Opinion issued March 1, 2012

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00790-CR

HARRINGTON CHRISTOPHER YOUNG, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Case No. 1192658

CONCURRING OPINION

I respectfully concur. Appellant, Harrington Christopher Young, pleaded guilty to the first degree felony offense of aggravated sexual assault of a child

under the age of fourteen.[1] Pursuant to a plea bargain without an agreed recommendation as to punishment, the trial court sentenced Young to fifteen years' confinement. In two issues, Young contends that (1) his trial counsel rendered ineffective assistance and (2) his sentence constitutes cruel and unusual punishment. I agree with the majority that Young has not established ineffective assistance of counsel, but I would decide the issue on the basis that Young cannot demonstrate that a reasonable probability exists that had his trial counsel taken the actions that Young contends he should have taken, the result of the proceeding would have been different and Young would have received deferred adjudication community supervision. Regarding Young's second issue, I would hold that he cannot establish that his sentence, which falls within the permissible statutory range, constitutes cruel and unusual punishment.

Background

I adopt the majority's description of the background facts, but respectfully add the following facts relevant to this opinion.

Young argues that his trial counsel told him that he was seeking deferred adjudication community supervision. The clerk's record contains Young's pro se notice of appeal, in which he states, "Defendant was [misled] by attorney into signing for a (PSI) presentencing investigation, being lead to believe he was

[1] *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (2)(B) (Vernon Supp. 2011).

signing a plan for 8 years (PSI) probation sentencing investigation." The record also includes a handwritten letter from Young to the trial court, in which he apologized for an outburst in court, presumably at his sentencing hearing, and explained that his trial counsel had informed him that he would be receiving probation.

The presentence investigation report ("PSI") included a copy of a printout from the Justice Information Management System ("JIMS"). The JIMS printout included a "summary of facts" concerning the initial complaint against Young. This summary reflected that Young forcibly assaulted the complainant, who "kick[ed] and hit[] him" in an effort to make him stop.[2] In an interview with the PSI investigator, Young denied that the complainant kicked and screamed, but he acknowledged that she twice told him to stop and that she pushed him away.

The PSI included reports of interviews with Young's family members, including the niece he admitted assaulting, who expressed forgiveness of Young, requested counseling and community supervision, and asked that he be sent home. The PSI also included statements by Young in which he expressed remorse, stated that he knew what he did was wrong and that he was "very ashamed" and "very sorry," and asked for probation. The PSI also listed "supervision plan/sentencing

[2] The facts in this summary are substantively identical to the facts contained in the probable cause affidavit included in the information initially charging Young with aggravated sexual assault in this case.

options" available for Young and included a number of character-reference letters from family members vouching for Young's character and requesting community supervision. Instead of placing Young on deferred adjudication community supervision, the trial court ultimately sentenced him to fifteen years' confinement.

Ineffective Assistance of Counsel

On appeal, Young contends that his trial counsel was constitutionally ineffective because (1) he failed to file a motion for deferred adjudication, for which the record reflected Young was eligible; (2) he failed to object to or move to correct the PSI based on the apparent errors regarding a pending aggravated sexual assault of a child case allegedly occurring in Baytown ("the Baytown incident") and the implication that Young was eighteen at the time of the charged offense; and (3) he failed to request a court reporter to preserve the record for appeal at the sentencing hearing.

To prevail on an ineffective assistance of counsel claim, Young must demonstrate two things by a preponderance of the evidence: (1) his trial counsel's performance was deficient; and (2) a reasonable probability exists that, but for the deficiency, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694, 104 S. Ct. at 2068. An appellant seeking to establish

ineffective assistance must meet *both* prongs of *Strickland*; thus, an appellate court reviewing an ineffective assistance of counsel claim is not required to address both "components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697, 104 S. Ct. at 2069 ("In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."). The majority concludes that Young has not demonstrated that his trial counsel's performance was deficient; I would conclude that Young has not demonstrated that, but for his trial counsel's alleged errors, a reasonable probability exists that the result of the proceeding would have been different and he would have received deferred adjudication community supervision instead of a fifteen-year sentence.

