TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00020-CR

Israel Noel Gomez, Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NO. D-1-DC-08-205656, HONORABLE KAREN SAGE, JUDGE PRESIDING**

MEMORANDUM OPINION

Appellant Israel Noel Gomez pleaded guilty to the offense of possession of a controlled substance and was placed on five years' deferred adjudication community supervision. In December 2015, the trial court granted the State's motion to proceed with adjudication of guilt and revoked appellant's community supervision, adjudged him guilty, and assessed his punishment at confinement for eight years in the Institutional Division of the Texas Department of Criminal Justice. In one point of error, appellant complains that he received ineffective assistance of counsel. Finding no reversible error but clerical errors in the judgment of conviction, we modify the judgment and, as modified, affirm.

Background[1]

Appellant was placed on deferred adjudication community supervision after he pleaded guilty to possession of a controlled substance. The terms and conditions of his community supervision included:

> Commit no offense against the laws of this or any State or of the United States.
>
> Avoid the use of all narcotics, habit forming drugs, alcoholic beverages, and controlled substances.
>
> Report to the supervision officer as directed by the judge or the supervision officer and obey all orders of the Court and the rules and regulations of the Community Supervision and Corrections Department.
>
> Submit a urine specimen at the direction of the Supervision Officer, daily if ordered, and pay all costs if required.
>
> Report to the supervision office for an evaluation for the following program or services and follow the recommendation and pay costs incurred while in the program: . . . Counseling/Treatment designated by the Supervision Officer.

Appellant also was required to pay court costs, a fine, restitution, and fees.

In September 2014, the State filed an amended motion to proceed with an adjudication of guilt, alleging multiple violations of appellant's terms and conditions of community supervision. The State alleged that he had failed to avoid the use of narcotics, habit forming drugs and controlled substances "in that he submitted a positive urine specimen for Cocaine and

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[1] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced during the hearing on the State's motion to adjudicate guilt, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

Benzodiazepines use on April 14, 2014." The State also alleged that appellant failed to report to his community supervision officer for May, June, July, and August 2014; failed to pay the fine, court costs, and fees; failed to complete outpatient treatment; and failed to submit specimens on two occasions, May 2, 2013 and December 10, 2013. The State thereafter filed second, third, and fourth amended motions to proceed with adjudication of guilt and alleged additional violations. The State's additional allegations included that appellant had committed subsequent offenses of misapplication of fiduciary property on August 5, 2014, and injury to a child on August 28, 2014, by "striking [the child] with his hand" and that he had failed to abide by the conditions of a bond and court order in the injury-to-a-child case "by going within 200 yards of and having contact with [the child]."[2]

The trial court considered the fourth amended motion to proceed with an adjudication of guilt at a hearing on December 17, 2015. Appellant pled true to all of the alleged violations of the terms and conditions of community supervision except he pled not true to the allegations that he had committed subsequent offenses. The parties then presented evidence, including testimony and exhibits, to support their competing positions as to the alleged subsequent offenses. At the conclusion of the hearing, the trial court found all of the State's allegations to be true, adjudged appellant guilty, and sentenced appellant to eight years' confinement. The trial court thereafter signed and entered its judgment adjudicating guilt on December 21, 2015. In its judgment, the

[2] The record reflects that the cases concerning the two subsequent offenses were pending at the time of the revocation hearing. At a subsequent hearing after the trial court entered its judgment adjudicating guilt, the prosecutor represented to the court that the State was "planning on dismissing the pending cases so [appellant could] just go on to TDC."

trial court listed its specific findings of appellant's violations of the terms and conditions of community supervision. Appellant filed a notice of appeal from the judgment adjudicating guilt on January 8, 2016.

