Plea not considered involuntary where juvenile plead to aggravated robbery, by using a “toy” gun.[In the Matter of J.B.](15-1-3)

On December 11, 2014, the Houston (1 Dist.) Court of Appeals held that a trial court did not err in accepting juvenile’s plea where trial court accepted plea based on an erroneous belief that aggravated robbery could be committed with a toy gun.

¶ 15-1-3. **In the Matter of J.B.** MEMORANDUM, No. 01-13-00844-CV, 2014 WL 6998068 (Tex.App.-Hous. (1 Dist.), 12/11/14).

**Facts:** J.B. stipulated that, while committing theft of property from the complainant, he exhibited a firearm. The following exchange occurred after the trial court admonished J.B. and before the trial court accepted the stipulation:

The Court: I'm going to show you your stipulation of evidence. Is this your signature?

J.B.: Yes, ma'am.

The Court: Did you sign it because it's true?

J.B.: No, ma'am.

(Speaking simultaneously.)

The Court: Is it true?

Defense counsel: Tell her what you're—

J.B.: Yes, ma'am.

The Court: This charge is true?

J.B.: Yes, ma'am.

The Court: You signed it because it's true?

J.B.: Yes, ma'am.

The trial court then accepted the signed stipulation, in which J.B. waived his right to a jury trial, and adjudicated J.B. delinquent.

Following the adjudication of delinquency, the trial court considered disposition. The probation report was admitted without objection. The trial court confirmed that J.B.'s agreement with the State was for 18 months' probation. The trial court then asked whether a weapon was used and whether there were coactors.

Defense counsel: No.

The Court: No?

The State: No coactors, Your Honor.

The Court: But he had a gun? Where'd he get the gun from?

J.B.: I didn't have a gun, ma'am.

Defense counsel: It wasn't a real gun, but it was—

The Court: No bullets?

Defense counsel: The complainant thought it was a gun.

The Court: Blanks? No bullets in it?

Defense counsel: Toy.

J.B.: No, ma'am.

The Court: Well, you scared somebody. The fact that you scared them is enough. Whether it was real or not is another issue; but the fact that you scared somebody and you're charged with a felony is pretty serious.

The parties then discussed the terms of probation, and the trial court accepted the recommendation of 18 months' probation.

In his first issue, J.B. contends that his plea was not voluntary, knowing, or intelligent because it was premised on his, his attorney's, and the trial court's erroneous belief that aggravated robbery could be committed with a toy gun.

A. Standard of Review and Juvenile Pleas

To satisfy due process, a guilty plea "must be entered knowingly, intelligently, and voluntarily." Kniatt v. State, 206 S.W.3d 657, 664 (Tex.Crim.App.2006); see alsoTEX.CODE CRIM. PROC. ANN. art. 26.13(b) (West Supp.2014) (requiring that guilty plea be made voluntarily and freely). In examining the voluntariness of a guilty plea, we examine the record as a whole. Martinez v. State, 981 S.W.2d 195, 197 (Tex.Crim.App.1998). When the record reflects that a defendant was duly admonished by the trial court before entering a guilty plea, it constitutes a prima facie showing that the plea was both knowing and voluntary. Id.Section 54.03(b) of the Family Code sets forth the admonishments required in juvenile proceedings:

(1) the allegations made against the child;

(2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the record of a juvenile court adjudication in a criminal proceeding;

(3) the child's privilege against self-incrimination;

(4) the child's right to trial and to confrontation of witnesses;

(5) the child's right to representation by an attorney if he is not already represented; and

(6) the child's right to trial by jury.
TEX. FAM. CODE ANN. § 54.03(b) (West 2014).

