NO. 12-16-00179-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

STUART MATTHEW KIRBY, APPELLANT	***§***	***APPEAL FROM THE 8TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***RAINS COUNTY, TEXAS***

MEMORANDUM OPINION

Stuart Matthew Kirby appeals his conviction for sexual assault of a child. In one issue, Appellant claims the trial court erred by failing to warn him of the right to counsel and the right to remain silent prior to a pre-sentence investigation. We affirm.

BACKGROUND

Appellant was charged by separate indictments with sexual assault of a child and indecency with a child by exposure. On December 3, 2015, Appellant entered into a plea bargain wherein he agreed to plead guilty to both charges and the State agreed to recommend deferred adjudication community supervision. The court admonished Appellant of his rights and Appellant pleaded "guilty" to both indictments. The court reset sentencing and directed Appellant to meet with a community supervision officer for a presentence investigation (PSI).

When Appellant returned for sentencing, the court learned that Appellant denied guilt during the PSI. Thus, the court declined to accept Appellant's guilty plea. Appellant ultimately waived his right to a jury and trial proceeded before the court. The court found Appellant guilty of sexual assault, sentenced him to imprisonment for ten years, and assessed a fine of $5,000.[1]

[1] After the trial court declined to accept Appellant's plea, the State moved to dismiss the indecency charge and Appellant was charged with two additional counts of sexual assault of a child by separate indictments. At trial, the court acquitted Appellant of the two subsequent sexual assault charges.

PRE-SENTENCE INVESTIGATION

In Appellant's sole issue, he argues the trial court erred by failing to admonish him of the right to counsel and the right to remain silent prior to the PSI.

Analysis

On appeal, Appellant argues that the trial court should have admonished him of the right to counsel and the right to remain silent before ordering Appellant to participate in the PSI. He further contends that his statements to the community supervision officer during the PSI effectively denied him the benefit of a plea bargain.

The State argues that Appellant waived any error by failing to object to the PSI. Texas courts have held that Fifth and Sixth Amendment violations associated with PSI interviews are not structural error and require a specific objection to preserve error. ***Collins v. State***, 378 S.W.3d 629, 631 (Tex. App.—Houston [14th Dist.] 2012, no pet.); ***Reyes v. State***, 361 S.W.3d 222, 231 (Tex. App.—Forth Worth 2012, pet. ref'd). Appellant's brief does not direct us to any portion of the record where he preserved error, nor does he assert error was preserved. *See* TEX. R. APP. P. 38.1(i) (stating that appellant's brief must contain clear and concise arguments, and appropriate citations to the record). Nor does our review of the record indicate that Appellant objected, at any time, to the PSI. *See* ***Collins***, 378 S.W.3d at 631; *see also* ***Reyes***, 361 S.W.3d at 231. Nevertheless, in his reply brief, Appellant argues that trial counsel never had the appropriate opportunity to object because the PSI process stopped once Appellant denied guilt and, further, that he was not required to object until sentencing.

Assuming, without deciding, that error is preserved, Appellant's argument still fails. There is no constitutional requirement that a defendant be warned of the right to remain silent or the right to counsel prior to a routine, authorized, presentence investigation. *See* ***United States v. Woods***, 907 F.2d 1540, 1543 (5th Cir. 1990) (holding that a probation officer's interview of a defendant without counsel during PSI did not violate defendant's Fifth or Sixth Amendment rights; defendant waived the right to remain silent by pleading guilty, and a routine presentence interview in a non-capital case is not a critical stage of proceedings in which counsel's presence or advice is necessary to protect defendant's right to a fair trial); *see also* ***Garcia v. State***, 930 S.W.2d 621, 624 (Tex. App.—Tyler 1996, no pet.) (holding there is no constitutional requirement that a defendant be warned of his right to refrain from self-incrimination prior to submitting to a routine, authorized, presentence investigation). In his reply brief, Appellant

maintains that these cases do not apply because his plea may have been intended as an "***Alford*** plea." *See* ***North Carolina v. Alford***, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). However, Appellant does not direct us to any authority to support this argument. *See* TEX. R. APP. P. 38.1(i). Accordingly, we conclude that Appellant's Fifth and Sixth Amendment rights were not violated by the trial court's failure to admonish Appellant of the right to counsel and the right to remain silent before ordering Appellant to submit to the PSI. *See* ***Woods***, 907 F.2d at 1543; *see also* ***Garcia***, 930 S.W.2d at 624.

We also reject Appellant's argument that his statements during the PSI effectively denied him the benefit of a plea agreement. Appellant was not legally entitled to a plea bargain, as there is no constitutional right to a plea bargain. *See* ***Morano v. State***, 572 S.W.2d 550, 551 (Tex. Crim. App. 1978) (holding that a trial judge may in every case or in any particular case refuse to allow plea bargaining and may refuse to allow the prosecutor to offer recommendations concerning the punishment to be assessed). Thus, for the above reasons, we overrule Appellant's sole issue.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

JAMES T. WORTHEN
Chief Justice

Opinion delivered May 3, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 3, 2017

NO. 12-16-00179-CR

STUART MATTHEW KIRBY,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 8th District Court
of Rains County, Texas (Tr.Ct.No. 5517)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.