A. Failure to File Motion Requesting Deferred Adjudication

Young contends that his trial counsel was constitutionally ineffective because he failed to file a motion for probation when the record reflected that Young was eligible for deferred adjudication community supervision.

As the majority notes, unlike jury-recommended community supervision, which requires the defendant to file a pre-trial sworn motion averring that he has not been previously convicted of a felony, no such motion is required for the trial

court to consider and impose deferred adjudication community supervision. *Compare* TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 4(d)(3), (e) (Vernon Supp. 2011) (providing that defendant is not eligible for jury-recommended community supervision unless he files with trial court, before trial, sworn motion stating that he has not been convicted of felony in Texas or in any other state), *with id.* § 5 (providing that trial court may impose deferred adjudication community supervision when, in court's discretion, "the best interest of society and the defendant will be served," and containing no motion requirement). Instead, the decision to impose deferred adjudication community supervision lies entirely within the trial court's discretion; although a defendant may be eligible for deferred adjudication community supervision, he is not entitled to it. *See id.* § 5(a) ("[W]hen *in the judge's opinion* the best interests of society and the defendant will be served, the judge *may*, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision.") (emphasis added); *Hurley v. State*, 130 S.W.3d 501, 506 (Tex. App.—Dallas 2004, no pet.) ("The trial court has broad discretion to fashion appropriate [sentencing] plans using the full range of punishment, community supervision, and deferred adjudication community supervision.").

Here, the record reflects that, although Young's trial counsel did not file a specific motion seeking deferred adjudication community supervision, the trial court was aware that Young desired deferred adjudication. The PSI reflects, in two places, that Young was "hoping for" and "asking for" probation. The PSI also included statements from Young's family members, including numerous character-reference letters, stating their desire that the trial court place Young on probation, require him to attend counseling, and allow him to return home. Thus, even though Young's trial counsel did not file a specific motion seeking deferred adjudication, the trial court, by reading the PSI and the attached reference letters, was aware that Young desired probation.

To establish prejudice, Young must demonstrate that, had his trial counsel filed a motion for deferred adjudication, a reasonable probability exists that the trial court would have granted this motion and imposed deferred adjudication community supervision instead of a fifteen-year sentence. Some facts in the record indicate that Young might be a good candidate for deferred adjudication community supervision: he was only seventeen years old when the offense occurred; he admitted in the PSI that he knew what he did was wrong; he expressed remorse and a desire to obtain counseling; his family, including the complainant, expressed their forgiveness; and the PSI contained several reference letters from family members praising Young's law-abiding ways and his general

good character. The record also contains evidence, however, that Young sexually assaulted his twelve-year-old niece on two separate occasions, that these encounters were not consensual, and that violence was involved.

The trial court was aware of Young's desire for deferred adjudication. Given the trial court's broad discretion in sentencing and its broad discretion in determining whether to impose deferred adjudication community supervision, I cannot conclude, under the facts of this case, that the result probably would have been different had Young's trial counsel filed a motion for deferred adjudication. Thus, I would conclude that Young has not demonstrated that a reasonable probability exists that, but for his trial counsel's failure to file a motion seeking deferred adjudication, the trial court would have imposed deferred adjudication community supervision instead of a fifteen-year sentence.

B. Failure to Object to Errors in PSI

Young also contends that his trial counsel was ineffective because he did not object to or move to correct the PSI, which contained erroneous information regarding the Baytown incident and which erroneously reflected that Young was eighteen at the time of the charged offense.

