**Opinion issued March 3, 2011**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NOS. 01-09-00858-CR**
**01-09-00859-CR**
**01-09-00860-CR**

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**COURTNEY WOODS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 337th District Court**
**Harris County, Texas**
**Trial Court Case Nos. 1199063, 1199276, and 1199277**

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## MEMORANDUM OPINION

Appellant Courtney Myers Woods pleaded guilty, without a plea agreement, to committing three aggravated robberies. The trial court sentenced him to twenty

years in prison on each case with the sentences to run concurrently. In a single issue raised in all three appeals, appellant asserts that he received ineffective assistance of counsel at punishment. We affirm.

## Background

Appellant pleaded guilty to committing three aggravated robberies in Harris County and requested the preparation of a presentence investigation report ("PSI") and the continuation of the hearing. The trial court granted appellant's request, recessed the hearing without making a finding of guilt, and ordered the preparation of a PSI.

A few months later the court reconvened the case to consider the PSI and appellant's other evidence and witnesses. Without objection from the defense, the State introduced a DVD of one of the aggravated robberies. The State called no witnesses.

The PSI included descriptions of the three robberies and statements of appellant to the effect that he needed money and had been to see some acquaintances known for having money who invited him to join a gang and participate in robberies. When he was caught following a robbery of a "Little Caesar's Pizza" restaurant, his participation in the gang ceased.

The PSI contained a "Victim Impact Statement" from a complainant in the robbery featured on the DVD that alleged that appellant had "pointed a gun at him during the robbery and he thought he was going to be killed."

The PSI also contained information on two alleged aggravated robberies by appellant in Brazoria County: "Aggravated Robbery, set for trial on 11/02/09 in Brazoria County, Texas. An Aggravated Robbery of a post office is being carried with that case, but it has not been indicted." The "post office" robbery was described in detail and the PSI noted that, after a live lineup, appellant was identified as the robber.

The PSI was not introduced into evidence but was considered by the trial court. The court invited both sides to provide additional information for its consideration but there is no record of the trial court asking the defense to point out any inaccuracies in the PSI report.

Appellant called numerous character witnesses—family, friends, a counselor, and a pastor—and introduced a packet of letters attesting to his character and asked the court to place him on deferred adjudication community supervision. Appellant's testimony noted that his need of money for college and to raise his child was such that he succumbed to others who pressured him into a "crime spree." Appellant further pointed out that the DVD bolstered his testimony

that he never took the gun (a pellet gun) out of his waistband or pointed it at anyone.

When asked in cross-examination about other aggravated robberies that he had committed, appellant invoked his Fifth Amendment privilege and his attorney informed the court that appellant was set for trial in Brazoria County for aggravated robbery. Since the PSI recited one case set for trial and another being "carried along with that," the trial court asked if the PSI was incorrect. As appellant's trial counsel was also counsel in the Brazoria County cases, she explained that, while the one case was indicted and set for trial, there was another aggravated robbery case not yet charged, but which was being used by the Brazoria County district attorney as an "extraneous offense."

In her closing argument, trial counsel reminded the court that the DVD did not show appellant brandishing a weapon, but only lifting his shirt to exhibit that he had one. The trial court noted the inconsistency of having seen no pointed gun in the video and the complainant's statement that appellant pointed a gun at him during the robbery. The prosecutor, too, responded, "I would agree with that, Judge." The court acknowledged the State's agreement: "All right. So, at this point, we'll say that [the complainant's] statement is mistaken." The State answered, "Yes, Judge. Although there was some of - - some of the incident did take place off video as you saw. But I can't say what happened there." The court

then observed "that there was no objection at that point to the PSI being accurate when I asked [defense counsel] about it." Trial counsel responded, "I understand" and "I apologize" and the trial court told her to continue her argument. She did, stating "So there wasn't an actual brandishing of the weapon . . . ." Counsel asked the court to give appellant another chance and place him on deferred adjudication community supervision.

