In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-09-00143-CR
NO. 09-09-00144-CR

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RODNEY ALLEN BOYCE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause Nos. 09-01-00185-CR and 09-01-00188-CR

MEMORANDUM OPINION

Rodney Allen Boyce entered a non-negotiated guilty plea to two indictments for driving while intoxicated and pled true to habitual offender enhancement allegations contained in the indictments. The trial court found Boyce to be an habitual offender and imposed a seventy-five year sentence in each case, with the sentences to run concurrently. The sole issue raised on appeal contends the trial court erred in failing to conduct an evidentiary hearing on Boyce's motion for new trial. We hold the trial court provided an

adequate opportunity to present evidence in support of a motion for new trial, and affirm the judgment.

Boyce pled guilty in a proceeding conducted before a visiting judge sitting for the 9th District Court of Montgomery County, Texas. The trial court accepted Boyce's guilty pleas and reset the cases for sentencing. On the date of the sentencing hearing, the elected judge of the 435th District Court of Montgomery County, Texas sat as the 9th District Court. Defense counsel, believing the case had been transferred, asked for a continuance or a week-long recess, "[n]ot that there is a specific objection to this specific court." Defense counsel stated, "I would like at least a week or two to discuss all possibilities with my client and also just to make sure we can get some family members in here." The judge explained that he was sitting as the 9th District Court and denied the motion.

After the lunch recess, the trial court reconvened the hearing and stated, as follows:

> THE COURT: And I understood earlier this morning that Mr. Boyce wanted to withdraw his plea of guilty. Is that no longer the case?
>
> THE DEFENDANT: No, sir, I'm not going to.
>
> THE COURT: I'm sorry, you have to speak up.
>
> [DEFENSE COUNSEL]: Stand up.
>
> THE DEFENDANT: I said, no, sir, I don't want to withdraw.
>
> THE COURT: Okay. You want to proceed here today?
>
> THE DEFENDANT: Yes.

Boyce pled true to five enhancement paragraphs. The trial court took judicial notice that one of the charged offenses occurred on April 26, 2008, and the other occurred on May 7, 2008, while Boyce was out on bond for the first offense. The trial court noted that Boyce had four prior convictions for driving while intoxicated.

After sentencing, Boyce obtained new counsel. On April 24, 2009, Boyce filed a motion for new trial on the grounds that his pleas of guilty were "effectively involuntary." The motion for new trial alleged that Boyce would not have pled guilty to the indictments if he had prior knowledge that the judge of the 435th District Court would preside at the punishment hearing. Boyce alleged he "ultimately agreed not to withdraw his plea in fear of a consecutive sentence and aggravated time for purposes of parole." At a hearing conducted on April 30, 2009, before the elected judge of the 9th District Court, trial counsel addressed the court and reminded the trial court that the State had only been able to establish four prior convictions for driving while intoxicated and that the State's rejected offer had been based on the prosecution's belief that Boyce had more convictions. Trial counsel stated to the court that

> I know [appellate counsel] is asking not to start the whole process all over again but for Mr. Boyce to get what he expected, which is to get sentenced by Your Honor as opposed to someone we hadn't researched, brand new judge I never would have advised Mr. Boyce to plea to; and I don't think Mr. Boyce would have pled to a former prosecutor who had been out of the -- you know, out of the D.A.'s office for only a couple of months.

Other than the statements of trial counsel, no other evidence or testimony was presented to the trial court and neither trial counsel nor appellate counsel informed the trial court that Boyce wished to present any other evidence before the trial court ruled on the motion for new trial. The trial court overruled the motion for new trial. The order overruling the motion for new trial was signed on May 11, 2009.

On appeal, Boyce argues that he met all of the prerequisites for an evidentiary hearing. *See Reyes v. State,* 849 S.W.2d 812, 815-16 (Tex. Crim. App. 1993). The motion was filed within thirty days of sentencing. *See* TEX. R. APP. P. 21.4(a). Boyce attached affidavits from trial counsel. *See Reyes,* 849 S.W.2d at 816. Boyce contends the affidavits identified matters not determinable from the record. *See id.* According to Boyce, his former trial counsel made an introductory statement at the hearing and the motion was denied without an evidentiary hearing.