A defendant charged with aggravated sexual assault of a child under the age of fourteen may be placed on deferred adjudication community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a) (requiring, in these cases,

affirmative finding in open court that community supervision is in best interest of victim before defendant can receive deferred adjudication community supervision). Article 42.12, section 5, subsection (d), however, limits the availability of deferred adjudication community supervision and provides that this sentencing option is not available if the defendant (1) is charged with indecency with a child, sexual assault, or aggravated sexual assault, regardless of the age of the victim, and (2) has previously been placed on community supervision "for any offense under Paragraph (A) of this subdivision." *Id.* § 5(d)(2). This limitation, however, applies only when the defendant has been previously placed on community supervision for one of the listed offenses. There is no such limitation on the availability of deferred adjudication community supervision if the defendant merely has a prior *arrest* for one of these offenses. Furthermore, although section 5, subsection (a) requires a "best interest of the victim" finding before the trial court can place the defendant on deferred adjudication community supervision when the aggravated sexual assault *victim* is under the age of fourteen, section 5 includes no limitations on the availability of deferred adjudication community supervision that are dependent upon the age of the *defendant*. *See id.* § 5(a).

Here, regardless of the confusion concerning whether the Baytown incident, an aggravated sexual assault case, was part of Young's juvenile or adult criminal record, the record is clear that no final disposition of the Baytown incident had

occurred at the time the investigator prepared the PSI in this case. Thus, Young had not previously been placed on community supervision for aggravated sexual assault at the time the trial court sentenced him. Because Young would be ineligible for deferred adjudication community supervision only if he had been previously placed on community supervision for the Baytown incident, the mere fact that he had previously been arrested for this incident does not affect his eligibility. Moreover, whether this incident occurred when Young was a juvenile or an adult is irrelevant; article 42.12, section 5 does not, for example, provide that a defendant may be eligible for deferred adjudication community supervision if he has a *juvenile* criminal record, but ineligible if he has an *adult* criminal record. *See id.* § 5. Because these errors do not affect his eligibility for deferred adjudication community supervision, Young cannot demonstrate that, had his counsel objected to or moved to correct the errors regarding the Baytown incident, there is a reasonable probability that the trial court would have imposed deferred adjudication community supervision instead of fifteen years' confinement.

Young's age at the time that he committed the charged offense is likewise irrelevant to his eligibility for deferred adjudication. Article 42.12, section 5 imposes an additional requirement—a finding in open court that community supervision is in the best interest of the victim—in indecency with a child, sexual assault, and aggravated sexual assault cases in which the *victim* is under the age of

fourteen. *See id.* § 5(a). The deferred adjudication statute contains no provisions restricting deferred-adjudication eligibility in aggravated sexual assault of a child under the age of fourteen cases to instances in which the *defendant* is a certain age, such as seventeen or younger. Thus, the erroneous implication in the PSI that Young was eighteen at the time of the charged offense has no effect on his eligibility for deferred adjudication community supervision. Young, therefore, cannot demonstrate that, had his trial counsel objected to the erroneous implication in the PSI concerning his age at the time of the charged offense, a reasonable probability exists that he would have received deferred adjudication instead of fifteen years' confinement.

C. Failure to Request a Reporter's Record

Finally, Young contends that his trial counsel rendered ineffective assistance because his counsel failed to request a court reporter for the sentencing hearing, and a transcript of the hearing would have revealed (1) counsel's objections to the errors in the PSI or his failure to so object, and (2) counsel's objection to the fifteen-year sentence as cruel and unusual or his failure to so object. Young contends, in his second issue, that his fifteen-year sentence constitutes cruel and unusual punishment. I first consider Young's second issue, as it is relevant in determining whether Young's trial counsel was constitutionally ineffective for failing to request a reporter's record.

