

Opinion issued December 23, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00893-CR

GILBERT SARABIA, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1203543**

MEMORANDUM OPINION

A jury convicted appellant, Gilbert Sarabia, of aggravated assault, *see* TEX. PENAL CODE ANN. §§ 22.01, 22.02 (Vernon Supp. 2010) and assessed punishment at 15 years' confinement. In four related points of error, appellant contends that he received ineffective assistance of counsel at trial because his trial attorney's law

license had been suspended because of his failure to pay his bar dues and occupational tax. We affirm.

BACKGROUND

Appellant filed a motion for new trial, alleging that his trial counsel was ineffective because his counsel's law license was suspended at the time of trial. At the motion for new trial hearing, the following evidence was developed. Appellant's trial counsel, Carlos Rodriguez, had his law license suspended on September 1, 2009, for failing to pay his bar dues and occupation tax. Appellant's trial took place during the period of Rodriguez's suspension, but before his license was reinstated after he paid his dues and taxes. Rodriguez testified that he did not know that he had been suspended when he represented appellant at trial. Rodriguez's license had been suspended for the same reason in the years 2002, 2004, 2006, 2007, and 2008. After the hearing on the motion for new trial, the trial court did not rule on appellant's motion for new trial, thus it was overruled by operation of law. *See* TEX. R. APP. P.21.8.

ANALYSIS

In issues one through four, appellant contends that he received ineffective assistance of counsel at trial in violation of the Sixth Amendment of the United States Constitution, article I, section 9 of the Texas Constitution, and article 1.051

of the Texas Code of Criminal Procedure. Specifically, appellant contends that counsel was ineffective, as a matter of law, because of his repeated suspensions.

The Court of Criminal Appeals addressed the issue of unlicensed, suspended, and disbarred counsel in *Cantu v. State*, 930 S.W.2d 594, 602 (Tex. Crim. App. 1996). The court concluded that because “a never-been-licensed layman” could never be considered “counsel” under the Sixth Amendment, a per se rule prohibiting such a layman from acting as counsel was appropriate. *Id.* at 601–02. The court found a different rule appropriate for attorneys who were once validly licensed but have subsequently been suspended or disbarred, and stated:

A suspended or disbarred attorney is incompetent as a matter of law if the reasons for the discipline imposed reflect so poorly upon the attorney’s competence that it may reasonably be inferred that the attorney was incompetent to represent the defendant in the proceeding in question. It is possible that the reasons for discipline could be so egregious that the attorney would not be competent to represent *any* criminal defendant. Or, the reasons for discipline might in some way be relevant to the attorney’s responsibilities in the proceedings in question so as to give rise to an inference that the attorney was incompetent to participate in those particular proceedings.

Id. at 602. The court then listed the following relevant factors in determining whether an attorney is incompetent as a matter of law:

- (1) severity of the sanction (suspension versus disbarment; length of suspension);
- (2) the reasons for the discipline;

- (3) whether the discipline was based upon an isolated incident or a pattern of conduct;
- (4) similarities between the type of proceeding resulting in discipline and the type of proceeding in question;
- (5) similarities between kinds of conduct resulting in the attorney's discipline and any duties or responsibilities the attorney had in connection with the proceeding in question;
- (6) temporal proximity between the conduct for which the attorney was disciplined and the proceeding in question; and
- (7) the nature and extent of the attorney's professional experience and accomplishments.

Id. at 602–03.

Reviewing the present case in light of these factors, we hold that Rodriguez's suspension did not render him incompetent as a matter of law. Rodriguez's suspension was minor and temporary; his license was reinstated when he later paid his dues and taxes. *See* TEX. STATE BAR R. art. III, § 7, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit G. app. A (Vernon 2005). While Rodriguez has a pattern of not timely paying his dues and taxes, there is no similarity between that offense and his ability to represent criminal defendants such as appellant. The temporary proximity between appellant's failure to pay his dues and fees and the time of appellant's trial is irrelevant because, once Rodriguez paid his fees, his license was restored to its former status and was retroactive to the inception of his suspension. *See* TEX. STATE BAR R. art. III, §7. Finally, the record shows little

about Rodriguez’s professional experience or accomplishments, but we note that, at a minimum, he met the requirements to be appointed to represent criminal defendants in Harris County.

In sum, we conclude that appellant’s suspension for failure to pay his bar dues and occupation tax—even his repeated failure to pay his bar dues and occupation tax— did not establish that, as a matter of law, he was incompetent to represent appellant at trial. *See Hill v. State*, 393 S.W.2d 901, 904 (Tex. Crim. App. 1965) (holding that failure to pay bar dues does not constitute denial of counsel).

We overrule issues one through four.

CONCLUSION

We affirm the trial court’s judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Bland and Massengale.

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