In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-20-00080-CR

ALICIA RAINE SPENCER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 336th District Court
Fannin County, Texas
Trial Court No. CR-19-26904

Before Morriss, C.J., Burgess and Stevens, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

Alicia Raine Spencer pled guilty to credit or debit card abuse of an elderly individual, a third-degree felony, and was placed on deferred adjudication community supervision for five years pursuant to a plea-bargain agreement with the State. *See* TEX. PENAL CODE ANN. § 32.31(b), (d). After the trial court found that she failed to comply with the terms and conditions of her community supervision, it adjudicated Spencer's guilt, sentenced her to three and one-half years' imprisonment, and ordered her to pay $324.89 in restitution. The trial court also ordered that Spencer's sentence be served consecutively with the sentence in our companion cause number 06-20-00081-CR.[1]

On appeal, Spencer argues that her counsel rendered ineffective assistance when she failed to object to hearsay statements about her drug and alcohol use at the revocation hearing. Spencer also argues that the trial court erred by ordering her sentence to run consecutively with the sentence imposed in cause number 06-20-00081-CR and by failing to affix her thumbprint to the judgment, in violation of Articles 42.01 and 38.33 of the Texas Code of Criminal Procedure.[2] We find that (1) Spencer was not prejudiced by any alleged ineffective assistance, (2) the trial court properly ran her sentences consecutively, and (3) the trial court complied with Articles 42.01 and 38.33. As a result, we affirm the trial court's judgment.

[1]In companion cause number 06-20-00081-CR, Spencer also appeals her conviction for possession of less than one gram of a penalty group one controlled substance within a drug-free zone, a third-degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.134(d).

[2]Even though the judgment contained Spencer's state identification number, she also argued that the judgment did not contain any identifying information other than her name.

I. Spencer Was Not Prejudiced by any Alleged Ineffective Assistance

The State's motion to adjudicate Spencer's guilt alleged two separate violations, including that (1) Spencer failed to abstain from marihuana and alcohol and (2) did not attend Alcoholic Anonymous (AA) meetings as required by the terms and conditions of her community supervision. At the adjudication hearing, when counsel asked Kirsty Carroll, Spencer's community supervision officer, whether a urinalysis had alerted the community supervision department of a presumptive positive for marihuana, Carroll responded, "Yeah. It was when I was out, but yeah, it was a urine test." Debra Roberts, the head of the community supervision department, also testified that the "urine test was a positive [for] amphetamine and marihuana, and [that Spencer] also admitted to alcohol." Carroll and Roberts both testified that Spencer did not regularly attend AA meetings. The trial court found both the State's allegations true.

The record shows that the urine test was administered by Patty Andrews, a member of the community supervision department who did not testify. Spencer had also admitted to drinking alcohol to Andrews, not Carroll or Roberts. As a result, Spencer argues that her counsel rendered ineffective assistance by failing to object to Carroll's and Roberts's testimony about her admission and the results of the urinalysis.

"As many cases have noted, the right to counsel does not mean the right to errorless counsel." *Lampkin v. State*, 470 S.W.3d 876, 896 (Tex. App.—Texarkana, 2015, pet. ref'd) (citing *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006)). "In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test set forth in *Strickland* . . . ." *Id.* (citing *Strickland*, 466 U.S. at 687–88; *Ex parte Imoudu*, 284

S.W.3d 866, 869 (Tex. Crim. App. 2009) (orig. proceeding)). "A failure to make a showing under either prong defeats a claim for ineffective assistance." *Id.* at 897 (citing *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003)).

The first prong requires a showing "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Under the second prong, a defendant must show that "the deficient performance prejudiced the defense." *Id.* at 687.

At an adjudication hearing, proof by a preponderance of the evidence on any one of the alleged violations is sufficient to support a trial court's decision to revoke community supervision. *See Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980); *Lively v. State*, 338 S.W.3d 140, 143 (Tex. App.—Texarkana 2011, no pet.). As the State correctly argues, Spencer cannot meet the second part of the *Strickland* test because her ineffective assistance claim does not impact the trial court's unchallenged finding that she violated the terms and conditions of her community supervision by failing to attend regular AA meetings. Moreover, during the adjudication hearing, Spencer admitted that she drank alcohol with a friend who was also using marihuana.[3] Spencer's own testimony was sufficient to support the trial court's finding that she violated the terms of her community supervision requiring her abstention from alcohol and drugs.

