AFFIRM; and Opinion Filed May 31, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01048-CR

DAVID TANNER WATKINS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1531440-P

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Brown

David Tanner Watkins appeals his conviction for injury to an elderly individual. In a single issue, appellant contends his trial counsel was ineffective at appellant's guilty plea hearing for failing to present evidence that appellant was mentally ill. We affirm.

The record reflects that appellant got into an argument with his paternal grandmother at her house, and she told him to leave. Appellant grabbed her. After his grandmother went outside to call the police, appellant ran at her and hit her arm to knock the phone out of her hand. Appellant was charged by indictment with intentionally and knowingly causing bodily injury to his grandmother, an elderly individual 65 years of age or older, by grabbing and squeezing and striking her with a hand. *See* TEX. PENAL CODE ANN. § 22.04(a)(3) (West Supp. 2017).

At a hearing on March 29, 2016, appellant entered an open plea of guilty. His signed judicial confession was admitted into evidence. Appellant was 22 years' old at the time of the hearing.

Appellant's stepmother and his grandmother testified for the State. Appellant's stepmother testified that appellant had been her stepson since he was 11 years' old. The stepmother witnessed the offense. She testified that both she and the grandmother had called the police on prior occasions regarding appellant for "verbal and physical disturbances" and that criminal trespass warnings had been issued to appellant for his grandmother's house. The stepmother did not think appellant was a good candidate for probation. She testified that within 24 hours of being released from jail, appellant would be high on drugs and would fail to report.

After the prosecutor finished questioning appellant's stepmother, the trial judge asked her some questions, including when appellant's problems began relative to when appellant became her stepson at age 11. The stepmother stated that appellant had a few incidents of getting in trouble at school, but "within the next year or so, it became – became escalated where he went into the judicial system – the judicial system and went into placement." She stated that appellant had been "in and out since then." The judge noticed "in [her] reading that [appellant] had been diagnosed with some mental illnesses." The stepmother testified that appellant was diagnosed with "the first mental illness" between the ages of 13 and 17 and "different diagnoses have gone on since then." He was diagnosed through the juvenile system. He had been on medications for his mental illness, but would take the medication for a week at the most.

Appellant's counsel questioned the stepmother about appellant's drug use. She testified that appellant used methamphetamine and heroin. Within the previous year, she found him in a bathroom in her house with a needle in his arm. She acknowledged that a portion of appellant's behavior might have been a result of his drug use. Counsel asked if appellant exhibited more

normal and rational behavior when he was on his medications, and the stepmother answered affirmatively. But she added that in addition to medication, appellant does better in a controlled environment, like jail. The stepmother testified that drug treatment would help appellant, but he also needed treatment for his mental illness. She testified that appellant would not get over his mental illness; it was "a condition for the rest of his life." At that point, appellant interjected, "Disagree." The judge admonished appellant not to speak out again.

Appellant's grandmother also testified about the offense. On cross-examination, the grandmother acknowledged that appellant had a drug problem. When asked if appellant might have some measure of success if he sought drug treatment, the grandmother brought up appellant's "mental problems." She thought he was "OCD and bipolar" and stated "they say he has some schizophrenia." She stated the combination of drugs and mental illness was "a mess." She thought appellant needed to take his medication and leave the drugs alone.

The judge then questioned the grandmother about whether appellant knew that he needed to take medication for his mental illness for the rest of his life. She thought he knew, but thought he did not want the medication when he was using drugs.

Appellant testified, and his trial counsel asked him about whether he had a drug problem. Appellant stated that he did not do drugs around either his grandmother or his stepmother. They assume he is always high and he is "really not." He denied that his stepmother had seen him with a needle in his arm. He stated he had not used heroin or methamphetamine prior to the offense. He testified that his stepmother wanted to see him in jail. Noting that the testimony of appellant's stepmother and grandmother appeared to be truthful, counsel asked appellant if he could understand why they might be afraid of his behavior. Appellant testified they did not have confidence he would make it in life. He was locked up a lot growing up, and they thought he was

better off locked up. If the judge gave him "probation or treatment," he was not going to be around his family. He was going to work on his life and had friends who could help him.