Boyce's claim that he was denied an opportunity to present evidence at the hearing is not supported by the appellate record. The trial court convened a hearing on the motion for new trial. Appellate counsel told the trial judge he had "[o]ne more quick one, Judge, on Boyce." Former appointed trial counsel described to the trial court the matters that are also described in her affidavit. The trial court noted that the case had not been transferred and that the judge of the 435th District Court had been sitting for the judge of the 9th District Court. At no point during the hearing did counsel inform the court that Boyce had additional

information to provide to the court. Boyce never attempted to introduce the affidavits into evidence and never indicated to the trial court that he desired to examine the prosecutor or have co-counsel from the trial testify. When the trial court ruled on the motion for new trial, counsel thanked the trial court without notifying the court that Boyce had additional evidence to present to the trial court. Boyce neither complained about the procedure employed by the trial court at the hearing nor informed the court that he desired to present additional evidence before the trial court ruled or reconsidered his motion for new trial. To the extent that Boyce complains that the trial court denied him an opportunity to present evidence at the hearing, he failed to preserve error. *See Ex parte Alakayi,* 102 S.W.3d 426, 434-35 (Tex. App.--Houston [14th Dist.] 2003, pet. ref'd); *see also* TEX. R. EVID. 103(a); TEX. R. APP. P. 33.1(a).

Furthermore, former trial counsel's statements to the trial court were not objected to or contested by the prosecution. *See Zamorano v. State,* 84 S.W.3d 643, 655 n.57 (Tex. Crim. App. 2002); *State v. Rangel,* 980 S.W.2d 840, 845 (Tex. App.--San Antonio 1998, no pet.). A comparison of former appointed counsel's statements in open court during the motion for new trial hearing to the affidavits attached to the motion for new trial do not reveal any significant information that was not presented to the trial court during the hearing on Boyce's motion for new trial.

Moreover, a review of an appellate complaint that the trial court erred in failing to conduct an evidentiary hearing "is limited to the trial judge's determination of whether the defendant has raised grounds that are both undeterminable from the record and reasonable, meaning they could entitle the defendant to relief." *Smith v. State,* 286 S.W.3d 333, 340 (Tex. Crim. App. 2009). In this case, the trial court could have determined from the face of the motion and attached affidavits that Boyce is not entitled to relief.

First, the elected judge of the 9th District Court did not accept Boyce's guilty pleas; accordingly, Boyce could not argue that a right to sentencing by the elected judge of the 9th District Court attached by reason of the initial plea proceeding. Second, such a claim would have no merit in any event because "it is proper for a different judge to sit at the punishment hearing and his decision as to punishment will not be disturbed on appeal absent a showing of abuse of discretion and harm." *Jackson v. State,* 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). Third, the visiting judge who took Boyce's guilty pleas accepted the pleas; accordingly, Boyce could not have withdrawn his pleas during the sentencing hearing without leave of court. *See Durst v. State,* 900 S.W.2d 134, 137-38 (Tex. App.--Beaumont 1995, pet. ref'd). Fourth, counsel's ground for a continuance had no merit because the sentencing judge conducted the sentencing hearing while sitting as the 9th District Court. *See* TEX. GOV'T CODE ANN. § 24.303 (Vernon 2004). Fifth, trial counsel not only did not object to the sentencing judge, she affirmatively informed the judge that she did not object

to him, thereby waiving any objection to his hearing the case. *See* TEX. R. APP. P. 33.1(a). Sixth, Boyce persisted in his pleas after he learned which judge would assess punishment, thereby waiving any error. *See id*. Seventh, the reasons identified in the affidavit for persisting in the plea are matters of trial strategy that do not implicate voluntariness. Boyce faced a dilemma of seeking to withdraw his pleas to avoid the sentencing judge at the risk of increasing his punishment exposure, but such hard choices are his to make unless all of his options are illegal. *See Ripkowski v. State,* 61 S.W.3d 378, 389-90 (Tex. Crim. App. 2001). That strategy may have led to an unsuccessful outcome, but Boyce's dissatisfaction with his sentences does not make his pleas involuntary. Finally, Boyce's motion for new trial did not raise an issue of ineffective assistance of counsel in connection with his guilty pleas; therefore, there was no reason to examine trial counsel regarding her trial strategy.

We hold the trial court provided an adequate opportunity to present evidence in support of a motion for new trial. Accordingly, we overrule the appellant's issue and affirm the judgments.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on December 29, 2009
Opinion Delivered January 27, 2010
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Before McKeithen, C.J., Gaultney and Kreger, JJ.