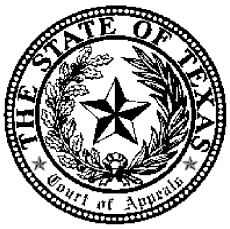
Affirmed and Opinion filed October 4, 2001.



In The

Fourteenth Court of Appeals

NO. 14-01-00316-CR

SHAZIZZ MATEEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 99CR1620

O P I N I O N

Appellant was arrested and charged by indictment with the offense of burglary of a habitation with the intent to commit sexual assault. He was released on bond, which was subsequently surrendered because appellant violated a protective order. After being arrested again and placed in custody, appellant entered a plea of nolo contendere to the offense charged. The trial court deferred adjudication of appellant's guilt and sentenced him to eight years community supervision.

Appellant subsequently filed an application for writ of habeas corpus in the trial court. In that application, appellant alleged (1) he did not knowingly, intelligently and

voluntarily waive his rights under the Texas and United States constitutions; and (2) the evidence is factually and legally insufficient to support his conviction.

We determine the voluntariness of a plea by the totality of the circumstances. *See Griffin v. State,* 703 S.W.2d 193, 196 (Tex. Crim. App. 1986). When the record reflects that the trial court properly admonished the defendant on the consequences of his plea, there is a prima facie showing that the defendant entered a knowing and voluntary plea. *See Fuentes v. State,* 688 S.W.2d 542, 544 (Tex. Crim. App. 1985). The burden then shifts to the defendant to show that he entered his plea without understanding the consequences. *Id.* Appellant's attestation of voluntariness at the original plea hearing imposes a heavy burden on him at a later hearing to show a lack of voluntariness. *See Dusenberry v. State,* 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). When the record is otherwise silent, we will presume the correctness of a recital in the judgment regarding the voluntariness of a guilty plea. *Miller v. State,* 879 S.W.2d 336, 338 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

The trial court's ruling in a habeas corpus proceeding should not be overturned without a showing of a clear abuse of discretion. *Brashear v. State,* 985 S.W.2d 474, 476 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). Whether the trial court abused its discretion depends on whether it acted without reference to any guiding rules or principles. *Montgomery v. State,* 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). In reviewing a trial judge's decision to grant or deny relief on a writ of habeas corpus, we afford almost total deference to a trial judge's determination of the historical facts supported by the record, especially when the fact findings are based on an evaluation of credibility and demeanor. *See Ex parte Martin,* 6 S.W.3d 524, 526 (Tex. Crim. App. 1999).

In his first two points of error, appellant claims his plea was involuntarily made because he did not want to remain incarcerated while awaiting trial. From the record, we conclude there is a prima facie showing appellant entered a knowing and voluntary plea. The clerk's record shows that appellant, his trial counsel, the prosecutor, and the trial judge

signed written plea admonishments pursuant to article 26.13 of the Code of Criminal Procedure. Those admonishments stated in bold type: "I understand the foregoing admonishments from the Court and am aware of the consequences of my plea. I further state that I am mentally competent, that my plea is freely and voluntarily made." By signing the plea documents, appellant indicated he was fully informed of the potential range of punishment for the crime and of the consequences of his plea. *See Dusenberry,* 915 S.W.2d at 949.

Because the evidence in the record was sufficient to make an initial showing of voluntariness, the burden shifted to appellant to show he entered his plea without understanding the consequences. At the original plea hearing, appellant testified that he understood the consequences of his plea and that he had not been forced or threatened to plead no contest. The court found appellant's plea to be free and voluntary. After the trial court accepted appellant's plea, the complainant testified that she consented to sexual intercourse with appellant and wished to have the charges dismissed against appellant. The complainant's testimony, however, did not disprove any elements of the offense. Appellant was charged with burglary of a habitation with intent to commit the offense of sexual assault. TEX. PENAL CODE ANN. § 30.02. The complainant's testimony did not disprove the fact that appellant entered the home without her consent.

The prosecutor recommended a sentence of eight years deferred adjudication community supervision. The court then accepted the recommendation and admonished appellant as to the consequences of violating the community supervision. Appellant's attorney then called appellant to testify as follows:

> Q. [by defense counsel]: Mr. Mateen, you heard [the complainant] saying that she was not sexually assaulted by you, correct?
>
> A. Correct.
>
> Q. And I advised you not to plead guilty to this, or no contest to this offense, is that correct?

A. Correct.

Q. And against my advice you're entering this plea here today? I mean, I advised you that you should take the case to trial, is that correct?

