Affirmed and Opinion filed May 3, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01364-CR

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RAFAEL RODRIGUEZ MEDRANO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 805,968

O P I N I O N

Appellant, Rafael Rodriguez Medrano, charged with aggravated sexual assault of a minor, entered a plea of guilty without an agreed recommendation from the State as to punishment. Before entering his plea, appellant signed a document entitled, "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession." In it, he agreed to waive his right to appearance, confrontation and cross-examination of witnesses. He was sentenced to 15 years in the Texas Department of Criminal Justice, Institutional Division.

Now, appellant urges that the trial court committed fundamental error by entering

judgment based upon his plea. He bases this contention upon the assumption that (1) article 1.15 of the Code of Criminal Procedure is unconstitutional as a violation of his right to compulsory process because it precluded him from presenting evidence at his "trial" and (2) the record is silent as to whether he waived his right to compulsory process.

Not long ago, the Court of Criminal Appeals identified three distinct types of rules contained in our system: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are implemented only upon request. *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993). *Marin* found that the third bundle of rights may be forfeited, a term it used synonymously with procedural default because "both refer to the loss of a claim or right for failure to insist upon it by objection . . . ." *Id.* The trial court has no duty to enforce forfeitable rights unless asked to do so. *Id.* at 279–80. "Waivable rights, on the other hand, do not vanish so easily [because the defendant] is never deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record." *Id.* at 280 (citing *Goffney v. State*, 843 S.W.2d 583, 585 (Tex. Crim. App. 1992)).

Perhaps somewhat surprisingly, many constitutional rights are forfeitable. *See, e.g.*, *Marin* at 278–79 (listing some constitutional rights which may not be forfeited, but which may be waived, before noting that "[a]ll but the most fundamental rights are thought to be forfeited if not insisted upon. . . . Many constitutional rights fall into this category."). Our first task, therefore, is to determine into which category identified by *Marin* the right of compulsory process falls. Next, if it falls within the second category, then we must also decide whether appellant's agreement to waive "his right to appearance . . . of witnesses" was sufficient to constitute an express waiver of the right to compulsory process.[1]

In *Ramirez v. State*, the El Paso Court of Appeals held that the defendant "effectively waived his right to compulsory process by his total failure to file his application for a

[1] Appellant does not argue that the right of compulsory process cannot be waived.

subpoena" pursuant to the Code of Criminal Procedure." 842 S.W.2d 796, 799 (Tex. App.—El Paso 1992, no pet.); *see also Suarez v. State*, 31 S.W.3d 323, 328 n.1 (Tex. App.—San Antonio 2000, no pet.) (reasoning defendant did not waive his right to compulsory process where his complaint on appeal was sufficiently similar to his objection at trial); *Smith v. State*, 789 S.W.2d 350, 357 (Tex. App.—Amarillo 1990, pet. ref'd) (finding that the right to compulsory process is not absolute and may be waived by a defendant's failure to attempt to exercise it). We hold, therefore, that the right of compulsory process falls into the third category identified in *Marin* and is, therefore, waived unless the defendant insists upon its benefits.[2]

In any event, we also find appellant expressly waived his right to compulsory process by signing the waiver wherein he agreed to waive his right to the *appearance* of witnesses. The right to have witnesses appear necessarily and logically entails the right to serve them with process. By implication, appellant also argues that his right to introduce evidence at sentencing was denied. We disagree. At that hearing, appellant's counsel told the court that, besides what was contained in the pre-sentence investigation report, appellant had no other evidence he wished introduce before proceeding to sentence. All points of error are overruled.

[2] Our holding is consistent with the Supreme Court's interpretation of the Federal Constitution. *See, e.g., Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (stating that, absent a case where the lawyer was ineffective, "the client must accept the consequences of the lawyer's decision to forgo cross-examination [and] to decide not to put certain witnesses on the stand . . . .").

The judgment of the trial court is affirmed.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed May 3, 2001.

Panel consists of Justices Fowler, Wittig, and Amidei.[3]

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[3] Former Justice Maurice Amidei sitting by assignment.