

Affirmed and Memorandum Opinion filed January 7, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00137-CR

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JUAN DOROTEO RIVAS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause Nos. 1133954 & 1145253**

MEMORANDUM OPINION

Appellant Juan Doroteo Rivas appeals two convictions for aggravated assault of a public servant. In a single issue, he contends the trial court erred in denying him the right to a jury trial. We affirm.

On May 30, 2007, Houston Police Officers Panagiotis Kopulos and Miguel Dominguez were on patrol when they observed appellant and two other individuals

illegally cross the street. After Officer Kopulos detained one of the individuals, appellant raised a gun and pointed it toward Officer Kopulos. As Officer Dominguez struggled with appellant for control of the weapon, appellant attempted to shoot Officer Dominguez narrowly missing the left side of his face. As a result, Officer Dominguez suffered gunpowder burns to his face.

Appellant entered a plea of guilty to two charges of aggravated assault of a public servant without an agreed recommendation from the prosecutor. The trial court requested that a presentence investigation report be prepared and held a punishment hearing after preparation of the report. Near the end of the first day of the punishment hearing, the trial court stated that it would not accept appellant's guilty plea because it appeared from appellant's statement that he was denying guilt. The court stated:

And, essentially, the Defense's position is that the Defendant is not guilty; and the Court will not accept his plea of guilty to either charge. This case is back on my trial docket like it was before.

Two weeks later, the court reconvened the punishment hearing with the following remarks:

Let the record further reflect that we were in the midst of a hearing on this case on December 16th, 2008. The Court stopped the Presentence Investigation Hearing as the Defense memorandum raised some issues of concern by this Court that the Defendant was, in fact, not guilty. And the Court at that juncture was concerned about proceeding onward with the PSI hearing if that was going to be the Defendant's position.

My understanding is that after we adjourned for the day that, [defense counsel], you consulted with your client and he wished to continue with this hearing and provide some additional information to the Court and was, in fact, pleading guilty and accepting responsibility for the offenses, but wished to present some, for lack of a better word, I guess, mitigation in his defense.

Is that essentially where we are?

[Defense counsel]: That's true, Your Honor. That's correct.

THE COURT: All right. And so the Court will simply continue the hearing that was begun on December the 16th, considering all of the testimony that had been adduced prior to that point, and we will continue onward today by agreement of the parties.

Appellant withdrew his previous sentencing memorandum in which he raised his innocence. At the conclusion of the hearing, the trial court found appellant guilty and sentenced him to 40 years in prison on each charge.

In a single issue, appellant contends the trial court erred in denying appellant his right to a jury trial. Appellant argues that when the trial court originally rejected appellant's guilty plea and set the case on the trial docket, appellant's guilty plea was effectively withdrawn by the trial court and the court could not find appellant guilty without requiring "re-entry" of appellant's plea along with his express waiver of the right to a jury.

If a defendant waives a jury and pleads guilty before the trial court, and evidence is presented, *and not later withdrawn*, that makes evident the innocence of the defendant or that reasonably and fairly raises an issue as to the defendant's guilt, then it is the duty of the trial court to consider the evidence submitted, and the trial court, as the trier of fact, may find the defendant guilty, not guilty, or guilty of a lesser included offense. *Aldrich v. State*, 104 S.W.3d 890, 892–93 (Tex. Crim. App. 2003); *Moon v. State*, 572 S.W.2d 681, 682 (Tex. Crim. App. 1978). A defendant has a right to timely request to change his plea, but a court has no duty to do so on its own motion. *Mendez v. State*, 138 S.W.3d 334, 336 (Tex. Crim. App. 2004). A defendant who has waived his constitutional right to plead not guilty must take some action to "don the armor again." *Id.* at 350. Consequently, the trial court had the discretion to evaluate any evidence that might reasonably and fairly have raised an issue as to his guilt without withdrawing appellant's plea. *See Aldrich*, 104 S.W.3d at 893.

In this case, the court, upon reading appellant's statement, exercised its discretion and refused his guilty plea. Two weeks later, after consulting with his attorney, appellant

chose to withdraw his statement and continue with the presentence investigation hearing. Appellant did not ask to withdraw his plea, but requested to continue the sentencing hearing. The trial court was within its discretion to find appellant guilty and assess punishment. Appellant's sole issue is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Justices Yates, Seymore, and Brown.

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