Affirmed and Opinion filed December 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00941-CR

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JOSEPH FREDERICK DUCRE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 744,952

O P I N I O N

Appellant, Joseph Frederick Ducre, was indicted for felony theft. The indictment contained two enhancement paragraphs alleging appellant had two previous felony theft convictions. Appellant pled guilty without an agreed recommendation and true to the enhancement paragraphs. The trial court admonished appellant, found him guilty, and found the enhancement paragraphs to be true. The trial court sentenced appellant to thirty (30) years' confinement in the Texas Department of Criminal Justice - Institutional Division. Appellant timely filed written notice of appeal and a motion for new trial.

In two points of error, appellant complains that (1) he was denied effective assistance of counsel and (2) the trial court erred in not conducting a hearing on his motion for new trial. We affirm the judgment of the trial court.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first point of error, appellant claims that the trial court reversibly erred in accepting appellant's plea of guilty due to the incorrect advice by trial counsel. In particular, appellant complains that his trial counsel incorrectly advised him he would not be subject to punishment as a habitual offender.

The State contends that the appellant has waived his claim of ineffective assistance of counsel by entering a plea of guilty without an agreed recommendation. We agree. The *Helms* rule provides that "where a plea of guilty is voluntarily and understandingly made, all non-jurisdictional defects including claimed deprivation of federal due process are waived." *Helms v. State,* 484 S.W.2d 925, 927 (Tex. Crim. App. 1972). Complaints of ineffective assistance of counsel are non-jurisdictional. *See Lyon v. State*, 872 S.W.2d 732, 736 (Tex. Crim. App. 1994). Thus, appellant has waived his complaint concerning the advice given by his lawyer. However,"[t]he *Helms* rule is predicated on a guilty plea that is voluntarily and understandingly made. Thus, by its very terms the *Helms* rule does not apply to bar appeal in open plea cases in which a defendant claims the plea was involuntary." *Flowers v. State,* 935 S.W.2d 131, 133 (Tex. Crim. App. 1996). A defendant therefore may always appeal the voluntariness of his plea. *See Broddus v. State,* 693 S.W.2d 459, 460 (Tex. Crim. App. 1985); *Soto v. State*, 837 S.W.2d 401, 403 (Tex. App.—Dallas 1992, no pet.).

Appellant's point of error does not claim that his plea was involuntary; he claims only that the trial court reversibly erred in accepting appellant's plea of guilty due to incorrect advice by his trial counsel. Because, arguably, this point of error could be read as an attack on the voluntariness of his plea, we will address the voluntariness issue. *See Bee v. State*, 974 S.W.2d 184, 187 (Tex. App.—San Antonio 1998, no pet.) (citing *Williams v. Khalaf*, 802

S.W.2d 651, 658 (Tex. 1990) (points of error should be construed liberally "in order to adjudicate justly, fairly and equitably the rights of the litigants.")); *see also* TEX. R. APP. P. 38.1(e), 38.9.

When a defendant challenges the voluntariness of his plea entered upon the advice of counsel, contending that his counsel was ineffective, "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, he would not have pleaded guilty and would have insisted on going to trial." *Ex parte Moody*, 991 S.W.2d 856, 857-58 (Tex. Crim. App. 1999). As with other types of ineffective assistance of counsel claims, appellant has the burden of showing that counsel's performance fell below a reasonable standard of competence and that appellant would, with a reasonable probability have pled not guilty and insisted on going to trial had he been properly advised of the range of punishment he was facing. *Id*.

Appellant alleges that counsel's performance was deficient because the effect of enhancement paragraphs on the punishment range is "basic law that an attorney practicing in felony court should have known." Assuming, without deciding, that counsel gave incorrect advice and that the advice given was not within the range of competence demanded of attorneys in criminal cases, we find that appellant has failed to show that but for counsel's errors he would not have pleaded guilty and would have insisted upon going to trial.

The record shows that the trial court properly admonished the appellant in writing as to the consequences of his plea. The admonishments included, among other things, the correct range of punishment. The appellant acknowledged receiving those admonishments at his plea hearing. The record also shows that before accepting his plea, the trial court specifically explained the effect the two enhancement paragraphs would have on the range of punishment. While appellant now argues that the incorrect advice of counsel "exposed him to a punishment range for which he did not know," the record clearly shows that he was informed of the proper

range of punishment. Finding that the plea was knowing and voluntary, we overrule appellant's first point of error.

