Affirmed and Majority and Dissenting Opinions filed November 16, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00208-CR

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TERRY GRAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 792,611

M A J O R I T Y O P I N I O N

Appellant entered a plea of guilty to the offense of aggravated robbery. He was convicted, and the trial court assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for sixteen years. In four points of error, appellant contends the trial court erred in not allowing him to withdraw his plea and in sentencing him to prison. Appellant further claims he received ineffective assistance of counsel. We affirm.

Jurisdiction

Appellant begins his brief with a "point of discussion" in which he argues that we have jurisdiction to consider his appeal. The State agrees that we have jurisdiction.[1] While Texas Rule of Appellate Procedure 25.2(b)(3) serves to limit appeals following pleas of guilty or no contest, that rule is limited to pleas where the punishment has been agreed to by both the State and the defendant. As there was no agreed punishment recommendation in this case, Rule 25.2(b)(3) is not applicable. Thus, we hold appellant's general notice of appeal is sufficient to confer jurisdiction upon this court. *See Hanson v. State*, 11 S.W.3d 9 285, 287 n. 1 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Failure to Withdraw the Plea

In his second point of error, appellant contends the trial court abused its discretion in overruling his motion to withdraw the plea. Appellant was charged by indictment with having committed an aggravated robbery in which he "did then and there use and exhibit a deadly weapon, to-wit: A FIREARM." He thereafter entered a plea of guilty and signed a judicial confession in which he swore that the allegations in the indictment were true. After accepting appellant's plea, the trial court ordered a presentence investigation.

The presentence investigation report reflects that two law students were robbed by appellant and his accomplice at gunpoint. The victims described the weapon as a blue steel, semiautomatic handgun which, at one point, was pressed to the head of one of the victims. When a truck containing three other law students approached the scene of the robbery, appellant pointed the pistol at the vehicle and said, "Get out of the truck, bitch, or I'm going to kill you." The truck sped away. Appellant then took the victims' wallets and fled with his companion. Approximately two weeks later, appellant was arrested by police after having been positively identified in a photo spread by one of the victims.

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[1] We note that subject matter jurisdiction cannot be conferred by agreement of the parties. *See State v. Roberts*, 940 S.W.2d 655, 657 (Tex. Crim. App. 1996).

The presentence investigation report also states that appellant admitted committing the robbery, but said he committed it with a BB pistol, not a firearm.[2] Further, at the time of the offense, appellant was living in the home of Ms. Brandy Anderson. On the day of the robbery, Ms. Anderson's mother reportedly found two wallets, a driver's license, a Texas Southern University identification card, and a BB pistol in a plastic bag under a bed in appellant's room. Whether the wallets, license, or identification belonged to the victims is uncertain because they were apparently discarded by the family before police could recover them. In any event, counsel filed a motion to withdraw appellant's plea contending there was some evidence appellant had not robbed his victims with a firearm. Appellant contends the trial court abused its discretion in denying the motion.

An accused may withdraw his plea any time before judgment is pronounced or the case has been taken under advisement. *See Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App.1979). However, the decision to allow the defendant to withdraw his plea after the judge has taken the case under advisement is within the sound discretion of the trial court. *See id.* Passing the case for a presentence investigation constitutes taking the case under advisement. *See Davis v. State*, 861 S.W.2d 25, 26 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Because appellant filed his motion to withdraw his plea after the trial court passed the case for preparation of a presentence investigation, we must review the court's denial of the motion under an abuse of discretion standard. Thus, to establish an abuse of discretion, appellant must show the trial court's ruling lies outside the "zone of reasonable disagreement." *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App.1990).

