In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00071-CR
NO. 09-10-00072-CR

CHARLES JOSEPH CHURAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause Nos. 63095, 63096

MEMORANDUM OPINION

These are appeals of the trial court's judgments revoking deferred adjudication community supervision and imposing sentence. In three issues, Churan argues that the trial court was not authorized to order the sentences to run consecutively, the trial court was not authorized to order the two cases to run consecutively to another case, and he received ineffective assistance of counsel. We reverse the trial court's judgments and remand the causes for a new punishment hearing.

Pursuant to plea bargain agreements, appellant Charles Joseph Churan pled guilty to indecency with a child (trial cause number 63095) and inducing sexual performance by a child (trial cause number 63096). In each case, the trial court found the evidence sufficient to find Churan guilty, but deferred further proceedings, placed Churan on community supervision for ten years, and assessed a fine of $500. The State subsequently filed a motion to revoke Churan's unadjudicated community supervision in each case. Churan pled "true" to two violations of the conditions of his community supervision in both cases. In each case, the trial court found that Churan had violated the conditions of his community supervision and found him guilty.

During the punishment hearing, the State recommended that the Court "sentence him to the absolute maximum on both his cases, and I'd recommend that the Court then stack them on top of one another." Defense counsel did not respond to the State's recommendation or otherwise comment on the issue of stacking the cases, nor did he file a motion for new trial. In the indecency with a child case, the trial court assessed punishment at ten years of confinement, and in the inducing sexual performance by a child case, the trial court assessed punishment at twenty years of confinement. The trial court ordered that the sentences were to run consecutively.[1]

[1]At the punishment hearing, the trial court orally pronounced that "[t]hese sentences will run consecutive." The trial court's judgments recite that the cases will run "consecutive to the case specified below," but nothing more is specified in either judgment.

Section 42.08 of the Code of Criminal Procedure grants the trial court authority to order sentences to run consecutively or concurrently. *See* TEX. CODE CRIM. PROC. ANN. art. 42.08 (Vernon Supp. 2010). However, the trial court's discretion to order sentences to run consecutively is limited by section 3.03(a) of the Penal Code, which provides as follows: "When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently." [2] *See* TEX. PEN. CODE ANN. § 3.03(a) (Vernon Supp. 2010).

Churan's offenses in cause numbers 63095 and 63096 involved the same victim and were committed on the same date, and the State concedes that the cases involved the same criminal episode and were tried in a single proceeding. However, as discussed above, when the trial court pronounced sentence and ordered that the cases would run consecutively, Churan did not object, and he did not timely raise the issue in a motion for new trial or otherwise. Therefore, issues one and two are not preserved for review. *See* TEX. R. APP. P. 33.1(a)(1)(A) (To preserve a complaint for appellate review, an appellant must present a timely request, or objection, or motion to the trial court.); *Mendenhall v.*

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[2]The date of Churan's offenses was August 14, 1992. Therefore, although Churan was convicted of offenses under sections 21.11 and 43.25 of the Penal Code, section 3.03(b) of the Penal Code does not apply to the instant case. *See* TEX. PEN. CODE ANN. § 3.03(b); Act of May 31, 1997, 75th Leg., R.S., ch. 667, §§ 7(a), 8, 1997 Tex. Gen. Laws 2250, 2252 ("The change in law made by this Act applies only to an offense committed on or after the effective date of this Act."), 2253 ("This Act takes effect September 1, 1997.").

State, 15 S.W.3d 560, 567 (Tex. App.--Waco 2000), *aff'd*, 77 S.W.3d 815 (Tex. Crim. App. 2002). Accordingly, we overrule issues one and two.

ISSUE THREE

In his third issue, Churan contends that he received ineffective assistance of counsel because counsel failed to object to the sentences running consecutively or to file a motion for new trial, failed to ensure that Churan was credited for the five years served concurrently in cause number 63094, and failed to timely appeal Churan's convictions in cause numbers 63095 and 63096. Churan concedes in his brief that the Court of Criminal Appeals granted him an out of time appeal, and Churan's appeals are now pending before this Court. Accordingly, we need not address Churan's ineffective assistance claim with respect to appealing his convictions. We therefore turn to Churan's claim that counsel was ineffective by failing to object or file a motion for new trial regarding the trial court's cumulation order.

To prevail on a claim of ineffective assistance of counsel, an appellant 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). The Court of Criminal Appeals has 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. *Id*. at 813-14. However, "when no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of whether the record adequately reflects the trial counsel's subjective reasons for acting as [he] did." *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 690).

Although the record does not reflect counsel's reasons for acting as he did, we conclude that there is no reasonable trial strategy to justify counsel's failure to object or to file a motion for new trial concerning the cumulation of Churan's sentences. *See id.* In addition, we conclude there is a reasonable probability that if counsel had brought to the trial court's attention that trial cause numbers 63095 and 63096 arose from the same criminal episode and were tried in a single criminal proceeding, the result would have been different; that is, the trial court would not have ordered that the sentences run consecutively. *See Andrews*, 159 S.W.3d at 103; *Bone*, 77 S.W.3d at 833; *see also* TEX. PEN. CODE ANN. § 3.03(a). Accordingly, we sustain issue three. We reverse the trial court's judgments and remand the causes for a new punishment hearing.[3] *See* TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (Vernon Supp. 2010).

REVERSED AND REMANDED.

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STEVE McKEITHEN
Chief Justice

Submitted on August 23, 2010
Opinion Delivered September 22, 2010
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Before McKeithen, C.J., Kreger and Horton, JJ.

[3]As part of his argument under issue three, Churan complains that he did not receive credit for the time he served in trial cause number 63094, and that counsel was therefore ineffective.