Affirmed and Opinion filed November 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-01-00183-CR

JOHNNY SERIALE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 836,830

O P I N I O N

Johnny Seriale appeals his eighteen-year, judge-imposed sentence for the sexual assault of his step-daughter. The complainant was fourteen years old at the time of the assault. In a single point of error, appellant alleges that the trial court improperly refused to allow appellant to withdraw his guilty plea after sentence had been handed down. We affirm.

Procedural History

Appellant pled guilty on October 23, 2000. Appellant signed a standard set of documents affirming that his plea was voluntary, made after consultation with his attorney, and with the knowledge that he waived his rights to appeal on most grounds. By agreement between the parties, sentencing was deferred pending the results of a pre-sentence investigation report. The report was returned and the sentence imposed on January 5, 2001. Appellant filed a *pro se* notice of appeal on the same day. On February 2, 2001, appellant filed a *pro se* motion to withdraw his plea of guilty. That motion was denied on February 5, 2001. No transcriptions of the trial proceedings were made. No motion for new trial was filed. No testimony from appellant's trial counsel is before us. The only record on appeal is from the court clerk.

Issue

Appellant alleges that the trial court abused it's discretion in refusing to allow the withdrawal of his plea. Appellant alleges that withdrawal of his plea was mandatory because his trial counsel deliberately lied to him in stating that he would receive probation if he pled guilty. Thus, appellant submits that his plea was involuntary under Article 26.13(b) of the Texas Code of Criminal Procedure.

I. Discretion to permit withdrawal of plea

It is well settled that the decision to permit withdrawal of a guilty plea is within the discretion of the trial court where, as here, the court has received the plea, heard the evidence, and withheld sentencing pending the pre-sentence investigation report. *See, e.g.*, *Harling v. State*, 899 S.W.2d 9, 12 (Tex. App.—San Antonio 1995, pet. ref'd).

II. Voluntariness

It is also well settled that a plea of guilt is unconstitutional if it is induced by threats, misrepresentations, or improper promises. *See generally Brady v. United States*, 397 U.S.

742, 90 S.Ct. 1463 (1970); *see also* TEX. CODE CRIM. PROC. ANN. Art 26.13(b) (Vernon Supp. 2001). A plea of guilty is invalid if it is induced by defense counsel's direct misrepresentation about the consequences of his plea of guilty. *Ex parte Griffin*, 679 S.W.2d 15, 18 (Tex. Crim. App. 1984). However, a plea is not involuntary merely because the sentence exceeds a defendant's expectations, even if that expectation was raised by his attorney. *See Stephens v. State*, 15 S.W.3d 278, 281 fn.1 (Tex. App.—Houston [14th Dist.] 2000, writ ref'd); *Russell v. State*, 711 S.W.2d 114, 116 (Tex. App.—Houston [14th Dist.] 1986, pet ref'd). In addition, the burden to prove a lack of voluntariness rests with the defendant. *Thornton v. State*, 734 S.W.2d 112, 113 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd).

Appellant makes no reference to the record in support of his contention that the trial court abused its discretion in refusing to permit withdrawal of his plea. In our own review, the only evidence we find supports the conclusion that appellant's plea was both voluntary and free from deception. Specifically, we note that appellant initialed an Admonishments and Judicial Confession affirming his knowledge that he faced imprisonment for "a term of not more than 20 years or less than 2 years." Paragraph seven of that document, also individually initialed by appellant, states:

> If you are pleading to the Court without an agreed recommendation and requesting that the Court order that a pre-sentence investigations be prepared, you must realize that you have no guarantee of any particular punishment and that any appellate rights you have would be limited to jurisdictional matters or to procedural errors that occur after the entry of your plea.

Finally, appellant's signed Plea of Guilty clearly states that "punishment should be set at Pre-sentence Investigation Hearing."

In his brief on appeal, appellant relies upon decisions in which a defendant entered a plea with the mistaken understanding that he would retain the right to appeal some particular ruling in the trial court. *See, e.g., Shalhorn v. State*, 732 S.W.2d 636 (Tex. Crim.

App. 1987) (motion to suppress); *Broddus v. State*, 693 S.W.2d 459 (Tex. Crim. App. 1985) (motion to suppress). None of these cases apply here.

We find no evidence of involuntariness in the record. Even if appellant's counsel had in fact promised a lighter sentence than that received, this would not, standing alone, show involuntariness. *See Stephens*, 15 S.W.3d 278. Therefore, the trial court cannot have abused its discretion in refusing to allow appellant to withdraw his plea. Appellant's point of error is overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed November 8, 2001.
Panel consists of Justices Yates, Edelman, and Wittig.[1]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Don Wittig sitting by assignment.