Here, the trial court was presented with a confusing array of testimony and contradictory statements suggesting three different possibilities, namely, a firearm, a BB pistol, or a toy gun were used in the robbery. Appellant never contested his involvement in the robbery; being an admitted participant in the hijacking,

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[2] "BB gun" is usually defined as a smooth-bore air gun firing a .175 caliber shot pellet. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 189 (1993). Although it is not a "firearm" and is generally considered to be non-lethal, a BB gun is capable of causing serious bodily injury and, thus, may constitute a "deadly weapon" as defined in the penal code. *See Delgado v. State*, 986 S.W.2d 306, 308 (Tex. App.–Austin 1999, no pet.) (holding there was sufficient evidence to show BB gun could, at close range, cause serious bodily injury or even death); *Misle v. State Farm Mut. Auto Ins. Co.*, 908 S.W.2d 289, 290 (Tex. App.–Austin 1995, no writ) (where BB gun was fired at plaintiff from a distance of fifteen feet, the BB penetrated her chest requiring emergency surgery).

appellant was undoubtedly aware of the type of weapon used in the offense. At the time of his plea, appellant signed a written judicial confession in which he admitted using a firearm to perpetrate the robbery. Moreover, the victims reported the weapon to be a firearm. Further, appellant's threatening behavior and statements during the hijacking suggest he was using a firearm. *See Edwards v. State*, 10 S.W.3d 699, 701 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that defendant's threats provided some evidence the weapon used was a firearm rather than merely a gun of the non-lethal variety).

However, in his statement to the officer conducting the pre-sentence investigation, appellant said the robbery was initiated, planned, and perpetrated by his codefendant who used a BB gun to force the two men to the ground. Appellant claimed his only role in the hijacking was to collect the victims' wallets. Moreover, Ms. Anderson's mother reportedly found a BB pistol in appellant's room.

Finally, at the hearing on appellant's motion to withdraw his plea, appellant testified that he, not his codefendant, held the weapon during the robbery. He further said the gun was only a toy, plastic, "cap gun." Moreover, appellant said that immediately after the robbery he threw the cap gun away and that any BB gun or other weapon found thereafter was not the gun used in the robbery.

It is the duty of the trial court to consider the evidence submitted. As the sole trier of facts, the court, "is the exclusive judge of the credibility of the witnesses and the weight to be given to their testimony." *Mattias v. State*, 731 S.W.2d 936, 940 (Tex. Crim. App. 1987); *see also Flanagan v. State*, 675 S.W.2d 734, 746 (Tex. Crim. App. 1984). Here, the underlying facts of this case involve appellant's multiple contradictory statements. Because the trial court apparently chose to accept the veracity of appellant's written judicial confession and the victim's statements, and reject appellant's subsequent self-serving testimonial revision of his criminal acts, we cannot say the trial court acted outside the zone of reasonable disagreement.

Accordingly, appellant's second point of error is overruled.

Due Process

In his third point of error, appellant claims his due process rights under the Texas Constitution were violated when the trial court sentenced him to sixteen years in the penitentiary. Appellant acknowledges

that this court will not review the length of a statutorily permissible sentence, but contends the trial court predicated the sentence on false information, which constitutes a denial of due process. *See Townsend v. Burke*, 334 U.S. 736, 740, 68 S.Ct. 1252, 1255, 92 L.Ed.2d 1690 (1948).

Appellant contends the trial court entered a finding of guilt based on incorrect information that the object used during the offense was a firearm. However, as stated earlier, appellant made inconsistent statements regarding whether a firearm, BB pistol, or toy cap gun had been used in the robbery. As the trier-of-fact, the trial judge apparently believed the object used was a firearm. Because appellant's sentence was not based on misinformation, no due process violation occurred. Appellant's third point of error is overruled.

Ineffective Assistance of Counsel

In his final point of error, appellant contends he received ineffective assistance of counsel because his trial counsel failed to properly investigate the facts of the case prior to advising him to plead guilty. When assessing the performance of trial counsel, an appellate court must begin its analysis with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984). The burden of establishing a claim of ineffective assistance of counsel rests with the appellant. *See Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984). Thus, any allegation of ineffectiveness must be firmly founded in the record. *See Thompson v. State*, 9 S.W.3d 803, 813 (Tex. Crim. App. 1999).

