Affirmed in part and Dismissed in part and Opinion filed July 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00140-CR & 14-98-00141-CR

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STEVE LEROY HOWARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 738, 424 & 526,028

O P I N I O N

Appellant Steve Leroy Howard pleaded guilty to felony possession of a controlled substance with intent to deliver in cause 14-98-00140-CR. He also pleaded true to a violation of his deferred adjudication probation in cause 14-98-00141-CR, felony delivery of a controlled substance. The trial court sentenced Appellant to seven years' imprisonment for the possession case and, after adjudicating his guilt, seven years' imprisonment for the delivery case. In each case, Appellant contends in four points of error that: (1) his pleas were involuntary; (2) the trial court erred in refusing to allow him to withdraw his pleas; (3) his

Texas rights to due process were violated; and (4) the seven years' imprisonment constitutes cruel and unusual punishment. We affirm the judgments of the trial court.

INVOLUNTARY PLEAS

Appellant contends that his guilty plea in his possession case and his plea of true in his delivery case were involuntary because of his poor health from his failing transplanted kidney and the massive amount of medication he had taken on the day of his pleas. He also contends that the trial court abused its discretion in refusing to grant his motion to withdraw his pleas.

A. Guilty Plea in Possession Case

We first examine whether Appellant's plea of guilty was involuntary in the possession case, 14-98-00140-CR, and whether the trial court abused its discretion in denying Appellant's motion to withdraw his plea. When the record reflects the trial court properly admonished the defendant, as it does here, there is a prima facie showing the plea was knowing and voluntary. *See Smith v. State*, 857 S.W.2d 71, 73 (Tex. App.–Dallas 1993, pet. ref'd). The burden then shifts to the defendant to establish he did not understand the consequences of his plea. *See Miller v. State*, 879 S.W.2d 336, 338(Tex. App.–Houston [14th Dist.] 1994, pet. ref'd). "An attestation of voluntariness at the plea hearing creates a heavy burden for appellant to show involuntariness at a subsequent hearing." *Jones v. State*, 855 S.W.2d 82, 84 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd).

Appellant testified at the hearing on his motion to withdraw his plea. He explained that on the morning of his plea, the bonding company gave him just one hour's notice that he needed to appear in court. Appellant testified that when he received this call, he had taken his fourteen to fifteen medications, but had not yet eaten food as required for taking them. He had no opportunity to eat, but rushed to the courthouse alone. The medications took effect, and he immediately felt dizzy and unwell in the courtroom. He testified that he could not hear and was incoherent. He did not understand what his attorney explained to him, and he felt absentminded when he appeared before the trial judge. Appellant testified that during the plea hearing, he understood only portions of the proceedings.

Appellant's doctor, Charles VanBuren, also testified. He stated that Appellant had a transplanted kidney and was taking significant amounts of medication at the time of the plea to prevent his body from rejecting the kidney. Some of the medications, used to control Appellant's blood pressure, could make him dizzy, weak, and feel like he could lose consciousness. External indications of such dizziness could include profuse sweating. Dr. VanBuren further testified that in Appellant's checkup the week after his plea hearing, Appellant was vomiting in the mornings and experiencing dizziness. Dr. VanBuren testified that if a person had low enough blood pressure, he would receive inadequate oxygen profusion to the brain and be unable to understand communication. However, if a person with blood pressure problems was able to talk and respond to questions, he would presume the person was well enough to understand the proceedings.

The trial judge took judicial notice that Appellant appeared unwell at his plea proceeding and that she had asked him if he felt well enough to continue. Appellant, who was sweating, felt well enough to proceed, but only when seated instead of standing. Lastly, the assistant district attorney present at the plea proceeding testified that although Appellant appeared to be ill, he never said he could not understand what was being explained to him.

While Appellant has shown that he was not feeling well on the day he pleaded guilty, evidence exists that shows he was coherent and able to understand the proceedings. Thus, we hold he has not met his burden of proof that he did not understand the consequences of his plea. Further, the trial judge was the trier of fact at the hearing on Appellant's motion to withdraw his plea, and she was not required to accept as true all of Appellant's testimony. *See Reissig v. State*, 929 S.W.2d 109, 113 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd). No abuse of discretion exists where there was conflicting evidence and the motion was overruled. *See Bath v. State*, 951 S.W.2d 11, 17 (Tex. App.–Corpus Christi 1997, pet. ref'd). Accordingly, we hold that the trial judge did not abuse her discretion in denying Appellant's motion to withdraw his guilty plea. We overrule points of error one and two in the possession case.

B. Plea of True in Delivery Case

In the delivery case, Appellant argues that his plea of true was involuntary and that the trial court erred in denying his motion to withdraw that plea. However, no appeal may be taken from the trial court's decision to proceed with an adjudication of guilt on a deferred adjudication. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(b) (Vernon Supp. 2000); *Phynes v. State*, 828 S.W.2d 1, 2 (Tex. Crim. App. 1992); *Olowosuko v. State*, 826 S.W.2d 940, 942 (Tex. Crim. App. 1992). Because we have no jurisdiction to review Appellant's claims, we dismiss points of error one and two in the cause number 14-98-00141-CR. *See Hargrave v. State*, 10 S.W.3d 355, 357 (Tex. App.–Houston [1st Dist.] 1999, pet. filed); *Gareau v. State*, 923 S.W.2d 252, 253 (Tex. App.–Fort Worth 1996, no pet.).

DUE PROCESS & CRUEL AND UNUSUAL PUNISHMENT

In point of error three in each case, Appellant argues that because his sentences are essentially death sentences for him, his Texas rights to due process have been violated. In point of error four in each case, he argues that his sentences are cruel and unusual punishment. The gist of Appellant's argument is that his transplanted kidney makes his health quite fragile. When jailed for a short time pending trial of these cases, Appellant's kidney function and health declined rapidly. His doctor testified that Appellant was hospitalized for seventeen days after his release from jail. His kidney's function had deteriorated considerably, and his creatine levels had doubled. The doctor testified that Appellant's body was probably going to reject the kidney and he would have to begin dialysis again.

Although well-argued, to address the merits of Appellant's contentions on appeal, he must have objected in the trial court to preserve error. *See Borgen v. State*, 672 S.W.2d 456, 460 (Tex. Crim. App. 1984); *Keith v. State*, 975 S.W.2d 433, 433-34 (Tex. App.–Beaumont 1998, no pet.). The purpose for the rule is to allow the trial court to cure any harm. *See Solis v. State*, 945 S.W.2d 300, 301 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd.). Because Appellant did not object, we cannot address his contentions. We thus overrule points three and four in both cases.

Having overruled all four points or error in cause 14-98-00140-CR, we affirm the trial court's judgment. Having dismissed points of error one and two and overruled points of error three and four in cause 14-98-00141-CR, we also affirm the trial court's judgment in that case.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed July 13, 2000.
Panel consists of Justices Robertson, Sears, and Cannon.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Ross A. Sears, and Bill Cannon sitting by assignment.