Opinion issued December 15, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00456-CR

ELDRED LONNIE REID, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122nd District
Galveston County, Texas
Trial Court Case No. 09CR14444

MEMORANDUM OPINION

Eldred Lonnie Reid was charged by indictment with the third degree felony of failure to register as a sex offender. *See* TEX. CODE CRIM. PROC. ANN. art. 62.102 (West 2006). Reid pleaded not guilty, and a trial was held before a jury,

which found him guilty. The jury assessed punishment at three years' imprisonment. Reid contends that the evidence is insufficient to support the jury's verdict, and that trial counsel failed to provide constitutionally effective assistance. We affirm.

Background

On May 8, 1995, Reid was convicted of rape in Rutherford County, Tennessee and sentenced to nine years in prison. On January 18, 2000, prior to his release from prison in Tennessee, Reid signed a "Sexual Offender Release Notification." The notification stated:

> The Sexual Offender Registry Program and sanctions for failing to comply with the requirements of the program have been explained to me. I have been provided a blank TBI Sexual Offender Registration form and I understand that I must submit it to TBI Headquarters in Nashville . . . within 10 days of discharge from incarceration without supervision.
>
> I also understand that if any information changes on my registration form even temporarily for any reason longer than 10 days, I must notify TBI's Sexual Offender Registry at the address below or be subject to penalties of the law.

In the blank that called for Reid's anticipated address, the document states "inmate says that he will not have an address."

Reid acquired property in Galveston County, Texas in May 2002. Reid did not register as a sex offender in Galveston County or anywhere else in Texas. In

May 2009 he was arrested and charged with failure to register as a sex offender. *See* TEX. CODE CRIM. PROC. ANN. art. 62.102.

At trial, the State offered testimony of Deputy W. O'Briant who testified based on fingerprint analysis that Reid was the same individual who had been convicted of rape in Tennessee in 1995. Deputy O'Briant stated that he was the primary registrar for the Galveston County sex offender registration for people who enter the county and live within unincorporated areas. He confirmed that Reid had never registered in Texas and also testified that individuals who are convicted of the offense of rape in a state other than Texas would be required to register in Texas, because the offense that other jurisdictions call rape equates to sexual assault under Texas law.

The State offered testimony of Officer P. Matranga, a Galveston County Constable, who testified that she and Reid had "a couple" of conversations concerning nuisance claims involving Reid's Galveston property before Reid's arrest. Officer Matranga testified that Reid called her on the day of his arrest to ask her to watch his property because he was being arrested for failing to register as a sex offender in Tennessee.

The State also presented Sergeant E. Hutchison of the Texas Department of Public Safety who described his investigation of Reid leading up to the arrest. Hutchison testified that based on his investigation, Reid was not registered in

Tennessee. Hutchinson said that because Reid was convicted as a sex offender in Tennessee, Reid was required to register in Texas if he resided in Texas for more than seven days. Hutchinson also confirmed that Reid was not registered in Texas. On cross-examination, Reid's attorney presented Hutchison with a document which Reid's attorney referred to as the "Tennessee Bureau of Investigation sexual offender registry search." Hutchison agreed that the document showed Reid was registered in Tennessee but stated that he did not know the validity or the accuracy of the document. The document was not entered into evidence and was not later verified.

Sufficiency of the Evidence

In his first point of error, Reid contends that the evidence is insufficient to support the verdict. In particular, he argues the evidence was insufficient to show that (1) Reid's property was not within a municipality and that Reid therefore was required to register with the county, (2) the existence of a reportable conviction, i.e., that the offense of "rape" in Tennessee and the offense of sexual assault in Texas are "substantially similar," (3) Reid knew he had a duty to register in Texas as opposed to Tennessee, (4) Reid was required to register annually for life, and (5) Reid resided or had the intent to reside for more than seven days in Galveston County. *See* TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(H), 62.051(West Supp. 2010).

A. Applicable Law

An appellate court reviews legal and factual sufficiency challenges using the same standard of review. *Griego v. State*, 337 S.W.3d 902, 902 (Tex. Crim. App. 2011) (per curiam). Under this standard, evidence is insufficient to support a conviction if considering all record evidence in the light most favorable to the verdict, a factfinder could not have rationally found that each essential element of the charged offense was proven beyond a reasonable doubt." *Gonzalez v. State*, 337 S.W.3d 473, 478 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979)). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Gonzalez*, 337 S.W.3d at 479; *see Jackson*, 443 U.S. at 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11. If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *Gonzalez*, 337 S.W.3d at 479.

