

Opinion issued January 13, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00797-CR

LATONYA PATRICE WEBB, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1134211**

MEMORANDUM OPINION

Appellant Latonya Patrice Webb pleaded guilty to the felony offense of retaliation against a public servant. *See* TEX. PENAL CODE ANN. §36.06 (Vernon Supp. 2010). The trial court sentenced Webb to 4 years' confinement, suspended

her sentence, and assessed 4 years' community supervision. After finding that she violated the terms of her supervision, the trial court revoked Webb's community supervision and assessed punishment at three years' confinement. On appeal, Webb contends (1) the evidence is legally insufficient to show she violated her supervision by committing the offense of robbery; (2) she received ineffective assistance of counsel at the revocation hearing; and (3) the trial court abused its discretion in assessing three years' confinement. We affirm the judgment of the trial court.

Background

The terms of Webb's supervision forbade her from committing any criminal offense and required her to perform 200 hours of community service at a rate of eight hours per month. The court also directed Webb to pay a fine and court costs totaling \$1025 at the rate of \$40 per month in addition to several other fees.

In its motion to revoke Webb's community supervision, the State alleged that she violated her supervision by committing the offense of robbery, not completing her community service at the specified rate, and failing to pay any of the mandated fees. Webb pleaded true to the allegation that she failed to pay her fine and court costs, but pleaded not true to all the other allegations. At its hearing on the State's motion, the trial court heard testimony that Webb assisted her son in shoplifting and

assaulting a store owner. Webb's probation officer testified that Webb had completed 46.5 hours of community service, but she had injured her shoulder and was unable to return to service for a few months. Although Webb received a doctor's approval to return to service, she never completed more hours. The officer also testified that she fully explained the community supervision requirements to Webb. The trial court found true the State's allegations of robbery and Webb's failure to perform community service at the proper rate. It accepted Webb's admission that she failed to pay her fine and court costs. The trial court revoked Webb's community supervision and assessed three years' confinement.

Sufficiency of the Evidence

In her first issue, Webb argues that the trial court abused its discretion in revoking her community supervision because the State presented insufficient evidence to support the trial court's finding that she had committed the offense of robbery. In a revocation proceeding, the State must prove by a preponderance of the evidence that a defendant has violated a condition of his community supervision. *Rickels v. State*, 202 S.W.3d 759, 763–64 (Tex. Crim. App. 2006). Showing “a single violation is sufficient to support a revocation.” *Canseco v. State*, 199 S.W.3d 437, 439 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). We review a trial court's determination to revoke community supervision for an abuse of

discretion and view the evidence in the light most favorable to the trial court's decision. *Id.* "The trial court is the exclusive judge of the credibility of the witnesses and [it] must determine whether the allegations in the motion to revoke are sufficiently demonstrated." *Id.*

Here, Webb only challenges the trial court's findings that she committed the offense of robbery and failed to pay her fine and court costs. However, the trial court also found the allegation true that Webb had failed to complete her community service at the required rate. The trial court heard evidence that Webb completed no service hours in the seven months after she received her doctor's approval to return to service. Webb presented no evidence to contradict her probation officer. A trial court may revoke community supervision based upon a single violation, including the violation of monthly community service requirements. *See id.* Therefore, we need not address the sufficiency of the evidence supporting other grounds for revoking Webb's community supervision, including the robbery finding. Accordingly, we hold that the trial court did not abuse its discretion in revoking Webb's community supervision. We overrule her first issue.

Ineffective Assistance of Counsel

In her second issue, Webb contends she received ineffective assistance of counsel because her attorney did not present an affirmative defense of indigence for her failure to pay her fine and court costs. To show ineffective assistance of counsel, a defendant must demonstrate both (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005). A defendant has the burden to establish both of these prongs by a preponderance of the evidence, and a failure to make either showing defeats his ineffectiveness claim. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

We presume that counsel's conduct falls within the wide range of reasonable professional assistance, and we will find counsel's performance deficient only if the conduct is so outrageous that no competent attorney would have engaged in it. *Andrews*, 159 S.W.3d at 101. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

When the record is silent as to counsel's strategy, we will not speculate as to the reasons behind counsel's actions. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

Here, the record is silent as to counsel's reasons for not raising an indigency affirmative defense. The record is also silent as to any advice she gave Webb with regards to pleading true. Webb has the burden to overcome the presumption that her counsel's conduct fell within the range of reasonable professional assistance. *See Andrews*, 159 S.W.3d at 101; *see also Mitchell*, 68 S.W.3d at 642. Finding her counsel ineffective on this record would require impermissible speculation. *See Godoy v. State*, 122 S.W.3d 315, 322 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding counsel not ineffective for failure to raise mental incompetence defense at revocation hearing when record silent on counsel's rationale). We hold Webb did not show she received ineffective assistance of counsel. We overrule her second issue.

Excessive Punishment

In her third issue, Webb argues that the trial court abused its discretion by sentencing her to confinement for three years because the sentence is excessive and disproportionate with regard to her failure to complete her monthly requirement for community service. However, a defendant must make a timely request, objection,

or motion and receive an adverse ruling to preserve complaints regarding punishment on appeal. *See* TEX. R. APP. P. 33.1; *see also* *Curry v. State*, 910 S.W.2d 490, 497–98 (Tex. Crim. App. 1995). Webb neither objected at sentencing nor raised the issue in a motion for new trial and therefore failed to preserve the issue for appellate review.

Regardless, punishment assessed within the statutory limits is generally not excessive. *Jacoby v. State*, 227 S.W.3d 128, 131 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). We defer to the legislature's determination of these statutory ranges. *Id.* at 132. Here, the trial court assessed three years' confinement for Webb's underlying offense, retaliation against a public servant, and not for violating the terms of her community supervision. *See Salley v. State*, No. 12-07-00854-CR, 2008 WL 3931940, at *3 (Tex. App.—Houston [14th Dist.] Aug. 21, 2008, pet ref'd) (mem. op., not designated for publication). Retaliation is a third degree felony with a statutory punishment range of two to ten years. *See* TEX. PENAL CODE ANN. § 36.06; *see also id.* § 12.34 (Vernon Supp. 2010). Therefore, the trial court assessed punishment within the statutory range for retaliation. *See Salley*, 2008 WL 3931940, at *3. We overrule Webb's third issue.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.

Do not publish. TEX. R. APP. P. 47.2(b).