Affirmed and Opinion filed August 16, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00554-CR

KENYATTA ALI-ABU SADIKI, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 813,925

O P I N I O N

Appellant pled guilty to an indictment charging him with aggravated robbery. Without benefit of a punishment recommendation from the State, the trial court assessed appellant's punishment at fifteen years' confinement in the Texas Department of Criminal Justice, Institutional Division.

During the Pre-Sentence Investigation ("PSI") hearing, the trial court extracted a judicial confession from appellant's co-defendant, which implicated appellant in a second aggravated robbery; an offense previously unknown to appellant's trial counsel. On the record, the court stated that it only based its assessment of appellant's punishment on the

evidence in the PSI report. Appellant's complaint in his single point of error is two-fold: (1) he claims that after the court uncovered this extraneous offense evidence, the trial court erred in denying his motion to withdraw his guilty plea; and (2) that by its actions, the trial court denied appellant the effective assistance of counsel.

In response to this point of error, the State contends that appellant's motion to withdraw his guilty plea, made after the case was taken under advisement, was subject to the trial court's discretion. The State contends that there is no evidence in the record that the trial court abused its discretion in denying appellant's motion to withdraw the guilty plea. For the reasons set forth below, we affirm the judgment of the trial court.

BACKGROUND AND PROCEDURAL HISTORY

Appellant and his co-defendant, Jimmie Lane Sanders, robbed Florell Thomas while she worked as a cashier for Ace Check Cashing Company. To perform the robbery, appellant used a gun equipped with a laser-sight. Sanders stood as appellant's lookout.

Without benefit of a plea recommendation from the State, appellant pled guilty to the offense of aggravated robbery. Appellant signed the trial court's admonishment form, in which he attested that he "freely, knowingly, and voluntarily executed [the admonishments] in open court with the consent and approval of [his] attorney." Appellant's trial counsel signed a document indicating he believed appellant voluntarily entered his plea. Appellant also signed a separate form in which he attested that he knowingly and voluntarily waived his right to cross-examine the witnesses against him, and stipulated that the allegations contained in the indictment were true and correct. After the court received appellant's plea papers, it orally reviewed with appellant the admonitions required by article 26.13 of the Texas Code of Criminal Procedure, and the rights that appellant waived. The State then offered evidence, and the court found appellant guilty of aggravated robbery.

Afterwards, the trial court recessed the proceedings to conduct a PSI for both appellant and his co-defendant. A PSI report was apparently filed, but is not in the

appellate record. Unsatisfied with the information contained in the PSI report, the trial court, in order to gather other information to assist it in determining the proper punishment, began questioning appellant's co-defendant. The questioning, pertinent to this appeal, occurred as follows:

THE COURT:	Now, the Ace Check Cashing Place [sic] wasn't the first robbery you all did; was it?
SANDERS:	Yes.
THE COURT:	That wasn't the first place ya'll robbed; was it?
SANDERS:	That was the first place I robbed, sir.
THE COURT:	It wasn't the first place that Mr. Sadiki robbed; was it?
SANDERS:	I don't know.
THE COURT:	Mr. Sanders, don't lie to me.
SANDERS:	I'm being honest with you, Judge Harmon.
THE COURT:	Don't lie to me, Mr. Sanders. If I catch you in a lie[,] you're going to prison. That wasn't the first place that Mr. Sadiki robbed; was it?
SANDERS:	Not to the best of my knowledge.
THE COURT:	Don't lie to me, Mr. Sanders. Wasn't [sic] the first place that Mr. Sadiki robbed; was it?
SANDERS:	No.
THE COURT:	What?
SANDERS:	No.
THE COURT:	Where else did Mr. Sadiki use that gun to rob somebody?
SANDERS:	He didn't tell me. I don't know.
THE COURT:	No, Mr. Sanders. Don't lie to me or you're going to go to prison. Wasn't [sic] the first place Mr. Sadiki robbed with that gun; was it?
SANDERS:	That wasn't the first place, no.
THE COURT:	Right. You know where else he used that gun to rob somebody; don't you? You're getting ready to go to prison, Mr. Sanders, the minute you start lying to me, so you better start telling the truth.

SANDERS: No, that wasn't the first place he robbed.

THE COURT: Where was the first place he robbed with that gun?

SANDERS: Uhm, Blockbuster.

