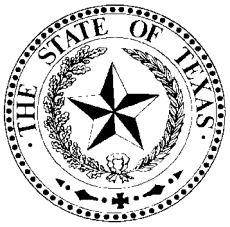
Affirmed and Opinion filed April 13, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00248-CR
NO. 14-98-00291-CR

DAVID SCHLEMEYER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 773,888 & 740,734

O P I N I O N

After entering a guilty plea and waiving his right to a jury trial, the trial court found David Schlemeyer, appellant, guilty of possession of cocaine weighing less than one gram. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(b) (Vernon Supp. 2000). After denying relief on the appellant's original writ of habeas corpus and granting the State's motion to adjudicate guilt, the trial court revoked appellant's probation and assessed punishment at one year's imprisonment in the Texas Department of Criminal Justice, State Jail Division. We have consolidated appellant's appeals from his conviction in the State's motion to adjudicate

guilt and the denial of his writ of habeas corpus. For three reasons, we affirm the trial court's judgment: (1) appellant's plea was voluntarily, knowingly, and intelligently entered; (2) Article 1.15 of the Texas Code of Criminal Procedure neither prohibits a defendant from offering evidence nor precludes the court from considering a defendant's evidence; and (3) neither state nor federal law requires a defendant to specifically waive the right to compulsory process.

PROCEDURAL BACKGROUND

Appellant was indicted with possession of cocaine weighing less than one gram. He pleaded guilty to the offense and received four years' deferred adjudication probation and a five hundred dollar fine consistent with his plea bargain agreement. Appellant subsequently filed a writ of habeas corpus attacking the validity of his guilty plea. After a hearing, his writ was denied.

Subsequently, appellant violated the terms and conditions of his community supervision: he failed to report to the probation office, failed to pay a supervision fee, fine, court costs, and crime stoppers' fee, and failed to submit to an alcohol and drug evaluation. As a result, the State filed a motion to adjudicate his guilt. The court then assessed appellant's punishment at one year's imprisonment. Appellant appeals both the denial of his writ of habeas corpus and his conviction for possession of cocaine from the State's motion to adjudicate guilt.

DISCUSSION AND HOLDINGS

Validity of Appellant's Guilty Plea

In his first and second points of error, appellant contends that the trial court erred in refusing to set aside his guilty plea because his plea was not voluntarily, knowingly, or intelligently entered. We disagree.

We determine the voluntariness of a plea by the totality of the circumstances. *See Griffin v. State*, 703 S.W.2d 193, 196 (Tex. Crim. App. 1986). The validity of a guilty plea

based on counsel's advice depends on whether counsel's performance was reasonably competent, rendering effective representation to a defendant during particular proceedings. *See Ex parte Battle,* 817 S.W.2d 81, 83 (Tex. Crim. App. 1991). When the record reflects that the trial court properly admonished the defendant on the consequences of his plea, there is a *prima facie* showing that the defendant entered a knowing and voluntary plea. *See Fuentes v. State,* 688 S.W.2d 542, 544 (Tex. Crim. App. 1985); *Forcha v. State,* 894 S.W.2d 506, 509 (Tex. App.—Houston [1st Dist.] 1995, no pet.). The burden then shifts to the defendant to show that he entered his plea without understanding the consequences. *See Fuentes,* 688 S.W.2d at 544. Appellant's attestation of voluntariness at the original plea hearing imposes a heavy burden on him at a later hearing to show a lack of voluntariness. *See Dusenberry v. State,* 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). "When the record is otherwise silent, we will presume the correctness of a recital in the judgment regarding the voluntariness of a guilty plea." *Miller v. State,* 879 S.W.2d 336, 338 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

The trial court's ruling in a habeas corpus proceeding should not be overturned without a showing of a clear abuse of discretion. *See Brashear v. State,* 985 S.W.2d 474, 476 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). Whether the trial court abused its discretion depends upon whether it acted without reference to any guiding rules or principles. *See Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App.1990). In determining this, we view the evidence in the light most favorable to the trial court's ruling in the habeas proceeding. *See Brashear,* 985 S.W.2d at 476.

