Affirmed and Opinion filed October 19, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01199-CR

MAXIMILIANO GUTIERREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 767,805

O P I N I O N

Appellant, Maximiliano Gutierrez, was indicted for the offense of possession of marihuana, weighing more than fifty pounds, but less than two thousand pounds. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121 (Vernon Supp. 1999). He waived trial by jury, and without a plea bargain agreement, pled guilty to the offense. Following a pre-sentence investigation, the trial court assessed appellant's punishment at fifteen years and one day in the Texas Department of Criminal Justice, Institutional Division and a $5000 fine. In his sole point of error, appellant contends that the trial court erred in denying his motion for new trial because he received ineffective assistance of counsel. We affirm.

The trial judge sentenced appellant on July 15, 1998. Appellant filed a notice of appeal two days later. On August 14, 1998, appellant filed a motion for new trial alleging that his trial counsel was ineffective. The hearing was held on October 1, 1998. At the hearing, appellant introduced evidence to

show that his attorney misinformed him about the punishment range for the offense. The trial judge denied the motion. The hearing and the trial judge's ruling on the motion for new trial occurred more than seventy-five days after sentence was imposed.

A motion for new trial is overruled by operation of law if it is not determined within seventy-five days after sentence is imposed or suspended in open court. *See* TEX. R. APP. P. 21.8. After seventy five days, the trial court loses jurisdiction and cannot rule on the motion. *See State v. Garza*, 931 S.W.2d 560, 562 (Tex. Crim. App. 1996). A hearing conducted after a motion for new trial is overruled by operation of law and will not be considered on appeal. *See Trevino v. State*, 565 S.W.2d 938, 941 (Tex. Crim. App . 1978) (construing Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, art. 40.05, 2 1965 Tex.Gen.Laws 317, 477 (TEX. CODE CRIM. PROC. ANN. Art. 40.05, since repealed)); *Laidley v. State*, 966 S.W.2d 105, 107 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

Accordingly, we hold that the trial court did not err in denying appellant's motion for new trial because the court did not have jurisdiction over the case. Additionally, because we cannot consider the testimony from the hearing on the motion for new trial, we are unable to conclude that appellant's trial counsel was deficient.[1] Thus, we overrule appellant's sole point of error and affirm the judgment of the trial court.

Ross A. Sears
Justice

Judgment rendered and Opinion filed October 19, 2000.
Panel consists of Justices Robertson, Sears, and Hutson-Dunn.[*]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] The State points out, and we agree, that appellant remains free to seek a post conviction writ of habeas corpus on an ineffective assistance of counsel claim. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07.

[*] Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn sitting by assignment.