COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00295-CR

STEVEN MASLYK — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM CRIMINAL DISTRICT COURT NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 1303910D

MEMORANDUM OPINION[1]

The State indicted appellant Steven Maslyk for indecency with a child by contact. After the trial court placed Maslyk on deferred-adjudication community supervision, it later found that Maslyk had violated his probation conditions,

[1]*See* Tex. R. App. P. 47.4.

adjudicated him guilty, and sentenced him to 15 years in prison.[2] This appeal followed.

In two points, Maslyk contends that (1) the trial court improperly adjudicated him guilty based on fundamental procedural error and (2) the trial court abused its discretion by finding the evidence sufficient to prove the alleged probation violations. We affirm.

FIRST POINT

Maslyk's first point relies on the following procedural sequence:

- February 5, 2016—the State filed its petition to proceed to adjudicate.
- February 9, 2016—Maslyk's attorney filed a notice of appearance.
- February 12, 2016—Maslyk's attorney had a $10,000 bond set for Maslyk.
- June 21, 2016—the trial court amended Maslyk's probation conditions.[3]
- July 8, 2016—The trial court held a hearing on the State's February 5, 2016 petition and adjudicated Maslyk guilty based on the petition's allegations, that is, allegations predating the June 21, 2016 amendments to Maslyk's probation conditions.

In his first point, Maslyk contends that the trial court erred by adjudicating him guilty because the trial court's June amendment to his probation conditions

[2]The terms "probation" and "community supervision" are synonymous and are generally used interchangeably. *Prevato v. State*, 77 S.W.3d 317, 317 n.1 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

[3]The amended conditions themselves are irrelevant to Maslyk's argument and to our analysis. Maslyk relies on the fact the trial court amended the conditions at all.

effectively placed him back on community supervision and, in the process, implicitly denied the State's February petition. Relying on *Rogers v. State*, Maslyk argues that it was improper to later adjudicate him guilty in July on the same allegations considered in June. *See* 640 S.W.2d 248, 251 (Tex. Crim. App. [Panel Op.] 1981); *see also id.* at 252 (first op. on reh'g).

Maslyk acknowledges, however, that he did not raise this complaint at trial. Absent an objection at trial, the alleged error is waived. *See id.* at 263–64 (second op. on reh'g); *see also Tapia v. State*, 462 S.W.3d 29, 33–46 (Tex. Crim. App. 2015) (addressing similar complaint on merits); *Sneed v. State*, 493 S.W.3d 218, 220–21 (Tex. App.—Fort Worth 2016, no pet.).[4]

To get around this waiver, Maslyk also argues that the error is fundamental because the amendment occurred without notice to or involvement by his attorney and can, therefore, be raised for the first time on appeal. Maslyk signed the June 21 amendments; his counsel did not. Maslyk maintains that because his

[4]In *Sneed*, the State filed a petition to proceed to an adjudication in March 2015; the trial court amended the conditions of Sneed's probation on April 7, 2015; on April 17, 2015, the State amended its petition to proceed to an adjudication by repeating the original allegations and adding one more; and at a subsequent hearing, the trial court adjudicated Sneed guilty based on four of the original allegations. *Id.* at 219. The record showed only one hearing on the State's petition to adjudicate. *Id.* Justice Meier held that the defendant did not preserve the alleged error. *Id.* at 221 (plurality opinion). Justice Gabriel concurred without an opinion. *Id.* (Gabriel, J., concurring). Justice Dauphinot wrote a concurring opinion in which she agreed the error was waived but, in dicta, added that the defendant's due process rights had been violated. *Id.* at 222 (Dauphinot, J., concurring). Maslyk does not rely on Justice Dauphinot's concurring opinion, but it appears to support his position.

attorney was unaware that the trial court had amended his conditions, his attorney could not render effective assistance.

Maslyk's fundamental-error argument is based either on being denied counsel or on having counsel who rendered ineffective assistance.

The denial of counsel is indeed fundamental error. *See Solomon v. State*, No. 02-16-00133-CR, 2016 WL 7240614, at *2 (Tex. App.—Fort Worth Dec. 15, 2016, no pet.) (mem. op., not designated for publication) (citing *Saldano v. State*, 70 S.W.3d 873, 887–88 (Tex. Crim. App. 2002), *modified sub silencio by Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009)). But Maslyk had counsel at all the relevant times and, more specifically, at the hearing on the State's petition to proceed to an adjudication. We reject Maslyk's argument that he was denied the right to counsel.

Construing Maslyk's brief liberally, we will interpret his argument as claiming that counsel rendered ineffective assistance, a claim that a defendant may raise for the first time on appeal. *See* Tex. R. App. P. 38.9; *Cannon v. State*, 252 S.W.3d 342, 347 n.6 (Tex. Crim. App. 2008). That is, Maslyk contends trial counsel should have preserved this issue at trial and did not.

