Opinion issued September 22, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00095-CR

GUADALUPE PEDRAZA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 506th District Court
Grimes County, Texas
Trial Court Case No. 16,537

MEMORANDUM OPINION

Appellant, Guadalupe Pedraza, pleaded guilty to the first degree felony offense of murder.[1] Appellant pleaded guilty in open court without an agreement

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[1] *See* TEX. PENAL CODE ANN. § 19.02(b)(2) (Vernon 2011).

as to punishment, and the trial court ordered a pre-sentence investigation report and set a sentencing hearing. After hearing evidence and argument of counsel, the trial court assessed appellant's punishment at thirty-two years' confinement. In two issues, appellant contends that (1) the trial court improperly considered the testimony of a probation officer concerning the contents of the pre-sentence investigation report during the sentencing hearing and (2) the trial court erred in accepting appellant's guilty plea because the record contains no written evidence of appellant's waiver of his right to a jury trial.

We affirm.

Background

Appellant participated in a drive-by shooting that resulted in the death of a woman. Appellant pleaded guilty to first degree murder. The record contains a document titled "Written Admonishments and Plea Bargain Agreement with Defendant's Written Waiver of Rights and Stipulation of Evidence." This document indicated that appellant was charged with one count of murder, a first degree felony, with a punishment range of five to ninety-nine years or life and a fine not to exceed $10,000. It contained admonishments regarding plea bargains, the citizenship ramifications of a guilty plea, and the right to appeal. Finally, this document stated that appellant had the right to a jury trial, the right to confront witnesses, the right against self-incrimination, and the right to be allowed certain

periods of time to prepare for trial. This document also indicated that appellant and the State had not agreed on any plea bargain terms, that the case was not a plea bargain case, and that appellant had the right to appeal. It was signed by the trial court, appellant, and his counsel.

On the record at the plea hearing, the trial court stated, "I have a document in my hands right here whereby you have apparently waived certain of your Constitutional rights; have you freely and voluntarily waived those rights?" Appellant replied yes, and also replied that he had freely and voluntarily signed the judicial confession. Appellant's trial counsel asked to enter some evidence of his advice to appellant and of appellant's decisions into the record in open court. Appellant, through his counsel's questioning, verified that counsel had advised him of the right to plead not guilty and the right to go to trial, and he verified that he was aware that the State had offered a plea bargain for thirty-five years' confinement, and that, although he was eligible for probation, the trial court was not likely to assess it in his case. Counsel concluded, "And it's your desire knowing all of these matters, knowing my advice, to go ahead and plead guilty and ask the judge to punish you in this matter, right?" Appellant responded, "Yes."

The trial court accepted appellant's guilty plea and ordered a pre-sentence investigation report ("PSI") prepared for consideration at the sentencing hearing. The PSI filed with the trial court indicated that appellant had no prior criminal

record, no current or past gang affiliations, and no history of medical or psychiatric problems. The PSI also stated that appellant had completed school through the eighth grade, appeared literate, but had never been employed. In the section of the report titled "Substance Abuse," it provided that appellant used cocaine and marijuana on a daily basis and that he used alcohol and ecstasy on a monthly basis. It stated that the information regarding appellant's drug use came from appellant and the offense report.

The narrative portion of the PSI elaborated further on appellant's drug use history. It stated:

> During the PSI process, a Substance Abuse Questionnaire (SAQ) was administered. This instrument measures the levels of drug and alcohol abuse, violent and antisocial behavior, aggressiveness and stress coping. The truthfulness scale associated with this instrument indicated it was an accurate profile. The alcohol scale scored in the problem risk range. It indicated that alcohol abuse was evident. Alcohol use or abuse is likely focal issues [sic]. It advised that an established pattern of alcohol abuse is indicated or the person is a recovering alcoholic. The drug scale scored in the problem risk range. It reported drug abuse is likely. An established pattern of drug abuse is evident or the person is recovering. The violence scale scored in the maximum risk range. Violent tendencies are indicated and a pattern of violence appears to be well established. Substance abuse, jealousy and perceived stress could escalate into violent behavior. This client is likely to be intimidating, threatening, dangerous and potentially brutal or savage. It indicated this is a violent person. The anti-social scale scored in the problem risk range. An established pattern of antisocial behavior is evident. Problem risk is characterized by many antisocial attitudes and behaviors as well as difficulty maintaining responsible relationships and loyalties. These individuals are frequently callous, irresponsible and lack a foundation of mutual affection or trust. Many are boastful, deceitful and given to tantrums