An appellate court "determine[s] whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence viewed in the light most favorable to the verdict." *Clayton v. State*, 235 S.W.3d

772, 778 (Tex. Crim. App. 2007) (quoting *Hooper v. State*, 214 S.W.3d 9, 16–17 (Tex. Crim. App. 2007)). When the record supports conflicting inferences, an appellate court presumes that the factfinder resolved the conflicts in favor of the verdict and defers to that resolution. *Id.* (citing *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793). "An appellate court likewise defers to the factfinder's evaluation of the credibility of the evidence and weight to give the evidence." *Gonzalez*, 337 S.W.3d at 479. In viewing the record, a court treats direct and circumstantial evidence equally: circumstantial evidence can be as probative as direct evidence, and "circumstantial evidence alone can be sufficient to establish guilt." *Clayton*, 235 S.W.3d at 778 (quoting *Hooper*, 214 S.W.3d at 13); *see Young v. State*, 283 S.W.3d 854, 861 (Tex. Crim. App. 2009).

B. Analysis

Reid first asserts that the evidence is insufficient to show that he lived outside a municipality and was thus required to register with a county. A person who is required to register as a sex offender must do so with the local law enforcement authority in any municipality where the person resides or intends to reside for more than seven days. TEX. CODE CRIM. PROC. ANN. art. 62.051(a). "If the person does not reside or intend to reside in a municipality, the person shall register or verify registration in any county where the person resides or intends to reside for more than seven days." *Id.* Reid concedes there is testimony to support

a finding that the property he purchased in 2002 is located in Galveston County. Reid argues, however, that there was no evidence to support a finding that the property was located outside of a municipality, which is required in order for Galveston County to be the proper entity for registration. During trial, Reid's attorney asked Constable Matranga about the nuisance claims that had been made about Reid's property. Matranga testified that "it's an unincorporated area: therefore there are not ordinances like there would be in a municipality which would be easier to control." Based on the evidence that Reid owned property in an unincorporated area in Galveston County, a rational jury could have found that Reid was required to register in Galveston County.

Reid next contends there was insufficient evidence to show that he had a reportable conviction that required registration. Persons with a "reportable conviction" of certain offenses of a sexual nature must register with the appropriate authorities. *See* TEX. CODE CRIM. PROC. ANN. art. 62.051(a). The list of reportable convictions includes, among other offenses, indecency with a child, sexual assault, aggravated sexual assault, and prohibited sexual conduct. *See* TEX. CODE CRIM. PROC. ANN. Art. 62.001(5)(A). A violation of law of another state is a reportable conviction if the elements of the offense "are substantially similar to the elements of [the reportable convictions]." *Id.* at 62.001(5)(H). Reid argues that because the jury was not presented with evidence of the elements of the Tennessee rape statute

or of the Texas statute defining sexual assault, the evidence was not sufficient for a jury to conclude that Reid's Tennessee rape conviction was substantially similar to a reportable conviction. *See* TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(H).

The State introduced a penitentiary packet that showed Reid had been convicted of rape in Tennessee on May 8, 1995. The indictment in the packet specified the elements of the offense of which Reid was convicted: "Eldred Reid unlawfully and with force or coercion did sexually penetrate [the victim]." Deputy O'Briant also testified that the offense of rape in other states equates to the offense of sexual assault in Texas. Agent Hutchinson testified that as a result of his conviction in Tennessee, Reid was required to register when he entered Texas with the intent to remain longer than seven days. Finally, the jury instructions contained a definition of reportable conviction which included "a conviction for a violation of Section . . . 22.011 (Sexual assault)." *See* TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(A). A rational jury could have found that the elements of rape in Tennessee are substantially similar to the elements of sexual assault in Texas.

Reid also contends that the evidence was insufficient to show that his failure to register in Texas was intentional or knowing because there was no evidence showing Reid knew he was required to register in Texas.[1] Proof of a culpable

[1] *See* TEX. CODE CRIM. PROC. ANN. art. 62.102(a) (West 2006) (definition of failure to register as sex offender does not specify culpable mental state); TEX. PENAL CODE ANN. § 6.02(b)–(c) (West 2011) (when definition of offense does not

mental state is almost invariably grounded upon inferences to be drawn by the finder of fact from the attendant circumstances. *See Tottenham v. State*, 285 S.W.3d 19, 28 (Tex. App.—Houston [1st Dist.] 2009, pet ref'd.) (citing *Dillion v. State*, 574, S.W.2d 92, 94 (Tex. Crim. App. 1978). In assessing the legal sufficiency of the evidence we give deference to the fact-finder to fairly resolve conflicts in testimony and to draw reasonable inferences from the facts. *See Young*, 283 S.W.3d at 861. We determine whether the necessary inferences are reasonable by considering the cumulative evidence, both direct and circumstantial. *Id.* at 861–62.

