated one. Appellant responded that he

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[3] Appellant does not challenge the legal or factual sufficiency of the evidence in this case. However, to support his argument that his guilty plea should have been withdrawn, appellant relies on *Mosley* to argue that a capgun is not, as a matter of law, a deadly weapon. However, in *Mosley*, the court concluded that the air pistol used in that case was not a deadly weapon because the evidence had established that the gun was defective and unloaded, and because the appellant never fired it or threatened to fire it or use it as a bludgeon. *See Mosley v. State*, 545 S.W.2d 144, 145 (Tex. Crim. App. 1976). In this case, the PSI described the gun as a "B.B. gun." Although a B.B. gun is not a "firearm" and is thus, not a deadly weapon per se, cases have held that, based upon its manner of use, a B.B. gun can be a deadly weapon under the penal code definition. *See Delgado v. State*, 986 S.W.2d 306, 308 (Tex. App.–Austin 1999, no pet.) (concluding that because the B.B. gun used by the appellant was capable of firing a pellet with sufficient force to cause serious bodily injury or death, and appellant had held the pistol close to the heads of the victims, threatening to kill them, the State sufficiently proved that the B.B. gun was a deadly weapon); *Corte v. State*, 630 S.W.2d 690, 692 (Tex. App–Houston [1st Dist.] 1981, pet. ref'd) (distinguishing *Mosley* and concluding that had the CO2 pellet gun been loaded it could have caused serious injury and was designed for that purpose); TEX. PEN. CODE ANN. § 1.07(17)(b) (Vernon 1994) (a deadly weapon includes anything that in the manner of its use or intended use is capable of causing death or serious bodily injury). In this case, appellant's co-defendant placed the tip of the gun at the base of one of the complainant's head "at close range" and when a vehicle containing other individuals pulled up during the robbery, appellant's co-defendant pointed the gun at them stating, "Get out of the truck . . . or I'm going to

understood and wished to plead guilty. The trial judge then found that appellant's guilty plea was substantiated and accepted it. At that point, appellant's punishment was the only issue left to be decided.

The evidence which appellant argues supports the trial court's duty to withdraw the plea was presented during the PSI hearing,[4] conducted over a month after the plea proceedings. However, because the trial court had already decided the issue of appellant's guilt, the issue whether the evidence substantiated appellant's guilt was not before the trial court during the PSI hearing.[5] Therefore, because appellant has not demonstrated that the trial judge abused his discretion in not withdrawing appellant's plea, his point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed April 27, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
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kill you." Also, in the PSI, appellant admitted he knew the gun was a B.B. style pistol.

4 Although appellant relies on *Payne* to support his position, *Payne* is distinguishable in that it dealt with an appellant's timely *motion* to withdraw a plea during the *guilt* phase rather than the trial court's duty to *sua sponte* withdraw a plea during the *punishment* phase. *See Payne v. State*, 790 S.W.2d 649, 651-52 (Tex. Crim. App. 1990). Once a plea is entered and the trial court either pronounces judgment or takes the case under advisement, it has no duty to withdraw the plea even upon request of te defendant, let alone *sua sponte*. *See Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979).

5 Moreover, the only evidence in the PSI raising an issue on appellant's guilt were his own statements that he had not known the robberies were going to occur or actively participated in them. Even if such statements had been made during the previous plea hearing, they were the type of evidence which would have been within the trial court's discretion to disbelieve.