Opinion filed May 11, 2017

In The

Eleventh Court of Appeals

No. 11-15-00107-CR

CLINTON LEE SHOEMAKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 220th District Court
Comanche County, Texas
Trial Court Cause No. CR-03750

M E M O R A N D U M O P I N I O N

After a grand jury indicted Clinton Lee Shoemaker for aggravated sexual assault of a child, he waived his right to a jury trial and pleaded guilty to that offense.[1] He stipulated that he intentionally and knowingly caused the penetration of the sexual organ of P.D., a child under the age of six, with his finger. The trial court assessed his punishment at confinement for fifty years. In three issues,

[1]TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016).

Appellant asserts that (1) he did not make an intelligent and voluntary waiver of his right to a jury trial, (2) he received inadequate admonitions from the trial court about his guilty plea, and (3) he received a sentence of confinement for fifty years that constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. We affirm.

I. *Background Facts*

Appellant appeared with his counsel in open court and waived his right to a jury trial. Appellant asserted that he could read and write even though he had attended special education classes.[2] In addition, Appellant's counsel stated that he believed that Appellant was competent. The trial court informed Appellant several times that he had an absolute right to a jury trial. When the trial court asked him if he understood that he was waiving this right, Appellant repeatedly affirmed that he understood his waiver. He also acknowledged that he would leave the issues in his case for the trial court to decide. After this discussion, the trial court approved Appellant's waiver of his right to a trial by jury.

The following day, Appellant acknowledged having received the State's discovery related to the charge against him of aggravated sexual assault of a child. The trial court admonished Appellant about the charge against him and the punishment range for the offense. The trial court further admonished Appellant that, if convicted, he would have to register as a sex offender. Appellant affirmed his somewhat limited ability to read and write and indicated that he was thinking clearly "[b]y far" at this appearance. He also asserted that he was entering a guilty plea freely and voluntarily and that he had not made this plea because of any threat or promise. Appellant initialed the relevant documents in the required places, which

[2]In the punishment phase, Appellant testified that he had trouble with reading and writing and that he attended special education classes from fifth grade through twelfth grade. He also testified that he graduated from De Leon High School.

reflected his understanding of the admonitions. The trial court then found Appellant competent to stand trial and accepted his guilty plea, which the trial court determined was made freely and voluntarily,

II. *Analysis*

A. Issue One: Appellant intelligently and voluntarily waived his right to a jury trial.

In his first issue, Appellant asserts that he did not intelligently and voluntarily waive his right to a jury trial. Although a defendant has an absolute right to a jury trial, he also has a right to waive it. *Adams v. United States*, 317 U.S. 269, 275 (1942); *see also* TEX. CODE CRIM. PROC. ANN. art 1.13(a) (West Supp. 2016). The defendant must make the waiver in person and in writing, in open court, and do so with the consent and approval of both the court and the State. CRIM. PROC. art. 1.13(a). In addition, "[f]ederal due process requires that '[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" *Davison v. State*, 405 S.W.3d 682, 686 (Tex. Crim. App. 2013) (second alteration in original) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). A guilty plea involves a waiver of several constitutional rights. *Ex parte Barnaby*, 475 S.W.3d 316, 322 (Tex. Crim. App. 2015) (citing *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969) (guilty plea involves, among other things, a waiver of a defendant's federal constitutional 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)); *see also Ex parte Palmberg*, 491 S.W.3d 804, 807 (Tex. Crim. App. 2016).

