

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-17-00308-CR

MARK ANTHONY SORRELLS, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 75th District Court
Liberty County, Texas
Trial Cause No. CR32828

MEMORANDUM OPINION

Appellant Mark Anthony Sorrells¹ appeals his conviction for possession of a controlled substance as an habitual offender. In issues one and two, Sorrells complains that the trial court erred by failing to advise him about the privilege of self-incrimination and the right to confront and cross-examine witnesses prior to Sorrells pleading guilty. In issue three, Sorrells contends that the trial court erred by

¹The clerk's record reflects that Mark Anthony Sorrells is also known as Danny Mark Reedy.

failing to substantially comply with article 26.13 of the Texas Code of Criminal Procedure prior to accepting his guilty plea. In issue four, Sorrells contends that the judgment should be modified to reflect additional jail time credit. We affirm the trial court's judgment.

Background

A grand jury indicted Sorrells for possession of a controlled substance, a state jail felony, and the indictment included several enhancement paragraphs. *See* Tex. Health & Safety Code Ann. § 481.115(b) (West 2017); Tex. Penal Code Ann. § 12.425 (West Supp. 2017). Sorrells was tried jointly for the offenses of felony possession of a controlled substance and aggravated assault with a deadly weapon, which both arose from the same transaction. Prior to opening statements, Sorrells pleaded “guilty” to possession of a controlled substance. The jury found Sorrells guilty of the felony offense of possession of a controlled substance, and not guilty of aggravated assault. Sorrells elected to have the jury assess punishment, and Sorrells pleaded “true” to the enhancement paragraphs. The jury found the enhancement paragraphs to be true, and assessed punishment at twenty years of confinement and a \$5000 fine.

Sorrells filed a motion for new trial, in which he argued that his trial counsel was ineffective for failing to advise him regarding the range of punishment prior to

entering his guilty plea. According to Sorrells, had he known that the enhancement allegations subjected him to an increased range of punishment, he would not have pleaded guilty to the offense. Sorrells argued that he was harmed by his counsel's failure to properly advise him, and that his guilty plea was not entered freely and voluntarily. In an affidavit in support of his motion for new trial, Sorrells averred that trial counsel advised him that the case at issue was a state jail felony and that he would get time served. Sorrells filed a motion to withdraw his guilty plea.

The trial court conducted a hearing on Sorrells's motion for new trial, during which the trial court took judicial notice of the court's file and considered Sorrells's affidavit in support of his motion for new trial, as well as a partial transcript from the trial that included Sorrells's plea in open court. The State presented the affidavit of Sorrells's trial counsel, in which counsel averred that Sorrells was fully aware of the trial strategy, and Sorrells understood the consequences of pleading guilty and the full range of punishment. Counsel explained that she had shown Sorrells pictures of the evidence in his possession case as well as the laboratory results, and that Sorrells had signed an acknowledgement regarding their discussion and Sorrells's review of the State's discovery.

Counsel averred that after she and Sorrells had discussed various trial strategies, Sorrells decided to plead guilty to the possession case, because "[h]e was

aware that when he was arrested he did possess methamphetamine, thus entering a plea of guilty was acceptable to him.” Counsel further averred that Sorrells had always maintained he was innocent of committing aggravated assault and “the trial strategy was to show the jury that he was accepting responsibility for the case he was guilty in and fighting the other case.” Counsel maintained that she informed Sorrells of the possible range of punishment, that pleading guilty would automatically lead to a punishment phase, and that although the possession case was a state jail felony, “the enhancement[] paragraphs in the indictment . . . could bump it up to a Second Degree Felony.” Counsel explained that she never told Sorrells that he would get time served, and that Sorrells was aware that with the enhancements he was facing two to twenty years confinement in a state penitentiary.

Counsel further averred that against her advice, Sorrells insisted on testifying during the guilt-innocence phase of the trial, and that during the trial, Sorrells admitted to possessing the methamphetamine and using drugs. Counsel explained that during the punishment phase, Sorrells pleaded “true” to the enhancement paragraphs and testified about his medications and traumatic brain injury.

The trial court denied Sorrells’s motion for new trial. The trial court noted that Sorrells did not decide to plead guilty until after the jury was seated and the indictments were read, and that it “became clear to the court that this was pure trial

strategy on behalf of the defendant and the defense counsel[.]” According to the trial court, the trial strategy worked well because the jury found Sorrells not guilty of aggravated assault, but it put the trial court in a dilemma because if it would have admonished Sorrells concerning the cross-examination and confrontation of witnesses when he pleaded guilty, there could have been a complaint that the jury had been tainted. The trial court inquired as to whether Sorrells was pleading guilty freely, voluntarily, knowingly, and without threat or coercion, and Sorrells acknowledged that he was.

