Opinion filed February 28, 2017

In The

Eleventh Court of Appeals

No. 11-15-00027-CR

MIKAEL ALEXANDER SALVAGGIO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 161st District Court

Ector County, Texas

Trial Court Cause No. B-43,425

MEMORANDUM OPINION

Mikael Alexander Salvaggio entered an open plea of guilty to the first-degree felony offense of aggravated robbery.[1] The State alleged that Appellant robbed a person over the age of sixty-five years and that, in the process, he caused bodily injury to that person. Additionally, the State notified Appellant that it intended to

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[1]TEX. PENAL CODE ANN. § 29.03(a)(3)(A) (West 2011).

rely upon Appellant's prior conviction for burglary of a habitation to enhance the minimum term of imprisonment. *See* TEX. PENAL CODE ANN. § 12.42 (West Supp. 2016). The trial court ultimately found Appellant guilty and assessed his punishment at confinement for forty years and a fine of $10,000. In two issues on appeal, Appellant complains that the trial court improperly admonished him in connection with his plea. We affirm.

In his first issue on appeal, Appellant maintains that the trial court violated his due process rights under the United States Constitution when it misstated the minimum punishment to which he could be subjected at two years rather than the correct minimum punishment of fifteen years, when it failed to tell him that he was not eligible for community supervision, and when it failed to admonish him that the court could also impose a fine up to $10,000.

A guilty plea involves, among other things, a waiver of a defendant's rights to be tried by a jury, to confront his accusers, to have a speedy and public trial, and to invoke his privilege against compulsory self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Ex parte Palmberg*, 491 S.W.3d 804, 807 (Tex. Crim. App. 2016) (orig. proceeding). To be effective, a waiver of those rights must be made voluntarily, knowingly, and intelligently. *Ex parte Barnaby*, 475 S.W.3d 316, 322 (Tex. Crim. App. 2015). A defendant who pleads guilty and waives his constitutional rights cannot be said to have waived those rights voluntarily, knowingly, and intelligently in the absence of a sufficient awareness of the circumstances surrounding his plea and the likely consequences of it. *Id.* In the end, the question is whether the plea was truly voluntary under all the facts and circumstances. *Id.* at 323.

When Appellant entered his guilty plea and waived his right to trial by jury, the trial court questioned him at length about his understanding of the various rights he was waiving by pleading guilty. It also questioned Appellant as to whether he

had been forced to plead guilty or whether he had been promised anything if he would plead guilty. During the trial court's admonishments, it said to the prosecutor, "Madame Prosecutor, what is the range of punishment in a case like this?" To which question the prosecutor answered, "First degree felony normally is punishable by 2 years or up to 99 years or life." The correct punishment range for a first-degree felony is, however, confinement for life or any term of not more than ninety-nine years or less than five years, and a fine not to exceed $10,000 may also be imposed. PENAL § 12.32 (West 2011). Here, though, the punishment range for a first-degree felony was enhanced with a prior non-state jail felony and, as such, carries a minimum period of confinement of fifteen years, not two years, and a fine of up to $10,000 may also be assessed. *Id.* § 12.42(c).

At the conclusion of the trial court's inquiries and admonishments, it stated: "All right. Very well. I am satisfied you know what you are doing, and I accept your plea."

We agree, as does the State, that the record shows that the trial court admonished Appellant as to the incorrect minimum period of confinement applicable in this case. We also note that the record reveals that the trial court did not tell Appellant that he was ineligible for community supervision nor did he tell him that a fine not to exceed $10,000 could also be imposed. Other than these complaints, Appellant does not claim that his plea was constitutionally deficient for any other reasons.

First, we will dispose of Appellant's claim that the trial court erred when it failed to tell him that he was not eligible for community supervision. Absent circumstances not relevant here, there is no mandatory duty placed upon a trial court to admonish a defendant about his eligibility for community supervision. *Ex parte Williams*, 704 S.W.2d 773, 775 (Tex. Crim. App. 1986). This part of Appellant's argument in his first issue on appeal is not well-taken.