On May 16, 2016, the trial court held a hearing on appellant's motion for a new trial. Appellant was represented by new counsel at this hearing. The witnesses included appellant's former attorney who represented him at the revocation hearing, appellant, and appellant's mother. Appellant's position was that he did not receive effective assistance of counsel, arguing that his former attorney "did not investigate or call witnesses or look into defenses on either of the subsequent allegations" and that appellant should have the "opportunity to actually have the investigation of the two—of the allegations, including any mitigating evidence that would have been helpful to the Court making its decisions on the allegations he pled true to." Following this hearing, the trial court signed an order denying "the motion for a new hearing."[3]

Analysis

Claim of Ineffective Assistance of Counsel

In his sole point of error, appellant argues that he received ineffective assistance of counsel. He asserts that his counsel was ineffective "by failing to adequately investigate either of the two subsequent offenses in an attempt to mitigate the sentence imposed by the Court." *See*

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[3] The order also recites that the trial court "granted the Writ of Habeas Corpus requested in Petitioner's Petition for Writ of Habeas Corpus." After retaining new counsel, appellant filed a petition for writ of habeas corpus on March 28, 2016, complaining that the appeal bond amount was "objectively excessive and unreasonable" and seeking appellant's release on a reasonable bond. The trial court reduced the amount of bond to $200,000 after holding another hearing on June 13, 2016.

Strickland v. Washington, 466 U.S. 668, 691 (1984) (explaining that counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010) (same). Appellant asserts that he provided "names of witnesses and pertinent documents and information" to his counsel that his counsel failed to investigate and that his counsel "did not review any evidence before the [revocation] hearing and did not subpoena or prepare a single witness."

To establish ineffective assistance of counsel, an appellant must demonstrate by a preponderance of the evidence both deficient performance by counsel and prejudice suffered by the defendant. *Strickland*, 466 U.S. at 687; *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *Perez*, 310 S.W.3d at 893. Appellate review of counsel's representation is highly deferential; we must indulge a strong presumption that counsel's representation falls within the wide range of reasonable professional assistance—that is, we must presume that trial counsel's actions or inaction and decisions were reasonably professional and motivated by sound trial strategy. *Strickland*, 466 U.S. at 686; *see Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013). To rebut that presumption, a claim of ineffective assistance "must be 'firmly founded in the record' and 'the record must affirmatively demonstrate' the meritorious nature of the claim." *See Menefield*, 363 S.W.3d at 592–93 (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)); *see also Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of an informed strategic or tactical decision, a reviewing court should presume

that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *Frangias*, 450 S.W.3d at 136 (quoting *Goodspeed*, 187 S.W.3d at 392).

"[T]o obtain relief on a failure-to-investigate claim, appellant 'must show what evidence would have been obtained by the investigation and that it would have helped him.'" *White v. State*, No. 02-16-00034-CR, 2017 Tex. App. LEXIS 721, at *7 (Tex. App.—Fort Worth Jan. 26, 2017, no pet.) (mem. op., not designated for publication) (citations omitted); *see Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004) ("To obtain relief on an ineffective assistance of counsel claim based on an uncalled witness, the applicant must show that [the witness] had been available to testify and that his testimony would have been of some benefit to the defense."); *Pinkston v. State*, 744 S.W.2d 329, 332 (Tex. App.—Houston [1st Dist.] 1988, no pet.) ("An attorney's failure to investigate or present witnesses will be a basis for establishing ineffective assistance of counsel only where it is shown that the witnesses would have been available and that the presentation of the evidence would have benefitted appellant."). To support his failure-to-investigate claim, appellant primarily relies on evidence from the post-conviction hearing that occurred in May 2016, but the evidence from that hearing is not properly in the record before us.

A motion for new trial must be filed no more than 30 days after the date the trial court imposes sentence. Tex. R. App. P. 21.4(a). The trial court also must rule on a motion for new trial within 75 days after imposing sentence. Tex. R. App. P. 21.8(a). If the trial court fails to rule by written order within 75 days of imposition of sentence, a motion for new trial is overruled by operation of law. Tex. R. App. P. 21.8(c). Once a motion for new trial is overruled by operation of

law, the trial court is without jurisdiction to rule on the motion. *State v. Garza*, 931 S.W.2d 560, 562 (Tex. Crim. App. 1996). A hearing held after the trial court has lost jurisdiction to rule on the motion is not authorized, and therefore, will not be considered on appeal. *Parmer v. State*, 38 S.W.3d 661, 667 (Tex. App.—Austin 2000, pet. ref'd).