FAILURE TO CONDUCT HEARING ON MOTION FOR NEW TRIAL

In appellant's second point of error, he complains the trial court erred in not holding a hearing on his motion for new trial. The right to a hearing on a motion for new trial is not an absolute right. *See Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993). A defendant seeking a new trial must first timely file the motion and second, he must present the motion to the trial court. *See generally* TEX. R. APP. P. 21. "Merely filing a motion [for new trial] does not constitute evidence of its presentment to the court." *Owens v. State*, 832 S.W.2d 109, 112 (Tex. App.—Dallas 1992, no pet.). Once the motion is presented, "the court is authorized to hear evidence by affidavit or otherwise and to determine the issues." *Reyes*, 849 S.W.2d at 815 (citing former TEX. RULE APP. P. 31(d)). Presentation of the motion to the court is therefore a prerequisite to the court hearing evidence.

The Court of Criminal Appeals recently explained the meaning of the term "present" in *Carranza v. State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998). "The term 'present' . . . means the record must show the movant for a new trial sustained the burden of actually delivering the motion for new trial to the trial court or otherwise bringing the motion to the attention or actual notice of the trial court."[1] *Id*. Appellant was sentenced on July 18, 1997, and his trial counsel timely filed a motion for new trial on August 12, 1997.[2] There is, however, no evidence in the record that he complied with the rule requiring the defendant to

[1] Examples of evidence of "presentment" given by the court in *Carranza* include obtaining the trial court's ruling on a motion for new trial, the trial judge's signing or noting on a proposed order, or a hearing date set on the docket. The court intended this list to be illustrative rather than exclusive. *See Carranza*, 960 S.W.2d at 79.

[2] A defendant may file motion for new trial not later than 30 days after imposition of sentence in open court. *See* former TEX. RULE APP. P. 31(a)(1), current TEX. RULE APP. P. 21.4(a).

present the motion to the trial court.[3] The record reflects that the trial court never ruled on the motion, and it was therefore overruled by operation of law;[4] no proposed order was submitted to the trial court; no hearing was held or set on the motion, nor was one ever requested by appellant. There being no evidence in the record to show appellant delivered his motion for new trial to the trial court or otherwise brought the motion to the attention or actual notice of the trial court, we hold the motion for new trial was not "presented" to the trial court as required by the Texas Rules of Appellate Procedure.

In addition, "'as a prerequisite to obtaining a hearing' and 'as a matter of pleading,' motions for new trial must be supported by affidavit, either of the accused or someone else specifically showing the truth of the grounds of attack." *Reyes,* 849 S.W.2d at 816. Appellant's trial counsel filed his motion for new trial accompanied by a document styled "affidavit" signed by trial counsel and a notary public. However, an affidavit is defined as "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." TEX. GOV'T CODE ANN. § 312.011 (Vernon 1998). *See also* BLACK'S LAW DICTIONARY 58 (6th ed. 1990). This "affidavit" does not meet the requirements of an affidavit because the jurat does not indicate that it is a sworn statement.[5]

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[3] *See* former TEX. RULE APP. P. 31(c), current TEX. RULE APP. P. 21.6.

[4] A motion for new trial not ruled on by written order within 75 days of sentence is considered overruled by operation of law. *See* former TEX. RULE APP. P. 31(e)(1) & (3), current TEX. RULE APP. P. 21.8. The motion being overruled by operation of law is further evidence of a lack of presentment. *See Musgrove v. State*, 960 S.W.2d 74, 76 (Tex. Crim. App. 1998) (stating "[t]hat the motion was ruled on within the 75 day period shows it was either presented within ten days of filing or the trial court permitted it to be presented after the ten days but within the 75 day period").

[5] The "affidavit" reads as follows: "I, Cheryl E. Irvin [appellant's trial counsel], hereby state that the information contained in the Motion for New Trial is true and correct." /s/ Cheryl E. Irvin
"Signed on this the 12th day of August, 1997, before me, Mary Y. Field a notary public for the State of Texas. /s/ Mary Y. Field

We find the appellant failed to present his motion for new trial to the trial court and the affidavit filed with the motion was invalid. The trial court therefore did not err in not holding a hearing on the motion for new trial and allowing the motion to be overruled by operation of law. Appellant's second point of error is overruled. The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed December 16, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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