> or outbursts of rage. Poor work histories, nonpayment of bills and difficulty conforming to social norms are common. The aggressiveness scale scored in the maximum risk range. Serious problems with aggressiveness are evident. Irresponsible aggressiveness, over-sensitivity, low frustration tolerance and impulsivity can be expected. High risk scorers are quick to anger, often disruptive and can be antagonistic. Interpersonal and authority problems are likely. Perceived stress or substance abuse could exacerbate aggressiveness. The stress coping scale scored in the problem risk range. Stress coping skills are not well established. Stress is likely a focal area of concern. Stress is contributing to emotional and adjustment problems.

During the sentencing hearing conducted before the trial court, the State called Philip Cox, the supervising probation officer who prepared and submitted the PSI, to testify as to its contents. Cox confirmed that the questionnaire assessing substance abuse, risk for violence and aggression, and antisocial behavior was given to appellant.

Appellant then specifically objected to the trial court's consideration of Cox's testimony as to the results of the questionnaire pursuant to Texas Rules of Evidence 702, 703, and 705 and requested permission to take Cox on voir dire. On voir dire, Cox testified that he administered the questionnaire and that another employee of the community supervision correctional department scored the test. Appellant asked, "And so the underlying facts or data which the opinions are based in the substance abuse questionnaire you couldn't testify to that, could you?" Cox replied, "No, sir." Appellant restated his objection under Rules 702, 703 and 705 to "the opinions contained in the results of the substance abuse questionnaire."

The State responded that the procedures and testing at issue had already been established as scientifically valid and that Cox should be able to testify to the results he received. The trial court overruled appellant's objection, stating that "the opinions that are stated in [the PSI] may be reported. The underlying analysis and scoring procedures are not before the Court. Therefore, as to the procedures for arriving at it you would have a valid objection; but the opinions that are stated in the report are simply that, and therefore they are admitted."

Cox testified regarding the results of the substance abuse questionnaire, tracking the language of the PSI. Cox further testified that he could not recall another instance of an individual scoring in the maximum risk range on every category and that the questionnaire was frequently used to provide "guidance into where we might want to start in the rehabilitation process."

The trial court assessed appellant's punishment at thirty-two years' confinement. In addition to the other statutorily required information, the judgment states, in part:

> Both parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea [of guilty]. The Court then admonished Defendant as required by law. It appeared to the Court that Defendant was mentally competent to stand trial, made the plea freely and voluntarily, and was aware of the consequences of this plea. . . .

This appeal followed.

Consideration of the PSI

In his first issue, appellant argues that the "trial court erred in admitting expert testimony over objection because the reliability of that testimony was not shown." Specifically, appellant contends that the portion of the PSI discussing the results of the substance abuse questionnaire, which Cox read into the record, was inadmissible. Appellant's only objection to Cox's testimony regarding the PSI at trial challenged Cox's knowledge of the "facts or data [upon] which the opinions are based," which we construe as an argument that Cox was not the proper witness to present the information contained in the PSI. Appellant did not present any objections to the PSI filed with the trial court. The objection made at trial must comport with the complaint raised on appeal, or the argument is waived. *See* TEX. R. APP. P. 33.1(a); *Guevara v. State*, 97 S.W.3d 579, 583 (Tex. Crim. App. 2003). Thus, we limit our consideration to whether Cox's testimony regarding the contents of the PSI was proper.

Under the Texas Code of Criminal Procedure, when a judge is assessing punishment for an offense, a PSI is required to be submitted for consideration by the judge in nearly all non-capital felony cases where community supervision is a punishment option. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(a) (Vernon Supp. 2011); *Stringer v. State*, 309 S.W.3d 42, 45 (Tex. Crim. App. 2010). The PSI is designed to aid the judge in arriving at an appropriate punishment for the defendant

by providing background information on the circumstances surrounding a criminal offense, the defendant's criminal and social history, and "any other information relating to the defendant or the offense requested by the judge." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(a); *Stringer*, 309 S.W.3d at 45. If the trial court determines that drugs or alcohol may have played a role in the commission of the offense, the judge may also order a drug or alcohol evaluation to be included as part of the PSI. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(h). The portion of the PSI challenged on appeal in the instant case contains a drug and alcohol evaluation within the substance abuse section.

