



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-15-00453-CR

DAVID WAYNE SMITH

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM THE 371ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1331265D

MEMORANDUM OPINION¹

Appellant David Wayne Smith appeals his felony conviction for assault against someone with whom he had a dating relationship.² In one issue, he contends that the trial court violated several of his constitutional and statutory

¹See Tex. R. App. P. 47.4.

²See Tex. Penal Code Ann. § 22.01(a)(1), (b)(2)(A) (West Supp. 2016); see *also* Tex. Fam. Code Ann. § 71.0021(b) (West Supp. 2016).

rights by failing to ensure that his decision to testify (and to waive his right to not testify) was made knowingly, intelligently, and voluntarily. Because precedent forecloses appellant's argument, we overrule his sole issue and affirm the trial court's judgment.

Background Facts

A grand jury indicted appellant for committing assault. The indictment alleged that he had a romantic or dating relationship with the victim, that he had been previously convicted of assault against a member of his family or household, and that he had been previously convicted of two felony offenses. Pursuant to a plea bargain agreement, appellant pled guilty, and the trial court deferred adjudication of his guilt and placed him on community supervision for three years. In its deferred adjudication order, the trial court found the indictment's enhancement allegations to be true.

Within the three-year community supervision term, the State filed a petition for the trial court to adjudicate appellant's guilt. In the petition, the State alleged that appellant had violated terms of his community supervision by drinking alcohol, by failing to comply with electronic monitoring, by failing to pay a supervision fee, and by failing to complete community service. At a hearing on the petition, appellant appeared with counsel and pled true to drinking alcohol, to failing to pay the fee, and to failing to complete community service. The trial court admonished appellant about the consequences of his "true" pleas. After considering the parties' evidence, including appellant's testimony, the trial court

found that appellant had violated his community supervision terms. The trial court revoked appellant's community supervision, found him guilty, and sentenced him to twenty-five years' confinement. Appellant brought this appeal.

Alleged Failure to Admonish

In his only issue, appellant contends that the record establishes violations of his constitutional and statutory rights—including the rights to due process and due course of law³—because it does not show that the trial court, the State, or his counsel advised him of his right to not testify⁴ before he testified at the revocation hearing. He argues,

The record . . . is absolutely silent regarding [a]ppellant having been warned that he had an absolute, fundamental federal and state constitutional privilege to remain silent, elect not to testify, and not incriminate himself No one -- not the trial court, not his own retained lawyer, nor the State's attorney -- undertook their respective legal and ethical obligations to advise [a]ppellant of this most fundamental rule of American justice.^[5]

Appellant asserts that "the trial court simply allowed him to testify without even a bare inquiry into the voluntary nature of his decision." The State argues that because appellant was represented by counsel, neither the trial court nor the

³See U.S. Const. amend. V; Tex. Const. art. I, § 19; Tex. Code Crim. Proc. Ann. art. 1.04 (West 2005).

⁴See U.S. Const. amend. V; Tex. Const. art. I, § 10; Tex. Code Crim. Proc. Ann. art. 1.05 (West 2005).

⁵We note that while the record does not establish that appellant's counsel informed him of his right to not testify, it also does not affirmatively show that counsel did not inform him of that right off the record.

State had an obligation to admonish him that he had a right to not testify. Binding precedent from the court of criminal appeals and our own court and persuasive authority from other courts support the State's argument.

The court of criminal appeals has held that a trial court "has no duty to inform a testifying defendant, represented by counsel, of his right not to testify." *Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005), *cert. denied*, 546 U.S. 1181 (2006); see *Hernandez v. State*, 506 S.W.2d 884, 886 (Tex. Crim. App. 1974) ("We find no error in the trial court's refusal to admonish appellant as to his privilege against self-incrimination."); see also *Powers v. United States*, 223 U.S. 303, 313, 32 S. Ct. 281, 283 (1912) ("We are of the opinion that it was not essential to the admissibility of [a defendant's] testimony that he should first have been warned that what he said might be used against him."). Instead, when a defendant who is represented by counsel testifies in his own behalf, "we will presume this act to be undertaken voluntarily and with full knowledge of his rights." *Mullane v. State*, 475 S.W.2d 924, 926 (Tex. Crim. App. 1971); see *Lantrip v. State*, 336 S.W.3d 343, 350 (Tex. App.—Texarkana 2011, no pet.) (applying the rule from *Mullane*).

We have decided cases in accordance with these principles. In *Thompson v. State*, we concluded that a defendant testified voluntarily and that a trial court did not violate the defendant's constitutional rights when the defendant's attorney called him to testify and the defendant did so without objection or protest. No. 02-04-00256-CR, 2005 WL 375485, at *2 (Tex. App.—Fort Worth Feb. 17, 2005,

pet. ref'd) (mem. op., not designated for publication) (citing *Mullane*). Similarly, in *Delgado v. State*, we rejected a defendant's complaint that a trial court "fundamentally erred by failing to inform [him], immediately before he testified, of his right to remain silent." 849 S.W.2d 904, 905 (Tex. App.—Fort Worth 1993, pet. ref'd). We explained that our state's decisional authority did not "require a trial judge to admonish an accused" about that right. *Id.* at 906.

At the revocation hearing, appellant's counsel called appellant to testify, and appellant did so without objection or protest. Thus, in light of the settled precedent cited above, which appellant does not address in his brief, we reject appellant's argument that the trial court violated any of his constitutional or statutory rights by failing to admonish him about his right to not testify. See *Johnson*, 169 S.W.3d at 235; *Thompson*, 2005 WL 375485, at *2; *Delgado*, 849 S.W.2d at 906.

Appellant also contends that there "was a concomitant duty on the part of the prosecutor to insure that the record reflected [a]ppellant's knowledge of his rights." But as explained above, because appellant was represented by counsel, we presume such knowledge. *Mullane*, 475 S.W.2d at 926; *Lantrip*, 336 S.W.3d at 350. We decline appellant's invitation to create a duty upon the State to advise appellant of his right to not testify.

We hold that the record does not establish a violation of appellant's constitutional or statutory rights based on the trial court's or the State's alleged

failures to inform him of his right to not testify. We overrule appellant's only issue.

Conclusion

Having overruled appellant's sole issue, we affirm the trial court's judgment.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; WALKER, J.; and CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: March 16, 2017