Here, the jury was presented with evidence that Reid was aware that he was required to register in Tennessee following his release because he signed the registry notification form in which he acknowledged this duty. The form also instructed Reid "that if any information changes on [his] registration form even temporarily for any reason longer than 10 days, [he] must notify TBI's Sexual Offender Registry at the address below or be subject to penalties of the law." The jury heard evidence that Reid did not register in Tennessee. The jury also

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specify the required culpable mental state, culpable mental state of intent, knowledge, or recklessness is required, unless definition dispenses with any mental element); *Reyes v. State*, 96 S.W.3d 603, 605 n.1 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (stating that sex offender registry statute requires culpable mental state of intent, knowledge, or recklessness); *see also* TEX. PENAL CODE ANN. § 6.03(a)–(b) (West 2011) (defining culpable mental states of intent and knowledge). Here the indictment charged that Reid "intentionally and knowingly" failed to register in Texas.

considered testimony from Officer Matranga that Reid had told her he was trying to fly under the radar so he would not "have to go back and register or something to that effect."

This evidence, together with the documentary evidence indicating Reid intended to be a "nomad" with no address, support a rational conclusion that Reid knew he was obligated to register where he lived and knowingly avoided the registration requirement in Texas as he had in Tennessee. *See Rodriguez v. State*, 45 S.W.3d 685, 688 (Tex. App.—Fort Worth 2001), *aff'd*, 93 S.W.3d 60 (Tex. Crim. App. 2002) (evidence sufficient to find appellant knew of his duty register when he was informed of duty prior to his release and deportation, even though authorities did not notify him to register again when appellant re-entered country illegally); *see also Reyes v. State*, 96 S.W.3d 603, 605 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (finding evidence sufficient to support conviction where appellant did not comply with the registration requirement under the statute as it existed at the time he was first required to register or after its amendment two years later).

Reid claims there is insufficient evidence to find that he had a duty to register annually. Reid concedes that Deputy O'Briant testified that the rape conviction would require annual registration. This testimony was sufficient evidence for a rational jury to find that that Reid was required to register annually.

Finally, Reid contends the evidence was insufficient to show that he had resided or intended to reside in Galveston County for more than seven days. *See* TEX. CODE CRIM. PROC. ANN. art. 62.051(a). The jury was presented with sufficient evidence to find Reid resided or intended to reside in Galveston County for more than seven days, including: (1) Agent Hutchison's testimony that the Tennessee records reflected that Reid was "leaving in Texas,"[2] (2) a deed showing that Reid had purchased property within Galveston County, (3) testimony that Reid had registered vehicles at the Galveston County address, (4) testimony that Reid had numerous discussions with Officer Matranga within Texas concerning nuisance violations with respect to his property, and (5) Officer Matranga's testimony that she had seen Reid at a town hall meeting.

Considering all record evidence in the light most favorable to the verdict, we hold that a jury could rationally have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Gonzalez*, 337 S.W.3d at 478.

We overrule Reid's first issue.

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[2] Agent Hutchison testified that the records stated that Reid was "leaving in Texas" but he assumed it was a typo and believed it was supposed to say "living."

Effective Assistance of Counsel

In his second point of error, Reid contends that as a result of a conflict of interest with his trial counsel, he received ineffective assistance of counsel. Specifically, Reid asserts that his counsel's conflict, which was based on Reid's purportedly having filed a grievance against him, resulted in counsel's failure to present admissible evidence of his registration as a sex offender in Tennessee and failure to object to inadmissible evidence.

A. Applicable Law

A defendant does not have the right to his own choice of appointed counsel, and unless he waives his right to counsel and chooses to represent himself or shows adequate reason for the appointment of new counsel, he must accept the counsel appointed by the court. *Garner v. State*, 864 S.W.2d 92, 98 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). A trial court is under no duty to search until it finds an attorney agreeable to the defendant. *Id.* However, there are certain circumstances in which a defendant may, upon a proper showing, be entitled to a change of counsel. *Id.* A defendant must bring such a matter to the trial court's attention and must carry the burden of proving he is entitled to new counsel. *Malcom v. State*, 628 S.W.2d 790, 791 (Tex. Crim. App. 1982) (panel op.) (citing *Webb v. State*, 533 S.W.2d 780, 784 n.3 (Tex. Crim. App. 1976)).