When the record demonstrates that the defendant was properly admonished, the burden then shifts to the defendant to show that he entered the plea without understanding the consequences of his actions and was harmed as a result. Martinez, 981 S.W.2d at 197. "The trial court is not required to withdraw a plea of guilty sua sponte and enter a plea of not guilty for a defendant when the defendant enters a plea of guilty before the court after waiving a jury, even if evidence is adduced that reasonably and fairly raises an issue as to his guilt." Rivera v. State, 123 S.W.3d 21, 32–33 (Tex.App.–Houston [1st Dist.] 2003, pet. ref'd) (citing Thomas v. State, 599 S.W.2d 823, 824 (Tex.Crim.App.1980)).

Whether the defendant used a real gun or a toy gun in committing a robbery affects the type of crime committed. If the defendant uses a real gun in robbing the complainant, he is guilty of aggravated robbery. See TEX. PENAL CODE ANN. § 29.03(a)(2). If the gun is a toy, however, the defendant is guilty of robbery only. See TEX. PENAL CODE ANN. § 29.02(a)(2) (West 2011); Payne v. State, 790 S.W.2d 649, 652 n.3 (Tex.Crim.App.1990). In Payne, the defendant moved to withdraw his guilty pleas after he testified in open court during sentencing that he used a toy gun, and not a real gun, when committing four robberies. 790 S.W.2d at 651–52. He testified that he did not tell his lawyer that the gun was a toy because he did not know that

it mattered and that he signed his pleas without knowing that he could not be convicted for aggravated robbery if he used a toy gun. Id. at 651. The trial court refused the defendant's motion to withdraw his pleas, but the Court of Criminal Appeals reversed, holding the defendant's testimony raised an issue regarding the voluntariness of his confessions. Id. at 652.

**Held:** Affirmed

**Memorandum Opinion:** Here, the record reflects that the trial court admonished J.B., who was represented by counsel, regarding the allegations against him, the consequences of the proceeding, including the admissibility of his juvenile record in criminal proceedings, his right to remain silent, and his right to trial, a trial by jury, and to confront witnesses. SeeTEX. FAM. CODE ANN. § 54.03(b). Thus, J.B. bears the burden to show that he entered his plea without understanding the consequences of his actions and was harmed as a result. See Martinez, 981 S.W.2d at 197.

In support of his claim that his plea was involuntary, J.B. points to the portion of the record in which he told the trial court that the gun he used was a toy. But this occurred after he waived a jury and the trial court accepted his plea and adjudicated him delinquent. Thus, the question we consider is not whether the trial court erred in accepting the plea, but, rather, whether it erred in failing to withdraw the plea after J.B. asserted during the disposition inquiry that the gun he used in the robbery was a toy. See Rivera, 123 S.W.3d at 32–33.

The record does not reflect that J.B. requested that he be allowed to withdraw his plea. See Thomas, 599 S.W.2d at 824 (where defendant is admonished and does not request to withdraw plea, court reviews only whether trial court should have withdrawn plea). And "[t]he trial court is not required to withdraw a plea of guilty sua sponte and enter a plea of not guilty for a defendant when the defendant enters a plea of guilty before the court after waiving a jury, even if evidence is adduced that reasonably and fairly raises an issue as to his guilt." Rivera, 123 S.W.3d at 32–33.

The primary case upon which J.B. relies, Payne, involves a defendant who affirmatively requested that the trial court permit him to withdraw his plea. 790 S.W.2d at 651–52. Payne thus does not support J.B.'s argument that the trial court erred because J.B. never asked the trial court to allow him to withdraw his plea, and the trial court was not required to withdraw J.B.'s plea sua sponte. See Thomas, 599 S.W.2d at 824; Rivera, 123 S.W.3d at 32–33; see also Lawal v. State, 368 S.W.3d 876, 882 n.1 (Tex.App.–Houston [14th Dist.] 2012, no pet.) (Payne is distinguishable from cases where no timely motion to withdraw plea was made because in Payne a timely motion to withdraw plea was raised during plea hearing).