Analysis

In issues one and two, Sorrells complains that the trial court erred by failing to advise him about his right against self-incrimination and the right to confront and cross-examine witnesses prior to Sorrells entering this guilty plea. *See* U.S. Const. amends. V, VI. Sorrells contends that the trial court violated his due process rights by failing to obtain waivers of these rights. *See id.* amend. XIV. According to Sorrells, he was not advised about his right against self-incrimination until after the State rested its case on guilt innocence, and there was no legitimate cross-examination of the State’s witnesses regarding the acquisition, chain of custody, or laboratory testing of the methamphetamine that was the subject of the case.

A guilty plea involves, among other things, a waiver of defendant's rights to be tried by a jury, to confront his accusers, and to invoke his privilege against compulsory self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Ex parte Palmberg*, 491 S.W.3d 804, 807 (Tex. Crim. App. 2016). For a waiver to be effective, it must be made voluntarily, knowingly, and intelligently. *Ex parte Barnaby*, 475 S.W.3d 316, 322 (Tex. Crim. App. 2015). In the absence of a sufficient awareness of the circumstances surrounding his plea and the likely consequences of pleading guilty, a defendant cannot be said to have waived his constitutional rights voluntarily, knowingly, and intelligently. *Id.* The question is whether the defendant's plea was truly voluntary under all the facts and circumstances. *Id.* at 323. To be valid under the Due Process Clause, a defendant's waiver must be "an intentional relinquishment or abandonment of a known right or privilege." *Davison v. State*, 405 S.W.3d 682, 686-87 (Tex. Crim. App. 2013) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

For a defendant to prevail on his constitutional claims, it is not enough to show that he was not admonished by the trial court; "the record must also be silent with respect to whether he was *otherwise* provided, or nevertheless aware of, the requisite information to render his guilty plea voluntary and intelligent." *Id.* at 687. A defendant's awareness that he was waiving his constitutional rights by pleading

guilty can be reasonably inferred from the record. *Gardner v. State*, 164 S.W.3d 393, 398-99 (Tex. Crim. App. 2005). Trial strategy may show the voluntary nature of a defendant's guilty plea, indicating that the plea was part of a trial strategy done in consultation with competent counsel to persuade the jury. *Id.* at 399.

Whether a defendant understood that he was waiving his rights by pleading guilty can also be reasonably inferred from the transcript. *See id.* During the hearing on Sorrells's motion for new trial, the trial court noted that Sorrells elected to testify on his own behalf during the guilt-innocence phase, and Sorrells's counsel requested that the trial court reopen the evidence to allow Sorrells to testify. The trial court explained that it conducted a hearing outside the presence of the jury admonishing Sorrells that he had the absolute right under the Fifth Amendment not to testify, but Sorrells insisted on testifying against the advice of his counsel.

The record shows that Sorrells acknowledged that he was pleading guilty voluntarily and knowingly. During the guilt-innocence phase, Sorrells testified that he had pleaded guilty in nine previous cases and had served time in jail and prison, and he explained that "I have always if I was guilty of something I owned up to it and I pled guilty. I didn't waste anybody's time." Sorrells testified that on the day he was arrested for possession of a controlled substance, he was under the influence of methamphetamine, which he did not have a prescription for, and had brought the

methamphetamine to work. Sorrells explained that he wanted to testify because he has “a right to say that I didn’t do it.” Sorrells maintained that he was guilty of possession of a controlled substance, but not guilty of aggravated assault with a deadly weapon. During closing argument, Sorrells’s counsel reminded the jury that Sorrells had taken “a big gamble in testifying[.]” and that Sorrells “did own up to the methamphetamines[.]”

We conclude that the record in this case shows that Sorrells understood that he was waiving his constitutional rights by pleading guilty. *See Gardner*, 164 S.W.3d at 399. Because Sorrells has failed to show that his due process rights were violated or that his guilty plea was not voluntarily or understandably made, we overrule issues one and two. *See Boykin*, 395 U.S. at 243; *Ex parte Barnaby*, 475 S.W.3d at 322; *Davison*, 405 S.W.3d at 686-87.

In issue three, Sorrells contends that the trial court erred by failing to substantially comply with article 26.13 of the Texas Code of Criminal Procedure prior to accepting his guilty plea. Tex. Code Crim. Proc. Ann. art. 26.13(a)(1) (West Supp. 2017).² According to Sorrells, the trial court did not provide any written admonishments or orally admonish Sorrells regarding the range of punishment, and

² We cite to the current version of article 26.13 of the Texas Code of Criminal Procedure, because the subsequent amendments do not affect the outcome of this appeal.

failed to inquire about Sorrells's mental competence. Sorrells argues that he was harmed by the trial court's failure to substantially comply with article 26.13, because he was not aware of the greater range of punishment attached to the offense at the time he entered his guilty plea. Sorrells presented his complaint in his motion for new trial.

