

Opinion issued August 5, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00274-CR

J. MATILDA LUNA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1135822

MEMORANDUM OPINION

Appellant was convicted by a jury of the offense of aggravated sexual assault of a child. The State and appellant agreed to remove the punishment phase of the trial from the jury and to recommend to the court a 10-year sentence. The

trial court accepted the sentencing agreement and assessed appellant's punishment at confinement for 10 years. The trial court entered a "Trial Court's Certification of Defendant's Right of Appeal," which states "the defendant has waived his right of appeal." Appellant filed a pro se notice of appeal.

We abated the case and remanded to the trial court because a reporter's record had not been filed and because the clerk's record did not contain a written waiver of appeal. The trial court conducted an abatement hearing at which appellant, appellant's counsel, and a representative of the State were present.

In support of the "Trial Court's Certification of Defendant's Right of Appeal," the trial court stated the following:

Mr. Luna had a jury trial. At that trial he was found guilty of aggravated sexual assault of a child. At some point after the finding of guilt, the defense and the State entered into a plea bargain wherein on the record both sides indicated that instead of the jury assessing punishment that the defendant . . . that there was an agreement made and they were going to take the case from the jury and the defendant was going to agree to a 10-year sentence . . . the court followed that agreement and sentenced the defendant to 10 years in prison. It was also the Court's understanding and I believe the understanding of the parties that in exchange for that 10-year sentence, Mr. Luna was waiving his right to appeal.¹

¹ We note counsel for the State advised the trial court that at the time of sentencing agreement, she added a hand-written notation to the form language of the Trial Court's Certification of Defendant's Right of Appeal to reflect the parties agreement that appellant would waive his right of appeal "to all stages of the trial." The hand-written notation "to all stages of the trial" follows the typed statement "the defendant has waived his right of appeal" and supports the trial court's finding that the sentencing agreement included a waiver or appeal for both the guilt innocence stage of the trial and the punishment stage.

Appellant's counsel and counsel for the State both replied "That's correct."

At the court's request, counsel for the State explained the negotiations between the State and the defense to remove the punishment hearing from the jury and to proceed to a hearing before the court with a sentencing agreement that included a waiver of appeal:

After the jury found the defendant guilty of the offense of aggravated sexual assault of a child, we then went to the punishment stage. In that punishment stage I put the victim's mother on, who also testified she's been sexually assaulted. At that point the attorneys for the defendant came to me and asked if I would plead the case before it went to the jury for verdict to five years TDC. I told them I would take it back to the family. I did. We came back with a counter offer of 10 years TDC with the understanding that the case was over, that the defendant would not appeal the case. I was told that that was his agreement . . . we would have gone forward with a jury verdict had we not agreed to the case being over completely at that point.

Appellant's counsel advised the court that the State's recitation was accurate.

The trial court then made a finding that appellant "waived his right to appeal, that both sides agreed to take this case from the jury, waive jury, and release the jury in exchange for the 10-year plea bargain."

A valid waiver of the right to appeal will prevent a defendant from appealing without the consent of the trial court. TEX. CODE CRIM. PROC. ANN. art. 1.14(a)

(Vernon Supp. 2009); *Monreal v. State*, 99 S.W.3d 615, 617 (Tex. Crim. App. 2003). The Court of Criminal Appeals has held that when a defendant waives his right of appeal as part of an agreement on sentencing and the agreement is followed by the court his waiver is made knowingly, intelligently, and voluntarily. *See Ex parte Delaney*, 207 S.W.3d 794, 7989–9, (Tex. Crim. App. 2006). *See also Blanco v. State*, 18 S.W.3d 218, 219–20 (Tex. Crim. App. 2000). Based on the record before this Court, we find that the trial court’s certification that appellant has waived his right of appeal as shown on the “Trial Court’s Certification of Right of Appeal” form signed by the trial court, is supported by the record. TEX. R. APP. P. 25.2(a). Because appellant has no right of appeal, we must dismiss this appeal "without further action." *Chavez v. State*, 183 S.W.3d 675, 680 (Tex.Crim.App. 2006).

Therefore, we dismiss the appeal.

PER CURIAM

Panel consists of Chief Justice Radack and Justices Bland and Sharp.

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