When we consider the voluntariness of a plea, we examine the record as a whole. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). "The voluntariness of a plea 'can be determined only by considering all of the relevant

circumstances surrounding it.'" *Barnaby*, 475 S.W.3d at 323 (quoting *Brady*, 397 U.S. at 749). "The crucial issue is whether, under all the facts and circumstances, the plea was truly voluntary." *Id.* (quoting *Gaither v. State*, 479 S.W.2d 50, 51 (Tex. Crim. App. 1972)); *see also Salvaggio v. State*, No. 11-15-00027-CR, 2017 WL 922509, at *1 (Tex. App.—Eastland Feb. 18, 2017, no pet.) (mem. op., not designated for publication). The trial court asked Appellant several times whether he understood that he had an absolute right to a jury trial and that he would give up this right once he signed the waiver form. The trial court also explained to Appellant that his waiver meant that "the whole case, all of the evidence, is going to be presented to me and not to a jury." In each instance that the trial court asked Appellant if he understood, Appellant responded, "Yes, Your Honor" or "Yes, sir." The trial court also asked Appellant if he was suffering from any mental conditions, to which Appellant replied, "Stress." Appellant's counsel also told the trial court that he thought that Appellant was competent.

On appeal, Appellant's counsel alleges that, because Appellant and his mother had intellectual disabilities and because Appellant had a long-term anxiety disorder and an alleged suicide ideation while in jail, Appellant did not intelligently and voluntarily waive his right to a jury trial.[3] However, Appellant told the trial court that he was not suffering from a mental condition, and he appropriately answered all of the trial court's questions about his rights and the waiver of those rights. In addition, his trial counsel acknowledged to the trial court that Appellant was competent. In reviewing the entire record, we hold that Appellant made a knowing, intelligent, and voluntary waiver of his right to a jury trial. *See Barnaby*, 475 S.W.3d at 323. We overrule Appellant's first issue on appeal.

[3]We note that the evidence about the anxiety disorder was introduced during the punishment phase as was the evidence that Appellant's mother was mentally challenged. Also in that phase, Appellant testified that he had contemplated suicide but that suicide was an unforgiveable sin. However, there is nothing in the record that reflects that Appellant was on a suicide watch or had attempted suicide.

B. Issue Two: The trial court properly and appropriately admonished Appellant about the consequences of his guilty plea to the charged offense.

In his second issue, Appellant asserts that the trial court failed to give him appropriate admonishments and failed to further inquire into Appellant's mental capacity prior to Appellant's guilty plea, as required under Article 26.13. Appellant argues that these failures resulted in a guilty plea that was not made intelligently and voluntarily. Prior to accepting a plea of guilty, the trial court is required to admonish the defendant of the following: (1) the punishment range; (2) the fact that any sentencing recommendation made by the State is not binding on the court;[4] (3) the limited right to appeal; (4) the possibility of deportation; and (5) the possibility of registration requirements for a sexual offender. CRIM. PROC. art. 26.13(a)(1)–(5); *see also Brown v. State*, No. 11-02-00027-CR, 2002 WL 32345393, at *1 (Tex. App.—Eastland Nov. 21, 2002, no pet.) (not designated for publication). The defendant must be competent; however, unless an issue is made of an accused's present insanity or mental competency at the time of the plea, the trial court need not make inquiry or hear evidence on such issue. *Kuyava v. State*, 538 S.W.2d 627, 628 (Tex. Crim. App. 1976); *see* CRIM. PROC. art. 26.13(b). "[T]his has been particularly true where the court has had opportunity to observe the accused in open court, hear him speak, observe [the defendant's] demeanor and engage him in colloquy as to the voluntariness of his plea." *Kuyava*, 538 S.W.2d at 628. In addition, when the record shows that the defendant was properly admonished, it presents a prima facie showing that the defendant's plea was knowing and voluntary, and the burden shifts to the defendant to show that he did not fully understand the consequences of his plea such that he was misled or suffered harm. *Woods v. State*, 398 S.W.3d 396, 403 (Tex.

[4]In this case, Appellant's guilty plea was an "open plea," and the State made no sentencing recommendation.

App.—Texarkana 2013, pet. ref'd) (citing *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (per curiam)); *see* CRIM. PROC. art. 26.13(b), (c).