Prior to accepting a plea of guilty, a trial court must admonish the defendant of the range of punishment attached to the offense. *Id.* A defendant is not made aware of the full consequences of his guilty plea if he is not admonished of the punishment he could receive if the enhancement allegations are proven true. *Taylor v. State*, 591 S.W.2d 826, 828 (Tex. Crim. App. 1980); *Lockett v. State*, 394 S.W.3d 577, 580 (Tex. App.—Dallas 2012, no pet.). It is the trial court's obligation to warn a defendant of the full consequences of his plea, including the full range of punishment available through enhancement. *Lockett*, 394 S.W.3d at 580. Because the record shows that the trial court failed to admonish Sorrells on the applicable punishment range prior to entering Sorrells's guilty plea, we conclude that the trial court failed to comply with the mandate of article 26.13(a)(1). *See Lockett*, 384 S.W.3d. at 581.

The admonishments under article 26.13(a) have not been held to be constitutionally mandated. *Aguirre-Mata v. State*, 125 S.W.3d 473, 476 (Tex. Crim. App. 2003) (citing *McCarthy v. United States*, 394 U.S. 459 (1969)). Thus, a trial

court's failure to admonish a guilty-pleading defendant on the range of punishment is nonconstitutional error, subject to the harm analysis under Rule 44.2(b) of the Texas Rules of Appellate Procedure. *Id.* at 473; *see* Tex. R. App. P. 44.2(b). Under Rule 44.2(b), we must disregard the error unless it affected the defendant's substantial rights. Tex. R. App. P. 44.2(b); *Burnett v. State*, 88 S.W.3d 633, 637 (Tex. Crim. App. 2002). In the context of a guilty plea, an error affects a defendant's substantial rights when, considering the record as a whole, we do have fair assurance that the decision to plead guilty would not have changed had the trial court properly admonished the defendant. *Anderson v. State*, 182 S.W.3d 914, 919 (Tex. Crim. App. 2006); *Moore v. State*, 278 S.W.3d 444, 448 (Tex. App.—Houston [14th Dist.] 2009, no pet.). We must review the entire record to determine whether anything in the record suggests that the defendant did not know the full range of punishment available through enhancement. *Burnett v. State*, 88 S.W.3d at 638; *Lockett*, 394 S.W.3d at 581.

Based on our review, nothing in the record suggests that Sorrells was unaware of the range of punishment to which he would be subject if the enhancement allegations were proven, and that, if he had known it, he would have pleaded not guilty. *See Aguirre-Mata*, 125 S.W.3d at 476-77; *Burnett*, 88 S.W.3d at 637-38. The record shows that prior to trial, the State gave Sorrells's counsel notice of its intent

to use Sorrells's extraneous offenses and prior convictions during the punishment phase. During Sorrells's arraignment, Sorrells pleaded "not guilty" to the offense of possession of a controlled substance, and Sorrells acknowledged that he had read the indictment charging him with possession of a controlled substance, which contained enhancement paragraphs and an habitual count. During voir dire, the State explained that the possession case was a state jail felony with a punishment range of up to two years, but that the range could change if additional facts were proven. During the guilt-innocence phase of trial, Sorrells testified that he understood that by pleading guilty he faced a number of years in prison.

The record further shows that during punishment, Sorrells pleaded "true" to the enhancement paragraphs. During his opening statement, the prosecutor explained to the jury that in light of Sorrells pleading true to the enhancements, the offense changed to a state jail habitual offender felony with a punishment range from two to twenty years. Sorrells's counsel did not object to the State's exhibits containing the three final conviction judgments for the offenses in the enhancement paragraphs to which Sorrells pleaded true. Sorrells testified during punishment and admitted that he had pleaded guilty to possession of a controlled substance, he was a drug user, and he understood that his punishment would include prison time. The record also shows that Sorrells's counsel did not object to the jury charge, which

instructed the jury that Sorrells had pleaded “true” to the enhancement paragraphs and that he must be punished for a felony of the second degree. Considering the record as a whole, we have fair assurance that Sorrells’s decision to plead guilty would not have changed had the trial court properly admonished him. *See Anderson*, 182 S.W.3d at 919; *Moore*, 278 S.W.3d at 448. Accordingly, the trial court’s error did not affect Sorrells’s substantial rights. *See Tex. R. App. P. 44.2(b); Anderson*, 182 S.W.3d at 919.

In his issue three argument, Sorrells also complains that the trial court failed to inquire about his mental competence, but Sorrells failed to point to anything in the record suggesting that he was not mentally competent. *See Tex. Code Crim. Proc. Ann. art. 26.13(b)* (West Supp. 2017) (providing that no guilty plea shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary). Because the record contains no evidence suggesting that Sorrells may be incompetent, the trial court was not required to sua sponte conduct a mandatory informal competency inquiry to determine where there was some evidence that would support a finding of incompetence. *See Tex. Code Crim. Proc. Ann. art. 46B.004(b), (c)* (West Supp. 2017); *Dominguez v. State*, 535 S.W.3d 125, 136 (Tex. Crim. App.—El Paso 2017, no pet.); *Rodriquez v. State*, 329 S.W.3d 74, 77 (Tex. App.—Houston [14th Dist. 2010, no pet.).

