**Affirmed and Opinion filed October 21, 1999.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-97-00258-CR**

**ANTHONY MICHAEL PACE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 182nd District Court**
**Harris County, Texas**
**Trial Court Cause No. 728,220**

## O P I N I O N

Anthony Michael Pace (Appellant) was indicted for the second degree felony offense of intoxication manslaughter. *See* TEX. PENAL CODE ANN. § 49.08 (Vernon 1994). Appellant pleaded *nolo contendere* and was tried by the court. The trial court found Appellant guilty and sentenced him to a term of sixteen years' confinement in the Institutional Division of the Texas Department of Justice. *See* TEX. PENAL CODE ANN. § 12.33(a) (Vernon 1994). On appeal to this Court, Appellant assigns three points of error, contending that (1) his plea was unknowing and involuntary because he was admonished by the trial court that he was eligible for deferred adjudication when, legally, he was not eligible for that disposition, (2) his plea was involuntary and unknowing because it was entered without effective assistance of

counsel because his trial counsel erroneously advised him that he was eligible for deferred adjudication, and (3) the evidence was insufficient to support his conviction. We affirm.

## BACKGROUND

Appellant caused an automobile accident that killed Myra Johnson. At the time of the accident, Appellant's alcohol concentration level was .23. *See* TEX. PENAL CODE ANN. § 49.01 (Vernon 1994).

## DISCUSSION

In his first point of error, Appellant challenges the voluntariness of his plea of *nolo contendere*. He contends that the trial court erroneously admonished him before he was sentenced that he was eligible for deferred adjudication. Appellant maintains that because he was charged with intoxication manslaughter, he was not eligible for deferred adjudication, and that his plea of *nolo contendere* was therefore not knowingly and voluntarily made. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(d)(1)(A) (Vernon Supp. 1998); *State v. Gonzalez*, 894 S.W.2d 857, 859 (Tex.App.–Corpus Christi 1995, no pet.).

The gravamen of Appellant's complaint in his first point of error, as we understand it, is that the trial court's admonishment, relative to deferred adjudication, influenced his decision to plead *nolo contendere*. The State acknowledges that the trial court's written admonishment contains a paragraph which indicates that deferred adjudication was available to Appellant. We observe that because Appellant was charged with intoxication manslaughter, he was not eligible for "deferred adjudication." *See Gonzalez*, 894 S.W.2d at 859.

However, this Court has previously rejected a similar argument to the one Appellant advocates in his first point of error. *See Fisher v. State*, 921 S.W.2d 814, 816 (Tex.App.–Houston [14th Dist.] 1996, pet. ref'd). In *Fisher*, the appellant was convicted of delivery of cocaine, enhanced by two prior convictions. *Id.* at 815. Even though the appellant was not eligible for deferred adjudication, the trial court nevertheless admonished

him on the conditions of deferred adjudication. *Id.* at 816. We held in *Fisher* that because (1) the record clearly indicated that the appellant entered his plea without a punishment recommendation by the State, (2) the trial court found that the appellant was mentally competent and was entering his plea freely and voluntarily, and (3) deferred adjudication had not been promised to the appellant, that the "deferred adjudication admonishments were not connected [to the appellant's guilty plea]." *Id.*; *accord Rodriguez v. State*, 933 S.W.2d 702, 705-06 (Tex.App.–San Antonio 1996, pet. ref'd). Likewise, in the instant matter, the record clearly shows that Appellant entered his plea without a punishment recommendation by the State. He entered his plea knowing that his range of punishment was "for a term not more than 20 years or less than 2 years in the Institutional Division of the Texas Department of Justice." The record also shows that Appellant was mentally competent and that he attested that he "freely, knowingly, and voluntarily" entered his plea, understanding that his punishment was left to the discretion of the trial court. Moreover, there is nothing in the record to indicate that Appellant sought nor was promised deferred adjudication. To the contrary, Appellant filed a written "motion for probation"; Appellant did not seek deferred adjudication in his motion. We also observe that the trial court expressly told Appellant during his sentencing hearing that it was not considering deferred adjudication as a potential disposition in his case. Appellant's trial counsel responded to the trial court's oral instruction by acknowledging that Appellant understood that the court was considering only "straight probation" as an alternative to a sentence in the Texas Department of Criminal Justice.[1]

