Affirmed and Memorandum Opinion filed January 28, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00046-CR

ALFRED DEAN JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1409436

M E M O R A N D U M O P I N I O N

Appellant Alfred Dean Johnson appeals his conviction for aggravated robbery. In two issues appellant argues his plea of guilty was rendered involuntary because the trial court failed to properly admonish him as to the range of punishment. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was indicted for aggravated robbery with a deadly weapon. The

indictment alleged that appellant had been previously convicted of two felony offenses. Appellant entered a guilty plea to aggravated robbery with a deadly weapon. Appellant received the panoply of admonishments required by article 26.13 of the Code of Criminal Procedure, including an admonishment that the range of punishment for the offense was "confinement in prison for 25–life." Appellant entered his plea without an agreed recommendation on punishment. A presentence investigation was conducted, and the trial court held a punishment hearing. No evidence other than the presentence investigation report was introduced at the punishment hearing. At the conclusion of the hearing the trial court found appellant guilty of aggravated robbery, found the two enhancement paragraphs true, and assessed punishment at 30 years in prison.

II. ANALYSIS

A. Due Process

In his first issue appellant argues the trial court violated his Fifth Amendment right to due process rendering his guilty plea involuntary by failing to admonish him of the punishment range.

Federal due process requires that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). A criminal defendant who enters a plea of guilty, by definition, has relinquished his Sixth Amendment rights to a trial by jury and to confront the witnesses against him, as well as his Fifth Amendment privilege against self-incrimination. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). "For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Appellant argues that the Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969), held that a violation of due process occurs if the record does not affirmatively demonstrate that appellant understood all of the constitutional rights he was waiving. To the contrary, "the Supreme Court in *McCarthy v. United States*, which was decided during the same term as *Boykin*, expressly stated that the admonishments in the federal equivalent of Article 26.13(a) have 'not been held to be constitutionally mandated' and that these admonishments are 'designed to assist the district judge in making the constitutionally required determination that the guilty plea was truly voluntary.'" *Aguirre-Mata v. State*, 125 S.W.3d 473, 475–76 (Tex. Crim. App. 2003) (quoting *McCarthy*, 394 U.S. at 465).

So long as the record otherwise affirmatively discloses that appellant's guilty plea was adequately informed, due process is satisfied. *Davison v. State*, 405 S.W.3d 682, 687 (Tex. Crim. App. 2013). For appellant to prevail on his constitutional claim, therefore, it is not enough that the record is unrevealing with respect to whether he was admonished by the trial court; the record also must be silent with respect to whether he otherwise was provided, or nevertheless was aware of, the requisite information to render his guilty plea voluntary and intelligent. *Id.*

On appeal, appellant argues he made an affirmative showing that he did not understand the consequences of his plea despite evidence of the trial court's admonishments. Prior to sentencing, appellant wrote a letter to the trial court that he argues is evidence of an affirmative showing that he did not understand the consequences of his plea. In the letter appellant wrote, "I am charged with aggravated robbery with a deadly weapon cause #1409436 out of the 182nd District Court of Harris County, Texas. I have pled guilty freely and voluntarily to the offense. I understand the full range of punishment and I have pled to a pre-

sentence investigation report and will have a sentencing hearing." On the second page of the letter appellant wrote, "Your Honor I know you can sentence me to any amount of prison time, from dropping it to a lesser charge for timed [sic] served or any amount of prison time." Appellant argues that his misunderstanding that the court could sentence him to "time served" is evidence that he was not properly admonished on the full range of punishment.

In the admonishment form signed by appellant, he was admonished with respect to each of the particular constitutional rights mentioned in *Boykin* that a defendant pleading guilty necessarily waives—trial by jury, confrontation, and the privilege against self-incrimination. Thus, the record is not altogether silent with respect to whether appellant understood the consequences of his plea. The court of criminal appeals has held that a trial court's failure to admonish a guilty-pleading defendant on the range of punishment does not render a guilty plea invalid under *Boykin*. *Aguirre-Mata*, 125 S.W.3d at 475, n. 7. Even assuming that a silent record with respect to appellant's awareness of the range of punishment is alone sufficient to trigger *Boykin*'s appellate presumption, the record is not totally "silent" with respect to appellant's knowledge of the applicable range of punishment when he entered his plea.

Appellant was properly admonished that the range of punishment he faced was between 25 years and life in prison. In a portion of his handwritten letter to the trial court appellant acknowledged that he understood the punishment range. From the record as a whole it may be inferred that, although appellant's guilty plea was open, not negotiated, he did not plead in ignorance of the applicable range of punishment. Thus, the record fails to engage *Boykin*'s appellate presumption that due process was violated because appellant entered an involuntary guilty plea. We overrule appellant's first issue.

B. Article 26.13 of the Texas Code of Criminal Procedure

In his second issue appellant argues the trial court violated his statutory right to voluntarily enter a knowing and intelligent plea by failing to admonish him of the punishment range.

Article 26.13(a)(1) mandates that, "[p]rior to accepting a plea of guilty or plea of nolo contendere, the court shall admonish the defendant of . . . the range of punishment attached to the offense[.]" Tex. Code Crim. Proc. Ann. art. 26.13(a)(1) (West Supp. 2015). Although the statute is intended to facilitate the entry of adequately informed pleas of guilty or nolo contendere, any claim that the trial court failed to follow the mandate of the statute is separate from the claim that the guilty plea was accepted in violation of due process. *Anderson v. State*, 182 S.W.3d 914, 918 (Tex. Crim. App. 2006). Substantial compliance with the requirements of article 26.13 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. Tex. Code Crim. Proc. Ann. art. 26.13(c).

A plea of guilty is not rendered involuntary because the resulting sentence is greater than expected. *Enard v. State*, 764 S.W.2d 574, 575 (Tex. App.—Houston [14th Dist.] 1989, no pet.). The record reflects the trial court complied with article 26.13 in admonishing appellant on the correct range of punishment for the offense charged. Appellant signed the written admonishments that stated the correct range of punishment for that offense. Moreover, the judgment recites that appellant was admonished "as required by law."

We presume that the admonishment was properly given absent competent proof in the record to the contrary. *Brown v. State*, 917 S.W.2d 387, 390 (Tex. App.—Fort Worth 1996, pet. ref'd). The only evidence that arguably rebuts the presumption that appellant was admonished properly as the judgment recitals

indicate is appellant's self-serving statement that he thought the trial court could reduce the charge and sentence him to time served. This statement is insufficient to overcome the presumption of regularity in the record. *See Reeves v. State*, 500 S.W.2d 648, 649 (Tex. Crim. App. 1973). Appellant's statements made in the letter to the trial court are insufficient to overcome the presumption that his plea was voluntary. There is no other competent evidence in the record to support appellant's claim regarding his understanding of the full range of punishment.

The record as a whole does not affirmatively show that appellant was unaware of the range of punishment for the offense of aggravated robbery with convictions for two prior felony offenses. The record therefore does not support appellant's claim that his plea was involuntary on that basis. We overrule appellant's second issue.

We affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.
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