In his first point of error, appellant argues that his plea was involuntary for two reasons. First, he asserts that his trial counsel misinformed him about the outcome of his case because his trial counsel gave him the impression that his case would be dismissed. Secondly, appellant argues that because he was incarcerated shortly before his trial setting, he was coerced into pleading guilty. While appellant was in jail, trial counsel informed him that his case would not be dismissed, and that his only options were to take a plea bargain

or go to trial. Being coerced into making this decision while incarcerated, he argues, rendered his plea involuntary.[1]

From the record, we conclude that there is a prima facie showing appellant entered a knowing and voluntary plea. The clerk's record shows that appellant, his trial counsel, and the trial judge signed written plea admonishments pursuant to article 26.13 of the Code of Criminal Procedure.[2] Appellant initialed specific admonishments, including an admonishment stating that he was aware of the consequences of his plea, that his plea was freely and voluntarily made, and that he was satisfied with attorney's representation. By signing the plea documents, appellant indicated that he was fully informed of the potential range of punishment for the crime and of the consequences of his plea.

Because the evidence in the record was sufficient to make an initial showing of voluntariness, the burden shifted to appellant to show that he entered his plea without understanding the consequences. At the habeas hearing, appellant testified that his trial counsel said he felt quite confident that he could have appellant's case dismissed. According to appellant, this statement gave him the impression that dismissal was the most likely outcome. However, appellant's trial counsel testified he told appellant that dismissing his case would only be a possibility. Trial counsel explained that he never guaranteed appellant's case would be dismissed. He also testified that his contract with appellant specifically states that no particular outcome is guaranteed. Thus, appellant did not meet his burden to show a lack of voluntariness.

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[1] As we noted, the validity of a guilty plea made on the advice of counsel depends on whether counsel rendered reasonably competent, effective assistance during the proceedings. *See Ex parte Battle*, 817 S.W.2d at 83. Defendants are commonly incarcerated when they enter their pleas, and may plead guilty by taking into account relevant factors, i.e., a shorter jail time by pleading guilty. Thus, we are unwilling to accept appellant's position that being incarcerated is a factor to be considered in determining whether his plea was involuntary.

[2] Article 26.13 requires a trial court to admonish a defendant of the consequences of his guilty plea before accepting it. *See* TEX. CODE CRIM. PROC. ANN. Art. 26.13 (Vernon 1989).

Appellant failed to show that his trial counsel did not render reasonably competent, effective assistance to coerce him into entering an involuntary plea. We cannot say that the trial court abused its discretion in denying appellant's habeas corpus relief. Accordingly, we overrule appellant's first point of error.

In his second point of error, appellant contends that his plea was not knowingly and intelligently entered. Specifically, he complains that he did not understand the consequences of his guilty plea because his trial counsel advised him that deferred adjudication was not a conviction. This advice led him to believe that his parole would not be revoked, and a "blue warrant" would not issue for his arrest.[3] When appellant violated certain conditions of his parole, he ultimately was arrested on a "blue warrant" and his parole was revoked. Consequently, appellant argues that trial counsel misled him, and that he would not have pleaded guilty if he had understood that deferred adjudication could result in a revocation of his parole.

As we previously noted, the record reflects that appellant received the statutory admonishments pursuant to article 26.13. He initialed a specific admonishment stating the statutory range of punishment for a state jail felony. Additionally, the record reflects that his trial counsel advised appellant of the parole implications of his charge, explaining that appellant's parole could be revoked even if he pleaded guilty. Trial counsel also advised appellant that he could be arrested at any time because a blue warrant had already been issued for his arrest.