At the May 2016 hearing, the trial court stated that the hearing was on "technically your motion for a new trial," and defense counsel responded that it was "the motion to hear the motion for new trial." The record, however, does not contain a motion for new trial.[4] Further, even if appellant filed a motion for new trial, the motion already would have been overruled by operation of law at the time that the trial court held the May 2016 hearing. *See* Tex. R. App. P. 21.8(c). The trial court imposed sentence on December 17, 2015. A motion for new trial then would have been overruled by operation of law on March 1, 2016, 75 days after the trial court imposed sentence. *See id.* Accordingly, even if appellant had timely filed a motion for new trial, we cannot consider the facts developed at the May 2016 hearing in the context of this direct appeal. *See Parmer*, 38 S.W.3d at 667. Because we may not consider the evidence adduced at the May 2016 hearing, the record does not contain any evidence to support appellant's contention that his counsel failed to reasonably investigate the subsequent offenses or to make a reasonable decision that a particular investigation as to the subsequent offenses was unnecessary. *See Strickland*, 466 U.S. at 691; *Perez*, 310 S.W.3d at 894.

[4] Appellant raised ineffective assistance claims in his petition for writ of habeas corpus seeking to reduce the bond amount, but that petition was not filed until March 28, 2016, which was outside the time period for filing a motion for new trial.

Moreover, appellant further has failed to show what evidence would have been obtained by a particular investigation or how that evidence would have helped appellant. *See White*, 2017 Tex. App. LEXIS 721, at *7. Absent evidence on these issues, appellant cannot meet his burden to show that counsel's performance was deficient based on counsel's investigative efforts. *See Strickland*, 466 U.S. at 690, 700 (explaining that appellant must show both deficient performance and prejudice to defense to succeed on claim of ineffective assistance of counsel); *Menefield*, 363 S.W.3d at 592 (observing that ineffective-assistance claim must be "firmly founded in the record" and "the record must affirmatively demonstrate" meritorious nature of claim); *see also Perez*, 310 S.W.3d at 894 (reciting court's conclusion in prior opinion that failure to call witnesses at punishment phase was irrelevant absent showing such witnesses were available and appellant would benefit from their testimony (citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983))). Accordingly, we overrule appellant's sole point of error.

Clerical Error in Judgment

In a cross-point, the State requests that this Court modify the judgment to correct clerical errors. The judgment reflects that appellant's first name is "Isreal" and that he was convicted of "Possession of a Controlled Substance Methamphetamine" when in fact the record reflects that his first name is "Israel" and he was convicted of "Possession of a Controlled Substance 3,4-Methylenedioxy Methamphetamine." The judgment also reflects "section 481.115(c)" of the Texas Health and Safety Code as the Statute for Offense when in fact the section was "481.116(c)." *See* Tex. Health & Safety Code §§ 481.115(c), .116(c); *see also id.* § 481.103(a)(1) (listing controlled substances in penalty group 2). The judgment also is missing allegations that the trial

court found to be true and other allegations that the trial court found to be true are incomplete or duplicative.

This Court has authority to modify incorrect judgments when the necessary information is available to do so. *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993). Accordingly, we modify the judgment to reflect that appellant's name is "Israel" Noel Gomez, that he was convicted of "Possession of a Controlled Substance 3,4-Methylenedioxy Methamphetamine," and that the statute for the offense was section 481.116(c) of the Texas Health and Safety Code. We further modify the judgment to delete the duplicate recitations of violations of the terms and conditions of community supervision listed on the judgment and to include the following additional violations:

> Committed the subsequent criminal offense in that on or about the 28th day of August 2014, in the County of Travis and State of Texas, the said, ISRAEL NOEL GOMEZ, did then and there intentionally, knowingly and recklessly cause bodily injury to [I.M.], a child 14 years of age or younger, by striking [I.M.] with his hand.
>
> Failed to abide by the conditions of his bond in cause number D1-DC-15-900017 and violated the court's order by going within 200 yards of and having contact with [I.M.]. Specifically, on November 2, 2015, in Travis County Texas, a CPS caseworker discovered the defendant in [I.M.]'s apartment while [I.M.] was present. When asked by the CPS caseworker for his identity, the defendant denied that he was Israel Gomez and claimed to be a neighbor or friend.

Conclusion

Having overruled appellant's point of error, we modify the judgment of conviction as noted above and affirm the judgment as modified.

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Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Modified and, as Modified, Affirmed

Filed: July 25, 2017

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