Affirmed and Memorandum Opinion filed December 7, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00862-CR

RAYMOND LEE BATES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 1220664

MEMORANDUM OPINION

Appellant Raymond Lee Bates challenges his conviction for the felony offense of making a false statement to obtain credit on the ground that his counsel was ineffective. We affirm.

BACKGROUND

Appellant pleaded guilty to the first degree felony offense of making a false statement to obtain credit without an agreed recommendation on punishment.[1] On

[1] The trial court admonished appellant that the range of punishment for this offense was "5 years to 99 years o[r] life."

October 2, 2009, the trial court sentenced him to five years' imprisonment. On that same date, his retained attorney filed a notice of appeal, requested bail pending appeal for appellant, and moved to withdraw from the case. The trial court set an appeal bond of $30,000 and granted appellant's trial attorney's motion to withdraw. The trial court further found that appellant was not indigent and thus did not appoint counsel for him on appeal.

On December 3, 2009, this Court abated this appeal because the reporter's record had not been filed. We ordered the trial court to conduct a hearing to determine whether appellant desired to prosecute his appeal and, if so, whether he was indigent and entitled to a free record and appointed counsel on appeal. The trial court conducted this hearing on December 17, 2009. Appellant informed the trial court that he wanted to prosecute his appeal, was not indigent, and had hired counsel to represent him on appeal. This appeal was thereafter timely filed.

ANALYSIS

Appellant entitles his issue "Point of Error One-Six." However, the issue he presents is not divided into six points. Instead, this issue reads in its entirety as follows:

> When a defendant shows that his trial attorney filed a Notice of Appeal but failed to advise a defendant about any timelines or post-judgment motions for the defendant's consideration. And the trial court failed to advise of his right to file a Motion for new trial. Should the appeal be abated and the appellate timetable be restarted?

First, we note that appellant asserts that the trial court failed to advise him of his right to file a motion for new trial. This assertion is (a) not supported by any record references and (b) not supported by any legal authority. Thus, this issue has not been properly briefed and we do not consider it. *See* Tex. R. App. P. 38.1(i). Second, appellant requests that we abate his appeal and reset the appellate timetable, apparently under the authority of Texas Rule of Appellate Procedure 2. Tex. R. App. P. 2 ("On a party's motion or on its own initiative an appellate court may—to expedite a decision or

for other good cause—suspend a rule's operation in a particular case and order a different procedure. . . ."). However, the Court of Criminal Appeals held in *Oldham v. State* that "using [Texas Rule of Appellate Procedure] 2(b) to suspend or enlarge appellate time limits which regulate the orderly and timely process of moving a case from trial to finality of conviction is overstepping the contemplated uses of Rule 2(b)." 977 S.W.2d 354, (Tex. Crim. App. 1998). Likewise, in *Smith v. State*, the Court of Criminal Appeals again declined to enlarge the appellate timetable for the filing of a motion for new trial. 17 S.W.3d 660, 661 (Tex. Crim. App. 2000). We thus conclude that, under the circumstances presented here, we may not use the authority of this rule to abate this appeal and restart the appellate timetable. We thus turn to what appears to be appellant's main issue: whether his counsel was ineffective for failing to advise him of his right to file a motion for new trial.[2]

We apply a two prong test in reviewing claims of ineffective assistance of counsel. *See Perez v. State*, 310 S.W.3d 890, 893–94 (Tex. Crim. App. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984)). To prove ineffective assistance, an appellant must demonstrate that (1) his counsel's performance was deficient because it fell below an objective standard of reasonableness, and (2) there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Id.* Failure to show either prong of the *Strickland* test defeats an ineffectiveness claim. *Id.*

[2] Although this issue is not identified in appellant's initial statement of his points of error, in the section of his brief entitled "Argument and Authorities," he states his issue as: "POINTS OF ERROR ONE-SIX: INEFFECTIVE ASSISTANCE OF COUNSEL[.]"

Here, appellant asserts that his trial counsel was ineffective because he did not file a motion for new trial and withdrew without properly advising appellant of his right and the deadline to file such a motion. The time for filing a motion for new trial is a critical stage of the proceeding, and a defendant has a constitutional right to counsel during the period. *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007). Generally, when a defendant is represented by counsel during trial, there still exists a rebuttable presumption that this counsel continued to adequately represent the defendant during this critical stage. *Id*. Even when a defendant rebuts this presumption, this deprivation of counsel is subject to a harmless error or prejudice analysis. *Id.* To show harm or prejudice, appellant must demonstrate he had a facially plausible claim that he was unable to present to the trial court in a timely filed motion for new trial and to make a record for appellate review. *Id.* at 912.

First, nothing in our record indicates that appellant's trial counsel failed to discuss filing a motion for new trial with appellant and that appellant considered and rejected the idea. *See Smith*, 17 S.W.3d at 662. The only relevant information in our record is that his counsel withdrew on the day appellant was sentenced after filing a notice of appeal and requesting an appeal bond, and that the trial court determined that appellant was not indigent. Appellant has provided no record support establishing that his trial counsel did not inform him of his right to file a motion for new trial and the appropriate timelines for doing so before withdrawing. Appellant simply may have failed to obtain new counsel during that critical time period. Thus, our record does not affirmatively demonstrate that appellant's trial counsel's performance was deficient. *See Thompson*, 9 S.W.3d at 813.

Moreover, even if appellant rebutted the presumption that his counsel adequately represented him during the critical time for filing a motion for new trial, appellant pleaded guilty in this case and has not stated on what, if any, basis a new trial would be appropriate. Accordingly, he has not demonstrated that he had a facially plausible claim that he could not present to the trial court in a timely filed motion for new trial. *Cooks*, 240 S.W.3d at 911–12. In other words, he has not shown that he was harmed or

prejudiced by being deprived of counsel during this critical time. *Id.*; *cf. Perez*, 310 S.W.3d at 894 (stating second prong of *Strickland* test, *i.e.*, appellant must demonstrate there is a reasonable probability that, but for his counsel's deficient performance, the result of the proceeding would have been different).

Appellant has failed to establish that his trial counsel's performance was deficient or that this deficient performance prejudiced him. We thus overrule his issue(s) and affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Yates, and Senior Justice Mirabal.[*]

Do Not Publish — TEX. R. APP. P. 47.2(b).

[*] Senior Justice Margaret Garner Mirabal sitting by assignment.