We will next address Appellant's due process claim as it relates to the trial court's misstatement as to the minimum punishment applicable in this case and the failure to advise Appellant that he could be fined up to $10,000. It is not constitutionally required that a defendant be told the range of punishment in order to survive a procedural due process attack in connection with a guilty plea. *Aguirre-Mata v. State*, 125 S.W.3d 473, 475–76 (Tex. Crim. App. 2003). Neither have those matters stated in Article 26.13 of the Texas Code of Criminal Procedure (which we will discuss in connection with the second issue on appeal) been held to be constitutionally mandated. *Id.* at 476. The bottom-line question, rather, is whether there is an affirmative showing on the record that the defendant entered his plea of guilty voluntarily and intelligently. *Id.* at 475.

Procedural due process is not offended if the record affirmatively shows that a defendant has been provided with, or made aware of, from the trial court or otherwise, information sufficient to show that his guilty plea was adequately informed so as to be entered knowingly, intelligently, and voluntarily. Here, the record does contain such a showing as to the applicable minimum period of confinement.

After Appellant entered his plea, but before the trial court assessed punishment, Appellant's attorney offered the trial court an alternative to immediate incarceration: deferred adjudication. When that alternative was submitted to the trial court, Appellant's attorney said, "The fact that the minimum is 15 means you can do deferred, and if he violated it, the range of punishment would be 15 to life." Appellant's counsel made this statement in Appellant's presence. Appellant did not protest and did not ask to withdraw his plea. Further, Appellant did not file a motion for new trial that contained those protests. Also, on January 16, 2015, in line with trial counsel's in-court statement about minimum confinement, the State gave written notice to Appellant that it intended to introduce evidence of a prior

conviction that would increase the minimum period of confinement to fifteen years. Again, Appellant never voiced any objection as to minimum punishment prior to this appeal. We want to be clear that we are not referencing Appellant's failure to complain as a waiver of his complaint but, rather, as evidence from which the trial court could infer that, from some source, Appellant knew the minimum punishment applicable to his case. Such failure to object or otherwise protest may also be considered in any necessary harm analysis under TEX. R. APP. P. 44.2(b).

The record in this case is sufficient to show that Appellant had sufficient information before him to render his plea one that was entered knowingly, voluntarily, intelligently, and with sufficient awareness of the relevant circumstances and consequences likely to result from the plea, as far as the possible confinement is concerned. There is nothing in this record to indicate otherwise.

As we have said, in addition to confinement, the punishment applicable to this offense included a possible fine of up to $10,000. The trial court imposed the maximum fine of $10,000. The record does not reflect that anyone at any time advised Appellant as to the possibility that his punishment could also include a fine not to exceed $10,000. Again, *Boykin* does not require, as a matter of due process, that the admonition as to punishment be given. The question is whether the plea was knowingly, intelligently, and voluntarily entered.

This record contains nothing to show that the lack of a statement as to the possible fine caused Appellant's plea to be other than knowing, voluntary, and intelligent. He did not protest when the trial court imposed the fine, and neither did he develop his claim in a motion for new trial. Under the circumstances, it would seem to be strange that a person could be facing a term of years of not less than fifteen nor more than ninety-nine years or life in prison, but yet argue that he would not have pleaded guilty had he known that a $10,000 fine could also be imposed. If the fine was so important to him that knowledge of its potential applicability would

be a deal breaker to his open plea, surely he would have raised either his voice or his pen in opposition to a continuation of the proceedings. We hold that this record affirmatively discloses that Appellant's guilty plea was adequately informed and knowingly, voluntarily, and intelligently entered; Appellant has failed to establish the merits of his due process claim. We overrule Appellant's first issue on appeal.

In his second issue on appeal, Appellant contends that his guilty "plea was involuntary because he was admonished improperly concerning his potential sentence in violation of [A]rticle 26.13 of the Texas Code of Criminal Procedure." This claim is not the same as the due process claim that Appellant makes in his first issue on appeal. *Davison v. State*, 405 S.W.3d 682, 687 (Tex. Crim. App. 2013).

