**Affirmed and Opinion filed August 16, 2001.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00747-CR**

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**JOHN THOMAS MITSCHKE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 85th District Court**
**Brazos County, Texas**
**Trial Court Cause No. 26,617-85**

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## O P I N I O N

Appellant, John Thomas Mitschke, was charged by indictment in two counts with aggravated sexual assault of a child and indecency with a child. Pursuant to a plea bargain agreement, appellant pled guilty to the indecency with a child charge in exchange for the State's agreement to dismiss the aggravated sexual assault of a child charge. A jury assessed punishment at twenty years' confinement in the Institutional Division of the Texas Department of Criminal Justice and a $10,000 fine. In two points of error, appellant contends his plea of guilty was involuntary and he did not receive effective assistance of counsel. We affirm.

## F A C T U A L  B A C K G R O U N D

Appellant was hired as a babysitter by Alice Caraway for her eight year old son, J.F. Appellant was hired to provide care for J.F. by picking J.F. up after school, helping him with homework, preparing dinner, and getting J.F. ready for bed. Appellant and Caraway began a relationship and married in November of 1991.

Caraway testified that J.F. had behavioral problems at school that escalated after appellant began to provide child care. J.F. had serious hygiene problems resulting from his refusal to take showers, wash his hair, brush his teeth, or use toilet paper. J.F. received counseling from a psychologist, Dr. Larry Roe. However, J.F.'s physical and mental condition continued to deteriorate until he moved to Washington to live with his biological father.

Two months after moving to Washington, J.F. phoned Caraway and informed her that he had been sexually abused by appellant. Specifically, J.F. testified that between ages nine and fourteen he and appellant engaged in oral and anal sex. In addition, J.F. testified that appellant physically abused him with a paddle or a fold-up cane to force J.F. to perform these sex acts.

Caraway confronted appellant about J.F.'s allegation of sexual abuse. At first, appellant denied the allegations. Then he stated J.F. misinterpreted appellant's touching, which was for medical purposes, as sexual contact. Later, appellant admitted touching J.F. when he put a condom on J.F. for demonstrative and teaching purposes. Finally, appellant admitted to Caraway that he discussed homosexuality with J.F. and stopped just short of intercourse with J.F. Appellant moved out of Caraway's home and began counseling with Dr. Roe, J.F.'s psychologist. Dr. Roe advised appellant to write down everything that he remembered. These statement's were introduced as evidence. Appellant explained that his contact with J.F. was one of education.

## I.

## Admonishments by the Trial Court

Appellant contends in his first point of error that his plea was involuntary because the trial court failed to admonish him of his requirement to register as a sex offender because he pleaded guilty to the offense of indecency with a child.[1] We disagree.

At least three courts of appeals have held that sex offender registration is a collateral consequence of a guilty plea, not a direct consequence. *Ruffin v. State,* 3 S.W.3d 140, 144-45 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *Guzman v. State,* 993 S.W.2d 232, 235 (Tex. App.—San Antonio 1999, no pet.); *In re B.G.M.,* 929 S.W.2d 604, 606-07 (Tex. App.—Texarkana 1996, no writ). The legislature amended article 26.13(a)[2] to add subsection (a)(5) requiring an admonishment regarding sex offender registration. Appellant entered his plea, however, before the September 1, 1999 effective date of the amendment. Thus, the sex offender admonishment was not required. *See* Act of May 29, 1999, 76th Leg., R.S., ch. 1415, § 1, 1999 Tex. Gen. Laws. 4831, 4831–32 (current version at TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (Vernon Supp. 2000)). Therefore, we overrule appellant's first point of error.

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[1] Specifically, this point of error states:

> Appellant's plea of guilty was not freely and voluntarily given under the Fifth and Fourteenth Amendments to the United States and Article I §§10 and 19 of the Texas Constitution and Articles 1.05, 38.22 and 38.23 of the Texas Code of Criminal Procedure as the trial court failed to admonish appellant concerning the sexual offender registration program.

[2] Article 26.13(a) of the Texas Code of Criminal Procedure mandates that before accepting a guilty plea, the trial court must admonish a defendant of:

> (1) the punishment range; (2) the fact that the State's sentencing recommendation is not binding on the court; (3) the limited right to appeal; and, (4) the possibility of deportation. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a) (Vernon 1989). The admonishments may be made either orally or in writing. *See id.* at art. 26.13(d).

