

Opinion issued February 3, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00305-CR

TONYA DENIESE HEBERT, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1138380**

MEMORANDUM OPINION

Tonya Deniese Hebert appeals from the order adjudicating her guilt for the offense of theft. *See* TEX. PENAL CODE ANN. § 31.03 (West Supp. 2010); *see also* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5 (West Supp. 2010). She contends that

she received ineffective assistance of counsel because her counsel “lied” to her and, as a result, her plea of true to the allegation of violating her community supervision was involuntary. We affirm the judgment of the trial court.

Background

In accord with an agreed recommendation from the State, the trial court deferred adjudication of Hebert’s guilt, following her guilty plea to the offense of theft, and placed her on community supervision for three years. The State later filed a motion to adjudicate guilt, alleging Hebert violated the terms of her supervision. Hebert signed a stipulation of evidence and judicial confession, admitting that she had violated her supervision. The stipulation included a recommendation from the State that she receive eight months’ confinement in a state jail and a \$500 fine. On the same day, Hebert signed admonishments, waivers, and a “Statement of Defendant,” which stated she made her plea voluntarily and she was satisfied with the representation she received. The trial court found Hebert guilty and assessed punishment according to the State’s recommendation.¹

¹ The original trial court certification of the right to appeal stated that this is a “plea bargain” case and that Hebert has no right to appeal. The State made punishment recommendations at both Hebert’s guilty plea and at her plea of true to the violation of her community supervision in response to the State’s motion to adjudicate her guilt. The term “plea bargain” only applies to the original guilty plea and not a plea of true on the grounds to revoke community supervision. *Hargesheimer v. State*, 182 S.W.3d 906, 913 (Tex. Crim. App. 2006); *Wilkerson v. State*, 264 S.W.3d 102, 103 (Tex. App.—Houston [1st Dist.] 2007) (memorandum

Hebert filed two letters within five days of the trial court's judgment adjudicating guilt. She asserted in the letters that her counsel pressured her to prevent her from retaining her own lawyer and told her she would receive over a year of confinement if she tried to reset the hearing. She asserted she accepted the State's recommendation and pleaded true based on this misinformation.

Ineffective Assistance of Counsel

I. Standard of Review

To show ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) 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 the 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

order). We received a corrected trial court certification on January 4 designating that this was not a plea bargain case and Hebert had the right to an appeal.

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 ineffectiveness. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

In assessing the voluntariness of a plea, we review the record as a whole and consider the totality of the circumstances. *Griffin v. State*, 703 S.W.2d 193, 196 (Tex. Crim. App. 1986); *Lee v. State*, 39 S.W.3d 373, 375 (Tex. App.—Houston [1st Dist.] 2001, no pet). A trial court may accept a guilty plea only if the defendant enters it knowingly and voluntarily. TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon Supp. 2010). A record indicating that the trial court properly admonished the defendant presents a prima facie showing that the guilty plea was made knowingly and voluntarily. *Starz v. State*, 309 S.W.3d 110, 117 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (citing *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998)). If the record presents such a showing, then the burden shifts to the defendant to show that he entered the plea without understanding the consequences. *Id.* A defendant who attests to understanding the nature of the guilty plea and that it is voluntary has a heavy burden on appeal to show that the plea was involuntary. *Id.*; *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). A guilty plea based on erroneous information

conveyed by defense counsel is involuntary. *Labib v. State*, 239 S.W.3d 322, 333 (Tex. App.—Houston [1st Dist.] 2007, no pet.). However, a trial court may reject the defendant’s uncorroborated testimony that he was misinformed by counsel. *Starz*, 309 S.W.3d at 117; *see also Labib*, 239 S.W.3d at 335 (“Appellant’s uncorroborated testimony that he was misinformed by counsel does not meet his burden to show that his plea was involuntary.”)

II. Uncorroborated Statements

Hebert filed two letters asserting that her counsel “lied” and pressured her into pleading true to the violation of her community supervision. Before her plea, however, Hebert signed written admonishments stating that she understood the admonishments and the consequences of pleading true. The admonishments create a prima facie showing that her plea was made knowingly and voluntarily. *See Starz*, 309 S.W.3d at 117. Hebert waived the right to a court reporter at the hearing adjudicating her guilt, so no transcript of the hearing exists and she did not file any post-trial motions. The record, therefore, is silent as to any advice, recommendations, or promises given by defense counsel and does not demonstrate that Hebert’s understanding deviated from the admonishments she signed. The only exceptions in the record are the unsworn letters filed with the trial court. We hold her uncorroborated statements in the letters are not sufficient to meet her burden to

show her plea was involuntary and that she received ineffective assistance of counsel. *See Labib*, 239 S.W.3d at 335.

We overrule Hebert's sole issue.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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