When the presentence investigation report revealed that appellant was insisting that a BB pistol, rather than a firearm, had been used in the robbery, the trial court recessed the punishment hearing to allow trial counsel to prepare and present a motion to withdraw the plea. When counsel called appellant to the witness stand he was treated to yet another account of the robbery:

> Q [By Mr. Hayes, defense counsel:] And you and I have talked about the fact that whether you wanted me to ask this Court to allow you to withdraw your plea because you pled to using a deadly weapon. Do you understand that?
>
> A [By appellant:] Yes, sir.

Q And you realize and we discussed whether a jury would necessarily believe that the gun that you used was a cap pistol or a deadly weapon?

A Yes, sir.

Q We discussed that, correct?

A Yes, sir.

Q And knowing how you are charged and knowing what you pled guilty to, are you still wanting to go ahead with your case today and have the Court go ahead and sentence you today?

A No, sir.

Q You're not? Well, what do you want to do?

A If I can have my plea taken out and plead to something else, sir, I would like to do that.

* * *

MR. HAYES: Maybe—Maybe I should put a couple of things on the record so the Court will kind of understand where I was this morning, and that part of his answer is a little bit of a surprise too, okay?

THE COURT: Okay.

MR. HAYES: If I might, at some point in time after, and at no point in time prior to doing the plea was I aware that there was a question that the thing that Mr. Gray was accused of having, that thing that looked like a gun was, in fact, maybe not a gun, but some other type of item, either a BB gun –

In fact, if there was anything that I thought it might be, it was a BB pistol that was referenced in the offense report.

* * *

[T]his morning early, before the Court was here, before anybody was here, I went back to talk to my client and advised him of the fact of what he wanted to do and talked with him about it. And I thought, it was my understanding at that time, that he did not want me to file the Motion to Withdraw the Plea, or I would have sat down and drafted one.

* * *

THE COURT: I see. But there is really not any new *Brady* material that's come to you this morning, because you already knew about the BB gun?

MR. HAYES: Well, I knew about the BB gun up to the point that—up till—Actually, this morning is the first time I learned from my client that, in fact, it may have been a different gun altogether and not an actual weapon, but only a cap pistol.

THE COURT: But apparently, this knowledge was in your client's mind all the time. He knew if he used a cap gun instead of a BB gun or real gun. He knew that at the time of the plea, did he not?

MR. HAYES: I would suspect, certainly, that he knew. If he is telling the truth this morning, I'm sure that he knew what he used at the time.

THE COURT: And he had plenty of opportunities, I presume, to communicate with you about the facts of the case prior to the plea?

MR. HAYES: Yes, Your Honor. And the reason I'm putting this on the record, I want the record to be real clear with respect to everything that occurred up to the time this morning, and it was my understanding this morning that Mr. Gray did not want me to file, and I may have misunderstood something he said.

Counsel stated that he was aware of the reported BB gun prior to the plea. However, after discussing the case with appellant, counsel apparently recommended that he enter a plea to the court without the benefit of a plea bargain agreement. Depending, of course, upon what appellant told his lawyer in these attorney/client discussions, appellant may have been well-advised to enter such a plea. Thereafter, counsel again had discussions with his client regarding the BB gun. Although we are not privy to these conversations, the record strongly suggests appellant informed his attorney that he did not wish to withdraw his plea.

Thereafter, at his client's behest, counsel filed a motion to withdraw the plea. However, when he attempted to support the motion with testimony, counsel was surprised to hear his client say a plastic cap gun was used in the robbery. Moreover, appellant further damaged his position by testifying that he disposed of the gun before returning home and that any gun found in his room was not the weapon used in the robbery. In short, by his own testimony, appellant eliminated the BB gun as a possible weapon.

Believing the presumption that counsel's conduct fell within the wide range of reasonable professional assistance has not been overcome, we overrule appellant's fourth point of error.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Majority and Dissenting Opinions filed November 16, 2000.

Panel consists of Justices Hudson, Wittig, and Baird.* (Judge Baird dissenting.)

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

* Former Judge Charles F. Baird sitting by assignment.

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DISSENTING OPINION

Believing the second and fourth points of error are meritorious and should be sustained, I respectfully dissent.