A. That's what you advised me.

Q. But you indicated to me that you just wanted to go ahead and plea to this deferred adjudication, plead no contest and do this deferred adjudication knowing that you're going to have to register as a sex offender for the rest of your life, is that correct? Is this what you want to do?

A. Of course not.

Q. But you indicated to me you wanted to go ahead and do this deferred adjudication rather than take it to trial?

A. If we must talk about the case, explain the situation and the fact I would be incarcerated until the time of court.

Q. Unless you can make bond.

A. So, at this point I plead no contest. I plead no contest.

THE COURT: You want to continue to plea no contest and go forward with this?

THE DEFENDANT: Yes.

Appellant now claims his decision to plead no contest was involuntary because he had to remain incarcerated if he entered a plea of not guilty. Defendants are commonly incarcerated when they enter their pleas and may plead guilty by taking into account relevant

factors, *i.e.*, shorter jail time or community supervision. Thus, we are unwilling to accept appellant's position that incarceration is a factor to be considered in determining whether his plea was involuntary. The trial court did not hold a hearing on appellant's application for writ of habeas corpus; therefore, we rely on the evidence presented at the original plea hearing. The record of the plea hearing reflects that the trial court and trial counsel clearly explained the consequences of appellant's plea to him and that appellant understood those consequences. Appellant has not met his burden to show lack of voluntariness. Appellant's first two points of error are overruled.

In his third and fourth points of error, appellant claims the evidence is legally and factually insufficient to sustain his conviction. Claims of factual innocence are cognizable in post-conviction habeas corpus proceedings because such claims raise issues of constitutional magnitude. *Ex parte Elizondo,* 947 S.W.2d 202, 205 (Tex. Crim. App. 1996).

In conjunction with his no contest plea, appellant endorsed a document entitled, "WRITTEN PLEA ADMONISHMENTS – WAIVERS-STIPULATIONS." A section of this document contains appellant's stipulation under the heading, "NOLO CONTENDERE PLEA." Appellant's signature appears below that section. In his evidentiary stipulation, appellant agreed that the allegations recited in the indictment "constitute the evidence in this case." Following the entry of appellant's plea, and without objection from either party, the trial court heard evidence from the complainant. The complainant testified that she alleged that appellant entered her home illegally with the intent to commit sexual assault. She further testified that she wanted to drop the charges and that she had lied to the police when appellant was arrested. She further testified that, although she had sexual intercourse with appellant, it was consensual. The complainant did not negate the elements of the offense of burglary. Appellant claims the complainant's testimony proves his innocence.

The legal effect of a plea of no contest is the same as a plea of guilty. *Stone v. State,* 919 S.W.2d 424, 426 (Tex. Crim. App. 1996). A plea of guilty is sufficient of itself to support a conviction under federal constitutional review. *Holland v. State,* 761 S.W.2d 307,

312 (Tex. Crim. App. 1988). Therefore, the only question before us is: Was there sufficient evidence to satisfy article 1.15 of the Code of Criminal Procedure? Article 1.15 provides that, when a defendant pleads guilty or no contest to a felony, the State must introduce evidence showing the guilt of the defendant. That evidence, however, may be stipulated to by the defendant. TEX. CODE CRIM. PROC. art. 1.15. The evidence shall be accepted by the court as the basis for its judgment, and it must be sufficient to support the judgment. *Id.* In reviewing whether a plea of guilty or no contest meets the requirements of article 1.15, we must determine if there was some evidence showing the defendant engaged in the criminal conduct sufficient to support the trial court's judgment of guilt.

Here, appellant entered into the following stipulation:

> I freely and voluntarily plead NOLO CONTENDERE (NO CONTEST) to the indictment . . . by which I have been charged in this cause and agree that the elements of the offense and the facts alleged therein constitute the evidence in this case.

Appellant stipulated that the allegations of the indictment constitute the evidence in this case. By agreeing to this, the parties have in effect agreed that, were the State to present its evidence, the evidence would be that on or about the 12th day of September, 1999, without the effective consent of the complainant, appellant entered a habitation with intent to commit sexual assault. A stipulation as to what witnesses would testify had they been present at trial is sufficient to support a conviction in the context of article 1.15. *See Stone*, 919 S.W.2d at 426. The stipulation here is the functional equivalent of a stipulation embracing every element of the offense charged. We conclude, therefore, there is sufficient evidence to establish the guilt of appellant. Appellant's third and fourth points of error are overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed October 4, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
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