The court continued to question Sanders, and determined that Sanders knew of the Blockbuster robbery because he worked at the store, and was on duty when the robbery occurred. After the court concluded its questions to Sanders, the State called another witness - the assistant district attorney who prosecuted the Blockbuster case. The D.A. testified that appellant was not the defendant, nor was he implicated, in that case. She also testified that Sanders never mentioned his inside knowledge, and maintained he was only a witness. The D.A. gave no testimony regarding appellant's alleged involvement, and apparently knew nothing of it. The State then rested for argument. At this time, appellant's trial counsel made a request for continuance to "look into factors brought out today for the first time." The court granted the request and reset the hearing to a later date.

At the later hearing, appellant's trial counsel informed the court that appellant wished to withdraw his guilty plea, and stated that, had he known of the extraneous aggravated robbery, he would not have advised appellant to plead guilty. Alternatively, appellant's counsel asked the trial court not to allow any further evidence of the extraneous robbery in considering appellant's punishment. The court denied both requests. After the requests were denied, the State introduced two additional witnesses who corroborated the extraneous aggravated robbery.

DISCUSSION AND HOLDING

I. Trial Court's Questions to Witness

A trial judge may question a witness only when seeking information, when attempting to clarify a point, or to get the witness to repeat something the judge could not hear. *Moreno v. State*, 900 S.W.2d 357, 359 (Tex. App.—Texarkana 1995, no pet.). However, a potential for danger exists when a court questions a witness. Two possible dangers are (1) that the judge may convey his or her opinion to the jury, ultimately

influencing the jury's decision, and (2) that the judge, in the fervor of his or her active participation in the trial, may become an advocate, rather than a neutral and detached fact finder and judge. *Id.*[1]

A. Preservation of Error

Though neither party briefs this court on preservation of error, we begin our discussion on this issue by noting that, in order to preserve error for appellate review about a trial judge's comments during trial, counsel must object, or otherwise bring the complaint to the trial court's attention. TEX. R. APP. P. 33.1; *Blue v. State*, 41 S.W.3d 129, 131 (Tex. Crim. App. 2001); *Sharpe v. State*, 648 S.W.2d 705, 706 (Tex. Crim. App. 1983); *Devis v. State*, 18 S.W.3d 777, 782 (Tex. App.—San Antonio 2000, no pet.). However, though not brought to the attention of the trial court, we are authorized to take notice of fundamental error that affects the defendant's substantial rights. TEX. R. EVID. 103(d); *Blue*, 41 S.W.3d at 131. Here, appellant's trial counsel did not object to the judge's questions. However, we find that by informing the court that he would not have advised appellant to plead guilty had he known of the extraneous offense that the court extracted from appellant's co-defendant, and then asking for permission to withdraw the guilty plea, he informed the trial court of his objection to the court's questions at a time when the court was still in a position to take action upon the objection. Of paramount importance to our determination that this action preserved error for our review is the fact that, because no jury was present, the determination of this case was solely in the hands of the judge.

B. Permissibility of Court's Questions

Although Texas is one of the few jurisdictions rejecting the adoption of Federal Rule of Evidence 614, which authorizes trial judges to call and interrogate witnesses, Texas, to a limited extent, tolerates judicial questioning. *See Morrison v. State*, 845 S.W.2d 882, 886 n.10 (Tex. Crim. App. 1992) (discussing cases where the court of criminal

[1] The first danger is not present in this case because there was no jury.

appeals and courts of appeals have tolerated judicial interrogation of a witness). Our research has revealed two such cases where the defendant was before the trial court on a plea of guilty. In one case, *Cleveland v. State*, the court of criminal appeals found no error in the trial court's questions because (1) the questions related to evidence appellant had already testified to, and (2) nothing in the record indicated that the court took the evidence into consideration in assessing punishment. 588 S.W.2d 942, 945 (Tex. Crim. App. 1979). In the other case, *Navarro v. State*, the court of criminal appeals found no error because the purpose of the questions was only to clarify the witness' testimony. 447 S.W.2d 291 (Tex. Crim. App. 1972).

Here, we are faced with a different situation. First, the questions the judge asked were relevant only to an extraneous offense not already testified to by appellant. And, the line of questioning was not intended to clarify Sanders' testimony. Rather, through this line of questioning, the court elicited information about a completely separate aggravated robbery, one of which no mention had been made before the trial court's questions.