I. Factual Summary

The indictment alleged commission of aggravated robbery by using and exhibiting a deadly weapon, namely a firearm. Appellant pled guilty to the charged offense on December 3, 1998. Sentencing was rescheduled for January 21, 1999, so a presentence investigation report could be prepared.

Sometime after appellant's guilty plea, but before the sentencing hearing, appellant's trial attorney

spoke with the attorney representing the co-defendant who questioned whether the weapon used in the robbery was, in fact, a deadly weapon. Appellant's trial counsel had suspected the same because a B.B. pistol was referenced in both the offense report and the co-defendant's statement. On December 22, 1999, following his conversation with the attorney representing the co-defendant, appellant's trial counsel wrote appellant and asked if he wished to withdraw his plea. However, appellant did not receive the letter.

The presentence investigation report, which was filed with the court on January 12, 1999, includes an interview with appellant where he admits committing the robbery but states that the weapon used "was only a B.B. style pistol and not a regular firearm."

On January 21, 1999, the trial judge called this case for sentencing. At that hearing, appellant testified that the sole weapon used in the robbery was a cap gun that was not capable of discharging a projectile. Specifically, the record reveals the following exchange on appellant's direct examination:

Q. There was a weapon of some sort that was used in the commission of this robbery; is that right?

A. Yes, sir.

Q. What was – What type of weapon was that?

A. Cap gun.

Q. A cap gun?

When you say cap gun, is that a BB gun or an air pistol or something that's capable of firing bullets or anything like that?

A. Don't fire at all.

Appellant then asked to withdraw his plea. The trial court recessed the proceedings so trial counsel could prepare a motion to withdraw the plea. That motion stated that appellant told his trial counsel that the weapon used in the robbery was a cap pistol, not capable of firing any type of missile and that material exists within the State's file in both the offense report and in the co-defendant's statement that supports appellant's contention that the weapon used was not a firearm. The trial court overruled the motion and ultimately sentenced appellant to sixteen years confinement in the Texas Department of Criminal Justice--Institutional Division for the offense of aggravated robbery.

II. Withdrawal of Plea

The second point of error contends the trial court erred in overruling appellant's motion to withdraw his guilty plea. As noted by the majority, the issue is whether the trial court abused her discretion in denying that motion. In resolving this issue, I find the following factors important.

A. Distinction Between Robbery and Aggravated Robbery

Although the evidence establishes appellant's guilt for the offense of robbery, the evidence also raises serious questions of whether a deadly weapon was used in the course of the robbery: the offense report made reference to a B.B. gun, the co-defendant's statement asserted the weapon actually used was a B.B. gun, appellant's interview for the pre-sentence report states the weapon was a B.B. gun and his testimony reflects the weapon was a cap gun.

The indictment alleged a firearm. The definition for firearm provides:

> Firearm means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

TEX. PEN. CODE ANN. § 46.01(3).

A B.B. gun is not a firearm. *See Mosley v. State*, 545 S.W.2d 144, 145-46 (Tex. Crim. App. 1977). The holding in *Mosley* has been recognized by this court. *See Williams v. State*, 980 S.W.2d 222, 225 (Tex. App.—Houston [14th Dist.] 1998, pet ref'd). Further, appellant's testimony regarding the cap pistol does not meet the definition of a firearm.[1]

If no firearm was used or exhibited, appellant has not committed aggravated robbery and is not guilty of the charged offense. *Compare* TEX. PEN. CODE ANN. §§ 29.03(a)(2) and 29.02(a)(2). Appellant's guilt as to one or the other offense directly impacts the range of punishment and parole

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[1] I do not quarrel with the majority's contention that a BB gun may constitute a deadly weapon. *Supra* at pg. 3 n. 2. However, that is not the issue; the issue is whether a BB gun or cap pistol is a firearm. They are not firearms because neither is capable of expelling a projectile by using the energy generated by an explosion or burning substance. *See* TEX. PEN. CODE ANN. § 46.01(3).

eligibility. *Compare* TEX. PEN. CODE ANN. §§ 12.32 and 12.33(a)(2); and *see* TEX. GOVT. CODE ANN. § 508.145(d).