In the State's argument, the prosecutor did not mention any brandishing of a weapon but asked the court's consideration of the "eight people who got robbed at gunpoint by" appellant; that appellant "had a choice to commit these five separate robberies, two of which he d[id] not want to acknowledge, and robbing eight people;" that "those eight people" had no choice; that appellant had forever "impacted the lives of those eight people;" and that there were "eight people whose . . . lives changed forever." The prosecutor asked for a prison sentence, pointing "out that [appellant] ha[d] committed five robberies," and that if he received the minimum sentence for each crime, that would be twenty-five years, and if he received the minimum sentence "for each person that he robbed," that would be forty years.

The trial court sentenced appellant to twenty years in prison in each case, with the sentences to run concurrently.

Appellant filed a timely notice of appeal and a request for new counsel. New counsel timely filed a motion for new trial, alleging, among other things, that appellant received ineffective assistance of counsel due to counsel's failure to object to incorrect, harmful information in the PSI, namely that appellant pointed a gun at a complainant rather than only displaying a gun handle in his waistband.

Trial counsel filed an affidavit stating that she had represented appellant in Harris County and Brazoria County. She explained that there was one aggravated robbery case pending in Brazoria County and another aggravated case involving a U.S. Post Office never formally charged but only used as an extraneous offense.[1] Counsel also explained that she had tried to reach a plea agreement but the State would not offer less than thirty-five years in prison, which appellant rejected. Appellant did not want a jury trial because of the risk and chose to plead without a plea agreement in hope of obtaining community supervision.

No hearing was conducted on the motion for a new trial because Brazoria County had sent appellant to prison rather than returning him to Harris County and appellant could not be present. Appellate counsel asked the trial court not to make findings of fact or conclusions of law and withdrew the motion for new trial.

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[1] In open court, appellate counsel later acknowledged receiving copies of the Brazoria County offense report from the State involving the robbery of a postal worker.

## Discussion

In his sole issue, appellant contends that he received ineffective assistance of counsel at the punishment portion of his hearing because his counsel failed to object to two statements in the presentence investigation report: (1) complainant's claim that appellant had pointed a gun at the complainant—a fact contradicted by the video and appellant's testimony—and (2) a statement that appellant had a pending uncharged case in Brazoria County (making a total of five pending aggravated robberies). Appellant acknowledges that there is no record of trial counsel's reasons for not objecting to these statements, but argues that there was no plausible defense strategy for not objecting to these statements.

The United States Constitution, the Texas Constitution, and a Texas statute guarantee an accused the right to reasonably effective assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.051 (West Supp. 2008); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, a defendant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *See Strickland*, 466 U.S. at 687–95, 104 S. Ct. at 2064–69;

*Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (applying *Strickland* test to review of claim of ineffective assistance of counsel under Texas statutes and constitutional provisions). Under *Strickland*, the defendant "must prove, by a preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). The defendant must also show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 833. A "reasonable probability" means a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Judicial scrutiny of counsel's performance must be highly deferential, and the defendant must overcome the presumption that, under the circumstances of the case, the challenged action might be considered sound trial strategy. *Id.* at 689, 104 S. Ct. at 2065. We apply a strong presumption that trial counsel was competent and presume that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

Prior to sentencing by a judge in a felony case, the judge shall direct a community supervision officer to prepare a pre-sentence investigation (PSI) report, which report it is statutorily permitted to consider. *See* TEX. CODE CRIM. PROC.

ANN. art. 42.12, § 9(a) (West Supp. 2010); TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(d) (West Supp. 2010). The judge shall allow the defendant or his counsel to review and comment on the report, and, with leave of the court, proffer evidence as to any factual inaccuracies therein. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(d), (e). The allegation that information in the report is inaccurate does not render the report inadmissible. *Stancliff v. State*, 852 S.W.2d 630, 632 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Rather, the defendant bears the burden of proving that the information was materially inaccurate and that the judge relied upon it. *Id.*

If the report contains information regarding extraneous offenses, "Section 3(a)(1) of Article 37.07 [of the Code of Criminal Procedure] does not prohibit a trial court, as a sentencing entity, from considering extraneous misconduct just because the extraneous misconduct has not been show to have been committed by the defendant beyond a reasonable doubt, if that extraneous conduct is contained in a PSI." *Smith v. State*, 227 S.W.3d 753, 763 (Tex. Crim. App. 2007). Rather, the trial court may consider extraneous acts contained in a PSI not proven beyond a reasonable doubt if there is some evidence from some source (including the PSI itself) from which the trial court may rationally infer that the defendant had any criminal responsibility for the extraneous offense. *Id*. at 764.

