

Affirmed and Opinion Filed May 25, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00895-CR

No. 05-15-00896-CR

JAMES JOSEPH ASHBY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause Nos. F06-01322-H & F06-87388-H**

MEMORANDUM OPINION

**Before Justices Francis, Fillmore, and Schenck
Opinion by Justice Francis**

James Joseph Ashby appeals his convictions for engaging in organized criminal activity and aggravated assault with a deadly weapon. In a single issue, appellant claims he received ineffective assistance of counsel at the hearing to revoke his community supervision. We affirm.

Under an agreement with the State, appellant was placed on deferred adjudication for ten years after pleading guilty to shooting a man in the neck, while being a member of a criminal street gang. The State moved to adjudicate his guilt on four grounds in the organized criminal activity case and two grounds in the aggravated assault case. At the hearing, appellant pleaded true to allegations in each case that he failed to pay community supervision fees and complete community service hours as directed. He pleaded not true to allegations that he committed family violence assault while on probation and did not report to his probation officer.

At the hearing, two Dallas County probation officers testified about the technical violations. A Dallas police officer testified about responding to a family violence assault call involving the father of a woman appellant had been dating. The man had been beaten and his face was lacerated and bloody; appellant was identified as the attacker. At the conclusion of the hearing, the trial court granted the State's motions and sentenced appellant to ten years in prison and made an affirmative finding of a deadly weapon in each case.

Appellant contends he did not receive effective assistance of counsel at the hearing because counsel did not object when the trial court proceeded to punishment immediately after adjudication without allowing for the introduction of mitigating evidence. He also alleges counsel was ineffective for failing to offer mitigating evidence. He claims this failure caused trial counsel's performance to fall "below the expected and accepted norms."

To show ineffective assistance of counsel, an appellant must demonstrate that (1) counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms, and (2) but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). This standard of proof of ineffective assistance applies to the punishment phase as well as to the trial stage of criminal proceedings. *Hernandez v. State*, 988 S.W.2d 770, 771–72 (Tex. Crim. App. 1999).

Evaluations of effectiveness are based on "the totality of the representation." *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013). Allegations of ineffectiveness must be firmly established by the record. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). It is an appellant's burden to prove a claim of ineffective assistance of counsel by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The appellant

must satisfy both prongs of the *Strickland* test, or the claim of ineffective assistance will fail. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

In general, direct appeals do not provide a useful vehicle for presenting ineffectiveness claims because the record for that type of claim is usually undeveloped. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *see also Mallett*, 65 S.W.3d at 63. In addition, before their representation is deemed ineffective, trial attorneys should be afforded the opportunity to explain their actions. *Goodspeed*, 187 S.W.3d at 392. If that opportunity has not been provided, an appellate court should not determine that an attorney's performance was ineffective unless the conduct at issue "was so outrageous that no competent attorney would have engaged in it." *See Garcia*, 57 S.W.3d at 440.

The trial court must provide a defendant an opportunity to present evidence in mitigation of punishment during a proceeding adjudicating guilt. *See Hardeman v. State*, 1 S.W.3d 689, 690-91 (Tex. Crim. App. 1999). However, a separate punishment hearing is not required. *Hardeman*, 1 S.W.3d at 690-91 (citing *Pearson v. State*, 994 S.W.2d 176, 178-79 (Tex. Crim. App. 1992)).

Here, we disagree with appellant's argument that counsel should have objected to the trial court's failure to allow mitigating evidence at the hearing. The record shows the court offered appellant every opportunity to call witnesses, cross-examine the State's witnesses, and present evidence after the court adjudicated him guilty. No objection was necessary. As for appellant's assertion that counsel was ineffective for failing to offer mitigating evidence or testimony on the two allegations appellant contested, what evidence he should have offered is not specified. In his brief, appellate counsel admits, "Each of the witnesses was vigorously cross-examined." This is an understatement. Trial counsel conducted a thorough examination of the police officer as to the new offense and the probation officer as to the failure to report allegations.

Trial counsel filed a written motion to continue appellant's probation and attached four exhibits to the motion. The exhibits included affidavits of non-prosecution and a letter from appellant's employer and his mother. Although the trial court did not admit the exhibits into evidence, the police officer told the court the complainant in the family violence assault did not want to prosecute appellant. And in light of the graphic photos of the complainant's injuries, sound trial strategy may well have dictated that not calling this witness to testify was in appellant's best interest. Then, after placing appellant on deferred adjudication for shooting a man in the neck with an assault rifle and finding he violated probation by beating another man, the trial court sentenced him to ten years in prison instead of the maximum twenty years.

Further, because appellant did not file a motion for new trial, trial counsel did not have an opportunity to explain himself in the trial court. On this record, we cannot conclude counsel's failure to present mitigating evidence was not the result of sound trial strategy. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). We conclude appellant has not met his burden of showing that trial counsel was ineffective. *See Thompson*, 9 S.W.3d at 812. We overrule appellant's sole issue.

We affirm the trial court's judgments.

/Molly Francis/

MOLLY FRANCIS
JUSTICE

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**Court of Appeals
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JUDGMENT

JAMES JOSEPH ASHBY, Appellant

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Opinion delivered by Justice Francis,

Justices Fillmore and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered May 25, 2016.



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Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered May 25, 2016.