The case of *Payne v. State*, 790 S.W.2d 649 (Tex. Crim. App. 1990), is factually indistinguishable from the instant case. In *Payne*, the Court of Criminal Appeals held the trial court erred in denying the defendant's motion to withdraw his plea. Because that case was not under advisement at the time the motion was made, the *Payne* court conducted a harm analysis rather than an abuse of discretion analysis. The *Payne* court found the defendant's testimony raised factual issues as to his guilt and the voluntariness of his plea. Accordingly, the court could not say beyond a reasonable doubt that the erroneous denial of the motion to withdraw did not effect the outcome of the trial. 790 S.W.2d at 652. The court further noted that a conviction for aggravated robbery would have subjected appellant to a different punishment range and could have adversely affected his release date, even in the event of an identical sentence. *Ibid*, n. 5. These considerations are present in the instant case. While recognizing we are not performing a harm analysis, I find *Payne* persuasive on the question of whether the trial court abused her discretion because appellant's testimony and the other evidence raised factual issues as to his guilt of the charged offense and the voluntariness of his plea.

B. Representation by Trial Counsel

It is fundamental that an attorney must acquaint himself with both the law and the facts of a case before he can render effective assistance of counsel. *See Flores v. State*, 576 S.W.2d 632, 634 (Tex. Crim. App.1978). These two duties work in tandem and without both, counsel's representation is deficient.

1. Knowledge of the Law

Appellant was obviously guilty of some offense. However, whether a firearm was used or exhibited during that offense is the difference between aggravated robbery and robbery. *Compare* TEX. PEN. CODE ANN. §§ 29.03(a)(2) and 29.02(a)(2). *See also Little v. State*, 659 S.W.2d 425, 426 (Tex. Crim. App. 1983) (Robbery may constitute a lesser included offense of aggravated robbery); *Teague v. State*, 789 S.W.2d 380, 381 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (same). The offense

report made reference to a B.B. gun, the co-defendant's statement asserted the weapon actually used was a B.B. gun, appellant's interview for the pre-sentence report states the weapon was a B.B. gun, and his testimony reflects the weapon was a cap gun. As noted above, neither a B.B. gun, nor a cap gun, is a firearm. Therefore, under settled law, appellant could not have been convicted of the charged offense if he had used either a B.B. gun or a cap pistol. Nevertheless, counsel advised appellant to plead guilty to the charged offense.

The testimony of appellant and the statements made by trial counsel prior to and during the hearing on the motion to withdraw the plea were more than sufficient to put the trial court on notice that counsel was not knowledgeable of the law which controlled the most crucial issue in this case. Yet, it was this ignorance that led trial counsel to advise appellant to plead guilty to the charged offense.

2. Duty to Investigate

The second duty is that of making an independent investigation of the facts of the client's case. *See Ex parte Ewing*, 570 S.W.2d 941, 947 (Tex. Crim. App. 1978). This is required because one's knowledge of the law is of no moment if there is not a corresponding knowledge of how the law will be applied to the facts of each individual case. In *Flores v. State*, 576 S.W.2d at 634, the court emphasized that the duty to investigate is "counsel's responsibility" and "may not be sloughed off to an investigator." Similarly, the duty to investigate may not be sloughed off to an associate. *See Butler v. State*, 716 S.W.2d 48, 55 (Tex. Crim. App. 1986). This burden will vary depending upon the complexities of the case, the plea to be entered by the accused, the punishment that may be assessed, etc. *See Flores*, 576 S.W.2d at 634.

Trial counsel conceded he was aware the offense report mentioned a B.B. gun and that the co-defendant's statement asserted a B.B. gun was used to commit the offense. And, the motion to withdraw the plea, which was signed and presented by counsel, states that appellant told counsel that a cap pistol was used in the robbery. However, counsel failed in his duty to conduct an independent factual investigation and sloughed off this duty by relying totally on the documents contained in the State's file and the information learned from counsel for the co-defendant. The burden to conduct a factual investigation

dealt squarely with the issues of the plea to be entered by appellant and the punishment applicable to that plea. *See Flores*, 576 S.W.2d at 634.

