Motion for Rehearing Overruled, Opinion of April 26, 2001, Withdrawn, Affirmed, and Opinion on Rehearing issued August 23, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-01341-CR

WILSON GIRALDO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th Judicial District Court
Harris County, Texas
Trial Court Cause No. 779, 050

O P I N I O N O N R E H E A R I N G

Wilson Giraldo appeals from his conviction for possession of cocaine, weighing at least 400 grams, with intent to manufacture or deliver. In his sole point of error, Giraldo contends that the trial court erred in refusing to set aside his guilty plea because it was not voluntarily, knowingly, and intelligently entered. We withdraw our prior opinion, overrule the motion for rehearing, and issue this opinion on rehearing. The judgment of the trial court is affirmed.

PROCEDURAL BACKGROUND

Appellant was indicted for possession of at least 400 grams of cocaine with intent to deliver. Appellant waived a jury trial and entered a guilty plea to this offense without an agreed punishment recommendation. The trial judge accepted the plea, found the evidence substantiated appellant's guilt, but withheld a finding of guilt pending a pre-sentencing investigation report. One month later, and just five days before the agreed setting for the pre-sentencing investigation report, appellant moved to withdraw his plea and his waiver of jury trial and to recant his judicial confession. After a hearing, the trial judge denied appellant's motion and sentenced him to 30 years' confinement and a $250,000 fine.

DISCUSSION AND HOLDINGS

In his sole issue, appellant contends that the trial court erred in refusing to set aside his guilty plea. A defendant may withdraw his guilty or nolo contendere plea as a matter of right without assigning a reason until judgment is pronounced or the case has been taken under advisement. *Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979); *Stone v. State*, 951 S.W.2d 205, 206 (Tex. App.—Houston [14th Dist.] 1997, no pet.). Once the trial court takes the case under advisement, it has discretion in deciding whether to permit the defendant to withdraw his guilty plea. *Jackson*, 590 S.W.2d at 515; *Stone*, 951 S.W.2d at 206. We have previously held that passage of a case for pre-sentence investigation constitutes "taking the case under advisement," despite the fact that punishment has not been assessed. *See Stone*, 951 S.W.2d at 207 (citing *DeVary v. State*, 615 S.W.2d 739, 740 (Tex. Crim. App. 1981)). Thus, a defendant does not have the right to withdraw his guilty plea while awaiting the results of a pre-sentence investigation report. *See Jackson*, 590 S.W.2d at 515; *Stone*, 951 S.W.2d at 207. In the present case, Giraldo did not timely move to withdraw his guilty plea and thus could not do so as a matter of right.

Accordingly, we must now determine whether the trial court abused its discretion

in denying his request to withdraw the plea as involuntarily given.[1] The test for abuse of discretion is whether the court acted without reference to any guiding rules and principles or acted arbitrarily or unreasonably. *See Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990).

Proper admonishment by a trial court creates a prima facie showing that a guilty plea is both knowing and voluntary. *See Ex parte Gibauitch*, 688 S.W.2d 868 (Tex. Crim. App. 1985); *George v. State*, 20 S.W.3d 130, 136 (Tex. App.—Houston [14 Dist.] 2000, no pet. h.). A defendant may, of course, still raise the claim that his plea was not voluntary, but the burden shifts to the defendant to demonstrate that he did not fully understand the consequences of his plea such that he suffered harm. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). Further, when a defendant affirmatively indicates at the plea hearing that he understands the nature of the proceeding and is pleading guilty because the allegations in the indictment are true, not because of any outside pressure or influence, he has a heavy burden to prove that his plea was involuntary. *See Crawford v. State*, 890 S.W.2d 941, 944 (Tex. App.—San Antonio 1994, no pet.); *Jones v. State*, 855 S.W.2d 82, 84 (Tex. App.—Houston [14 th Dist.] 1993, pet. ref'd).

The voluntariness of a plea is determined by the totality of the circumstances. *See George*, 20 S.W.3d at 136; *Hancock v. State*, 955 S.W.2d 369, 371 (Tex.App.—San Antonio 1997, no pet.). Moreover, the judge presiding over a motion for new trial is the trier of fact and his findings should not be disturbed absent an abuse of discretion. *See Tollett v. State*, 799 S.W.2d 256, 259 (Tex. Crim. App. 1990); *Reissig v. State*, 929 S.W.2d 109, 113 (Tex.App.—Houston [14 th Dist.] 1996, pet. ref'd).

In the present case, the plea admonishments form indicated that Giraldo understood

[1] The Court of Criminal Appeals recently determined that although a defendant may not attack the voluntariness of a guilty plea resulting from a plea-bargain agreement, in the absence of such an agreement a defendant may attack voluntariness on direct appeal. *See Cooper v. State*, 45 S.W.3d 77, 81 (Tex. Crim. App. 2001).

the Spanish language and that the admonishments and waivers and the judicial confession were read to him and explained to him in that language by his attorney "and/or" an interpreter, namely Elizabeth Broyles, before he signed them. The form further indicates that Giraldo consulted fully with his attorney before entering his plea and that he was aware of the consequences of his plea. Giraldo signed the form, as witnessed by a deputy district clerk, and initialed each relevant paragraph. The form was approved by the trial judge, the attorney for the State, and Giraldo's attorney, Ira Perz. The record sufficiently demonstrates that Giraldo received the requisite admonishments; the burden then shifts to him to demonstrate that he did not fully understand the consequences of his plea such that he suffered harm. *See Martinez*, 981 S.W.2d at 197.