In this case, although Appellant complains of improper admonishments, he does not assert in his brief that the trial court failed to give any of the required admonishments. In fact, the trial court advised Appellant that the charge, aggravated sexual assault of a child, is a first-degree felony with a punishment range of imprisonment for not more than ninety-nine years or less than twenty-five years, or life. The trial court also admonished Appellant that, if he was not a citizen, his guilty plea could have immigration consequences and that his guilty plea would require him to register as a sex offender. The trial court also found that Appellant was competent and had entered a free and voluntary plea. Furthermore, prior to the trial court's acceptance of Appellant's guilty plea, Appellant asserted that he could read and write, was thinking clearly, and was pleading guilty freely and voluntarily and that his plea was not made as a result of a threat or promise. Appellant's trial counsel also acknowledged to the trial court that he thought that Appellant was competent to enter his guilty plea.

After the trial court's admonishments, the trial court verified that Appellant's initials were on the written plea admonishments, including the supplemental admonishments for sex offender registration requirements. Appellant's initials on those documents signified his understanding of those matters, and when queried by the trial court to confirm that understanding, Appellant responded, "Yes, Your Honor." After a review of the record, we find no evidence that Appellant failed to understand the consequences of his guilty plea. In addition, the record before us contains no evidence that Appellant's mental competency was an issue at the plea hearing.[5] Based on the record before us, the trial court properly admonished

[5]*See* Footnote No. 3.

Appellant and did not err when it did not conduct a further inquiry into Appellant's competency. *See Kuyava*, 538 S.W.2d at 628. We overrule Appellant's second issue.

C. Issue Three: Appellant's punishment was not cruel and unusual.

In his third issue, Appellant asserts that his punishment of confinement for fifty years constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment. He asserts that the length of the sentence is cruel and unusual because Appellant had no prior criminal history other than a previous DWI conviction. Appellant also asserts that confinement for fifty years exceeds the median sentence, 132 months, for sexual assault of a child.

We note that Appellant complained of the length of the sentence in a motion for new trial, which preserved this issue for appeal. *See* TEX. R. APP. P. 33.1(a). In reviewing a trial court's sentencing determination, "a great deal of discretion is allowed the sentencing judge." *Jackson v. State*, 680 S.W.2d 809, 814 (Tex. Crim. App. 1984). We will not disturb a trial court's decision as to punishment absent a showing of abuse of discretion and harm. *Id.* The Eighth Amendment prohibits grossly disproportionate sentences for an offense. *Bradfield v. State*, 42 S.W.3d 350, 353 (Tex. App.—Eastland 2001, pet. ref'd) (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)). However, "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Solem v. Helm*, 463 U.S. 277, 289–90 (1983) (alteration in original) (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)). When a sentence falls within the statutory range of punishment, it is generally not "excessive, cruel, or unusual." *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016). The statutory range of punishment for the first-degree felony of aggravated sexual assault of a child younger than the age of six is confinement for not more than ninety-nine years or less than twenty-five years, or life. PENAL § 22.021(f).

During punishment, the State introduced an audio recording of Appellant's interview with Texas Ranger Jason Shay, in which Appellant admitted he had twice sexually abused P.D., a child under the age of six. Ranger Shay also testified that he found Appellant's admission to being attracted to young girls a cause of concern. The State argued for a longer sentence than the minimum because of the threat that Appellant posed to young children, as shown by his possession of child pornography, his admitted attraction to young children, and his aggravated sexual assault of P.D. Based on the evidence presented, the trial court did not abuse its discretion by sentencing Appellant to confinement for fifty years. *See Pitcher v. State*, No. 11-10-00070-CR, 2010 WL 3449229, at *1 (Tex. App.—Eastland Sept. 2, 2010, no pet.) (mem. op., not designated for publication) (holding that the trial court did not abuse its discretion when it sentenced a defendant to confinement for seventy-five years for the sexual assault of his four-year-old daughter). The sentence was within statutory range, and there is nothing in the record to indicate that it was grossly disproportionate to his offense. We overrule Appellant's third issue.

III. *This Court's Ruling*

We affirm the judgment of the trial court.

MIKE WILLSON
JUSTICE

May 11, 2017

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

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