The failure to conduct an independent investigation was compounded by counsel's ignorance of the law, namely that neither a B.B. gun nor a cap pistol is a firearm. *See* part II, B, 1, *supra*. This ignorance caused trial counsel to disregard the information he did possess, all of which indicated a deadly weapon was not used or exhibited to commit the offense. The failure to conduct an independent investigation led counsel to advise appellant to plead guilty. The motion to withdraw the plea and the comments made by trial counsel put the trial court on notice and made her fully aware of counsel's failure to conduct the investigation necessary to advise appellant of the type of plea he should have entered. *See Flores*, 576 S.W.2d at 634.

Additionally, the trial court knew that trial counsel did not personally consult with appellant upon learning of the need to withdraw the plea. Even though appellant was confined in the Harris County jail, counsel said he sent appellant a letter -- a letter never received by appellant. The effect was that counsel did not discuss this matter with appellant until the morning the case was scheduled for sentencing. At that meeting, trial counsel was told of appellant's desire to withdraw his plea. This needless delay meant that appellant could not request that his plea be withdrawn for nearly two months after his plea was entered.

Diligent trial counsel would have contacted appellant and/or brought this matter to the trial court's attention. Either action should have been done personally and immediately upon becoming aware of the need for appellant to withdraw his plea. Had either course been followed, the motion to withdraw would have been more timely. Counsel learned of the need to withdraw the plea before the presentence investigation report had been completed. In fact, it was not completed until January 12, 1999; three weeks after trial counsel's letter.[2]

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[2] Clearly, appellant was not obliged to contact the trial court *pro se.* Appellant never indicated a desire for self-representation and there is no right to hybrid representation. *See McKaskle v. Wiggins*, 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); *Webb v. State*, 533 S.W.2d 780, 784 (Tex. Crim. App. 1976). Consequently, appellant's first opportunity to bring the weapon issue before the trial court was when he testified at the sentencing hearing.

C. Conclusion

The record reveals that appellant pled guilty to the first degree felony offense of aggravated robbery even though there was considerable evidence the weapon used in the robbery was not a firearm as alleged in the indictment. Appellant entered that plea on the advice of counsel who was not knowledgeable of the law, had not conducted an independent investigation and who did not seek to have the plea withdrawn in a timely fashion. I cannot see how a judge, in light of these factors, would not permit appellant to withdraw his plea. Especially a trial judge who, in the instant case, ordered trial counsel to file a motion requesting that the plea be withdrawn. Because there is no justification whatsoever for denying the motion, the decision to do so was outside the zone of reasonable disagreement. *See Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990); *Watson v. State*, 974 S.W.2d 763, 765 (Tex. App.—San Antonio 1998, pet. ref'd); *Rivera v. State*, 952 S.W.2d 34, 36 (Tex. App.—San Antonio 1997, no pet.). Therefore, I would sustain the second point of error.

III. Ineffective Assistance of Counsel

The fourth point of error contends appellant received ineffective assistance of counsel.

A. Standard of Appellate Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984). This guarantee applies at the time a defendant enters a plea to the charging instrument. *See Ruffin v. State*, 3 S.W.3d 140, 143 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). When a defendant enters a plea of guilty upon the advice of counsel which was not effective, the plea is involuntary. *Ibid*. When a defendant enters a plea of guilty upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel, the voluntariness of the plea depends on (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and, if not, (2) whether there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Ibid*. The defendant bears the burden of proving ineffective assistance of counsel claims by a

preponderance of the evidence. *Ibid*.