The record shows that Sorrells's counsel never suggested that Sorrells may have been incompetent. The trial court engaged in extensive dialogue with Sorrells regarding the voluntariness of Sorrells's guilty plea and Sorrells's decision to testify in the guilt-innocence phase of the trial against the advice of his counsel, and that dialogue allowed the trial court to reasonably conclude that there was no evidence to suggest that Sorrells was incompetent. The trial court asked Sorrells if he understood his Fifth Amendment right not to testify and the consequences of waiving that right. The trial court also inquired as to whether Sorrells understood that the State would be allowed to cross-examine him regarding his prior convictions for the purpose of impeachment. After receiving admonishments from his counsel and explanations from the trial court concerning the consequences of waiving his right, Sorrells elected to testify on his behalf. Based on this record, we cannot conclude that the trial court abused its discretion by failing to sua sponte conduct a mandatory informal competency inquiry to further inquire into Sorrells's competency. *See Luna v. State*, 268 S.W.3d 594, 599-600 (Tex. Crim. App. 2008). We overrule issue three.

In issue four, Sorrells contends that the judgment should be modified to reflect additional jail-time credit. Sorrells argues that the aggravated assault charge and the possession charge constitute the same case for purposes of presentence jail-time credit because his possession case arose solely because of his arrest for aggravated

assault. The State argues that Sorrells has failed to show that he is entitled to additional jail-time credit.

The record shows that Sorrells was arrested for aggravated assault with a deadly weapon and possession on January 29, 2016. On March 23, 2016, a grand jury indicted Sorrells for aggravated assault with a deadly weapon, and two days later, Sorrells posted a \$20,000 bond in the aggravated assault case and a \$10,000 bond in the possession case. In July 2016, Sorrells failed to appear for docket call in the aggravated assault case, and the trial court ordered his bond to be forfeited and issued a *capias* for his arrest. On October 13, 2016, a grand jury indicted Sorrells for possession of a controlled substance. On October 28, 2016, the trial court issued an order discharging the surety's liability on Sorrells's bond in the possession case due to Sorrells being incarcerated for theft, and the trial court ordered the court clerk to issue a *capias* for Sorrells's arrest in the possession case. The clerk's record indicates that Sorrells's projected release date for the theft offense was March 11, 2017. Although the *capias* in the possession case was issued in October 2016, the clerk's record indicates that it was not executed until March 10, 2017, at which time Sorrells was arrested for possession.

During sentencing, the trial court gave Sorrells credit for any time that he had been incarcerated. The trial court's judgment indicates that Sorrells received time

credited from “1/29/2016 to 3/29/2016” and from “3/10/2017 to 7/25/2017[.]” Sorrells filed a motion to enter a Nunc Pro Tunc Order, asking the trial court to correct the time to be credited toward his sentence. According to Sorrells, the trial court should give him credit for time served from August 1, 2016 to March 10, 2017, or in the alternative from October 28, 2016 to March 10, 2017.

The trial court is required to give a defendant credit on his sentence for the time that the defendant spent in jail, including the time from his arrest and confinement until his sentence by the trial court. Tex. Code Crim. Proc. Ann. art. 42.03, § 2(a) (West Supp. 2017);³ *see also* Tex. R. App. P. 23.2(b). The trial court must award jail-time credit in each cause that was an independent and sufficient cause of detention. *Ex parte Crossley*, 586 S.W.2d 545, 546 (Tex. Crim. App. 1979). “[T]he credit at issue relates not just to any time the defendant spent incarcerated before conviction. Rather, it is the time one is incarcerated for the case in which he is ultimately tried and convicted.” *Collins v. State*, 318 S.W.3d 471, 473 (Tex. App.—Amarillo 2010, pet. ref’d).

³We cite to the current version of article 42.03 of the Texas Code of Criminal Procedure, because the subsequent amendments do not affect the outcome of this appeal.

Because Sorrells is only entitled to jail-time credit for the time he spent in jail on the possession charge for which he was convicted, we hold that Sorrells is not entitled to jail-time credit for time he spent in jail relating to the aggravated assault charge, including the time he was detained for forfeiting his bond. *See id.* Because the record shows that the trial court awarded jail-time credit based on the periods of time that Sorrells spent in jail for the possession charge, we overrule issue four. Having overruled all of Sorrells's issues, we affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on March 15, 2018
Opinion Delivered May 2, 2018
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.