Opinion issued January 13, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00524-CR

STEVE JENKINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Case No. 1178676

MEMORANDUM OPINION

Appellant Steve Jenkins pleaded guilty to aggravated robbery, and the trial court assessed punishment at life in prison pursuant to the habitual offender statute.

See TEX. PENAL CODE ANN. §§ 12.42(d), 29.03 (Vernon 2003 & Supp. 2010).[1] On appeal, Jenkins argues that his guilty plea was involuntary because the trial court improperly admonished him as to the range of punishment for aggravated robbery. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1) (Vernon Supp. 2010).

The trial court erred because the admonishments given to Jenkins indicated a maximum sentence of 99 years rather than life in prison, and for that reason did not substantially comply with the requirements of article 26.13(a)(1). Because Jenkins was not harmed by the error, we affirm.

Background Facts

Jenkins was indicted for aggravated robbery. He pleaded guilty and signed a "waiver of constitutional rights, agreement to stipulate, and judicial confession," in which he certified that he understood the allegations in the indictment and confessed that they were true. Jenkins also acknowledged that the prosecutor had not made a sentencing recommendation. The plea was signed by Jenkins, his counsel, the assistant district attorney, and the trial court.

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[1] The habitual offender statute provides that a defendant who has previously been convicted of two felony offenses "shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years." TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 2010). Jenkins had been convicted twice of felony burglary of a habitation and pleaded true to both enhancement paragraphs.

Jenkins also signed a set of admonishments, statements, and waivers, in which the trial court admonished him, in writing, that "[t]he punishment range [for aggravated robbery] is confinement in prison for 25 years–99 years TDCJ-ID and a fine of up to $10,000." Significantly for this appeal, Jenkins was 45 years old at the time the admonishments were given. He certified that he understood the charge against him, the nature of the proceedings, and the voluntary nature of his plea, and he acknowledged that he understood the admonishments and the consequences of his plea. Jenkins, his attorney, the assistant district attorney, the deputy district clerk, and the trial court all signed the admonishment form. There was no reporter's record made during the plea hearing, so there is no record of whether or how Jenkins was orally admonished before the trial court entered his plea.

The trial court heard evidence at the sentencing phase. Jenkins explained that he had a substance abuse problem and that he was using drugs when the robbery occurred. He testified that he was sorry for what he had done and asked the court to "have mercy" on him. On cross-examination, Jenkins acknowledged that the minimum sentence for aggravated robbery was 25 years. He also said, "I know I'm fixing to leave, and maybe I'll never get out of prison." During closing arguments, the State argued that Jenkins deserved a life sentence but recommended that he receive no less than 50 years' confinement. Jenkins's attorney argued that a

life sentence was too long and asked the trial court to be merciful. The trial court accepted Jenkins's guilty plea and assessed punishment at life in prison. The court's judgment states that Jenkins was convicted of aggravated robbery and sentenced to life in prison.

Analysis

In his sole issue, Jenkins argues that his guilty plea was involuntary because the trial court improperly admonished him regarding the applicable range of punishment. He contends that the punishment assessed by the trial court lies outside of the punishment range stated on the admonishment form, and therefore it does not substantially comply with the requirements of article 26.13(a)(1) of the Code of Criminal Procedure. He complains that he was misled by the punishment range indicated on the admonishment form, and he further contends that he would have opted for a jury trial had he known that he could be sentenced to life in prison.

Before accepting a guilty plea, the trial court is required to admonish the defendant of the range of punishment attached to the offense. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(1). While these admonishments are not constitutionally required, their purpose is to assist the trial court to determine whether the defendant knowingly and voluntarily relinquishes his rights, so as to ensure that only a constitutionally valid plea is entered and accepted by the court.

