Affirmed and Substitute Opinion filed January 20, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-97-00258-CR

———————————

ANTHONY MICHAEL PACE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 728,220

S U B S T I T U T E O P I N I O N

We withdraw our previous opinion in this case, issued on October 21, 1999, and issue this substitute opinion in its stead.

Anthony Michael Pace (Appellant) was indicted for the second degree felony offense of intoxication manslaughter. *See* TEX. PENAL CODE ANN. § 49.08 (Vernon 1994). Appellant pleaded *nolo contendere* and was tried by the court. The trial court found Appellant guilty and sentenced him to a term of sixteen years' confinement in the Institutional Division of the Texas Department of Justice. *See* TEX. PENAL CODE ANN. § 12.33(a) (Vernon 1994). On appeal to this Court, Appellant assigns three points of error, contending that (1) his plea was unknowing and involuntary because he was admonished by the

trial court that he was eligible for deferred adjudication when, legally, he was not eligible for that disposition, (2) his plea was involuntary and unknowing because it was entered without effective assistance of counsel because his trial counsel erroneously advised him that he was eligible for deferred adjudication, and (3) the evidence was insufficient to support his conviction. We affirm.

BACKGROUND

Appellant caused an automobile accident that killed Myra Johnson. At the time of the accident, Appellant's alcohol concentration level was .23. *See* TEX. PENAL CODE ANN. § 49.01 (Vernon 1994).

DISCUSSION

In his first point of error, Appellant challenges the voluntariness of his plea of *nolo contendere*. He contends that the trial court erroneously admonished him that he was eligible for deferred adjudication. Appellant maintains that because he was charged with intoxication manslaughter, he was not eligible for deferred adjudication, and that his plea of *nolo contendere* was therefore not knowingly and voluntarily made. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(d)(1)(A) (Vernon Supp. 1998); *State v. Gonzalez*, 894 S.W.2d 857, 859 (Tex.App.–Corpus Christi 1995, no pet.). The gravamen of Appellant's complaint in his first point of error is that the trial court's admonishment, relative to deferred adjudication, influenced his decision to plead *nolo contendere*. The State acknowledges that the trial court's written admonishment contains a paragraph which indicates that deferred adjudication was available to Appellant. We observe that because Appellant was charged with intoxication manslaughter, he was not eligible for "deferred adjudication." *See Gonzalez*, 894 S.W.2d at 859.

In *Ex parte Williams*, the appellant contended that his guilty plea was not voluntary or knowing because the trial court erroneously admonished him that he was eligible for probation. *See* 704 S.W.2d 773, 775 (Tex.Crim.App. 1986). The Court of Criminal Appeals acknowledged that "substantial compliance by the [trial] court with the admonishment requirement 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 by the admonishment of the court." *Id.* (quoting *Harrison v. State*, 688 S.W.2d 497, 499 (Tex.Crim.App. 1985)) (emphasis in original). The court found that the guilty plea in *Ex parte Williams* was not voluntary because (1) the defendant actively sought probation during plea negotiations, (2) the trial

judge recognized that the defendant was seeking probation when it agreed to grant probation, (3) the defendant filed a motion for probation prior to offering his plea of guilty, and (4) during the hearing on his motion for new trial, defendant testified that he fully expected to receive probation and his attorney acknowledged the same understanding. *See id*. at 777-78.

In this case, Appellant has failed to make such an objective showing that he was misled or harmed by the inaccurate admonishment by the trial court concerning his eligibility for deferred adjudication. The only indication in the record to suggest that Appellant believed he was eligible for deferred adjudication is found at the conclusion of his sentencing hearing. When Appellant's trial counsel was concluding his closing argument, the following colloquy ensued:

> [TRIAL COUNSEL]: Judge, I thank the court so very much for its time and attention. I beg you to consider with appropriate terms and conditions granting this defendant deferred adjudication and putting him on notice. Thank you.
>
> [PROSECUTOR]: May I respond, Your Honor.
>
> THE COURT: Before you respond I think the only consideration I can actually have would be straight probation.
>
> [TRIAL COUNSEL]: I'm sorry. Excuse me, Your Honor. Straight probation.