The burden was on Appellant to show that he entered his plea without understanding the consequences of his plea and possible punishment. *See Rodriguez*, 933 S.W.2d at 706; *Richard v. State*, 788 S.W.2d 917, 920 (Tex.App.–Houston [1st Dist.] 1990, no pet.). This burden is quite heavy, especially when, as here, the record shows that the defendant understood the nature of the proceedings, that the allegations are true, and that no outside

[1] Although he was not eligible for community supervision in the form of "deferred adjudication,"Appellant remained a candidate for "regular" community supervision or probation. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3 (Vernon Supp. 1998); *Richard v. State*, 788 S.W.2d 917, 919 (Tex.App.–Houston [1st Dist.] 1990, no pet.).

pressure or influences coerced him into making the plea. *Id.* A defendant's unfulfilled expectation of a lighter sentence will not render his plea involuntary. *See id.*

Appellant has failed to meet his burden in this case. *See id.* Based upon the record presented for our review, we are unable to discern how the trial court's written admonishment, relating to deferred adjudication, played any role in Appellant's decision to plead *nolo contendere*. *See Fisher*, 921 S.W.2d at 816. Secondly, we find nothing in the record to suggest that Appellant was misled or harmed by the trial court's written admonishment. *See Ex parte Williams*, 704 S.W.2d 773, 775 (Tex. Crim. App. 1986). Accordingly, we hold that Appellant's plea of *nolo contendere* was entered knowingly and voluntarily. Point of error overruled.

In his second point of error, Appellant asserts that his plea was involuntary and unknowing because it was entered without effective assistance of counsel because his trial counsel erroneously advised him that he was eligible for deferred adjudication.

Appellant fails to disclose where in the record it shows that his trial counsel advised him that he was eligible for deferred adjudication. *See* TEX. R. APP. P. 38.1(h) (West 1998). Further, this Court's review of the record discloses nothing to indicate that trial counsel advised Appellant that he was eligible for deferred adjudication. To the contrary, the record clearly shows that trial counsel filed a "motion for probation." The motion for probation filed by trial counsel was based upon section 3 of Article 42.12 of the Code of Criminal Procedure, which relates to "regular probation." *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3 (Vernon Supp. 1998); *Richard*, 788 S.W.2d at 919. "Deferred adjudication" was not sought in Appellant's motion for probation. If anything, the record refutes Appellant's claim. Point of error overruled.

In his final point of error, Appellant maintains that "the trial court erred in entering a judgment of guilty because the evidence was insufficient to support the judgment because the only evidence offered by the State was not a judicial confession nor a stipulation of

evidence." *See* TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp. 1999); *see also Wright v. State*, 930 S.W.2d 131, 132-33 (Tex.App.–Dallas 1996, no pet).

On page four of Appellant's written admonishments, under the heading "Statements and Waivers of Defendant," he attested: "I WAIVE the right to have a court reporter record my plea." His initials appear next to this waiver. Consequently, there is no transcript of Appellant's plea hearing.

As a threshold issue, the State argues that Appellant's waiver of a court reporter at the plea hearing prevents this Court from having an adequate record to review the sufficiency of the evidence. We agree. "[W]hen an appellant does not provide a statement of facts [or reporter's record] from the plea hearing it is a sufficient reason to overrule a challenge to the sufficiency of the evidence in a plea proceeding." *Williams v. State*, 950 S.W.2d 383, 385 (Tex.App.–Houston [1st Dist.] 1997, pet. ref'd); *Richardson v. State*, 921 S.W.2d 359, 360-61 n. 3 (Tex.App.–Houston [1st Dist.] 1996, no pet.). Similarly, in a court trial in which article 1.15, *supra*, applied, it has been held that "in the absence of a statement of facts, we must presume there was sufficient evidence to sustain and support the judgment." *Id.*; *Blacklock v. State*, 820 S.W.2d 882, 884 (Tex.App.–Houston [1st Dist.] 1991, pet. ref'd).

We hold that for an appellant to challenge the sufficiency of the evidence to support a judgment based upon a plea of guilty or no contest, he or she must bring forward a full statement of facts, including a transcription of the plea proceedings. *See id.* Appellant did not present this Court with a statement of facts or reporter's record. *See id.* Point of error overruled.

The judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed October 21, 1999.
Panel consists of Justices Amidei, Edelman, and Wittig.

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