Aguirre-Mata v. State, 125 S.W.3d 473, 474 n.4 (Tex. Crim. App. 2003) (*Aguirre-Mata II*); *Carranza v. State*, 980 S.W.2d 653, 656 (Tex. Crim. App. 1998). Consistent with the requirements of the Fifth and Fourteenth Amendments, a guilty plea is valid only if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *See, e.g.*, *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 161 (1970); *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). If a plea is entered after a defendant is made fully aware of the plea's direct consequences, it is considered voluntary. *State v. Jiminez*, 987 S.W.2d 886, 888 (Tex. Crim. App. 1999). But if the plea is involuntary, it must be set aside. *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S. Ct. 1709, 1713 (1969); *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975).

I. Lack of substantial compliance

"In admonishing the defendant . . . substantial compliance by the court 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." TEX. CODE CRIM. PROC. ANN. art. 26.13(c) (Vernon Supp. 2010). Accordingly, an incorrect or incomplete admonishment will not result in reversible error, provided that: (1) the trial court undertakes to admonish the defendant as to the range of punishment, either orally or in writing; (2) it assesses punishment

within the range prescribed by law; and (3) the defendant fails to affirmatively show that his plea was involuntary. *Ramos v. State*, 928 S.W.2d 157, 160 (Tex. App.—Houston [14th Dist.] 1996, no pet.).

If the record shows that the trial court gave an incorrect admonishment regarding the range of punishment but the actual sentence is less than both the misstated maximum and the statutory maximum, then substantial compliance with article 26.31(a)(1) is attained. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (finding substantial compliance when defendant was admonished that punishment range was 2 to 10 years' confinement, or life, but actual statutory range was 2 to 10 years). When, however, the defendant receives a greater sentence than the court informed the defendant was possible, the admonishment does not substantially comply. *See Weekley v. State*, 594 S.W.2d 96, 97 (Tex. Crim. App. 1980), *abrogated on other grounds by Aguirre-Mata v. State*, 992 S.W.2d 495 (Tex. Crim. App. 1999) (*Aguirre-Mata I*). That is what happened here. The admonishments did not substantially comply with the requirements of article 26.13(a)(1) because Jenkins received a greater sentence—life—than the maximum sentence the court informed him was possible—99 years.

II. Non-constitutional harm analysis

When an admonishment does not substantially comply with the requirements of section 26.13(a)(1), the court must analyze harm under Rule 44.2(b) of the

Texas Rules of Appellate Procedure to determine if the trial court's noncompliance caused the plea to become involuntary. *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002); *Aguirre-Mata I*, 992 S.W.2d at 499. The court must disregard any error unless it affects the appellant's substantial rights. TEX. R. APP. P. 44.2(b); *Burnett* 88 S.W.3d 633, 637. An improper admonishment affects the appellant's substantial rights only if the record shows that the appellant's plea was involuntary, i.e., that he was not aware of the consequences of his plea and that he was misled or harmed by the improper admonishment. *Anderson v. State*, 985 S.W.2d 195, 198 (Tex. Crim. App. 1998) (citing *Carranza*, 980 S.W.2d at 657–58). Accordingly, the court should affirm unless, considering the record as a whole, it does not have a fair assurance that the defendant's decision to plead guilty would not have changed had the defendant been properly admonished. *Id.* at 198; *see VanNortrick v. State*, 191 S.W.3d 490, 492 (Tex. App.—Dallas 2006, pet. ref'd).

Relying on *Weekley v. State*, 594 S.W.2d 96 (Tex. Crim. App. 1980), Jenkins argues that the defendant need not demonstrate harm when the sentence imposed is outside the range of punishment referenced in the admonishments. *Id.* at 97. Jenkins also contends that his plea was involuntary because the written admonishments were misleading and that he would have sought a jury trial had he

known that he could be sentenced to life in prison as opposed to a maximum of 99 years.

