Opinion issued February 24, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00254-CR

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DEZMAN DURAN SCOTT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case Nos. 1157530 & 1227808

MEMORANDUM OPINION

Appellant, Dezman Duran Scott, was charged by indictment with the offense of aggravated robbery.[1] *See* TEX. PENAL CODE ANN. § 29.03 (Vernon 2003). In a separate indictment, appellant was charged with the offense of aggravated assault.[2] *See* TEX. PENAL CODE ANN. § 22.02 (Vernon Supp. 2010). Appellant pleaded guilty to both offenses and pleaded true to one enhancement allegation in each case.

Following the preparation of a presentence investigation ("PSI") report, the trial court conducted a sentencing hearing. At the hearing, the trial court found appellant guilty of each offense, found the enhancement allegations to be true, and found the deadly-weapon allegations contained in the indictments to be true. The trial court sentenced appellant to 30 years in prison for each offense, with the sentences to run concurrently. In one point of error, appellant contends that he received ineffective assistance of counsel in the trial court.

We affirm the judgment in each appellate cause.

Background

On March 6, 2008, 14-year-old D.W. was home alone. Unbeknownst to D.W., appellant, a stranger to D.W., entered the home. Appellant held D.W. at

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[1] Appellate cause number 01–10–00254–CR; trial court case number 1157530.

[2] Appellate cause number 01–10–00255–CR; trial court case number 1227808.

gunpoint while he collected items to steal. Before appellant left, D.W.'s mother, Yolanda, and other family members returned home. Appellant threatened Yolanda with the gun and fled.

Several days later, the complainants spotted appellant working at a neighborhood fast food restaurant. The complainants contacted the police, who arrested appellant. The police found several items in appellant's backpack that had been taken from the complainants' home.

In three separate indictments, appellant was charged with the offense of aggravated robbery and with two offenses of aggravated assault. The indictments also contained a single enhancement paragraph alleging that appellant had been convicted of the felony offense of burglary of a habitation in 2005.

Appellant pleaded guilty to the charge of aggravated robbery and to one of the charges of aggravated assault. He also pleaded true to the enhancement allegation in each indictment.

Before his pleas, the trial court orally admonished appellant regarding the consequences of his plea. The trial court also reviewed the plea papers and written admonishments that appellant had signed.

The trial court explained to appellant that, if proven, the enhancement allegation in each indictment increased the applicable sentencing range for each offense. The trial court informed appellant that if the State met its burden of proof

at trial regarding the primary offense of aggravated robbery and the enhancement allegation, the sentencing range was 15 to 99 years in prison and up to a $10,000 fine. The trial court also informed appellant that, if the aggravated assault offense and the enhancement allegation were proven at trial, the sentencing range was 5 to 99 years in prison and up to a $10,000 fine.

In each case, the written stipulation of evidence and judicial confession signed by appellant provided that, following a PSI and a sentencing hearing, the State would recommend to the trial court that appellant be sentenced to a minimum of 15 years in prison. A handwritten notation in the plea papers noted that such recommendation was without an agreed recommendation regarding punishment. The trial court reviewed this provision with appellant. The trial court further said to appellant, "There is no plea bargain, per se, there's [sic] recommendations. You will have the right to appeal whatever I assess in this case."

After the trial court finished reviewing the plea papers, appellant pleaded guilty to the offenses of aggravated robbery and aggravated assault. Appellant pleaded true to the enhancement allegation in each indictment. Following the pleas, the trial court stated that it found the pleas to be knowing and voluntary and accepted appellant's pleas. The court noted that it would wait until receiving the PSI report and conducting the punishment hearing to make its guilt findings,

although it had sufficient evidence to find appellant guilty of each offense at that time.

Only then did the State inform the trial court that it would be filing a motion to dismiss the second charge of aggravated assault to which appellant had not pleaded guilty. The court indicated that it would sign an order granting the motion.

