Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01074-CR
NO. 14-97-01075-CR

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PEDRO JOSE SANTANA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 748,799 and 748,798

O P I N I O N

Pedro Jose Santana appeals convictions for aggravated robbery and attempted capital murder on the grounds that the trial court erred in: (1) convicting him under the provisions of article 1.15 of the Texas Code of Criminal Procedure because that statute is unconstitutional; (2) finding appellant guilty where the record is silent as to a waiver of his right of compulsory process; (3) viewing appellant's presentence investigation report ("PSI") prior to entering a formal finding of guilt; and (4) assessing punishment at forty years confinement because the sentence is not proportional to the crime and is therefore unconstitutional. We affirm.

Background

Appellant was charged with the felony offense of aggravated robbery and, in a companion case, with attempted capital murder.[1] He pled guilty to the offenses without an agreed recommendation from the State as to punishment. After finding appellant guilty of both offenses, the trial court assessed punishment at 40 years confinement.

Denial of Compulsory Process

Appellant's first point of error urges this court to hold article 1.15 of the Texas Code of Criminal Procedure unconstitutional because it requires a court to base its determination of guilt or innocence on the evidence stipulated or offered by the State alone, without considering evidence offered by the defendant. Appellant contends that this denies a defendant the opportunity to have his evidence heard by the trier of fact, violating both state and federal constitutional rights to compulsory process, due process, and due course of law.

Appellant's second point of error asserts that the trial court committed fundamental error in entering a judgment of guilty where the record was silent as to a waiver of appellant's Sixth Amendment right to compulsory process. Although appellant's trial counsel decided to proceed under article 1.15, appellant argues that this cannot be held as a valid waiver of his right to compulsory process. Further, although the record reflects that appellant executed a written waiver of his constitutional right to confrontation and cross-examination, he asserts that this waiver did not expressly or implicitly waive his right to produce witnesses on his behalf and to have the court consider their testimony.

Appellant's argument regarding the constitutionality of article 1.15 has been previously rejected by this court. *See Vanderburg v. State*, 681 S.W.2d 713, 717-18 (Tex. App.–Houston [14th Dist.] 1984, pet. ref'd). As noted in *Vanderburg*, a guilty plea is a conviction with nothing remaining for the court to do but render judgment and determine punishment. *See id.* at 718; *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The requirement under article 1.15 that the State produce evidence to support the

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[1] Although appellant has appealed the two convictions separately, we address them both in this opinion because similar legal issues are raised in each.

judgment is an additional procedural safeguard that is not required under federal constitutional law.[2] *See Ex Parte Martin*, 747 S.W.2d 789, 792 (Tex. Crim. App. 1988).

Even if appellant's assertions were valid, the record does not reflect that appellant objected to his alleged inability to present evidence at the hearing on his plea of guilty,[3] nor does it reflect that appellant attempted to put on evidence and was prevented from doing so. *See* TEX. R. EVID. 103(a)(2). In addition, to exercise the right to federal constitutional compulsory process, a defendant must make a plausible showing to the trial court that the witness's testimony would be both material and favorable to the defense. *See Coleman v. State*, 966 S.W.2d 525, 527-28 (Tex. Crim. App. 1998). Appellant failed to do this. Further, appellant did not raise a Sixth Amendment argument in the trial court and thus, did not preserve a Sixth Amendment complaint for appellate review. *See* TEX. R. APP. P. 33.1(a)(1)(A).

Finally, Texas law requires an express waiver of only three rights: (1) the right to a jury trial, (2) the right to confront one's accusers, and (3) the right to refuse to testify at trial. *See Vanderburg*, 681 S.W.2d at 717. There is no further requirement under Texas or federal law that a defendant expressly waive his right to compulsory process. *See id*. Appellant specifically waived his rights, orally and in writing, to a jury trial and to the appearance, confrontation, and cross-examination of witnesses. He also consented to the oral and written stipulation of evidence and to the introduction of affidavits, written statements of witnesses, and other documentary evidence. Because the record in this case clearly reflects that appellant expressly waived the rights requiring an express waiver, we overrule his first and second points of error.

Review of PSI Before Finding of Guilt

Appellant's third point of error argues that a conviction is fundamentally defective where the trial judge reviews and considers a PSI prior to entering a finding of guilt.

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[2] Further, nothing in article 1.15 prevents the court from considering testimony produced through cross-examination of the state's witnesses or by the defense putting on its own evidence. *See Vanderburg*, 681 S.W.2d at 718. However, it would be illogical to allow a defendant to plead guilty and then to conduct a mini-trial on guilt-innocence. *See id.* "Any trial allowed would be on the punishment phase only." *Id.*

[3] *See* TEX. R. APP. P. 33.1(a)(1)(A).