On the one hand, aspects of the questioning are troubling: the judge repeatedly threatened prison if Sanders lied. On the other hand, Sanders *was* lying. The judge may have been so persistent because he sensed, by Sanders' tone or body language, that he was lying. From the cold record, we cannot tell. Moreover, although the questioning pertained to an extraneous offense, if it was found to have been committed beyond a reasonable doubt, it certainly would be a factor the judge could consider in assessing punishment.

But, even if it was error, it was harmless. When assessing appellant's punishment, the trial court stated he only based his decision on the evidence in the PSI report. In addition, the court sentenced appellant to only fifteen years. Yet, the range of punishment was five to ninety-nine years, or life in prison. TEX. PEN. CODE ANN. §§ 12.32(a) - (b) & 29.03(b) (Vernon 1994). We do not believe fifteen years' confinement is an inappropriate sentence.

Considering the above facts in light of the possible danger that exists when a court

questions a witness – that the judge, in the fervor of his active participation in the trial may become an advocate rather than a neutral and detached fact-finder and judge – it does not appear that this trial court so removed itself from its appropriate role that it could not later objectively and appropriately assess punishment.

II. Withdrawal of Guilty Plea

Having set out the pertinent law and facts, we now turn to whether appellant should have been permitted to withdraw his guilty plea as a result of these questions. When the motion to withdraw the guilty plea was made, the court had already taken this case under advisement. *Thompson v. State*, 852 S.W.2d 268, 270 (Tex. App.—Dallas 1993, no pet.). Thus, the court's decision to grant the motion was committed to its discretion. *DeVary v. State*, 615 S.W.2d 739, 740 (Tex. Crim. App. 1981).

There is no indication that the plea, when originally entered, was involuntary. However, the record does indicate that, if appellant's trial counsel had known of the extraneous offense, he claims he would have advised appellant to enter a plea of not guilty. If appellant had pled not guilty, appellant's trial counsel might have tried to get the extraneous offense suppressed, and at least, would have been prepared for it. Moreover, there is no indication in the record that the State knew of, or would have ever used this extraneous offense as it pertained to appellant. No witnesses at the PSI hearing were questioned by the State about it. Not until the sentencing hearing, some two months after Sanders testified to the extraneous offense, did the State bring corroborating witnesses for this extraneous offense.

However, a withdrawal of a guilty plea is permitted only when the original plea was involuntary. Here, the theoretical reasons for the trial court to grant the motion to withdraw the guilty plea are that (1) appellant, as his trial counsel argued, did not commit the extraneous offense, or (2) appellant had not anticipated the trial court's cognisance of the extraneous offense.

We first note that there is no indication that the trial court considered the extraneous

offense without determining whether it had been proven beyond a reasonable doubt. The only way appellant's complaint is relevant to his plea is if the trial court considered the extraneous offense in assessing punishment, otherwise, no harm would have befallen appellant. As to appellant's involvement in the extraneous offense, the court only denied the request not to consider the testimony of the corroborating witnesses in assessing punishment. The court did not say whether it had determined the extraneous offense was proven beyond a reasonable doubt, or that it ultimately considered the extraneous offense in assessing appellant's punishment. On the contrary, the court stated on the record that it only considered the evidence contained in the PSI report in assessing appellant's punishment.

In addition, we do not find that the questions the court asked appellant's co-defendant somehow negated the court's discretion as to whether to grant appellant's motion to withdraw his guilty plea. On the state of the record, even if appellant could demonstrate that the extraneous offense evidence was improperly considered by the trial court, and that the court's cognisance of the extraneous offense made appellant's original plea involuntary, we do not find that the court abused its discretion in denying the motion to withdraw the guilty plea. We find no authority, and appellant cites us to none, to indicate that the trial court's actions somehow negated its discretion with regard to whether appellant should have been permitted to withdraw his plea. As a result, we hold that, in denying appellant's motion to withdraw his guilty plea, the trial court did not abuse its discretion.

III. Ineffective Assistance of Counsel

Appellant also complains that the trial court denied him effective assistance of counsel by assuming the role of advocate and soliciting testimony of an extraneous offense that it used in assessing punishment. In essence, appellant contends that, because the court created the very situation necessitating the withdrawal, the trial court abused its discretion by denying his motion to withdraw his guilty plea, thereby rendering appellant's

trial counsel ineffective.

