Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00541-CR
NO. 14-99-00542-CR

ROBERT LEE ROBERTSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 797,808 & 797,482

O P I N I O N

Robert Lee Robertson was charged with two counts of aggravated robbery. He pled guilty to both counts and was assessed twenty-two years confinement for each offense. In this consolidated appeal, he claims the trial court erred in the following ways: (1) proceeding to judgment and sentence in violation of appellant's right of compulsory process; (2) accepting his guilty plea without a showing in the record that it was voluntary; (3) accepting his plea without admonishing him on the possibility of deportation; (4) accepting his plea without an affirmative waiver of his right against self-incrimination; and (5) that his sentence was in violation of state and federal rights against cruel and unusual punishment. We affirm.

Background

Appellant was charged with two incidences of aggravated robbery in two separate indictments. In the first indictment, appellant pled guilty and elected to have his punishment determined by a jury. After a trial on punishment, the jury assessed twenty-two years confinement. Appellant then pled guilty to the second indictment, stipulating to an agreed punishment of twenty-two years, the same as that assessed by the jury. Neither party provided factual details of the offenses and they do not appear to be of material importance to this appeal. Thus we address only the procedural facts as they relate to each issue.

First Indictment — Jury Trial

Voluntariness of Plea

Appellant first contends that the record fails to show his plea was voluntarily, knowingly, and intelligently made under federal constitutional law. He does not raise any state constitutional or statutory claims pertaining to voluntariness. To assess a plea's voluntary nature, we ask whether "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Parke v. Raley*, 506 U.S. 20, 29 (1992). We consider the totality of the circumstances to answer this question. *See Crawford v. State*, 890 S.W.2d 941, 944 (Tex. App.–San Antonio 1994, no pet.).

Appellant correctly points out that under *Boykin v. Alabama*, 395 U.S. 238 (1969), a valid guilty plea will not be inferred from a silent record. However, we disagree that in this case the record is silent or that it fails to affirmatively show his plea was voluntary. The record reveals that the trial court informed appellant of the range of punishment and that appellant's attorney assured the court he had talked with appellant and that appellant understood the charges against him. The court then stated on the record, "I have admonished you about your rights and the consequences of giving up those rights and the whole ten yards; do you understand, sir?" Appellant replied, "Yes." Appellant's attorney did not voice an objection that his client did not understand his rights or that the trial court did not properly admonish him. In the jury charge, the trial court twice stated that it, as required by law, admonished appellant of the consequences of his plea, and that it observed that he appeared competent and made his guilty plea freely and voluntarily. We apply a presumption of regularity and presume recitals in court documents are correct

unless the record affirmatively shows otherwise. *See Garza v. State*, 896 S.W.2d 192, 197 (Tex. Crim. App. 1995); *Moussazadeh v. State*, 962 S.W.2d 261, 264 (Tex. App.--Houston [14th Dist.] 1998, pet. ref'd).[1] Finally, we note that appellant elected to be tried by jury on his punishment and that he called witnesses at trial. By implication, then, appellant understood and even availed himself of these two federal constitutional rights. In contrast to our case, the record in *Boykin*, a death penalty case, was devoid of any evidence that appellant's plea was voluntary. *See Boykin*, 395 U.S. at 239. Therefore, we hold that under the totality of the circumstances, the record contains ample evidence that appellant's guilty plea was voluntarily, knowingly, and intelligently made. We overrule appellant's first issue.

Admonishment on Deportation Consequences

Appellant next argues that the trial court committed reversible error by accepting his guilty plea without admonishing him of potential deportation consequences pursuant to section 26.13(a)(4) of the code of criminal procedure. Relying on *Morales v. State*, 872 S.W.2d 753 (Tex. Crim. App. 1994), appellant claims that the court's failure to do so was reversible error without the necessity of showing harm. *Morales*, however, was explicitly overruled by *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997).

The correct harm review is stated in *Carranza v. State*, 980 S.W.2d 653 (Tex. Crim. App. 1998). There, the court held that the failure to provide an admonishment on deportation consequences was a non-constitutional error and is thus governed by TEX. R. APP. P. 44.2(b). *Id*. at 657. Under this standard, the burden of proof is on the appellant to show his substantial rights were violated by the error. *Id.* at 658; *Garza v. State*, 2 S.W.3d 331, 334 (Tex. App.–San Antonio 1999, pet. ref'd). Appellant has offered no evidence that he might be subject to deportation or that he was otherwise misled or harmed.

