Review of Recent Juvenile Cases (2009)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

Defendant in a plea-bargained case may not raise the voluntariness of his plea on appeal.[Turner v. State](09-1-7)

On December 18, 2008, the Eastland Court of Appeals found that a plea-bargaining defendant may pursue the remedy of withdrawing his plea, because it was not voluntary, by filing a motion for new trial in the trial court or by filing a habeas corpus.

¶ 09-1-7. **Turner v. State**, MEMORANDUM, No. 11-07-00139-CR, 2008 WL 5257361 (Tex.App.-Eastland, 12/18/08).

Facts: On January 19, 2006, a grand jury indicted appellant for capital murder. On February 5, 2007, appellant accepted a plea bargain and pleaded guilty to the reduced offense of murder. Pursuant to the plea bargain, the trial court sentenced appellant to thirty years in the Texas Department of Corrections, Institutional Division. On March 7, 2007, a motion for new trial and a motion to withdraw plea were filed by an attorney who was not one of the attorneys of record. The State objected to the motion for new trial and the motion to withdraw the plea on the grounds that they were not timely filed by the attorneys of record and that they were not adequately supported by affidavits. On March 29, 2007, however, the trial court granted the new counsel's motion to substitute counsel. On March 30, the trial court held a hearing and denied both the motion to withdraw the plea and the motion for a new trial.

Held: Affirm.

Memorandum Opinion: When appellant accepted the plea bargain and pleaded guilty to murder instead of capital murder, the trial court explained to him that his right to appeal would be limited to his pretrial motions and that he was waiving all other matters. Appellant's first two issues are the only issues that deal with pretrial motions. Those first two issues contend that the trial court erred in denying the motions of his original trial counsel to withdraw and for a continuance. In appellant's third issue, he argues he was denied due process as follows: that he had ineffective assistance of counsel, that the State deprived him of exculpatory evidence, that the State "committed prosecutorial misconduct in the deliberate and hasty destruction of evidence," and that the trial court did not make sufficient inquiries concerning the voluntariness of appellant's plea. In appellant's fourth issue, he argues that his due process rights were denied at the certification hearing and by the discovery policy of the district attorney's office.

The trial court's certification of appellant's right of appeal reflects that this is a plea bargain case and that his appeal is limited to matters raised by written motion filed and ruled on before trial. The trial court did not give its permission for appellant to include other matters in his appeal. The limitations of Tex.R.App. P. 25.2(a)(2) restrict the jurisdiction of appellate courts to consider issues raised by plea-bargaining defendants. Therefore, we can only address the motions to withdraw and for continuance. We have no jurisdiction to address

appellant's claim that his plea was not voluntary. The Court of Criminal Appeals has held that a defendant in a plea-bargained, felony case may not raise the voluntariness of his plea on appeal. *Cooper v. State,* 45 S.W.3d 77 (Tex.Crim.App.2001) (relying on former Tex.R.App. P. 25.2(b)(3), now Rule 25.2(a)(2)).

In *Whitfield v. State,* 111 S.W.3d 786 (Tex.App.-Eastland 2003, pet. ref'd), this court dealt with some of the issues being raised in this case. Whitfield pleaded guilty to the offense of second degree robbery, and punishment was assessed for a term of fifteen years. Soon after he entered his guilty plea, Whitfield filed a motion for new trial that challenged the voluntariness of his guilty plea and the effectiveness of his trial counsel. The trial court denied the motion for new trial after conducting an evidentiary hearing. We dismissed the appeal based on *Cooper. Cooper* recognized that a plea-bargaining defendant may pursue the remedy of withdrawing his plea by filing a motion for new trial in the trial court or habeas corpus, but we concluded that under the reasoning of *Cooper* the refusal of the trial court to set aside the plea cannot be appealed. *Whitfield,* 111 S.W.3d at 789-90. If the trial court refuses to set aside the plea, the only remedy for a plea-bargaining defendant is to seek a writ of habeas corpus.

Conclusion: Appellant's claim of ineffective assistance of counsel and other claims in his third and fourth issues referring to matters that occurred prior to his conviction are not cognizable under Rule 25.2(a)(2). *Woods v. State,* 108 S.W.3d 314 (Tex.Crim.App.2003). We are limited to the pretrial motions.