COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

MIGUEL ANGEL FIERRO,	§	No. 08-21-00005-CR
Appellant,	§	Appeal from the
v.	§	42nd District Court
THE STATE OF TEXAS,	§	of Taylor County, Texas
Appellee.	§	(TC#28644A)
	§	

MEMORANDUM OPINION

Pursuant to a plea bargain agreement, Appellant Miguel Angel Fierro pleaded guilty to the offense of aggravated assault, to include a deadly weapon finding of "yes, not a firearm." *See* TEX. PENAL CODE ANN. § 22.02(a)(2). The trial court assessed punishment of seven years' confinement with the sentence to run concurrent with other charges. Appellant attempts to appeal this judgment of conviction and the sentence rendered. Having reviewed the trial court's certification of no right to appeal, we dismiss this attempted appeal based on lack of jurisdiction. *See* TEX. R. APP. P. 25.2(a)(2).

I. PROCEDURAL BACKGROUND

In the underlying case identified as trial cause number 28644A, the State charged Appellant by indictment with aggravated assault and such charge included an enhancement paragraph stating

Appellant had a prior conviction for another charge of aggravated assault. In the same trial court, Appellant also had a second, unrelated charge pending of possession of a controlled substance with intent to deliver, which was identified as trial cause number 28390-A. In separate hearings held back-to-back, Appellant pleaded guilty in both cause number 28644A and cause number 28390-A on November 10, 2020.

In trial cause number 28644A—the underlying case of this attempted appeal—the trial court signed a form titled, "Trial Court's Certification of Defendant's Right of Appeal," certifying that Appellant's case was a plea-bargain case and defendant had no right of appeal. Both Appellant and his defense counsel also signed the trial court's certification form.

On December 2, 2020, with the aid of trial counsel, Appellant filed a motion for new trial requesting to set aside his plea of guilty. Appellant's motion asserted two grounds: (1) that he had made a "horrible mistake," and (2) that his counsel had "scared him" into taking a plea. In support, Appellant's motion included a handwritten note from Appellant. Appellant's counsel simultaneously filed a motion to withdraw as counsel for Appellant based on a conflict of interest. On December 2, 2020, the trial court appointed new counsel to represent Appellant. On December 3, 2020, the trial court granted withdrawal of Appellant's previous trial counsel. On December 8, 2020, Appellant's new counsel filed a notice of appeal with the trial court asserting he desired to appeal the judgment of conviction and the sentence rendered against him in cause number 28644A. That notice of appeal was also filed in the Eleventh Court of Appeals, Eastland, Texas.

On December 18, 2020, the appeal of trial cause number 28644A was transferred to this Court by order of the Supreme Court of Texas. On that same date, Appellant filed a pleading titled, "Appellant's Response Showing Grounds for Appeal," based on correspondence earlier sent by the Eleventh Court of Appeals requesting an explanation of the appeal grounds in the case.

Appellant's response acknowledged the appeal was brought in a plea-bargain case and the trial court's certification of defendant's right of appeal indicated he had no right of appeal. However, Appellant asserted that, once the record became available, it would show the trial court's certification was defective. The reporter's record and clerk's record were thereafter filed in February and March of 2021, respectively.

On June 10, 2021, Appellant's new counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), together with a motion to withdraw, asserting that no non-frivolous issue existed upon which Appellant could appeal. Counsel's *Anders* brief pointed out the trial court had *not* certified that the Appellant had a right to appeal, that admonishments were properly given, and that nothing in the record indicated that the plea of guilty was involuntary. Also, although the brief generally mentioned that Appellant had filed a motion for new trial, the brief did not otherwise mention the grounds asserted by the motion or any presentment to the trial court. The State filed a response letter indicating it had no response to the *Anders* brief and waived the right to respond. The State also reserved the right to reply to Appellant's pro se brief should Appellant choose to file one and should a response be necessary.

On August 9, 2021, we issued an order abating the appeal and returned the case to the trial court for a determination of whether Appellant had the right to appeal his conviction, and to make findings of fact and conclusions of law on that issue. The trial court subsequently entered findings providing that: (1) the two cause numbers in 28390-A and 28644A are clearly distinguishable regarding Appellant's right to appeal; (2) that, in cause number 28390-A, Appellant had raised matters by written motion that the trial court ruled on before trial that were not waived, and thus, Appellant had the right to appeal his conviction in that case; and (3) that Appellant did not have the right to appeal his conviction in cause number 28644A, and Appellant was aware of that fact.