To establish ineffective assistance, an appellant must show by an evidentiary preponderance that his counsel's representation was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). An appellate court cannot infer ineffective assistance

based on ambiguities in the record or when counsel's reasons for failing to do something do not appear in the record. *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012); *Mata v. State*, 226 S.W.3d 425, 432 (Tex. Crim. App. 2007). Trial counsel "should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective." *Menefield*, 363 S.W.3d at 593. If trial counsel is not given that opportunity, we should not conclude that counsel's performance was deficient unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Nava*, 415 S.W.3d at 308. These principles are precisely why it is a "rare case" in which the trial record alone will support an ineffective-assistance claim. *Id.*

Here, Maslyk personally certainly knew about the amendments—he signed them—but the record does not show whether Maslyk's counsel knew about them. We do not know if trial counsel's failure to raise the *Rogers* issue was based on (1) not knowing the trial court had amended Maslyk's probation conditions; (2) knowing the trial court had amended those conditions but not knowing about the *Rogers* issue; or (3) knowing the trial court had amended Maslyk's conditions, knowing about the *Rogers* issue, but concluding that the issue had no merit in Maslyk's circumstances. Contextually, because Maslyk contends that the *Rogers* issue is a certain winner, we construe his position to be that all three explanations for not pursuing the *Rogers* issue still amount to conduct "so outrageous that no competent attorney would have engaged in it." *Nava*,

415 S.W.3d at 308 (*quoting Menefield*, 363 S.W.3d at 593); *see* Tex. R. App. P. 38.9.

Although we cannot resolve what counsel knew, we can resolve whether counsel's raising the *Rogers* issue would have benefited Maslyk. As shown below, we hold that trial counsel's not raising *Rogers* does not show a deficient representation.

Article 42.12[5] discusses amendments to probation conditions in two contexts:

- Code of criminal procedure article 42.12, section 10, addresses who has the authority to impose, modify, or revoke community supervision; and section 11 addresses the basic community-supervision conditions. *See* Tex. Code Crim. Proc. Ann. art. 42.12, §§ 10, 11 (West Supp. 2016). Under these provisions, an amendment to probation conditions occurs independently of any petition to proceed to an adjudication. *See id.*

- Code of criminal procedure article 42.12, section 21, addresses what occurs when a defendant violates probation conditions, and section 22 addresses the continuation or modification of community supervision in conjunction with section 21. *See id.* art. 42.12, §§ 21, 22 (West Supp. 2016). Any amendment under these provisions occurs specifically in conjunction with a petition to proceed with an adjudication after a hearing on the petition. *See id.*

Regarding amendments under section 11(a)—which are independent of a petition to proceed to an adjudication—we have written: "Because a trial court

[5]Effective January 1, 2017, the Legislature repealed article 42.12 and re-codified it as Chapter 42A. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, §§ 3.01, 4.02, art. 42.12, 2015 Tex. Sess. Law Serv. 2320, 2394 (West) (codified at Tex. Code Crim. Proc. art. 42A). The Legislature intended no substantive changes. *Id.* § 4.01. Maslyk's case preceded the effective date of Chapter 42A.

retains continuing jurisdiction over a defendant's probation, it has almost unlimited authority as a matter of law to alter or modify any conditions of probation during the probationary period." *Stevens v. State*, 938 S.W.2d 517, 520 (Tex. App.—Fort Worth 1997, pet. ref'd); *see also Beech v. State*, Nos. 2-08-053-CR, 2-08-054-CR, 2009 WL 673482, at *2 (Tex. App.—Fort Worth Mar. 12, 2009, no pet.) (mem. op., not designated for publication).

Amendments can occur without a hearing. *See Rickels v. State*, 108 S.W.3d 900, 902 (Tex. Crim. App. 2003); *Blavier v. State*, No. 06-11-00147-CR, 2011 WL 6288046, at *1 (Tex. App.—Texarkana Dec. 15, 2011, no pet.) (mem. op., not designated for publication) ("The conditions of community supervision may be modified without a formal hearing if the defendant agrees to the modification in writing."); *Burns v. State*, No. 05-10-00402-CR, 2011 WL 1238389, at *2 (Tex. App.—Dallas Mar. 31, 2011, no pet.) (mem. op., not designated for publication) (holding amending conditions without a hearing not error where defendant signed amendments); *see also Ex parte Harrington*, 883 S.W.2d 396, 397, 401 (Tex. App.—Fort Worth 1994, pet. ref'd) (holding that a modification at a hearing without a motion to proceed to adjudication was nonetheless valid).

In Maslyk's case, for example, on the same date he received his original conditions—July 9, 2013—he also received amended conditions. Thereafter, Maslyk received additional amended conditions on January 9, 2014; September 4, 2014; April 13, 2015; May 20, 2015; and November 9, 2015. The record shows

that all these amendments occurred without any petition to proceed to an adjudication and were thus necessarily amendments under section 11(a). Under section 11(a), revoking Maslyk's community supervision was never in play; his probation was never in jeopardy—it merely continued with additional conditions.

