



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-17-00090-CR

TREY ANDERSON A/K/A ATTRAYELLE ANDERSON, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from County Court at Law No. One
Lubbock County, Texas
Trial Court No. 2016-486,238; Honorable Mark Hocker, Presiding

May 30, 2018

MEMORANDUM OPINION

Before **CAMPBELL** and **PIRTLE** and **PARKER, JJ.**

By two counts contained in one information, Appellant, Trey Anderson a/k/a Attrayelle Anderson, was charged with assault. He entered a guilty plea to misdemeanor assault¹ alleged in count one and the charge alleged in count two was dismissed. The

¹ TEX. PENAL CODE ANN. § 22.01(a)(1), (b) (West Supp. 2017).

trial court entered a finding of guilt and assessed a sentence of ten days confinement in the county jail. The guilty plea hearing was not recorded by the official court reporter. With the assistance of new counsel, Appellant filed a post-conviction motion for leave to appeal alleging a “misunderstanding of how the charge in [the trial court] would affect another charge that was pending against him in New Mexico.” Following an informal, unrecorded hearing, the trial court granted Appellant “permission to appeal from his plea bargain.”

Initially, Appellant’s appeal was prosecuted as frivolous and filed pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). This court abated the appeal for appointment of new counsel to explore whether there was any merit concerning the issue of the voluntariness of Appellant’s plea given that no recording was made of the guilty plea hearing.²

Appellant’s new appointed counsel has filed a meritorious brief urging reversal of Appellant’s conviction. Counsel argues that this court cannot independently review the voluntariness of Appellant’s negotiated guilty plea without a record of the hearing. The State responds that Appellant’s complaint is not preserved for review for two reasons: (1) he failed to object to the absence of the hearing being recorded and (2) he did not request that his hearing be recorded. We agree with the State and will affirm.

² See *Anderson v. State*, No. 07-17-00090-CR, 2017 Tex. App. LEXIS 8780, at *5 (Tex. App.—Amarillo Sept. 15, 2017, order) (not designated for publication).

APPLICABLE LAW

Article 44.02 of the Texas Code of Criminal Procedure and Rule 25.2(a)(2)(B) of the Texas Rules of Appellate Procedure provide a defendant the right of appeal from a negotiated guilty plea with permission from the trial court. TEX. CODE CRIM. PROC. ANN. art. 44.02 (West 2009); TEX. R. APP. P. 25.2(a)(2)(B). Rule 13.1 of the Texas Rules of Appellate procedure mandates that a court reporter make a full record of all proceedings unless excused by agreement of the parties. See TEX. R. APP. P. 13.1(a).

ANALYSIS

The right of appeal is separate and apart from preservation of error. There is no doubt that Appellant has the right of appeal given the trial court's permission to do so. However, preservation of error is a systemic requirement on appeal. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009). If an issue is not preserved for review, this court should not address it. *Id.*

Appellant recognizes that an objection to a court reporter's failure to make a full record of all proceedings as required by Rule 13.1(a) is necessary to preserve such a complaint for appellate review. He likewise acknowledges that voluntariness of a negotiated guilty plea generally cannot be raised on direct appeal. See *Cooper v. State*, 45 S.W.3d 77, 83 (Tex. Crim. App. 2001). However, relying on *McCombs v. State*, 678 S.W.2d 715, 721 (Tex. App.—Austin 1984, pet. ref'd), for the proposition that recitals in a judgment and sentence carry a presumption of regularity, he requests consideration of his complaint because the trial court granted him permission to appeal from a negotiated guilty plea.

Assuming arguendo that Rule 13.1 of the Texas Rules of Appellate Procedure imposes a burden on the trial court to ensure the presence of a court reporter at all proceedings, a defendant still has the burden to object when the official court reporter is not present to make a record to preserve a complaint for appeal. See *Davis v. State*, 345 S.W.3d 71, 77 (Tex. Crim. App. 2011). See also *Henderson v. State*, Nos. 02-09-161-CR, 02-09-162-CR, 02-09-163-CR, 2010 Tex. App. LEXIS 1592, at *5-6 (Tex. App.—Fort Worth March 4, 2010, no pet.) (mem. op., not designated for publication) (finding that complaint of involuntariness of a guilty plea without a reporter’s record not reviewable in the absence of an objection or motion).

In *Tanguma v. State*, 47 S.W.3d 663, 674 (Tex. App.—Corpus Christi 2001, pet. ref’d), the court held that an appellant’s failure to object to a court reporter’s failure to record bench conferences did not waive the issue on appeal. The court found that Rule 13.1 of the Texas Rules of Appellate Procedure placed the affirmative duty to record all proceedings “squarely on the court reporter.” *Id.* But *Tanguma*’s holding that Rule 13.1 dispenses with the requirement of an objection was disapproved in *Valle v. State*, 109 S.W.3d 500, 508-09 (Tex. Crim. App. 2003). There the Court of Criminal Appeals wrote, “[a]n objection is still required.” *Id.* at 509. Accordingly, we conclude that Appellant’s failure to either request the presence of a court reporter at his guilty plea hearing or object to the absence of a court reporter at that hearing waives any issue on the voluntariness of his guilty plea. His sole issue is overruled.

Appellant may be entitled to relief by filing a post-conviction writ of habeas corpus and developing a record to support his claim that his plea may not have been voluntary.

A writ of habeas corpus may be supported by information from sources broader than the appellate record before us. See *Cooper*, 45 S.W.3d at 82.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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