The Sixth Amendment guarantees the right to reasonably effective assistance of counsel, which includes the right to "conflict-free" representation. *See Strickland v. Washington*, 466 U.S. 668, 687, 692, 104 S. Ct. 2052, 2064, 2067 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 348–50, 100 S. Ct. 1708, 1718–19 (1980). A defendant may establish that his trial counsel rendered ineffective assistance due to a conflict of interest if he can demonstrate (1) that his counsel was burdened by an actual conflict of interest and (2) that conflict actually affected the adequacy of counsel's representation. *Cuyler*, 446 U.S. at 349, 100 S. Ct. at 1718; *Acosta v. State*, 233 S.W.3d 349, 356 (Tex. Crim. App. 2007). If a defendant establishes both requirements of *Cuyler*, he need not demonstrate prejudice—the second prong of ineffective assistance claims under the usual *Strickland* standard—to obtain relief. *Cuyler*, 446, U.S. at 349–50, 100 S. Ct. at 1719; *see also Banda v. State*, 890 S.W.2d 42, 60 (Tex. Crim. App. 1994) ("If appellant demonstrates [the *Cuyler* requirements], then the second prong of the *Strickland* test will be met because prejudice is presumed."). When a trial court knows, or reasonably should know, that a particular conflict of interest exists, the court should initiate an inquiry. *Cuyler*, 446 U.S at 347; *Garner*, 864 S.W.2d at 99. An actual conflict of interest exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests to the

detriment of his client's interest. *Ex parte Morrow*, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997).

The filing of a civil action against a court-appointed attorney is not a per se conflict of interest warranting disqualification of counsel. *McKinny v. State*, 76 S.W.3d 463, 478 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (en banc) (citing *Dunn v. State*, 819 S.W.2d 510, 519 (Tex. Crim. App. 1991)). If a per se rule were applied, a defendant could delay or prevent a trial by simply filing a civil suit against his court-appointed counsel. *Id.*

B. Analysis

After Reid's first appointed counsel was removed and new counsel was appointed, Reid filed a pro se motion requesting new counsel be dismissed and wrote a letter to the trial judge complaining about his new counsel. One complaint in Reid's motion was that counsel would not provide to the State Bar of Texas letters Reid had previously written to counsel in which Reid complained about counsel's representation of Reid. The motion also notes Reid's intent to file a formal grievance with the State Bar of Texas concerning his counsel. Reid's letter to the trial court, dated several weeks after he filed his motion, states that Reid had mailed a complaint about his trial counsel to the State Bar of Texas. This same letter also states Reid had filed a complaint against the trial judge himself. In an

undated letter to Chief Justice Wallace Jefferson, Reid noted he had been unsuccessful in filing a complaint against counsel with the State Bar of Texas.

During pre-trial proceedings, trial counsel asked Reid questions concerning plea offers from the State and neither party addressed the issue of a conflict of interest at this time or at any other point during trial. Although the record indicates Reid was dissatisfied with his counsel, and may have attempted to file a grievance against him with the State Bar of Texas, we can find no such grievance in the record, and we cannot ascertain the specific allegations of that grievance, even if it exists. Reid has shown the "mere possibility of a conflict of interest, and such possibility, without more, is not sufficient to impugn his conviction." *McKinny*, 76 S.W.3d at 478 (citing *Cuyler*, 446 U.S. at 350, 100 S. Ct. at 1719) (holding appellant did not show existence of actual conflict where no copy of grievance allegedly filed by appellant against trial counsel was contained in record and appellate court therefore could not ascertain the specific allegations of that grievance).

As Reid has offered no proof of a formal grievance against his counsel that might have given rise to a conflict of interest, we hold that Reid has failed to show an actual conflict of interest. Because Reid did not satisfy the first prong of *Cuyler*, we need not address the second prong of *Cuyler*. *See Cuyler*, 446 U.S. at 349–50, 100 S. Ct. at 1719.

We overrule Reid's second point of error.

Conclusion

We affirm the decision of the trial court.

Rebeca Huddle
Justice

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

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