Appellant complains of trial counsel's failure to make a "proper objection" to the PSI statement of the complainant who claimed to have had a gun pointed at him. Counsel, however, did point out to the trial court that this was inaccurate and noted the disparity with the video.[2]

Appellant does not suggest what additional objections counsel should have made beyond those permitted by the Code of Criminal Procedure, nor has he presented any authority supporting the position that, had counsel made such additional unspecified objections, the objections would have been granted and such grant would have produced a source of reasonable probability, sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different. We hold that appellant has failed to meet his burden under the first and second prongs of *Strickland* as to this portion of his complaint.

Appellant further complains that trial counsel was ineffective for not objecting to the "misstatement that Appellant had 5 Aggravated Robberies" since he submits there was "no evidence that Appellant was at all connected to, involved with or guilty of the fifth Aggravated robbery that was in the PSI." Appellant argues that trial counsel either failed to read the PSI and/or "had no idea of her

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[2] We note also that the prosecutor pointed out that part of the offense took place "off-camera." While appellant denied pointing the gun at any time, the trial court could have chosen not to believe him, but to believe instead that the complainant's statement referred to the "off-camera" period.

duty to object" to this information he characterizes as inadmissible "because there is no evidence that he was guilty of another offense in Brazoria County, although it's stated so in the PSI."

We must first clarify that the PSI did not state that appellant was guilty of two Brazoria County offenses, but only that there was one case set for trial and another, not indicted, was being "carried with" that trial case. Indeed, appellant's counsel focused the court's attention on the fact that the unindicted, uncharged case was being used as an extraneous. That case, the "post office robbery," was the one discussed in the PSI in which appellant was identified by the complainant. Although no evidence was proffered that these statements in the PSI were untrue, trial counsel properly clarified the relationship of the cases.

Because there was no evidence connecting him to the uncharged aggravated robbery, appellant argues, Code of Criminal Procedure article 37.07, section 3(a)(1) prohibits the consideration of this extraneous offense unless it was proven beyond a reasonable doubt that he committed the crime. Appellant cites to a 1995 case from this Court and a 1993 case from the Fifth Circuit interpreting then-existing Texas law and holding that the failure to object to extraneous offenses in a PSI was ineffective assistance of counsel because extraneous offenses were then

not admissible as evidence at punishment.[3] *See Thomas v. State*, 923 S.W.2d 611, 612–13 (Tex. App.—Houston [1st Dist.] 1995, no pet.); *see also Spriggs v. Collins*, 993 F.2d 85, 89–90 (5th Cir. 1993). Both cases pre-date significant changes in the Code of Criminal Procedure (notably, that extraneous offenses are now admissible at punishment), and in 2007, the Court of Criminal Appeals specifically held article 37.07, section 3(a) to be inapplicable to extraneous offenses discussed in a PSI and so extraneous offenses contained in a PSI do not need to be proven beyond a reasonable doubt in order to be considered by the trial court at punishment. *See Smith*, 227 S.W.3d at 763–64. Rather, there only need be some evidence from some source from which it could be rationally inferred that a defendant had any criminal responsibility for the extraneous offense. *Id*. at 764. Here, information in the PSI positively identifying appellant was sufficient for the trial court to rationally infer he had some criminal responsibility for that offense. We hold that appellant has failed to meet his burden under the first prong of *Strickland* as to this portion of his complaint.

We overrule appellant's sole issue.

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[3] The Fifth Circuit has since repudiated its holding in *Spriggs*, noting that Texas law has now changed. *See Givens v. Cockrell*, 265 F.3d. 306, 310 n.4 (5th Cir. 2001).

## Conclusion

We affirm the judgment of the trial court in each cause.

Jim Sharp
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

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