In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00237-CR

GREGORY SHELLO a/k/a GREGORY PAUL SHELLO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 07-01982

MEMORANDUM OPINION

Appellant Gregory Paul Shello appeals from the revocation of his deferred adjudication community supervision and imposition of sentence. We affirm.

Pursuant to a plea bargain agreement, Shello pled guilty to assault on a public servant. The trial court found the evidence sufficient to find Shello guilty, but deferred further proceedings, placed Shello on community supervision for five years, and assessed a fine of $1000. The State subsequently filed a motion to revoke Shello's unadjudicated community supervision. Shello pled "true" to one violation of the conditions of his community supervision. The trial court found that Shello violated the conditions of his

community supervision, found Shello guilty of assault on a public servant, and assessed punishment at ten years of confinement. Shello then filed this appeal, in which he raises two issues for our consideration.

ISSUE ONE

In issue one, Shello contends the trial court abused its discretion by revoking his community supervision and adjudicating him guilty because he did not knowingly plead "true." Specifically, Shello asserts that the "plain meaning of his testimony" indicates that he denied committing the violation, and "the trial court failed to establish otherwise through admonishment, waiver[,] or testimony." At the hearing on the motion to revoke Shello's community supervision, the following exchange occurred between Shello and the trial court:

> THE COURT: . . . Count 1 alleges that you failed to successfully complete the SAFPF program. Is that true or not true?
>
> [SHELLO]: Yes, sir.
>
> THE COURT: "Yes, sir," what?
>
> [SHELLO]: I was released --
>
> THE COURT: "Yes, sir," it's true or it's not true?
>
> [SHELLO]: It's true, sir.
>
> THE COURT: Have you entered into your plea to Count 1 freely and voluntarily? Did you plea [sic] "true" to this because it is true and for no other reason?
>
> [SHELLO]: I -- I got into a fight.

> THE COURT: Okay. My question is, is have you pled "true" to Count 1 of your own free will; nobody's making you do this; you pled true because it is true?
>
> [SHELLO]: Yeah, I say "true" because I got in a fight, but I was defending myself.
>
> THE COURT: That's not what I'm asking you.
>
> [SHELLO]: I plea [sic] true, sir.
>
> THE COURT: I'm asking you if you pled true to the fact that you did not enter and successfully complete the SAFPF program of your own free will -- nobody's making you do this; you're saying, Judge, it is true because it is true and for no other reason --
>
> [SHELLO]: Yes, sir.
>
> THE COURT: -- is that right?
>
> [SHELLO]: Yes, sir.

Shello complains on appeal that he was unaware that he could plead "not true by reason of self-defense[,]" and that his plea of true was, therefore, made unknowingly.

We review a trial court's order revoking community supervision for abuse of discretion. *Jackson v. State*, 645 S.W.2d 303, 305 (Tex. Crim. App. 1983). In part, Shello contends in issue one that his plea of "true" was involuntary because the trial court did not properly admonish him. The statutes governing community supervision do not refer to article 26.13 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon Supp. 2009); *Harris v. State*, 505 S.W.2d 576, 578 (Tex. Crim. App. 1974) (admonishments required by article 26.13 for guilty plea proceedings do not apply in revocation proceedings); *see also generally* TEX. CODE CRIM. PROC.

ANN. art. 26.13 (Vernon Supp. 2009) (admonishments required in guilty plea proceedings). The record does not demonstrate that the defendant did not understand his plea, or that his plea was otherwise involuntary. Therefore, we overrule issue one.

ISSUE TWO

In his second issue, Shello argues that the trial court abused its discretion by revoking his community supervision and adjudicating guilt because he received ineffective assistance of counsel, which rendered his plea of "true" involuntary. Specifically, Shello complains that trial counsel did not file any motions, witness subpoenas, or discovery requests; did not subpoena the SAFPF video surveillance records or Shello's medical records to demonstrate that Shello acted in self-defense, and that counsel's summary of Shello's case "showed he was not familiar with the facts." In addition, Shello also contends that trial counsel did not review the SAFPF documents, did not object to the trial court's references to the SAFPF documents, failed to object to the trial court's characterization of Shello's progress in SAFPF and Shello's criminal history, and did not object to the trial court's consideration of *ex parte* communications.

To prevail on a claim of ineffective assistance of counsel, Shello must satisfy a two-pronged test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). Texas courts have held that *Strickland* requires an appellant to show a reasonable probability that, but for his counsel's errors, the outcome of his trial would have been different. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). "Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Id*. Appellant must prove there was no plausible professional reason for specific acts or omissions of his counsel. *Id*. at 836. Furthermore, "[a]ny 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) (citing *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). Because the reasonableness of counsel's decisions and strategy often involves facts that do not appear in the appellate record, the record on direct appeal is generally insufficient to support a claim of ineffective assistance. *See id*. at 813-14. The mere fact that another attorney might have tried the case differently does not support a finding of ineffective assistance of counsel. *Hawkins v. State*, 660 S.W.2d 65, 75 (Tex. Crim. App. 1983).

Nothing in the record supports Shello's claims. Shello did not file a motion for new trial to develop a record supporting his ineffective assistance claim. Therefore, we have no explanation as to the reasons for counsel's decisions at the hearing. *See*

Goodspeed v. State, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (Appellate court generally will not find counsel ineffective when there is no record to show counsel has had the opportunity to explain himself.). Nothing in the record demonstrates that there were witnesses available, or that their testimony would have been beneficial to Shello. In addition, nothing in the record demonstrates that video surveillance footage from SAFPF, Shello's medical records, or Shello's records from SAFPF would have been beneficial to Shello. We conclude that Shello has not demonstrated that counsel was ineffective or that his plea of "true" was involuntary. *See Thompson*, 9 S.W.3d at 813. Accordingly, we overrule issue two and affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on March 1, 2010
Opinion Delivered May 19, 2010
Do Not Publish

Before McKeithen, C.J., Gaultney and Kreger, JJ.