Consequently, after reviewing the record, we do not believe that appellant has brought forward any evidence that his plea was not knowingly entered. "Challenged assertions in an appellate brief that are unsupported by the record will not be accepted as fact." *Laidley v. State*, 966 S.W.2d 105, 107 (Tex. App.—Houston [1st Dist.] 1998, pet.

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[3] A "blue warrant" is a warrant the parole division issues for the arrest of someone suspected of violating parole. *See Dean v. State*, 900 S.W.2d 367, 367 (Tex. App. — Texarkana 1995, no pet.)

ref'd). Based on the totality of the circumstances, we believe appellant was admonished in compliance with article 26.13 of the Texas Code of Criminal Procedure, and the trial court did not abuse its discretion in denying appellant's habeas corpus relief. We, therefore, overrule appellant's second point of error.

Constitutionality of Article 1.15 of the Texas Code of Criminal Procedure

In points of error three through six, appellant challenges the validity of Article 1.15 of the Texas Code of Criminal Procedure. He argues that article 1.15 is unconstitutional because it denies his federal and state rights to compulsory process by prohibiting him from presenting evidence. Additionally, appellant argues that the trial court committed fundamental error in proceeding to find him guilty when he did not waive his federal or state rights to compulsory process. Again, we disagree.

Article 1.15 reads as follows:

> No person can be convicted of a felony except upon the verdict of a jury duly rendered and recorded, unless the defendant, upon entering a plea, has in open court in person waived his right of trial by jury in writing in accordance with Articles 1.13 and 1.14; provided, however, *that it shall be necessary for the State to introduce evidence in the record showing the guilt of the defendant and said evidence shall be accepted by the court as the basis for its judgement* and in no event shall a person charged be convicted upon his plea without sufficient evidence to support the same. The evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses, and further consents either to an oral stipulation of the evidence and testimony or to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment of the court. Such waiver and consent must be approved by the court in writing, and be filed in the file of the paper of the cause. (emphasis added).

TEX. CODE CRIM. PROC. ANN. Art. 1.15 (Vernon Supp. 2000). In points three and four, appellant argues that under the statute, the court must determine his guilt or innocence based only on the evidence the State offers. He argues that the language of the statute that reads,

"it shall be necessary for the State to introduce evidence into the record showing the guilt of the defendant . . ." expressly precludes the court from considering evidence the defendant offers. Appellant misconstrues the purpose and effect of Article 1.15, and we have expressly rejected this argument. *See Vanderburg v. State*, 681 S.W.2d 713 (Tex. App.–Houston [14th Dist.] 1985, pet. ref'd).

Article 1.15 is a procedural safeguard ensuring that no person will be convicted of a felony on a guilty plea without sufficient evidence of guilt. *See Lyles v. State*, 745 S.W.2d 567 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd). The article maintains the burden of proof on the State, even when a defendant enters a guilty or *nolo contendere* plea. *See id.* "Nothing in article 1.15 prohibits the court from considering testimony produced through cross-examination of the state's witnesses or by the defense putting on its own evidence through rebuttal witnesses." *Vanderburg*, 681 S.W.2d at 718. Therefore, we overrule appellant's third and fourth points of error.

In his fifth and sixth points of error, appellant contends that the trial court committed fundamental error because the record does not indicate whether appellant waived his federal or state right to compulsory process. We have also overruled this issue because neither United States or Texas law requires a defendant to expressly waive his right to compulsory process. *See Vanderburg*, 681 S.W.2d at 717; *Lyles*, 745 S.W.2d at 568. The United States Supreme Court has held that a defendant must specifically waive three federal rights when entering a guilty plea: the privilege against compulsory self-incrimination, the right to a jury trial, and the right to confront one's accusers. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969). The right to compulsory process is not one of these fundamental rights; Texas does not include it among the constitutional rights a defendant must waive. *See Vanderburg*, 681 S.W.2d at 717.

Appellant's fifth and sixth points of error are overruled, and the judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed April 13, 2000.

Panel consists of Justices Yates, Fowler and Frost.

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