Ineffective assistance of counsel may be raised indirectly as affecting the voluntariness of the plea, because a guilty plea is not knowing or voluntary if made as a result of ineffective assistance of counsel. *Marshall v. State*, 28 S.W.3d 634, 638 (Tex. App.—Corpus Christi 2000, no pet.). Here appellant's voluntariness argument is couched in terms of an ineffective assistance claim. A trial court abuses its discretion in refusing to allow a defendant to withdraw a guilty plea if the defendant can show his plea was involuntary due to ineffective assistance of counsel. *Rivera v. State*, 952 S.W.2d 34, 36 (Tex. App.—San Antonio 1997, no pet.). The voluntariness of the plea depends upon (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases, and (2) whether there is a reasonable probability that, but for counsel's unprofessional errors, he would not have entered his plea, and would have insisted on going to trial. *Ex Parte Moody*, 991 S.W.2d 856, 857-58 (Tex. Crim. App. 1999). Appellant must prove ineffective assistance by a preponderance of the evidence. *Ex Parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). As in any case where we analyze the effectiveness of counsel, we begin with the presumption that counsel was competent. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Appellant has the burden of rebutting this presumption by presenting evidence illustrating why counsel took particular actions. *See Jackson*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc).

Once an accused testifies that he understands the nature of the plea and that the plea was voluntary, he has a heavy burden on appeal to prove the involuntariness of his plea. *Edwards v. State*, 921 S.W.2d 477, 479 (Tex. App.—Houston [1st Dist.] 1996, no pet.); *see Jones v. State*, 855 S.W.2d 82, 84 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). To determine the voluntariness of the plea, the entire record must be examined. *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975).

We reject appellant's contention that the trial judge so zealously took on the role

of advocate that he thereby denied appellant's counsel the ability to effectively advise him how to proceed. Though the manner of the trial court's questioning of appellant's co-defendant was inappropriate, the subject matter of the questions was permissible. As for the trial court's fervor in asking the questions, it is apparent from the record that any initial fervor had cooled by the time the court assessed punishment – the court did not consider the extraneous offense in assessing appellant's punishment.

Furthermore, appellant does not complain that his trial counsel failed to adequately investigate his case.[2] Counsel is presumed to have proceeded in a professional manner. Thus, we presume that appellant's trial counsel had a firm command of the facts of the case and made an independent investigation of those facts. *See Melton v. State*, 987 S.W.2d 72, 77 (Tex. App.—Dallas 1998, no pet.). The record is silent as to why appellant's trial counsel was surprised to learn of appellant's possible involvement in an additional aggravated robbery. Consequently, appellant has failed to provide to us a basis which we can conclude counsel's advice itself, apart from the actions of the trial court, was not within the range of competence demanded of attorneys in criminal cases. In order to find that the trial court's apparently surprising discovery that appellant had committed an additional aggravated robbery caused appellant's counsel to be ineffective, we would have to speculate that appellant did not inquire whether appellant had committed any extraneous offenses. This we will not do. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). In fact, we presume that as a reasonably effective attorney, appellant's trial counsel either did make such inquiries, or because of trial strategy, chose not to. If the former, then appellant cannot keep such information from his attorney and then later claim his own reticence in being forthcoming with his attorney caused him to suffer

[2] Among cases where the voluntariness of a plea is challenged through an ineffectiveness of counsel claim, this case is somewhat peculiar. Typically, the lawyer is criticized for failing to fully investigate the defendant's case. Indeed, in assessing the effectiveness of counsel, the focus is typically on the actions counsel took, not the effect on counsel of the acts of a third party. Here, no such allegation is made. It appears that appellant has no complaint about the way his counsel handled the case. His complaint is with the trial court assuming the role of advocate and eliciting evidence of an extraneous offense from appellant's co-defendant.

ineffective assistance. If the latter, appellant has not proven, nor does he contend, that such a decision rendered his counsel ineffective.

Appellant has failed to overcome the presumption that counsel effectively assisted him. We reject this portion of appellant's point of error.

For the foregoing reasons, we overrule appellant's sole point of error. The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed August 16, 2001.

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

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

[3] Senior Justice Joe L. Draughn sitting by assignment.