While the trial court's admonishment as to the range of punishment did not substantially comply with article 26.13(a)(1), Jenkins misstates the applicable standard. The Court of Criminal Appeals in *Aguirre-Mata v. State*, 992 S.W.2d 495 (Tex. Crim. App. 1999), recognized the abrogation of *Weekley* and other similar cases that suggested harm is presumed whenever the trial court's admonishments do not substantially comply with article 26.13(a)(1). *See* 992 S.W.2d 497 n.2, 498–99. Instead, we now determine whether the trial court's failure to substantially comply with article 26.13(a)(1) affected the appellant's substantial rights; that is, did the improper admonishment render Jenkins's plea involuntary? *Aguirre-Mata II*, 125 S.W.3d at 473; *see VanNortrick*, 191 S.W.3d at 492; *Anderson*, 985 S.W.2d at 198. When reviewing the voluntariness of a guilty plea, the record is viewed as a whole and the voluntariness of a guilty plea is determined by the totality of the circumstances. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998); *Griffin v. State*, 703 S.W.2d 193, 196 (Tex. Crim. App. 1986); *Edwards v. State*, 921 S.W.2d 477, 479 (Tex. App.—Houston [1st Dist.] 1996, no writ).

Jenkins complains that his plea was involuntary because he was improperly admonished as to the range of punishment, and he contends that he would not have

pleaded guilty if he had understood the consequences of plea. However, he neither argues nor explains why knowing he was subject to the possibility of a life sentence would have resulted in him making a different decision than the one he made knowing he was subject to a possible sentence of 99 years. Jenkins certified that he was mentally competent, that his plea was given freely and voluntarily, and that he understood the charges against him and the nature of the proceedings. He also acknowledged that he understood the consequences of his plea. Nothing in the record suggests that Jenkins did not understand a maximum sentence of 99 years to be functionally equivalent to a maximum sentence of life imprisonment. Indeed, during the punishment hearing, Jenkins, who was 45 years old at the time, acknowledged that he may "never get out of prison." Without more, the mere contention that he would not have pleaded guilty does not demonstrate harm for the purpose of establishing that the plea was involuntary or unknowing because a guilty plea may be voluntary and intelligent even if the defendant was misled or confused about the sentence he could receive. *Ex parte Gibauitch*, 688 S.W.2d 868, 872 (Tex. Crim. App. 1985); *see also Aguirre-Mata II*, 125 S.W.3d at 474 n.4 (concluding that admonishments required by art. 26.13(a) are not constitutionally mandated but are designed to assist district judge in determining whether guilty plea is truly voluntary).

Moreover, *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463 (1970), and its progeny require only that the defendant be aware of the direct consequences of his guilty plea. *See* 397 U.S at 755–57, 90 S. Ct. at 1472–74. The only practical difference between a sentence of 99 years and life in prison relates to parole eligibility, which is a collateral consequence of the defendant's guilty plea. *Bell v. State*, 256 S.W.3d 465, 469 (Tex. App.—Waco 2008, no pet.) (citing *Ex parte Young*, 644 S.W.2d 3, 4 (Tex. Crim. App. 1983), *overruled on other grounds by Ex parte Evans*, 690 S.W.2d 274, 279 (Tex. Crim. App. 1985)); *see also Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985) (holding that State is not constitutionally required to furnish defendant with information about parole eligibility in order for defendant's guilty plea to be voluntary); *Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008) ("the majority of circuits deciding the issue have concluded that parole ineligibility is only a collateral consequence"). The record reflects that Jenkins understood that he might never get of prison. Accordingly, we conclude that his guilty plea was not involuntary or unintelligent because he was incorrectly admonished that the maximum punishment was for 99 years.

Conclusion

Because the record shows that Jenkins was aware of the consequences of his plea, we conclude that the trial court's failure to properly admonish him regarding the possibility of a life sentence did not mislead or harm him. *See Burnett*,

88 S.W.3d at 641. In the absence of any evidence that Jenkins's decision to plead guilty would have changed if the trial court had given a different admonishment, we hold that there is no evidence of harm and we overrule his sole issue.

We affirm the judgment of the trial court.

Michael Massengale
Justice

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

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