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[1] Appellant claims the record affirmatively shows the court did not admonish him. We disagree. As noted, the record shows that the court stated appellant was admonished, which appellant affirmatively acknowledged. Though not all the admonishments were on the record, the record does not affirmatively reveal the admonishments were not given. Thus, the presumption of regularity raised by the jury charge has not been rebutted.

Assuming, then, that the court failed to provide this admonishment, any error in failing to do so was harmless. This issue is therefore overruled.

Waiver of Right Against Self-Incrimination

Appellant claims the court committed reversible error by accepting his guilty plea where appellant never waived his federal right against self-incrimination. We first note that a trial court's failure to admonish a defendant concerning his privilege against self-incrimination does not invalidate a plea otherwise freely and voluntarily made. *See Vasquez v. State*, 522 S.W.2d 910, 912 (Tex. Crim. App. 1975). As we found, appellant's plea was voluntarily made under the totality of the circumstances. Additionally, a plea of guilty entered before a jury constitutes a jury trial. *See Williams v. State*, 674 S.W.2d 315, 318 (Tex. Crim. App. 1984). The trial court is not required to inform a defendant of his right against self-incrimination in a trial before a jury on a plea of guilty. *Id.* at 320. We overrule this issue

Cruel and Unusual Punishment

Appellant complains the punishment assessed by the jury was constitutionally defective because it was not proportional to the charged offense, thus it is in violation of appellant's federal and state constitutional rights against cruel and unusual punishment. However, since appellant did not object to the punishment at the trial court, the issue is not preserved for review. *See* TEX. R. APP. P. 33.1. We also observe that because the punishment assessed here is within the statutory range set by the Legislature, it is not cruel or unusual. *See McNew v. State*, 608 S.W.2d 166, 174 (Tex. Crim. App. [Panel Op.] 1978); *Benjamin v. State*, 874 S.W.2d 132, 135 (Tex. App.--[Houston 14th Dist.] 1994, no pet.). We overrule this issue.

Second Indictment — Bench Trial

Right to Compulsory Process

In this second trial, appellant argues that:

> The trial court committed fundamental error in proceeding to judgment and sentence after accepting appellant's guilty plea for aggravated robbery, where under Texas law the State

> is required to produce evidence to support the judgment of guilt, where a defendant is not entitled to put on any evidence, and consequently the procedure violates the defendant's federal [and state] constitutional right to compulsory process.

Appellant claims article 1.15 of the code of criminal procedure is unconstitutional because it bars the defendant from presenting evidence and bars the court from considering defendant's evidence. In doing so, he argues, this provision violates his constitutional guarantees to compulsory process. We disagree. As the State points out, nearly the exact claims advanced by appellant were rejected in *Lyles v. State*, 745 S.W.2d 567 (Tex. App--Houston [1st Dist.] 1988, pet. ref'd), and *Vandenburg v. State*, 681 S.W.2d 713 (Tex. App.--Houston [14th Dist.] 1984, pet. ref'd). In *Lyles*, the court stated:

> Appellant misconstrues both the purpose and the effect of article 1.15. The purpose of the article is to ensure that no person be convicted of a felony on a plea of guilty without sufficient evidence being introduced to show guilt. The effect of the article is to maintain the burden of proof on the State even where a plea of guilty or nolo contendere has been entered by the defendant. The article neither prohibits the defendant from offering evidence nor prohibits the court from considering the evidence offered by the defendant.

Lyles, 745 S.W.2d at 568-69 [citations omitted].

The reasoning in the *Lyles* and *Vandenburg* is sound and in point with our case. Article 1.15 does not violate appellant's rights to compulsory process. We therefore overrule this issue.

Appellant next complains:

> The trial court committed fundamental error in proceeding to enter a judgment of guilt . . . after appellant's bench trial, where the record is silent as to a waiver of appellant's federal [and state] constitutional right to compulsory due process.

Again, the *Lyles* court has correctly addressed this issue, holding that there is no requirement that appellant waive his right to compulsory process. *Id.* at 568. In any event, in this case, the record reflects appellant waived his right to appearance, confrontation, and cross-examination of witnesses. As a practical, if not logical, matter, the waiver of these rights subsumes the right to compulsory process. Thus, a waiver of these rights is a waiver of the right to compulsory process of witnesses. Therefore, the court

did not err in failing to procure a specific waiver of appellant's right to compulsory process. We overrule this issue.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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