At the conclusion of the testimony, the judge asked defense counsel if he believed appellant was mentally competent. Counsel responded that he just read appellant's "PSI and his CATs evaluation," which indicated appellant had been diagnosed with "bipolar and schizophrenia." Trial counsel stated, "This is the first that I've been made aware of that." Counsel indicated he had been representing appellant for about four months. He believed appellant was mentally competent, and the judge agreed.

Before assessing punishment, the judge stated that appellant was in denial about his mental illness and drug addiction. The judge further stated that appellant knew he was supposed to take "those meds" and warned him that he needed to take them for the rest of his life. The trial court assessed the maximum punishment of ten years' confinement. The judge told appellant he needed to sign up for "every possible thing" to help him with his mental illness.

Appellant's trial counsel filed a motion for new trial that did not raise the issue of ineffective assistance. The motion was overruled by operation of law.

Appellant contends his trial counsel was ineffective for failing to investigate and present mitigating evidence of his mental illness at the hearing. Appellant maintains that but for counsel's deficient performance, there is a reasonable probability his sentence would have been shorter.

To prevail on a claim of ineffective assistance of counsel, an appellant must show the following: 1) counsel's performance fell below an objective standard of reasonableness; and 2) a reasonable probability exists that, but for counsel's errors, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *see Andrews v. State*, 159 S.W.3d 98, 101-02 (Tex. Crim. App. 2005). An accused is not entitled to error-free representation, and a reviewing court must look to the totality of the representation in gauging the adequacy of counsel's

performance. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013). Direct appeal is usually an inadequate vehicle for raising a claim of ineffective assistance because the record is generally underdeveloped. *Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012); *see Smith v. State*, 286 S.W.3d 333, 341 (Tex. Crim. App. 2009). Further, trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective. *Menefield*, 363 S.W.3d at 593. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

On this record, appellant has not met his burden to overcome the presumption of reasonable assistance. While the record reflects that defense counsel did not know about appellant's bipolar and schizophrenia diagnoses until the plea hearing, that alone does not establish that counsel's performance was deficient. Counsel represented appellant for about four months and believed he was mentally competent. The record is silent about what counsel did to prepare for the plea hearing and the reason counsel was unaware of the mental illnesses. Counsel did present appellant's drug use as a mitigating circumstance and elicited testimony that appellant would benefit from drug treatment. And after the issue of mental illness was raised, counsel elicited testimony that appellant's behavior improved when he was on medication. We cannot conclude that counsel's performance fell below an objective standard of reasonableness.

Further, even if we assume trial counsel's performance was deficient, appellant cannot show a reasonable probability that, but for counsel's errors, the result would have been different. "Reasonable probability" is a probability sufficient to undermine confidence in the outcome, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Smith*, 286 S.W.3d at 340. The trial court was aware of appellant's mental illnesses based on written information, the source of which is not reflected in the record. Further,

both of the State's witnesses testified about appellant's mental illness. Appellant's stepmother said appellant needed treatment for his mental illness. Appellant would take his medication for a week at a time at most. Appellant's grandmother testified that appellant had OCD, bipolar disorder, and schizophrenia. She indicated that appellant's drug use interfered with his ability to take his medication. Appellant spoke up to dispute that he needed to be on medication for mental illness for the rest of his life. The judge took appellant's mental illness into account when determining punishment, specifically noting that appellant was in denial about it. Although appellant contends trial counsel failed to present mitigating evidence of mental illness, he does not specify any additional mitigating evidence that was not presented. *See Bone v. State*, 77 S.W.3d 828, 834–37 (Tex. Crim. App. 2002) (no proof of prejudice where record did not show that other mitigating evidence existed). We cannot conclude that counsel's error, if any, was so serious as to deprive appellant of a fair trial. We overrule appellant's sole issue.

We affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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TEX. R. APP. P. 47.2(b).

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID TANNER WATKINS, Appellant	On Appeal from the 203rd Judicial District Court, Dallas County, Texas
No. 05-17-01048-CR V.	Trial Court Cause No. F-1531440-P.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Brown, Justices Bridges and Boatright participating.

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

Judgment entered this 31st day of May, 2018.