On September 3, 2021, following receipt of the supplemental clerk's record containing the transcript of the trial court's hearing, this Court reinstated the attempted appeal of cause number 28644A. On September 13, 2021, Appellant filed a pro se brief asserting four grounds for his appeal: (1) ineffective assistance of counsel; (2) that the State withheld *Brady*[1] material; (3) that his plea was involuntary; and (4) that a successful challenge negated the entire plea agreement.

II. DISCUSSION

Rule 25.2(a)(2) of the Texas Rules of Appellate Procedure requires that the trial court enter its certification of a defendant's right of appeal each time it enters a judgment of guilt or other appealable order. TEX. R. APP. P. 25.2(a)(2). In a plea-bargain case, a defendant may appeal only those matters raised by written motion and ruled on before trial, or after getting the trial court's permission to appeal. TEX. R. APP. P. 25.2(a)(2)(A), (B); *see Chavez v. State*, 183 S.W.3d 675, 680 (Tex. Crim. App. 2006) (stating that while an intermediate appellate court has jurisdiction to ascertain whether an appellant who pleaded guilty is permitted to appeal under rule 25.2(a)(2), an appellate court must dismiss a prohibited appeal without further action, regardless of the basis for the appeal); *Harden v. State*, No. 11-21-00179-CR, 2021 WL 4201579, at *1 (Tex. App.—Eastland Sept. 16, 2021, no pet.) (mem. op., not designated for publication). Moreover, the Texas Court of Criminal Appeals instructs that rule 25.2(b) does not permit a plea-bargaining defendant to appeal matters related to the voluntariness of the plea bargain—unless the defendant has obtained the trial court's permission to appeal. *See Cooper v. State*, 45 S.W.3d 77, 83 (Tex. Crim. App. 2001); *Harden*, 2021 WL 4201579, at *1.

Here, the trial court's certification reflects that the appeal "is a plea-bargain case, and the defendant has NO right of appeal[.]" Yet, irrespective of the trial court's assertion, the

[1] *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

requirements of rule 25.2, which are recited in a certification, must be true and supported by the record. *See Dears v. State*, 154 S.W.3d 610, 613 (Tex. Crim. App. 2005). On review, the record in this instance supports the trial court's certification that Appellant waived his right to a jury trial and entered a negotiated guilty plea.

The transcript of the guilty-plea hearing shows that when Appellant was asked by the trial court how he wished to plead to the charge of aggravated assault, he answered, "Guilty." When asked whether he was pleading guilty freely and voluntarily, he answered, "Yes, sir." The trial court further asked whether anyone had threatened or coerced Appellant and he answered, "No, sir." The court next asked whether there were any promises made other than the plea bargain and he answered, "No, sir." When asked whether he was pleading guilty because he was in fact guilty, he answered, "Yes, sir." The trial court also asked questions about the written plea agreement. Appellant affirmed that he had signed a document telling the court he understood it was a plea bargain case, and if the trial court followed the agreement, he would have no right to appeal. In sum, the transcript of the hearing establishes that Appellant knowingly, willfully, and voluntarily waived his rights and accepted the State's plea offer of seven years' incarceration, and that the State waived an enhancement paragraph and dismissed two pending cases against Appellant in exchange for his guilty plea.

Moreover, the appellate record does not reflect that the trial court ruled on any pretrial motions or that Appellant obtained permission to appeal any issues. After we abated the appeal to the trial court to enter findings regarding Appellant's right to appeal, the trial court found that: (1) Appellant was aware that he could not appeal his conviction when he pleaded guilty; and (2) Appellant had no right to appeal this case, which was distinct from the other case to which he did have the right to appeal because he had raised a pretrial matter by written motion that had been

ruled on prior to his guilty plea.

Because Appellant did not obtain the trial court's permission to appeal the voluntariness of his plea, we do not have the power to address his complaints on that matter. *See Cooper*, 45 S.W.3d at 83. As described by the Court of Criminal Appeals, the number of cases in which the involuntariness would appear in an appellate record is small, and "[e]xperience has shown [the Court] that most cases of involuntary pleas result from circumstances that existed outside the record such as misunderstandings, erroneous information, impaired judgment, ineffective assistance of counsel, and plea-bargains that were not followed or turn out to be impossible of performance." *Id*. at 82. As a consequence, to resolve claims of involuntary pleas, other procedures such as a motion for new trial and habeas corpus are superior in that such claim may be supported by information from sources broader than the appellate record. *Id*. We note here that even though Appellant filed a motion for new trial, it appears from our record that no evidentiary hearing was held on that motion.

Based on the trial court's certification and the record before us, we conclude that Appellant does not have a right to a direct appeal. All pending motions are denied as moot. Accordingly, we dismiss the appeal.

GINA M. PALAFOX, Justice

October 28, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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