Among other things not relevant to this appeal, under Article 26.13, before a trial court can accept a plea of guilty, it must admonish the defendant of the range of punishment attached to the offense. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (West Supp. 2016). Substantial compliance with Article 26.13(a)(1) is sufficient, "unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court." *Id.* art. 26.13(c). If the trial court has failed to admonish the defendant correctly and completely, then we address whether the admonishment given can properly be categorized as substantial compliance. *Luckett v. State*, 394 S.W.3d 577, 580 (Tex. App.—Dallas 2012, no pet.). There is no substantial compliance if the defendant receives a punishment greater than the range on which the trial court admonished him. *Id.* If the admonishment does not substantially comply with the mandate of Article 26.13, then we perform a harm analysis for nonconstitutional error under Rule 44.2(b) of the Texas Rules of Appellate Procedure, rather than under Article 26.13(c). TEX. R. APP. P. 44.2(b); *Davison*, 405 S.W.3d at 688; *Luckett*, 394 S.W.3d at 580.

Here, there was no substantial compliance with Article 26.13(a)(1). The trial court incorrectly admonished Appellant when it effectively, through the prosecutor, understated the minimum confinement applicable in the case and omitted altogether the possibility of a fine. Appellant's actual punishment included the imposition of a $10,000 fine and was, therefore, greater than that provided for in the actual admonishment that the trial court gave him. Because there was no substantial compliance with Article 26.13(a)(1), we will review the error for nonconstitutional harm under Rule 44.2(b). *Aguirre-Mata*, 125 S.W.3d at 474.

In a review of nonconstitutional error under Rule 44.2(b), we will disregard an error unless it affected the defendant's substantial rights. TEX. R. APP. P. 44.2(b). In the process, we review the entire record, and we will reverse only if, from "the record as a whole, [we] conclude[] that an error may have had 'substantial influence' on the outcome of the proceeding." *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988)). If we have "a grave doubt" as to whether the result in the case was free from the substantial influence of the error, then we will treat the error as if it did influence the result. *Id.* If the matter is so evenly balanced that the judge feels "in virtual equipoise as to the harmlessness of the error," then "grave doubt" exists and the defendant wins. *Id.* at 637–38.

As we have noted, Appellant's trial attorney attempted to convince the trial court that, as an alternative to incarceration, it could defer adjudication and place Appellant on community supervision. Appellant's counsel on appeal takes the position that the argument accentuates his belief that the trial attorney did not understand the punishment range or the unavailability of community supervision if the trial court assessed a term of more than ten years.

It seems to us that trial counsel knew exactly what he was doing. Counsel faced the possibility that the trial court could imprison his client for not less than

fifteen nor more than ninety-nine years or life, and also could possibly fine him as much as $10,000 in a case where his client had admitted to robbing an elderly person in the bathroom of a sports bar. Under these facts, trial counsel took a thorny path that might lead to nowhere, but it was his client's only chance to make it through the thicket and avoid a mandatory prison term: deferred adjudication. *See Cabezas v. State*, 848 S.W.2d 693, 695 (Tex. Crim. App. 1993) (deferred adjudication was available despite possible minimum punishment). It is difficult to believe that Appellant's attorney would not have discussed this unique approach with Appellant. The record does not show otherwise.

This record contains nothing to show that the lack of a statement as to the possible fine caused Appellant's plea to be other than knowing, voluntary, and intelligent. As we said in our discussion of the first issue, Appellant offered no protest when the trial court imposed a fine as part of his punishment. Furthermore, Appellant did not develop his claim in a motion for new trial. We cannot say from this record as a whole that the error in the Article 26.13 admonishments affected Appellant's substantial rights. *Burnett*, 88 S.W.3d at 637–38. We overrule Appellant's second issue on appeal.

We affirm the judgment of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

February 28, 2017

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.