A PSI report was prepared and admitted into evidence at the sentencing hearing. D.W. and Yolanda also testified for the State. They described the events of March 6, 2008, when appellant came into their home, held D.W. at gunpoint while stealing items, and then threatened Yolanda with a gun when she returned home. D.W. also testified that, at the time, she thought that appellant would kill her. After the robbery, D.W. had nightmares, refused to return to her mother's house, and underwent therapy. She stated that she continues to live with the fear that someone will come into her home. Yolanda also testified regarding her daughter's trauma.

In its closing argument, the State requested that appellant be sentenced to 30 years in prison for each offense. Appellant's counsel requested that appellant be sentenced to the minimum recommendation reflected in the plea papers, which was 15 years in prison.

The trial court sentenced appellant to 30 years in prison for each offense. In each case, the trial court signed, as required by Rule of Appellate Procedure

25.2(a)(2), a certification of appellant's right to appeal. The certifications each recite, "[T]his criminal case . . . is not a plea-bargain case, and the defendant has the right of appeal."[3]

Appellant did not file a motion for new trial in either case. These two appeals followed.

Ineffective Assistance of Counsel

In each appeal, appellant asserts one point of error. He contends that he received ineffective assistance of counsel in the trial court.

A. Applicable Legal Principles

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[3] The State contends that the Rule 25.2 certifications incorrectly reflect that the cases were not plea-bargain cases within the meaning of that rule. We disagree. Rule 25.2(a)(2) defines a plea-bargain case as one in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant. *See* TEX. R. APP. P. 25.2(a)(2). Here, the plea papers provide that the State would recommend a *minimum* sentence of 15 years. Such an agreement does not fit within the rubric of plea-bargain cases as contemplated by Rule 25.2. *See* TEX. R. APP. P. 25.2(a)(2); *cf. Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003) (explaining that agreement placing cap on punishment is plea bargain for purposes of Rule 25.2(a)(2)). The record also does not support the State's assertion that it dismissed the other aggravated assault charge against appellant in exchange for appellant's guilty pleas. *See Shankle*, 119 S.W.3d at 813 (explaining that charge bargaining in which State agrees to dismiss or refrain from bringing additional charges in exchange for guilty or no contest plea is plea bargain case for Rule 25.2 purposes). The record does not contain an agreement by appellant to plead guilty to the other two charges in exchange for the dismissal of the third charge. Instead, as it appears in the record, the State's decision to dismiss the third charge was a unilateral decision made after appellant pleaded guilty to the first two charges.

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. *See* U.S. CONST. amend. VI. To show ineffective assistance of counsel, a defendant must demonstrate both (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005). A failure to make a showing under either prong defeats a claim of ineffective assistance of counsel. *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003).

An appellant bears the burden of proving by a preponderance of the evidence that his counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*. at 814. We presume that a counsel's conduct falls within the wide range of reasonable professional assistance, and we will find a counsel's performance deficient only if the conduct is so outrageous that no competent attorney would have engaged in it. *Andrews*, 159 S.W.3d at 101.

B. Analysis

Appellant's ineffective assistance of counsel claim stems from the provision in the plea papers indicating that the State would recommend a minimum sentence of 15 years for each offense. Appellant contends that defense counsel's performance was deficient because counsel approved and signed the plea papers even though counsel knew that the State would recommend at least a 15-year sentence for appellant in each case.

In his appellate brief, appellant points out that "the plea admonishments were signed by Appellant's attorney and plainly state Appellant entered his plea with 'the consent and approval' of his attorney." Appellant contends, "[T]here is no plausible reason an attorney would approve of a plea that detrimentally caps his client's punishment without any benefit. In effect, Appellant gave up his valuable right to a trial and gave up any possibility of receiving deferred adjudication. In exchange, Appellant received no benefit whatsoever." Appellant asserts that counsel's approval of his pleas constitutes deficient representation.