B. Duties of Counsel

It is axiomatic that as professionals engaged in an area foreign to lay people that attorneys must be knowledgeable of the law. Therefore, appellate courts have not hesitated to hold the failure of counsel to acquaint himself with the law results in deficient performance. For example, in *Ex parte Menchaca,* 854 S.W.2d 128 (Tex. Crim. App. 1993), the Court of Criminal Appeals found counsel ineffective for failing to object to an inadmissible prior conviction. Counsel testified he did not know what the basis of his objection would have been. *Id*. at 131. This court reached the same result in *Turner v. State,* 755 S.W.2d 207 (Tex. App.—Houston [14th Dist.] 1988, no pet.), because defense counsel failed to inform the defendant the trial court could not grant probation to one convicted of aggravated robbery. More recently, in *Trinh v. State,* 974 S.W.2d 872, 876 (Tex. App.—Houston [14th Dist.] 1998, no pet.), this court ordered a new trial because counsel had advised the defendant to file a sworn motion for probation and an election to have the jury assess punishment even though the defendant was not eligible for probation from the jury. The *Trinh* court pointedly noted that the reversal was the "product of counsel's ignorance of criminal law." *Id*. at 876. *See also Ex parte Canedo,* 818 S.W.2d 814, 815 (Tex. Crim. App. 1991) (counsel's mistaken belief regarding shock probation eligibility lead defendant to choose sentencing by trial court); *Ex parte Welch,* 981 S.W.2d 183 (Tex. Crim. App. 1998) (counsel ineffective for failing to file motion for probation); *Ex parte Zepeda,* 819 S.W.2d 874, 876 (Tex. Crim. App. 1991) (counsel ineffective for failing to request accomplice-witness instruction when the prosecution was based entirely on accomplice witness testimony); *Jackson v. State*, 766 S.W.2d 504, 510 (Tex. Crim. App. 1985) (trial counsel did not advise defendant about the consequences of electing jury to assess punishment on retrial); *May v. State,* 722 S.W.2d 699 (Tex. Crim. App. 1984) (failure to submit sworn application for probation); *Howard v. State*, 972 S.W.2d 121, 129 (Tex. App.—Austin 1998, no pet.) (failure to request accomplice witness instruction); *Valencia v. State*, 966 S.W.2d 188, 190 - 191 (Tex. App.—Houston [1st Dist] 1998, pet. ref'd) (failure to object to improper punishment argument).

As discussed earlier, counsel bears the additional duty of making an independent factual investigation. *See Ewing*, 570 S.W.2d at 947. This duty is "counsel's responsibility" and "may not be

sloughed off to an investigator." *See Flores*, 576 S.W.2d at 634. Nor may the duty be sloughed off to an associate. *See Butler*, 716 S.W.2d at 55.

Finally, counsel has a duty of loyalty to his client. This is the most basic of counsel's duties. *See Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067. This duty is breached when counsel labors under a conflict of interest. *Ibid*.

C. Analysis

As noted in part II, B, I, *supra*, it is clear that trial counsel was ignorant of the requirement that a deadly weapon be used or exhibited and/or ignorant of the definition of deadly weapon and *Mosely*. This ignorance led counsel to advise appellant to plead guilty to a first degree felony rather than a felony of the second degree.

Moreover, counsel clearly sloughed off his duty to conduct a factual investigation and has relied totally on the documents contained in the State's file and the information learned from counsel for the co-defendant. And, what is even worse, all of this information leads to the conclusion that a deadly weapon was not used to commit the offense. Equally troubling is trial counsel's performance when he was made aware of the need to withdraw appellant's plea. Rather than personally visiting with appellant in jail, counsel responded by writing a letter. The effect was that appellant did not receive counsel's letter and counsel did not discuss this matter with appellant until one month after writing the letter -- on the morning the case was scheduled for sentencing. As noted by the State, this needless delay meant that appellant did not move to withdraw his plea for "nearly two months after his plea was entered, and on the very date the court was to sentence him."