## II.
## Ineffective Assistance of Counsel

In his second point of error, appellant contends trial counsel was ineffective in failing to inform appellant that as a consequence of his plea, he would be required to register as a sex offender. In addition, appellant contends that he received ineffective assistance of counsel because trial counsel failed to preserve error regarding the overruled challenge for cause concerning Juror Turner. Therefore, appellant asserts that he was precluded from striking another questionable juror.

To succeed on a claim of ineffective assistance of counsel the appellant must show: (1) counsel's performance was deficient in that the counsel's representation fell below an objective standard of reasonableness; and (2) counsel's performance prejudiced the defendant so that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. Further, there is no need to address both prongs in any particular order, and if there is an insufficient showing on one prong, the other does not need to be addressed. *Id.* at 697.

### A. Failure to Admonish

The Sixth Amendment guarantee of reasonably effective assistance of counsel applies at the time a defendant enters a plea to the charging instrument. *McMann v. Richardson*, 397 U.S. 759, 770-71(1970). When a defendant enters a plea of guilty or nolo contendere upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel, the voluntariness of the plea depends on (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and, if not, (2) whether there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *Ex parte Morrow*, 952

S.W.2d 530, 536 (Tex. Crim. App. 1997).

In *Ruffin v. State,* this Court stated that registration requirements have no impact on the range of punishment for the instant offense and represent only the *possibility* of punishment should appellant fail to comply with the terms of the program upon his release from confinement. 3 S.W.3d 140, 144 (Tex. App.—Houston [14th Dist] 1999, pet. ref'd); *see also Morrow,* 952 S.W.2d at 536 (citing *Varela v. Kaiser,* 976 F.2d 1357 (10th Cir. 1992)(holding Sixth Amendment's guarantee of effective assistance of counsel does not extend to collateral aspects of the prosecution). The requirement to register is not a direct consequence of a plea of guilty to the offense of indecency with a child, therefore, trial counsel was not required under the Sixth Amendment to inform appellant that as a consequence of his plea he would be required to register as a sex offender.[3] *See Ruffin,* 3 S.W.3d at 144-45. Because trial counsel's performance was not deficient in this regard, the first prong of the *Strickland* analysis has not been met, and consequently the second prong does not need to be addressed. *See* 466 U.S. at 697. We overrule the first contention in appellant's second point of error.

**B. Failure to Preserve Error**

Second, appellant asserts that trial counsel failed to preserve error for the overruled challenge for cause concerning Juror Turner. Consequently, appellant contends that due to trial counsel's strike on Juror Turner, appellant was forced to accept Juror McMurray. Appellant seems to contend that failing to preserve error amounted to deficient performance. Regarding the prejudice prong, instead of arguing that failure to preserve

[3] We will not address the contentions pertaining to article I, section 10 of the Texas Constitution or article 1.05 of the Texas Code of Criminal Procedure because appellant proffers no argument or authority as to the protection offered by those provisions or how their protection differs from the protection guaranteed by the U.S. Constitution. *See, e.g., Narvaiz v. State*, 840 S.W.2d 415, 432 (Tex. Crim. App. 1992); *Morehead v. State*, 807 S.W.2d 577, 579 n. 1 (Tex. Crim. App. 1991); *McCambridge v. State*, 712 S.W.2d 499, 501-02 n. 9 (Tex. Crim. App. 1986); *Garay v. State*, 954 S.W.2d 59, 64 (Tex. App.—San Antonio 1997, pet. ref'd).

error directly caused prejudice, appellant argues that being forced to have Juror McMurray on the panel "obviously prejudiced [a]ppellant" because of her experience as an outcry witness involving her cousins' abuse. However, after reviewing the record, we find that Juror McMurray was "open-minded and persuadable, with no extreme or absolute positions." *Munoz v. State*, 24 S.W.3d 427, 434 (Tex. App.—Corpus Christi 2000, no pet.). Specifically, McMurray stated, "I think I'm fair. I think even when I'm dealing with my kids – when they raise a question, 'Does [sic] children lie or whatever,' I like to hear everything before making a judgment." Therefore, we find that by having Juror McMurray on the panel, there was no reasonable probability that the outcome of the trial would have been different. Because appellant has not met the prejudice prong of the *Strickland* analysis, we need not address the first prong. *See* 466 U.S. at 697. We overrule the second contention in appellant's second point of error. We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed August 16, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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