

Affirmed and Memorandum Opinion filed December 21, 2010.



In The

**Fourteenth Court of Appeals**

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NO. 14-09-00955-CR

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**FLOYD FRAZIER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 177th District Court  
Harris County, Texas  
Trial Court Cause No. 1215000**

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**MEMORANDUM OPINION**

Floyd Frazier appeals his conviction for sexual assault of a child. In two issues, appellant contends that (1) the trial court erred in conducting a punishment hearing without appellant entering a plea of guilty in violation of his due process rights and Texas Code of Criminal Procedure article 27.13; and (2) his plea was involuntary because the trial court improperly admonished him. We affirm.

**I. Factual and Procedural Background**

Appellant was charged by indictment with sexual assault of a child. The indictment also contained two enhancement paragraphs for prior convictions. Appellant

initially pleaded not guilty. A jury was selected and then dismissed after the trial court granted a motion for mistrial.

Two days later, on November 4, 2009, the trial court held a hearing. Appellant stated at the outset of the hearing that he was weighing his options whether to proceed before another jury or before the court. After a discussion with the trial court about the range of punishment, the State's evidence, and appellant's defense, the following exchange took place:

**The Defendant:** I'll proceed, Your Honor.

**The Court:** That's what you want to do?

**The Defendant:** Yes, sir.

**The Court:** Come to me on punishment? Okay.

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**Appellant's Trial Counsel:** Okay. When I left [jail the previous night], it was my understanding that you wanted to plead guilty to the Judge and we would have a punishment hearing with live testimony and then you could even take the stand if you wanted to take the stand and testify in your own behalf; is that correct?

**The Defendant:** Correct.

**Appellant's Trial Counsel:** All right. Now, is it your choice today to go ahead and plead guilty to the Judge and have a live testimony punishment hearing in front of Judge Fine?

**The Defendant:** Yes, it is.

The State offered into evidence a "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" signed by appellant. Appellant stated that he understood by signing the document he was giving up rights and that the State need not bring any further evidence of guilt. The trial court inquired whether appellant signed the admonishment documents freely and voluntarily and whether appellant understood exactly what he was signing before he signed it; appellant responded affirmatively. The

trial court announced that it was accepting appellant's plea of guilty. The trial court then heard the testimony of several witnesses over the course of two days, including the complainant and appellant, and assessed punishment at 33 years' confinement.

## **II. Analysis**

### **A. Guilty Plea**

For the first time on appeal, appellant contends that the trial court erred by conducting a punishment hearing without appellant's entering a plea of guilty in violation of appellant's due process rights and Texas Code of Criminal Procedure article 27.13.<sup>1</sup> Assuming our ability to review this issue despite appellant's failure to raise the complaint in the trial court,<sup>2</sup> we hold that his contention lacks merit.

Article 27.13 of the Texas Code of Criminal Procedure provides that “[a] plea of ‘guilty’ . . . in a felony case must be made in open court by the defendant in person; and the proceedings shall be as provided in Articles 26.13, 26.14, and 27.02. If the plea is before the judge alone, same may be made in the same manner as is provided for by Articles 1.13 and 1.15.” Tex. Code Crim. Proc. Ann. art. 27.13 (West 2006). The intent of article 27.13 is “to establish that the accused voluntarily desires to plead guilty.” *Matchett v. State*, 941 S.W.2d 922, 930 (Tex. Crim. App. 1996). The statute does not require an oral plea. *Costilla v. State*, 146 S.W.3d 213, 217 (Tex. Crim. App. 2004). We evaluate the particular facts of this case to determine whether the trial court complied with the law. *Id.* at 217. Where the facts point to appellant's voluntary desire to plead guilty, the trial court has complied with the statute. *Id.*

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<sup>1</sup> While appellant notes that he did not enter a plea of “true” in court to the enhancement paragraphs, appellant does not assign error thereto. During the punishment phase, appellant admitted to the two convictions alleged in the enhancement paragraphs of the indictment.

<sup>2</sup> The Beaumont Court of Appeals held in *Costilla v. State* that this error can be raised for the first time on appeal; the Court of Criminal Appeals declined to address whether the complaint was procedurally barred. *See Costilla v. State*, 146 S.W.3d 213, 216 (Tex. Crim. App. 2004).

Here, the record establishes appellant's voluntary desire to plead guilty. While the better practice is for the trial court to inquire of the defendant personally what his plea is, appellant agreed with his trial counsel that it was his choice, on that day, before the judge, to "go ahead and plead guilty." *See id.* In addition, appellant signed the "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" in which he acknowledged that the allegations in the indictment were true and that he intended to enter a plea of guilty. His attorney signed the document stating that he believed appellant knowingly and voluntarily executed the document after his attorney had fully discussed its contents and its consequences. The trial court also signed the document stating that appellant had entered a plea of guilty, that appellant appeared to be mentally competent, and that his plea appeared to be free and voluntary. *See id.* (considering written acknowledgments, waivers, and stipulations along with other facts pointing to defendant's voluntary desire to plead guilty). Appellant stated in court that he understood the charge and the effect the enhancement paragraphs had on the charge. He also stated that he understood that by signing the "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," the State need not bring any further evidence of his guilt and that his signature and his plea of guilty were sufficient for the trial court to find him guilty.

Because the record establishes appellant's voluntary desire to plead guilty, we overrule appellant's first issue.

## **B. Effect of Statements Made by Trial Court**

In his second issue, appellant contends that his plea was induced by misinformation from the trial court. Specifically, appellant argues that the trial court made inaccurate statements about the punishment range, the State's evidence, and the viability of appellant's defense.