Finally, the majority opinion reveals that counsel was laboring under a conflict of interest. Following appellant's testimony regarding the cap gun, counsel filed a motion to withdraw appellant's plea. However, in presenting that motion, counsel made statements that undermined the merits of the motion in an effort to hide his ignorance of the law and his failure to investigate. Specifically, counsel stated he was "surprised" by appellant's testimony regarding the cap gun. Further, counsel told the trial court that he was not aware, prior to appellant's plea, that there was a question as to whether the weapon was a firearm. Counsel then

engaged in an exchange with the trial court that wholly undermined appellant's motion to withdraw the plea:

> [T]his morning early, before the Court was here, before anybody was here, I went back to talk to my client and advised him of the fact of what he wanted to do and talked with him about it. And I thought, it was my understanding at that time, that he did not want me to file the Motion to Withdraw the Plea, or I would have sat down and drafted one.
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> * * *
>
> THE COURT: I see. But there is really not any new *Brady* material that's come to you this morning, because you already knew about the BB gun?
>
> MR. HAYES: Well, I knew about the BB gun up to the point that—up till—Actually, this morning is the first time I learned from my client that, in fact, it may have been a different gun altogether and not an actual weapon, but only a cap pistol.
>
> THE COURT: But apparently, this knowledge was in your client's mind all the time. He knew if he used a cap gun instead of a BB gun or real gun. He knew that at the time of the plea, did he not?
>
> MR. HAYES: I would suspect, certainly, that he knew. If he is telling the truth this morning, I'm sure that he knew what he used at the time.
>
> THE COURT: And he had plenty of opportunities, I presume, to communicate with you about the facts of the case prior to the plea?
>
> MR. HAYES: Yes, Your Honor. And the reason I'm putting this on the record, I want the record to be real clear with respect to everything that occurred up to the time this morning, and it was my understanding this morning that Mr. Gray did not want me to file, and I may have misunderstood something he said.

Relying on this exchange, the trial court overruled the motion to withdraw the plea. Now, the majority relies on these statements to find counsel was not ineffective. Specifically, the majority states: "[T]he record strongly suggests appellant informed his attorney that he did not wish to withdraw his plea." *See* slip op. pg. 8. That "strong suggest[ion]" can come only from the statements of counsel which blamed appellant for seeking to withdraw his plea at this late time. In fact, the opposite was true, counsel's deficient representation was the reason appellant needed to withdraw his plea; the effort to withdraw the

plea was tardy only because counsel failed to proceed promptly when he learned the plea should be withdrawn. In short, counsel was advancing his own interests to the detriment of appellant's. The result was counsel arguing against the very motion he was presenting. This conflict should be exposed and condemned rather than rationalized and used to overrule the fourth point of error.

E. Conclusion

I find by a preponderance of the evidence that, at the time of appellant's plea, trial counsel had neither acquainted himself with the law applicable to the case nor conducted a factual investigation – both of which are fundamental to providing effective assistance of counsel. *See Flores*, 576 S.W.2d at 634. Nevertheless, counsel advised appellant to plead guilty to the offense of aggravated robbery despite the legal and factual bases that showed appellant was guilty of the lesser offense of robbery. Furthermore, counsel was deficient in failing to take the actions necessary to allow appellant to timely withdraw his plea. When counsel's deficient performance was exposed, counsel breached his duty of loyalty and successfully argued against appellant's attempt to withdraw his plea. For these reasons, appellant's plea was involuntary; counsel's advice that appellant plead guilty to the offense of aggravated robbery was not within the range of competence demanded of attorneys in criminal cases and, but for this advice there is a reasonable probability the defendant would not have pleaded guilty and would have insisted on going to trial. *See Ruffin*, 3 S.W.3d at 143.

IV. Conclusion

My review of this record leads me to the conclusion that appellant's plea was involuntary and the result of ineffective assistance of counsel. The trial court should have permitted appellant to withdraw his plea. While the prompt disposition of criminal cases is to be commended and encouraged, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), we should not permit "a myopic insistence upon expeditiousness" *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964), to result in denials of due process and fundamental constitutional rights. The second and fourth points of error should be sustained. Because they are not, I respectfully dissent.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed November 16, 2000.
Panel consists of Justices Hudson, Wittig and Baird.[3]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Former Judge Charles F. Baird sitting by assignment.