Because Spencer has not shown that she was prejudiced by any alleged ineffectiveness of counsel, we find that she cannot meet *Strickland*'s second prong. As a result, we overrule Spencer's first point of error.

[3]Spencer also admitted that she had tested positive for amphetamine but believed that the positive drug test was the result of ingesting Adderall, which she described as "clean meth."

II. The Trial Court Properly Ran Spencer's Sentences Consecutively

Spencer argues that the trial court erred in running her sentence in this case consecutively with her sentence for possession of a controlled substance in a drug-free zone in cause number 06-20-00081-CR. We disagree.

Spencer relies on Section 3.03 of the Texas Penal Code, which states that, with certain exceptions, sentences shall run concurrently "[w]hen the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action." TEX. PENAL CODE ANN. § 3.03(a). The record shows that Spencer's offenses occurred several months apart, and Spencer fails to explain how the two offenses arose out of the same criminal episode. As a result, Spencer does not show that Section 3.03(a) required the trial court to issue concurrent sentences.

More importantly, we find that the issue is controlled by Section 481.134 of the Texas Health and Safety Code, which sets forth special provisions for increased punishment of drug offenses that occur in drug-free zones. As a result of a finding that Spencer's drug possession occurred in a drug-free zone, Spencer was punished in accordance with Section 481.134(d). *See* TEX. HEALTH & SAFETY CODE ANN. § 481.134(d). Under Section 481.134(h), "[p]unishment that is increased for a conviction for an offense listed under this section may not run concurrently with punishment for a conviction under any other criminal statute." TEX. HEALTH & SAFETY CODE ANN. § 481.134(h). The Texas Court of Criminal Appeals has written, "It is apparent from the language of this statute that a conviction for an offense listed anywhere within § 481.134 cannot run concurrently with a conviction for an offense under any *other* criminal statute."

Williams v. State, 253 S.W.3d 673, 678 (Tex. Crim. App. 2008). "Just reading the statute under the auspices of common usage and grammar, 'any other criminal statute' means a criminal statute not listed within § 481.134." *Id.* (quoting TEX. HEALTH & SAFETY CODE ANN. § 481.134(h)).

Because Spencer was convicted of one offense that was not within Section 481.134 and another offense that was listed within Section 481.134, the trial court did not err in ordering consecutive sentences. Consequently, we overrule Spencer's second point of error.

III. The Trial Court Complied with Articles 42.01 and 38.33

Article 42.01 states, "The judgment shall reflect . . . [t]he defendant's thumbprint taken in accordance with Article 38.33." TEX. CODE CRIM. PROC. ANN. art. 42.01, § 1(23). Article 38.33 states, "The court shall order that a defendant who is convicted of a felony or a misdemeanor offense that is punishable by confinement in jail have a thumbprint of the defendant's right thumb rolled legibly on the judgment or the docket sheet in the case." TEX. CODE CRIM. PROC. ANN. art. 38.33, § 1. The judgment adjudicating Spencer's guilt does not contain her thumbprint in the body of the judgment. As a result, Spencer's prayer for relief asks this Court to remand the judgment to allow the trial court to correct the defect.

The State argues that Spencer's thumbprint was taken on the day of sentencing before the judgment was signed and is affixed to the judgment as reflected in a supplemental clerk's record. We agree.

The judgment, signed on June 17, 2020, shows that Spencer was sentenced on May 28, 2020. The supplemental clerk's record contains a "CLERK'S CERTIFICATION FINGER [SIC]

PRINT ON FELONY CASE" form showing a rolled right thumbprint taken on May 28. The form was signed by a "Matt Abbott" of the "Classification" Department or Office. While the document does not contain the clerk's signature, it contains language stating "I, Nancy Young, District Clerk in and for Fannin County, Texas[,] do certify the foregoing is the Thumb Print of the Defendant's Right Hand in the above and numbered cause." The cause number on the document matches the cause number on the judgment and appears directly underneath the judgment in the supplemental clerk's record. We recognize that no current authority suggests that substantial compliance with Articles 42.01 and 38.33 is sufficient. Even so, we find that the supplemental clerk's record shows actual compliance because the "CLERK'S CERTIFICATION FINGER [SIC] PRINT ON FELONY CASE" page was affixed to the judgment, as intended when the print was taken. As a result, we overrule Spencer's last point of error.

IV. Conclusion

We affirm the trial court's judgment.

Ralph K. Burgess
Justice

Date Submitted: December 7, 2020
Date Decided: December 21, 2020

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