The trial court has broad discretion in fashioning an appropriate sentencing plan. *See Hurley*, 130 S.W.3d at 506. Generally, punishment that is assessed within the statutory limits is not excessive, cruel, or unusual punishment. *Dale v. State*, 170 S.W.3d 797, 799 (Tex. App.—Fort Worth 2005, no pet.). We review Eighth Amendment challenges "by reviewing the proportionality of the sentence compared to the crime." *Arriaga v. State*, 335 S.W.3d 331, 335 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (citing *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010)). We consider (1) the gravity of the offense and the harshness of the penalty; (2) the sentence imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the crime in other jurisdictions. *Id.* We only consider the second two factors if we determine that the sentence is grossly disproportionate to the offense under the first factor. *Id.*

Young pleaded guilty to the charge of aggravated sexual assault of a child under the age of fourteen. TEX. PENAL CODE ANN. § 22.021(a)(1)(B)(iii), (2)(B) (Vernon Supp. 2011). As a first degree felony, this offense carries a potential punishment range of five to ninety-nine years' imprisonment or confinement for life. *See id.* § 22.021(e) (defining aggravated sexual assault as first-degree felony); *id* § 12.32(a) (Vernon 2011) (describing punishment range for first degree felonies). "This legislative policy determination is entitled to wide deference." *Arriaga*, 335 S.W.3d at 335.

Here, the trial court assessed punishment at fifteen years' confinement. Other Texas courts have upheld more severe punishments for aggravated sexual assault of a child as not disproportionate to the offense and, therefore, as constitutionally permissible. *See id.* at 335–36 (upholding life sentence); *Williamson v. State*, 175 S.W.3d 522, 525 (Tex. App.—Texarkana 2005, no pet.) (upholding three life sentences for three counts of aggravated sexual assault of child); *Nunez v. State*, 110 S.W.3d 681, 682–83 (Tex. App.—Corpus Christi 2003, no pet.) (upholding twenty-year sentence for aggravated sexual assault of child).

Young argues that this sentence was disproportionate to the offense given his age and the fact that he was eligible for deferred adjudication. A trial court's decision whether to impose deferred adjudication community supervision is entirely discretionary; a trial court is not statutorily required to impose deferred adjudication even if the defendant meets the eligibility requirements. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a); *Hurley*, 130 S.W.3d at 506. Given the trial court's broad discretion in sentencing and the particular facts of this case—especially the fact that Young sexually assaulted his twelve-year-old niece on two occasions and that there is evidence that the encounters were violent and non-consensual—I would conclude that the trial court did not abuse its discretion by refusing to impose deferred adjudication community supervision and by, instead, assessing punishment at fifteen years' confinement. I would therefore overrule

Young's second issue on the basis that he cannot demonstrate that the trial court abused its discretion in sentencing him, and, thus, he cannot demonstrate that his fifteen-year sentence constitutes cruel and unusual punishment.

As the majority notes, trial counsel's failure to request that a court reporter record specific proceedings is not *per se* ineffective assistance of counsel. *Gonzales v. State*, 732 S.W.2d 67, 68 (Tex. App.—Houston [1st Dist.] 1987, no pet.). "Some injury resulting from the failure to request transcription must be raised by appellant on appeal." *Lopez v. State*, 838 S.W.2d 758, 760 (Tex. App.—Corpus Christi 1992, no pet.).

As I have already stated, even if his trial counsel failed to object to the errors in the PSI, Young cannot demonstrate that, but for this failure, a reasonable probability exists that he would have received deferred adjudication community supervision. I would similarly hold that Young cannot demonstrate that the trial court abused its discretion when it assessed punishment at fifteen years' confinement even though Young was eligible for deferred adjudication community supervision. Thus, regardless of whether a reporter's record would have revealed that his trial counsel failed to object to the errors in the PSI and to the fifteen-year sentence as cruel and unusual punishment, Young cannot establish prejudice—that the result of the proceeding would have been different—as a result of his trial counsel's failure to request a reporter's record.

I would therefore overrule Young's first issue on the basis that he cannot demonstrate prejudice as a result of his trial counsel's alleged errors. I would overrule his second issue on the basis that he cannot demonstrate that the trial court abused its discretion in assessing punishment at fifteen years' confinement instead of deferred adjudication community supervision.

Conclusion

Because I disagree with the majority's reasoning regarding Young's claims, but agree that Young has not established that his trial counsel rendered constitutionally ineffective assistance or that his sentence constituted cruel and unusual punishment, I respectfully concur.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Justice Keyes, concurring.

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