There is no record in this case of the actual guilty plea proceedings. The record, however, does contain a transcript from the hearing on the motion for new trial. At this hearing, Giraldo testified that, at the time he was arrested, he did not know that there were drugs in the car he was driving, and that, at the time he pled guilty, he did not know that in order to be guilty of the crime charged he had to have been aware that the drugs were in the car. He further stated that he never spoke to his counsel about pleading guilty before he pled guilty. He said that he did not understand anything in regard to the guilty plea, that no one explained the admonishments to him, and that he did not know what he was doing. He also testified that the reason he didn't tell the judge he didn't understand was because it was the first time he had been before a judge and he did not know how to properly express himself. When questioned by the judge at the hearing on the motion, Giraldo admitted that he remembered answering "yes" to the judge's question at the plea proceeding regarding whether he was pleading guilty because he was guilty and for no other reason. He then tried to explain: "I didn't know that I was putting all the guilt on myself."

Ira Perz was Giraldo's original counsel in this case. He testified that he is a native Cuban and once worked as a Spanish language interpreter in federal court. Perz further testified that he had a thorough understanding of the case against Giraldo and that he met

with Giraldo at least ten times before the guilty plea was entered. He stated that he explained the applicable law and the right to a jury trial to Giraldo and that he satisfied himself that Giraldo understood. Perz additionally testified that before Giraldo signed the waivers of constitutional rights and the agreement to stipulate, he explained the documents to Giraldo, had the court interpreter explain the documents, and then he explained them for a second time. Perz also discussed the presentence investigation and motion for mercy with Giraldo in connection to the plea of guilty. In Perz's opinion, Giraldo understood all of his rights and privileges at that time. Perz did acknowledge that, to someone not familiar with the process, the in-court proceedings may have seemed rather rapid.

Elizabeth Broyles has been a Spanish language interpreter since 1986, and she has been approved for that function by the Harris County district court's administrative office. She testified that she went though the waivers of constitutional rights, the agreement to stipulate to the evidence, and the judicial confession with Giraldo, explaining each and every one of the listed rights and privileges. She further stated that, after reading the document to him, she asked him a question, or questions, to satisfy herself that he understood the document. Broyles also translated when Giraldo entered his plea before the court, and she testified that he stated during the plea proceeding that he understood what he was doing.

On cross-examination, defense counsel highlighted the fact that Spanish is a language with many dialects and that Giraldo's native Columbian dialect may have certain differences from Broyles's native Mexican dialect. Broyles, however, pointed out that she studied Spanish in high school and college and that in her twelve years as an interpreter she has translated for Columbians in numerous previous trials. Broyles also stated that the in-court proceedings went rather rapidly and that she was running out of breath in keeping up with the judge. She does not think, however, that she missed any words in the translation. She further testified that Giraldo appeared to be very nervous during the proceedings and that he said "*que*" or "*que paso*" while still in the courtroom after the plea. She explained that "que" means "what" and "que paso" means "what's going on" or

"what happened."

We find that the record adequately supports the trial court's determination that Giraldo understood his rights and voluntarily and knowingly waived them and pled guilty. The testimony of both his prior counsel, Perz, and the court interpreter, Broyles, demonstrates that they were diligent in explaining Giraldo's rights and privileges to him and that they were both satisfied that he understood them. Even if there were some differences in dialect or accent between these native Spanish speakers, there is no showing in the record of any insurmountable difficulties in communication. *See Hernandez v. State*, 986 S.W.2d 817, 822 (Tex. App.—Austin 1999, pet. ref'd)(plea held knowing and voluntary where attorney testified he was able to communicate with appellant despite not being able to speak her native language and despite appellant's claim that she misunderstood attorney and could not understand the written admonishments). Additionally, Giraldo admitted that he told the judge he was pleading guilty because he was guilty and for no other reason. *See Crawford*, 890 S.W.2d at 944; *Jones*, 855 S.W.2d at 84 (when defendant affirmatively indicates he understands the nature of the proceeding and is pleading guilty because the allegations in the indictment are true, not because of any outside pressure or influence, he has a heavy burden to prove that his plea was involuntary). The fact that Giraldo appeared nervous during the court proceedings may just as well come from confessing his guilt in public as opposed to any supposed confusion he had regarding events. Furthermore, Giraldo's use of the phrase "que" or "que paso" is, at most, ambiguous. The trial court may very well have considered this to simply mean "what's going on" during the time after the plea was entered, as opposed to a definitive indication that Giraldo was confused regarding the guilty plea, particularly in light of the testimony from counsel and the interpreter that they explained his rights to him.

Giraldo relies on *Aleman v. State*, 957 S.W.2d 592 (Tex. App.—El Paso 1997, no pet.), for the proposition that a court interpreter should not merely translate the proceedings for the defendant but must act as the defendant's voice in court. *See id.* at 594. In *Aleman*, however, the court reporter failed to tell the judge that the defendant was

dissatisfied with the plea-bargain agreement. *See id*. at 593-94. There is no showing in the present case that the interpreter, Broyles, failed to communicate any expressed dissatisfaction from Giraldo to the judge.

Giraldo has failed in his burden to demonstrate that he did not fully understand the consequences of his plea such that he suffered harm. *See Martinez*, 981 S.W.2d at 197. The trial court did not abuse its discretion in denying the request to withdraw the guilty plea. Accordingly, we overrule appellant's sole point of error.

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed August 23, 2001.

Panel consists of Justices Draughn, Hutson-Dunn, and Amidei.

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

[**] Senior Justices Joe L. Draughn and D. Camille Hutson-Dunn, and Former Justice Maurice Amidei sitting by assignment.