

Opinion filed February 11, 2016



In The

# **Eleventh Court of Appeals**

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**No. 11-14-00052-CR**

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**MISTY LANE CAMPBELL, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 50th District Court  
Baylor County, Texas  
Trial Court Cause No. 5524**

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## **MEMORANDUM OPINION**

Misty Lane Campbell appeals her jury conviction for forgery against an elderly individual. The jury assessed her punishment at confinement for a term of six years in the Institutional Division of the Texas Department of Criminal Justice. In two issues on appeal, Appellant complains of the lack of a continuance prior to the start of trial. We affirm.

### *Background Facts*

Appellant was indicted for the offense of forgery against an elderly individual. On the first day of trial, Appellant's trial counsel filed an unverified motion for continuance. Counsel alleged in this motion that he believed that, on or about November 21, 2013, "the County Attorney told him that the case was going to be set for trial in January." Trial counsel further alleged that he did not receive written notice of the trial setting and that he was not prepared for trial. The trial court denied the motion without a hearing, and trial began on January 14, 2014. The jury subsequently found Appellant guilty.

### *Analysis*

In her first issue, Appellant contends that the trial court abused its discretion when it denied her motion for continuance. She alleges in her second issue that the trial court's denial of her motion for continuance resulted in her rights to due process and effective assistance of counsel being violated. We disagree.

The State asserts that Appellant waived her complaint regarding the trial court's denial of her motion for continuance because the motion was unsworn. We agree with the State's contention. Article 29.08 provides that "[a]ll motions for continuance must be sworn to by a person having personal knowledge of the facts relied on for the continuance." TEX. CODE CRIM. PROC. ANN. art. 29.08 (West 2006). Thus, an unsworn motion for continuance preserves nothing for review. *See Dewberry v. State*, 4 S.W.3d 735, 754–55 (Tex. Crim. App. 1999) (To be preserved for appeal, a motion for continuance must be in writing and sworn to.). There is no due process exception to this requirement. *See Blackshear v. State*, 385 S.W.3d 589, 591 (Tex. Crim. App. 2012); *Anderson v. State*, 301 S.W.3d 276, 280–81 (Tex. Crim. App. 2009). Appellant filed an unsworn motion for continuance, which the trial court denied. Accordingly, Appellant did not preserve error on her complaint about the denial of her motion for continuance. We overrule her first issue.

In her second issue, Appellant contends that the denial of her unsworn motion for continuance resulted in a violation of her rights to due process and effective assistance of counsel. As noted previously, there is no due process exception to the statutory requirements for a motion for continuance. *Anderson*, 301 S.W.3d at 278–80. Appellant is essentially asking this court to make a due process exception to the statutory requirements. In *Anderson*, the Court of Criminal Appeals expressly precluded an intermediate court of appeals from making an exception of this type on due process grounds. *Id.*; see *Blackshear*, 385 S.W.3d at 590–91.

To determine whether Appellant’s trial counsel rendered ineffective assistance, we must first determine whether Appellant has shown that her counsel’s representation fell below an objective standard of reasonableness and, if so, then determine whether there is a reasonable probability that the result of the proceeding would have been different but for her counsel’s errors. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986). An allegation of ineffective assistance of counsel must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). In asserting her claim of ineffective assistance of counsel, Appellant is complaining about the trial court’s decision not to grant her request for a continuance rather than any deficiency with trial counsel’s representation. She does not allege any detrimental effects that she suffered at trial as a result of the denial of the motion for continuance, and she does not contend that the outcome of the criminal charge against her would have been different if a continuance had been granted. Thus, Appellant has not satisfied either prong required by *Strickland* in order to obtain relief based upon an allegation of ineffective assistance of counsel. Accordingly, we overrule Appellant’s second issue.

*This Court's Ruling*

We affirm the judgment of the trial court.

JOHN M. BAILEY  
JUSTICE

February 11, 2016

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,  
Willson, J., and Bailey, J.