A trial judge may not read a PSI unless the defendant pleads guilty or nolo contendre, is convicted of the offense, or authorizes it in writing. *See* TEX. CODE CRIM. PRO. ANN. art. 42.12, § 9(c) (Vernon Supp. 1999). Review of a PSI by a court prior to a determination of the defendant's guilt violates due process. *See State ex rel. Turner v. McDonald*, 676 S.W.2d 375, 379 (Tex. Crim. App. 1984); *State ex rel. Bryan v. McDonald*, 662 S.W.2d 5, 7 (Tex. Crim. App. 1983). However, where a defendant signs a judicial confession and enters a plea of no contest or guilty before the trial judge reviews the PSI, then the defendant's guilt has been established for this purpose and review of the PSI merely influences the determination of punishment. *See Vela v. State*, 915 S.W.2d 73, 74-75 (Tex. App.–Corpus Christi 1996, no pet.); *Blalock v. State*, 728 S.W.2d 135, 138 (Tex. App.–Houston [14th Dist.] 1987, pet.ref'd); *Wissinger v. State*, 702 S.W.2d 261, 263 (Tex. App.–Houston [1st Dist.] 1985, pet ref'd).

In this case, prior to the judge's review of the PSI, appellant had signed a "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," filed a Motion for Community Supervision, and pled guilty.[4] Also, the trial judge found that there was evidence to substantiate appellant's guilt prior to reviewing the report. Therefore, we conclude that article 42.12, section 9(c) of the Code of Criminal Procedure was complied with and appellant's third point of error is overruled.[5]

Cruel and Unusual Punishment

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[4] The trial judge also stated his understanding that appellant was going to petition the court for deferred adjudication and advised appellant that should probation be granted, deferred adjudication was the only probation the court could grant in connection with these particular offenses. Appellant conceded in his brief that the trial court's action in deferring a formal finding of guilt was the only procedure whereby the appellant could avoid going to prison after entering a plea of guilty. Were we to affirm appellant's position, it would in effect deny a trial judge the opportunity to review a PSI to determine whether deferred adjudication is appropriate.

[5] Moreover, subsequent to appellant's plea, the trial judge advised the appellant that he would be deferring a finding of guilt in the case and assessing punishment after reviewing the PSI. Thus, appellant knew the trial court would be reviewing the PSI and lodged no objection. Error in the consideration of evidence is waived in the absence of a timely objection. *See* TEX. R. EVID. 103(a); *Vela*, 915 S.W.2d at 75. Further, although appellant argues that the due process right enunciated in the *McDonald* cases cannot be waived, a denial of due process may be waived by lack of objection. *See Moore v. Illinois*, 408 U.S. 786, 799 (1972); *Wissinger*, 702 S.W.2d at 265 (noting "[i]t will be a rare error that is so fundamental as to require a reversal without an objection and without harm").

In his fourth and fifth points of error, appellant argues that his sentence amounted to cruel and unusual punishment under both the Eighth Amendment of the United States Constitution and Article I, section 13, of the Texas Constitution. Although appellant acknowledges that his sentence was within the statutory range applicable to these offenses,[6] he argues that because of his age, lack of any prior trouble, and employment record, the resulting punishment was not proportional to the offense.

Appellant pled guilty to aggravated robbery and attempted capital murder of a peace officer, both first degree felony offenses punishable by not less than 5 years and not more than 99 years or life in prison. *See* TEX. PEN. CODE ANN. §§ 12.32, 29.03 (Vernon 1994). He was sentenced to 40 years for each offense, the terms to run concurrently. The PSI indicates that both offenses occurred in connection with a bank robbery wherein appellant exchanged gun fire with a police officer. During the exchange, appellant was less than ten feet away from the officer and appellant admitted to shooting first.

There is considerable doubt whether the Eighth Amendment contains any guarantee of proportionality for non-death penalty offenses. *See Harmelin v. Michigan*, 501 U.S. 957, 964-96 (1991). Even if it does, however, in light of the serious and violent nature of these crimes, appellant has not demonstrated that his sentences are disproportionate to the crimes he committed.

Finally, regarding appellant's argument that his sentence is cruel and unusual under the Texas Constitution, Texas courts have long held that a punishment falling within the statutory range, as in this case, is not cruel and unusual punishment. *See Samuel v. State*, 477 S.W.2d 611, 614 (Tex. Crim. App. 1972); *Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983). Accordingly, we overrule appellant's fourth and fifth points of error and affirm the judgment of the trial court.

Richard H. Edelman
Justice

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6 *See* TEX. PEN. CODE ANN. §§ 12.32, 29.03 (Vernon 1994).

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do not publish — TEX. R. APP. P. 47.3(b).