Amendments under section 22(a) are different. In conjunction with a hearing on a petition to proceed to an adjudication, the trial court may, *after a hearing*, return the defendant to community supervision and modify his probation conditions rather than revoke the defendant's probation, adjudicate him guilty, and send him to prison. *See* Tex. Code Crim. Proc. Ann. art. 42.12, § 22(a) ("If after a hearing under Section 21 of this article a judge continues or modifies community supervision after determining that the defendant violated a condition of community supervision, the judge may impose any other conditions the judge determines are appropriate . . . ."). Under section 22(a), revoking a defendant's probation or returning a defendant to community supervision, with or without any modifications, is directly in play. *See id.*

Procedurally, *Rogers* falls under section 22(a). *Rogers* involved two separate hearings on the State's motion to revoke probation. At the first hearing, the trial court reinstated the defendant on probation and modified his conditions; at the second hearing, the trial court revoked the defendant's probation on the identical allegations presented at the first hearing. *Rogers*, 640 S.W.2d at 248–49.

In contrast, the June 21, 2016 amendments here fall under section 11(a). Although there was an amendment, as in *Rogers*, Maslyk's amendment—albeit after the State filed a petition to proceed to an adjudication—was not after a hearing on a petition to proceed to an adjudication. The June 21, 2016 amendments are necessarily section 11(a) amendments and *Rogers* is thus distinguishable.

Unlike in *Rogers*, the trial court here never had two hearings on the same petition and did not rule twice on the same allegations in an inconsistent, arbitrary manner. *See Rogers*, 640 S.W.2d at 254 (first op. on reh'g) ("[I]t is the epitome of arbitrariness that a court should hear all the evidence and return a person to the liberty of probation, only to take the liberty away months later for no additional reason (at least none that appears of record).") The only way Maslyk could have brought his case within *Rogers*'s parameters is if the June amendments had resulted from a hearing on the State's petition to proceed to an adjudication. They did not. The June amendments preceded the July hearing on the State's petition to proceed to an adjudication; accordingly, they could not have resulted from that hearing. Additionally, no other adjudication hearing occurred. It was not possible for the trial court to rule on the same allegations inconsistently at two separate hearings.

Consequently, even if trial counsel had raised the *Rogers* objection in the trial court, that issue would have had no merit. By not raising a meritless complaint at trial, then, trial counsel's performance was not deficient.

We overrule Maslyk's first point.

SECOND POINT

In Maslyk's second point, he argues that the trial court abused its discretion by adjudicating him guilty because the evidence did not show by an evidentiary preponderance that he committed the alleged probation violations.

We review an order revoking community supervision under an abuse-of-discretion standard. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). In a revocation proceeding, the State must prove by an evidentiary preponderance that the defendant violated the terms and probation conditions. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). The trial court alone judges the witnesses' credibility and the weight to be given their testimony, and we review the evidence in the light most favorable to the trial court's ruling. *Cardona*, 665 S.W.2d at 493; *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981). If the State fails to meet its evidentiary burden, the trial court abuses its discretion in revoking the community supervision. *Cardona*, 665 S.W.2d at 493–94. Proof by an evidentiary preponderance that the defendant violated any *one* community-supervision condition suffices to support a revocation order. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980); *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980).

Maslyk's July 9, 2013 amended community-supervision condition 8 provided:

> Do not purchase, possess, access, or view sexually explicit visual or audio material on any medium. *Install and activate, at your own cost, software capable of blocking access to sexually explicit material on any personal computer in your residence*. Permit access by the supervision officer, at any time, to any personal computer in your residence to monitor compliance with the above. [Emphasis added.]

In the State's petition to proceed to adjudication, in paragraph 1(c), it alleged that Maslyk had violated the italicized portion.

Testimony showed that Maslyk and his brother lived in the same residence and that in Maslyk's brother's bedroom was a laptop computer that was not equipped with the requisite blocking software.[6] It either did not have the blocking software, or it had nonfunctioning blocking software. Regardless, the laptop did not have software capable of blocking access to sexually explicit material.

The trial court found this allegation, along with others, true. Based on the evidence at the hearing, we hold that the trial court did not abuse its discretion by finding that allegation true. *See Cardona*, 665 S.W.2d at 493.

Because the State proved that Maslyk violated at least one alleged probation condition, we need not decide whether the State met its burden on the others. *See Moore*, 605 S.W.2d at 926.

We overrule Maslyk's second point.

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[6]In a supplemental brief, Maslyk attempts to argue that this condition violated his brother's reasonable right-to-privacy expectation. Maslyk did not preserve this argument for review. *See* Tex. R. App. P. 33.1.

CONCLUSION

Having overruled Maslyk's points, we affirm the trial court's judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: SUDDERTH, KERR, and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: May 25, 2017