

AFFIRM; and Opinion Filed October 9, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-01044-CR

**ALFREDO BERNAL, JR, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the County Criminal Court No. 8
Dallas County, Texas
Trial Court Cause No. M16-23931-J**

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Schenck

Alfredo Bernal, Jr. appeals his conviction for evading arrest and detention. In his sole issue, Bernal contends the trial court erred in proceeding to a bench trial without first securing a written jury waiver from the State. We affirm the trial court's judgment. Because all issues are settled in the law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

Bernal was charged by information with evading arrest and detention. He entered a plea of nolo contendere. The plea paperwork indicates Bernal waived his right to a trial by jury and the right to a record of the proceeding. The trial judge and the attorney for the State did not sign the plea document. The case proceeded to trial before the court. The trial judge found Bernal guilty and sentenced him to 33 days' confinement in the Dallas County jail with no fine. This appeal followed.

DISCUSSION

Bernal contends that the trial court erred in proceeding to a bench trial without first securing the State's written waiver in compliance with article 1.13 of the Texas Code of Criminal Procedure. Article 1.13(a) provides:

The defendant in a criminal prosecution for any offense other than a capital felony case in which the state notifies the court and the defendant that it will seek the death penalty shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that, except as provided by Article 27.19, the waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the state. The consent and approval by the court shall be entered of record on the minutes of the court, and the consent and approval of the attorney representing the state shall be in writing, signed by that attorney, and filed in the papers of the cause before the defendant enters the defendant's plea.

TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (West Supp. 2016). Bernal relies on *State ex rel. Curry v. Carr*, 847 S.W.2d 561 (Tex. 1992), *Allen v. State*, 953 S.W.2d 769 (Tex. App.—Corpus Christi 1997, no pet.), and *Lawrence v. State*, 626 S.W.2d 56 (Tex. App.—Houston [1st Dist.] 1981, no writ) to argue that absent the mandatory written consent and approval of the State as set forth in article 1.13(a), the trial court did not have discretion to serve as a fact finder in his case. *Carr* and *Allen* are distinguishable from this case¹ and *Lawrence* was decided by the First District Court of Appeals before the Texas Court of Criminal Appeal decided *Shaffer*, which is controlling in this case. *Shaffer v. State*, 769 S.W.2d 943, 944 (Tex. 1989) *modified by*, 780 S.W.2d 801 (Tex. Crim. App. 1989).

The State's written consent to a defendant's jury waiver is meant to protect the State's right to insist on a jury trial even where a defendant wishes to waive a jury. *Id.* at 944. Thus, the State consent requirement protects the State's interest, not the defendant's, and the violation of

¹ In *Carr*, it was the State, not the defendant, who relied on article 1.13(a) to complain about the trial court's refusal to empanel a jury after the State refused to consent to a jury waiver and requested a jury trial. 847 S.W.2d at 561. In *Allen*, there was no waiver of a jury trial by the defendant or approved by the State. 953 S.W.2d at 771.

such a State protective rule, while constituting error, simply cannot constitute error to a defendant or from which a defendant can complain. *See id.* at 944; *Brown v. State*, No. 05-97-00173-CR, 1998 WL 337878, at *1 (Tex. App.—Dallas June 26, 1998, no pet.) (mem. op., not designated for publication). Accordingly, we conclude the State’s failure to give written consent to Bernal’s jury waiver, in violation of article 1.13, does not constitute error as to Bernal or from which Bernal can complain. Consequently, we overrule Bernal’s sole issue.

CONCLUSION

We affirm the trial court’s judgment.

/David J. Schenck/

DAVID J. SCHENCK
JUSTICE

DO NOT PUBLISH
TEX. R. APP. P. 47

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ALFREDO BERNAL JR, Appellant

No. 05-16-01044-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court
No. 8, Dallas County, Texas

Trial Court Cause No. M16-23931-J.

Opinion delivered by Justice Schenck.

Justices Lang and Evans participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 9th day of October, 2017.