Texas Code of Criminal Procedure article 26.13 requires that, prior to accepting a guilty plea, the trial court must admonish the defendant. Tex. Code Crim. Proc. Ann. art.

26.13(a)(1) (West Supp. 2010). A guilty plea must be made freely and voluntarily. *Id.* art. 26.13(b). Admonishments may be given orally or in writing. *Id.* art. 26.13(d). Substantial compliance with the statute is sufficient unless a defendant affirmatively shows that he was not aware of the consequences of the plea and was also misled or harmed by the admonishment. *Id.* art. 26.13(c).

Appellant initialed and signed written admonishments. The trial court orally inquired of appellant whether he signed and initialed the admonishments freely and voluntarily and whether he understood what he was signing before he did so. Appellant does not argue that the written admonishments were inaccurate or misleading. Rather, appellant contends that the trial court provided him with misinformation, thereby inducing his guilty plea during the following discussion in open court:

**The Court:** I want you to understand what's on the table.

**The Defendant:** Uh-huh.

**The Court:** All right?

**The Defendant:** Yes, sir.

**The Court:** You're charged at 25 to life.

**The Defendant:** Yes, sir.

**The Court:** The minimum you can receive is 25 years.

**The Defendant:** Yes, sir.

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**The Court:** If the State tries a clean case — they've got DNA evidence, assuming they can — it's admissible —

**The Defendant:** Uh-huh.

**The Court:** — assuming they can get in evidence, they'll have your DNA evidence, the mother's DNA evidence, the child's DNA evidence showing

it's your child. That leaves no question but that statutory rape occurred or there was some sex going on.

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**The Court:** I don't know — I understand your defense is — what are — it's what Mr. Gonzalez said during opening statement.

**The Defendant:** Yes, sir.

**The Court:** That may work. A jury may say, "Okay. There's a reasonable doubt as to whether or not you acted intentionally or knowingly or recklessly in the commission of the offense." There's that possibility. You could go home. All right?

**The Defendant:** Yes.

**The Court:** Then there's the other possibility that they find you guilty. If they find you guilty, minimum 25 years. They cannot give you probation. And they're going to give you somewhere between 25 and 99.<sup>3</sup>

First, appellant contends that the trial court's statement about punishment was inaccurate because the punishment range of 25 years to 99 years or life would be correct only if appellant was found guilty of the charged offense and if both enhancement paragraphs were found true. Appellant was charged with sexual assault of a child, and the indictment contained two enhancement allegations. Based on the allegations in the indictment, the range of punishment was from 25 years to 99 years or life. Tex. Penal Code Ann. §§ 12.42(d), 22.011(f) (West Supp. 2009).<sup>4</sup> The trial court's statement corresponded with the allegations in the indictment and was not incorrect given the enhancement paragraphs. *See Teamer v. State*, 557 S.W.2d 110, 112 (Tex. Crim. App. 1977) (holding substantial compliance with article 26.13 when court correctly stated

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<sup>3</sup> Appellant also cites other statements made by the trial court about the likelihood that the jury would "cut [the punishment range] down the middle," the fact that "things don't look bright," and the trial court's ability to consider deferred adjudication. However, appellant does not articulate how, if at all, these statements were inaccurate, misleading, or harmful.

<sup>4</sup> Subsection 12.42(c)(2) lists exceptions to the punishment range stated in Subsection 12.42(d). Tex. Penal Code Ann. § 12.42(c)(2). Neither party contends that these exceptions apply in this case.

range of punishment with the enhancement paragraph). In addition, appellant initialed next to the same punishment statement for a habitual offender on the written admonishment and does not claim that the written admonishment was inaccurate or misleading.<sup>5</sup>

Appellant does not cite a particular admonishment in article 26.13 relating to the trial court's second and third statements notwithstanding his contention that these statements induced his guilty plea. Appellant argues that the trial court's statement about the State's evidence was inaccurate because it assumed the complainant's age, the accuracy of the DNA evidence, and that the only means by which the complainant could have become pregnant was through sexual intercourse. He also claims that the trial court misstated the requisite mens rea for the charged offense in that appellant could not have been found guilty if he had committed the act recklessly.

The indictment alleged that appellant intentionally and knowingly caused the penetration of the sexual organ of the complainant, a person younger than 17 years of age and not appellant's spouse, by placing his sexual organ in the complainant's sexual organ. The trial court stated that "if" the State tried a clean case and DNA evidence was admitted showing appellant was the father of the complainant's child, that evidence would leave no question that appellant had sexual contact with the complainant. The trial court also noted the possibility that the jury would find reasonable doubt based on appellant's defense.

Appellant signed the "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" that included the charge. Therefore, appellant was aware of the State's burden of proof before the trial court accepted appellant's guilty plea. Appellant

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<sup>5</sup> "[I]f it is shown on the trial of a felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by imprisonment in the institutional division of the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years[.]"

never stated that he did not understand the charge. In fact, he stated the opposite. Appellant has not affirmatively shown that he was unaware of the consequences of his plea and that the trial court's oral statements cited above harmed or misled him. Tex. Code Crim. Proc. Ann. art. 26.13(c). Accordingly, we overrule appellant's second issue.

### **III. Conclusion**

Having overruled appellant's issues, we affirm the trial court's judgment.

/s/ Adele Hedges  
Chief Justice

Panel consists of Chief Justice Hedges, Justice Yates and Senior Justice Mirabal.<sup>6</sup>

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<sup>6</sup> Senior Justice Margaret Garner Mirabal sitting by assignment.