Affirmed as Reformed and Memorandum Opinion filed November 16, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00621-CR

DONALD LEE BOWIE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 1209965

MEMORANDUM OPINION

A jury convicted appellant, Donald Lee Bowie, of possession of a controlled substance. The jury found two enhancement allegations true and on July 8, 2009, sentenced appellant to confinement for twelve years in the Institutional Division of the Texas Department of Criminal Justice. Appellant filed a notice of appeal.

We first note the judgment inaccurately recites the findings on the two enhancement paragraphs were "not true." We therefore reform the judgment and affirm as reformed.

In his first three issues, appellant claims he was deprived of his right to counsel during the period of time to file a motion for new trial. *See* U.S. Const. amend. VI; Tex. Const. art. I § 10; and Tex. Code Crim. Proc. art. 1.05.[1] The record reflects on July 8, 2009, the day sentence was pronounced, the trial court granted trial counsel's motion to withdraw, found appellant indigent, and ordered the court reporter to prepare a free record. However, appellate counsel was not appointed until September 11, 2009, after the time to file a motion for new trial expired. No motion for new trial was filed.

The time for filing a motion for new trial is a critical stage of the proceeding and a defendant has a constitutional right to counsel during the period. *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007). Generally, when a defendant is represented by counsel during trial, there still exists a rebuttable presumption that this counsel continued to adequately represent the defendant during this critical stage. *Id*. Even when a defendant rebuts this presumption, this deprivation of counsel is subject to a harmless error or prejudice analysis. *Id.* To show harm or prejudice, appellant must demonstrate he had a facially plausible claim that he was unable to present to the trial court in a timely filed motion for new trial and to make a record for appellate review. *Id.* at 912.

The presumption that counsel continued to represent the defendant, however, does not apply when, as in this case, counsel has been expressly permitted to withdraw. *See Garcia v. State*, 97 S.W.3d 343, 348 (Tex. App. – Austin 2003, no pet.). *See also Nguyen v. State*, 222 S.W.3d 537, 540 (Tex. App. – Houston [14th Dist.] 2007, pet. ref'd). Accordingly, the record demonstrates appellant was denied counsel during the period of time to file a motion for new trial. However, we find this deprivation of counsel was harmless beyond a reasonable doubt.

[1] Although appellant claims he was deprived of his right to counsel under the federal constitution, the state constitution, and the Texas Code of Criminal Procedure, appellant does not assert the analysis differs.

Appellant does not identify any issues he would have raised on appeal that he cannot now pursue due to the absence of a motion for new trial. Rather, appellant claims that due to the delay of appointment of counsel, counsel could not have investigated whether there was cause to file such a motion and prepare it in a timely manner.

Counsel was prevented from filing a timely motion for new trial. However, this did not prevent counsel from investigating whether there were grounds that cannot now be pursued due to the absence of a motion for new trial, identifying those grounds on appeal, and demonstrating prejudice arising from his tardy appointment.

In a footnote, appellate counsel asserts that a member of appellant's family claimed appellant was not competent at the time of trial. Counsel asserts he could not investigate this claim because appellant was transferred to Beeville.[2] Counsel's allegation recounting an out-of-court statement by an unnamed individual that is unsupported by any evidence in the record does not establish a facially plausible claim that appellant was incompetent to stand trial. *See Cook,* 240 S.W.3d at 912. Appellant's first three issues are overruled.

In issues four through seven, appellant complains of the trial court's time limit on voir dire. Specifically, appellant claims counsel was prevented from asking the venire members individually, "What is, in your opinion, the most important purpose of the sentence, rehabilitation, deterrence or punishment?" and exercising his peremptory challenges based on those answers. We determine beyond a reasonable doubt that any error in preventing appellant's counsel from asking this question individually did not contribute to the conviction or punishment. *See* Tex. R. App. P. 44.2(a); *Jones v. State*, 223 S.W.3d 379 (Tex. Crim. App. 2007). Because the error, if any, was harmless, we need not decide whether the trial court abused its discretion in limiting voir dire.

The record reflects defense counsel questioned the venire on sentencing. He asked about consideration of the full range of punishment and what factors are important in

[2] Counsel fails to explain why he could not communicate with appellant in Beeville.

assessing a sentence. The trial court also discussed punishment with the venire, including the range of punishment and considering the entire range of punishment.

Pursuant to section 12.42(a)(2) of the Texas Penal Code, appellant was punished for a second-degree felony, for which the range of punishment is two to twenty years. During the punishment hearing, the State introduced evidence of five other convictions in addition to those alleged in the two enhancement paragraphs. In closing arguments, defense counsel argued appellant should not receive the maximum sentence, and the State suggested a sentence of eighteen years. The jury sentenced appellant to confinement for twelve years.

In light of appellant's seven prior convictions, as well as the questions that were asked on voir dire about sentencing, we are persuaded beyond a reasonable doubt that the omission of one question from the voir dire examination regarding the purpose of the sentence did not contribute to the sentence assessed. Issues four through seven are overruled.

Accordingly, we reform the judgment to reflect the findings on the first and second enhancement paragraphs to be "true," and affirm the judgment as reformed.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.
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