In trying a case, a criminal-defense lawyer controls the progress of a case, except for three decisions that are reserved to the client: (1) how to plead to the charges against him; (2) whether to be tried by a jury or to the court; and (3) whether to testify in his own behalf. S*ee Burnett v. State*, 642 S.W.2d 765, 768 n.8 (Tex. Crim. App. 1982). Thus, the decision to plead guilty is the personal decision

of the accused. *See Moore v. State*, 4 S.W.3d 269, 276 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The Court of Criminal Appeals has held that "the only required duty of counsel under the most liberal construction when a plea of guilty is entered is that counsel should ascertain if the plea is entered voluntarily and knowingly." *Butler v. State*, 499 S.W.2d 136, 139 (Tex. Crim. App. 1973); *see Starz v. State*, 309 S.W.3d 110, 118 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd).

Here, appellant does not contend that his pleas were not entered voluntarily and knowingly. Nor does the record reflect as much. To the contrary, the record shows that the trial court orally admonished appellant and insured that appellant understood the written admonishments that he had signed earlier. *See* TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon Supp. 2010) (listing required admonishments).

The trial court informed appellant that he had a right to a trial by jury and that, by pleading guilty, he was waiving that right. The court also informed appellant regarding the sentencing range for each offense and the effect of the enhancement allegation on the possible sentences. The trial court read the plea papers to appellant, including the portion indicating that the State would recommend a minimum 15-year sentence in each case. Appellant indicated both orally and in writing that he understood the terms and conditions as provided in the

plea papers. After acknowledging that he understood and accepted the terms and conditions of his pleas, appellant indicated that he desired to plead guilty. The trial court found appellant to be mentally competent and to have entered the pleas freely, voluntarily, and knowingly.

Significantly, there is no assertion by appellant, or in the record, that his plea was involuntary because he was misinformed or misled by his counsel regarding the terms of the plea or the plea process. *See Fimberg v. State*, 922 S.W.2d 205, 208 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (explaining that a guilty plea is involuntary when based on erroneous information conveyed by trial counsel to defendant). Nor does appellant contend that that his plea was involuntary because his counsel failed to investigate the charges against him. *See Ex parte Briggs*, 187 S.W.3d 458, 468–69 (Tex. Crim. App. 2005) (granting habeas relief in case in which counsel failed to perform adequate investigation of case facts before defendant pleaded guilty).

In short, the record before us shows that appellant made a voluntary and informed decision to plead guilty with the full knowledge that the State would seek a minimum 15-year sentence against him. As the Court of Criminal Appeals has explained, "Trial counsel is in no position to prevent a defendant from knowingly and intelligently entering a plea of his choosing. Counsel exists to advise his client of the consequences of the defendant's actions." *Rodriguez v. State*, 899 S.W.2d

658, 666 (Tex. Crim. App. 1995). Here, the trial court verified that appellant was knowingly and intelligently entering his plea and that he had been advised of the detrimental effects of his plea, which, by implication, included the State's sentencing recommendations. Accordingly, the record shows that trial counsel performed his duty, in the context of a plea proceeding, to ensure that appellant's pleas were knowing and voluntary. *See Butler*, 499 S.W.2d at 139.

In addition, appellant did not file a motion for new trial in either case. We have no record to show what advice trial counsel gave with regard to the minimum 15 year sentence recommendation or why appellant chose to plead guilty with full knowledge of the minimum sentencing recommendations. *See Johnson v. State*, 176 S.W.3d 74, 79 (Tex. App.—Houston [1st Dist.] 2004, pet. ref'd) ("In the absence of a proper evidentiary record, it is extremely difficult to show that trial counsel's performance was deficient.").

We conclude that appellant has not shown, by a preponderance of the evidence, his counsel's representation fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. We hold that appellant has not shown that he received ineffective assistance of counsel when he pleaded guilty to the offenses of aggravated robbery and aggravated assault. Because appellant has not shown deficient representation by his trial counsel, we do not reach the second *Strickland* prong. *See Rylander*, 101 S.W.3d at 110–11.

We overrule appellant's sole point of error in each appeal.

Conclusion

We affirm the judgments of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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