We find that Appellant has failed to show harmful reliance on the trial court's admonishment regarding his eligibility for deferred adjudication. The circumstances in this case are similar to those in *Harrison*. *See* 688 S.W.2d 497, 500 (Tex.Crim.App. 1985). In *Harrison*, the appellant contended that this plea was not voluntary because he was improperly admonished by the trial court on his eligibility for probation. *See id*. at 498-99. The court held that there was no support in the record for the appellant's assertion that he was expecting probation or was misled by the trial court's erroneous admonishment. *See id*. at 500. The court noted that no motion for probation was filed to put the trial court on notice that the appellant believed he was eligible for probation, and no protest was made by the appellant either at sentencing or by filing a motion for new trial alleging an involuntary plea. *See id*. Likewise, in this case, Appellant did not file a motion for deferred adjudication. Further, in his motion for

new trial, Appellant did not contend or present evidence that his plea of *nolo contendere* was not voluntarily or knowingly entered because of his reliance on the trial court's erroneous admonishment. Nor are any of the other considerations leading to the reversal in *Ex parte Williams* present here. *See* 704 S.W.2d at 777-78.

Therefore, based upon the record presented for our review, we are unable to find that the trial court's written admonishment, relating to deferred adjudication, played any role in Appellant's decision to plead *nolo contendere*. Secondly, Appellant has not made an objective showing that he was misled or harmed by the trial court's inaccurate admonishment. *See Ex parte Williams*, 704 S.W.2d at 775; *Harrison*, 688 S.W.2d at 500. Point of error one is overruled.

In his second point of error, Appellant asserts that his plea was involuntary and unknowing because it was entered without effective assistance of counsel because his trial counsel erroneously advised him that he was eligible for deferred adjudication.

Appellant fails to disclose where in the record it shows that his trial counsel advised him that he was eligible for deferred adjudication. *See* TEX. R. APP. P. 38.1(h) (West 1998). Further, this Court's review of the record discloses nothing to indicate that trial counsel advised Appellant that he was eligible for deferred adjudication. To the contrary, the record clearly shows that trial counsel filed a "motion for probation." The motion for probation filed by trial counsel was based upon section 3 of Article 42.12 of the Code of Criminal Procedure, which relates to "regular probation." *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3 (Vernon Supp. 1998); *Richard*, 788 S.W.2d at 919. "Deferred adjudication" was not sought in Appellant's motion for probation. If anything, the record refutes Appellant's claim. Point of error two is overruled.

In his final point of error, Appellant maintains that "the trial court erred in entering a judgment of guilty because the evidence was insufficient to support the judgment because the only evidence offered by the State was not a judicial confession nor a stipulation of evidence." *See* TEX. CODE CRIM. PROC. ANN. art. 1.15 (Vernon Supp. 1999); *see also Wright v. State*, 930 S.W.2d 131, 132-33 (Tex.App.–Dallas 1996, no pet).

On page four of Appellant's written admonishments, under the heading "Statements and Waivers of Defendant," he attested: "I WAIVE the right to have a court reporter record my plea." His initials appear next to this waiver. Consequently, there is no transcript of Appellant's plea hearing.

As a threshold issue, the State argues that Appellant's waiver of a court reporter at the plea hearing prevents this Court from having an adequate record to review the sufficiency of the evidence. We agree. "[W]hen an appellant does not provide a statement of facts [or reporter's record] from the plea hearing it is a sufficient reason to overrule a challenge to the sufficiency of the evidence in a plea proceeding." *Williams v. State*, 950 S.W.2d 383, 385 (Tex.App.–Houston [1st Dist.] 1997, pet. ref'd); *Richardson v. State*, 921 S.W.2d 359, 360-61 n. 3 (Tex.App.–Houston [1st Dist.] 1996, no pet.). Similarly, in a court trial in which article 1.15, *supra*, applied, it has been held that "in the absence of a statement of facts, we must presume there was sufficient evidence to sustain and support the judgment." *Id.*; *Blacklock v. State*, 820 S.W.2d 882, 884 (Tex.App.–Houston [1st Dist.] 1991, pet. ref'd).

We hold that for an appellant to challenge the sufficiency of the evidence to support a judgment based upon a plea of guilty or no contest, he or she must bring forward a full statement of facts, including a transcription of the plea proceedings. *See id.* Appellant did not present this Court with a statement of facts or reporter's record. *See id.* Point of error three is overruled.

The judgment is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Substitute Opinion filed January 20, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig (Justice Amidei not participating).
Do Not Publish — TEX. R. APP. P. 47.3(b).