The contents of the PSI are not required to meet the standards of the Texas Rules of Evidence to be considered by a judge during the sentencing phase. *Smith v. State*, 227 S.W.3d 753, 762–63 (Tex. Crim. App. 2007); *Fryer v. State*, 68 S.W.3d 628, 631 (Tex. Crim. App. 2002). As a PSI is a written report that contains the evaluations and opinions of the probation officer charged with compiling the report, a PSI often contains opinions and factual summaries that would be considered hearsay if the Rules of Evidence applied. *See Fryer*, 68 S.W.3d at 631.

Here, appellant challenged Cox's testimony as to the derivation of the scores on the substance abuse questionnaire used in the PSI. Cox did not score the report itself, but simply submitted the scores for testing and then compiled the portion of the PSI evaluating substance abuse risk on the basis of the results of those scores.

The portion of Cox's testimony at trial to which appellant objected consisted of a summary of the contents of the PSI report. Because the consideration of the contents of a PSI report by a trial court is permitted by statute, there is no error in the trial court's consideration of Cox's testimony recounting the contents of the PSI he compiled. *See Stringer*, 309 S.W.3d at 46 ("[T]he information in the PSI is statutorily authorized.").

We overrule appellant's first issue.

Waiver of Jury Trial

In his second issue, appellant contends that the lack of a written waiver of his right to a jury trial is harmful error. Code of Criminal Procedure article 1.13(a) states in relevant part that a

> [d]efendant in a criminal prosecution for any offense other than a capital felony case . . . shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that such 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.

TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (Vernon 2005).

In *Johnson v. State*, the Court of Criminal Appeals held that the lack of a written jury waiver signed by the defendant is not harmful error when the record reflects that the defendant was aware of and waived his right to a jury trial. 72 S.W.3d 346, 349 (Tex. Crim. App. 2002). In *Johnson*, the judgment of the trial court reflected that the appellant affirmatively waived his right to a jury trial. *Id.*

The court observed that because the trial court's judgment reflected that the appellant waived his right to a jury trial and the appellant presented no direct proof of the judgment's falsity, an appellate court must presume that the judgment was correct. *Id.* The *Johnson* court reasoned that as there is no federal or state constitutional requirement that a jury waiver be in writing, a lack of written record of a jury waiver is evaluated as statutory error under Texas Rule of Appellate Procedure 44.2(b). *Id.* at 348; *see also* TEX. R. APP. P. 44.2(b) (providing that any non-constitutional "error, defect, irregularity, or variance that does not affect substantial rights must be disregarded"). The court held that when the judgment of the trial court reflects that an appellant affirmatively waived his right to a jury trial and no controverting evidence is presented to contest this fact, there is no harm from the statutory violation of article 1.13(a) because the record reflects that the appellant was aware of his right to a jury trial and opted for a bench trial instead. *Johnson*, 72 S.W.3d at 349; *see also Kmiec v. State*, 91 S.W.3d 820, 824 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (holding violation of article 1.13(a) harmless when appellant did not present direct evidence that recitation of jury waiver in judgment was false).

Here, although the record lacks a written jury waiver, it reflects that appellant affirmatively waived his right to a jury trial. As in *Johnson*, the

judgment of the trial court reflects that appellant affirmatively waived his right to a jury trial and the judgment evidence is uncontroverted. The judgment states that

> [b]oth parties announced ready for trial. Defendant waived the right of trial by jury and entered the plea [of guilty]. The Court then admonished Defendant as required by law. It appeared to the Court that Defendant was mentally competent to stand trial, made the plea freely and voluntarily, and was aware of the consequences of this plea. . . .

Appellant produced no evidence to refute the correctness of the judgment, so we must presume that the judgment is correct absent evidence of its falsity.

In addition to the evidence of a jury waiver found in the text of the judgment, the record reflects that appellant affirmatively waived his right to a jury trial. Before appellant pleaded guilty, his defense counsel admonished him in open court that he had a right to plead not guilty and a right to a trial by jury. Appellant responded that he was aware of these rights and chose to plead guilty and be sentenced by the judge.

Therefore, because the judgment and trial record consistently reflect that appellant waived his right to a jury trial, and appellant has presented no controverting evidence, we presume that appellant was aware of and waived his right to a jury trial. Thus, we hold that there was no harm from the violation of article 1.13(a). *See Johnson*, 72 S.W.3d at 349; *Kmiec*, 91 S.W.3d at 824.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

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