Moreover, in the other cases relied upon by J.B., In re T.W.C., 258 S.W.3d 218 (Tex.App.–Houston [1st Dist.] 2008, no pet.), In re S.F., 2 S.W.3d 389 (Tex.App.–San Antonio 1999, no pet.), and In re E.Q., 839 S.W.2d 144 (Tex.App.–Austin 1992, no writ), the record affirmatively showed that the juvenile was misadvised and would not have entered a guilty plea but for the faulty advice. Here, the record does not affirmatively show that J.B. was misadvised. To the extent that J.B. argues that his plea or his failure to withdraw the plea was the result of faulty advice amounting to ineffective assistance of counsel, it is J.B's burden to prove ineffective assistance by showing that (1) counsel's performance was so deficient that counsel was not functioning as acceptable counsel under the Sixth Amendment, and (2) but for counsel's error, the result of the proceedings would have been different. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

J.B.'s appellate counsel filed a motion for new trial, but did not allege that his trial counsel was ineffective, and no hearing was held on the motion. The motion sought only a new trial or in the alternative, a modified judgment striking the deadly weapon finding, and did not seek to withdraw J.B.'s plea. Nothing in the record demonstrates why J.B.'s trial counsel did not seek to withdraw his guilty plea or what advice J.B.'s trial counsel gave him. Moreover, the probation report indicates that the complainant stated that J.B. pointed a black semi-automatic pistol at him and told the complainant that he would shoot him if he followed J.B. On this record, we cannot determine what, if any, conflicting evidence may have informed counsel's recommendations or J.B.'s decision to plead guilty. Accordingly, we must presume that counsel acted reasonably. See Rylander v. State, 101 S.W.3d 107, 111 (Tex.Crim.App.2003) (ordinarily, courts will not find counsel ineffective where counsel has not been afforded an opportunity to explain actions because presumption that counsel acted reasonably has not been rebutted); Thompson v. State, 9 S.W.3d 808, 814 (Tex.Crim.App.1999) (where record is silent regarding reasons for counsel's actions, presumption of reasonableness is not rebutted). We note, however, that the appeal procedures in the Family Code do “not limit a child's right to obtain a writ of habeas corpus.” TEX. FAM. CODE ANN. § 56.01(o) (West 2014); see In re Hall, 286 S.W.3d 925, 926–27 (Tex.2009) ( juvenile court had jurisdiction to hear writ of habeas corpus); In re R.G., 388 S.W.3d 820, 824 (Tex.App.–Houston [1st Dist.] 2012, no pet.)( juvenile court had jurisdiction to entertain application for writ of habeas corpus). The Court of Criminal Appeals has recognized that a defendant who shows that he pleaded guilty to aggravated robbery because his counsel did not inform him that aggravated robbery cannot be proven if a toy gun was used may be entitled to habeas relief. See Ex Parte Carriker, No. WR–77916–01, 2012 WL 3600313, at *1 (Tex.Crim.App. Aug. 22, 2012).

Accordingly, we hold that, on this record, J.B. has not met his burden to show that his plea was involuntary, the trial court did not err in failing to withdraw J.B.'s plea, and J.B. is not entitled to reversal based upon his ineffective assistance claim. See Thomas, 599 S.W.2d at 824 (following acceptance of possession of controlled substance plea, defendant's testimony that she

did not buy drug or know she had it did not require trial court to sua sponte withdraw guilty plea); Rivera, 123 S.W.3d at 32–33 (where defendant argued on appeal that he involuntarily pleaded guilty due to ineffective assistance of counsel, trial court did not err in failing to sua sponte withdraw guilty plea); see also Quintanilla v. State, No. 01–02–00722–CR, 2003 WL 1938224, at *2 (Tex.App.–Houston [1st Dist.] Apr. 24, 2003, pet. ref'd) (where appellant never requested to withdraw guilty plea but claimed during sentencing that he committed offense because family's safety was threatened, trial court did not err in failing to sua sponte withdraw plea). We overrule J.B.'s first issue.

**Conclusion:** We affirm the trial court's judgment.