**Affirmed and Opinion filed October 26, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-01240-CR**

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**JAMES MICHAEL BUIE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 182nd District Court**
**Harris County, Texas**
**Trial Court Cause No. 801,628**

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## O P I N I O N

Appellant, James Michael Buie, pled guilty without the benefit of a plea bargain to the offense of sexual assault. The trial court accepted his plea and postponed sentencing to allow for the preparation of a pre-sentence report. Several months later, the trial court sentenced appellant to confinement in the Institutional Division of the Texas Department of Criminal Justice for eleven years. Appellant raises two points of error: (1) the trial court erred in denying appellant's motion for new trial alleging ineffective assistance of counsel; and (2) the trial court committed reversible error by failing to consider the full range of punishment. We affirm.

In his first point of error, appellant contends his plea was involuntary due to ineffective assistance of counsel; thus, the trial court erred in denying his motion for new trial. Appellant asserts his trial counsel

improperly rejected a plea offer of five years deferred adjudication and nine months confinement in an alcohol treatment facility without first consulting him. Appellant also claims his plea was motivated by significant misinformation information conveyed by his trial counsel. Appellant's sole evidentiary support for his first point of error is an affidavit he filed in support of his motion for new trial.[1]

At a hearing on a motion for new trial, the trial judge is the trier of fact and the court's findings should not be disturbed absent a showing the court abused its discretion. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995); *Reissig v. State*, 929 S.W.2d 109, 113 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). Moreover, the trial court is not required to accept the testimony of any witness simply because it is uncontradicted. *See Reissig*, 929 S.W.2d at 113. The record evinces that the trial court expressly rejected appellant's assertion that his trial counsel was ineffective. Appellant fails to show this rejection lay outside the zone of reasonable disagreement and constituted an abuse of the trial court's discretion.

Furthermore, the record demonstrates that appellant was fully admonished on the issue of punishment. Because these admonishments provide prima facie proof that appellant's plea was both knowing and voluntary, the burden shifts to appellant to establish he did not understand the consequences of his plea. *See Kirk v. State*, 949 S.W.2d 769, 771 (Tex. App.—Dallas 1997, pet ref'd). In the affidavit attached to appellant's motion for new trial, appellant claims he did not understand that incarceration was a possibility until the evening before he was sentenced. This statement directly conflicts with the trial court's admonishment concerning the range of possible punishment:

> THE COURT: Has anybody promised you anything, that you would receive some specific punishment?
>
> THE DEFENDANT: No, ma'am.
>
> THE COURT: You understand that the range is anything from deferred adjudication or also straight probation all the way up to twenty years in prison?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: You understand that anywhere within the range of punishment is available to the Court for sentencing?

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[1] In determining a motion for new trial, the "court may receive evidence by affidavit or otherwise." TEX. R. APP. P. 21.7.

THE DEFENDANT: Yes, ma'am.

Thus, the record supports the State's assertion that appellant was fully apprized of the range of potential punishment prior to entering his plea of guilty. Appellant's argument that his plea was based on significant misinformation by the court or one of its officers necessarily fails because appellant cannot establish that he did not understand the consequences of his plea.

Moreover, appellant's contention that his counsel was ineffective fails to meet the test for ineffectiveness defined in *Strickland v. Washington*. 466 U.S. 668 (1984). In order to establish a claim for ineffective assistance of counsel, appellant must prove that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's deficient performance resulted in prejudice to his defense. *See Lemke v. State*, 13 S.W.3d 791, 796 (Tex. Crim. App. 2000). Here, it is unclear whether appellant is contending his counsel was ineffective because: (1) he failed to properly communicate the State's offer of five years deferred and nine months confinement in a treatment facility; or (2) he erroneously predicted the court would impose a lesser punishment than the one being offered by the State. In either case, the record does not support appellant's contention.

Failure of defense counsel to inform a criminal defendant of the a plea offer made by the State is an omission that falls below an objective standard of professional reasonableness. *See Lemke*, 13 S.W.3d at 795. Here, however, appellant's own affidavit establishes that trial counsel communicated the State's offer to appellant immediately after rejecting it. There is nothing in the record to suggest the offer was not still available to the appellant at the time it was communicated to him. Further, appellate counsel admitted in oral argument that appellant was not enticed by the State's offer because he feared the lengthy alcohol treatment program would cause him to lose his job.

We also find appellant's counsel was not ineffective for erroneously predicting that appellant would get a lighter punishment if he pled guilty to the court without a recommendation. The error here is simply one of professional judgment. A plea is not rendered involuntary simply because the sentence exceeds what is expected, even if the expectation was raised by the defendant's attorney. *See Reissig v. State*, 929 S.W.2d 109, 112 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd); *Enard v. State*, 764 S.W.2d 574, 575 (Tex.App.—Houston [14th Dist.] 1989, no pet.).

In his second point of error, appellant contends he was denied due process because the trial court did not consider the full range of punishment when assessing his punishment. Appellant fails to cite any portion of the record to support his contention. Appellant's assertion is based on nothing more than that the court assessed his punishment at eleven years in the penitentiary. The record shows: (1) the sentence assessed by the court was within the statutory range of punishment; (2) appellant made no objection to the sentence when it was imposed; and (3) he made no complaint regarding the punishment in his motion for new trial. A defendant waives any due process complaint when he does not object to the error during the punishment proceedings or raise such an error in a motion for new trial. *See Cole v. State*, 931 S.W.2d 578, 580-81 (Tex. App.—Dallas 1993, no pet.). Thus, the alleged error has not been preserved for review.

Accordingly, the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.

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