**Affirmed and Memorandum Opinion filed February 8, 2011.**


**In The**

# Fourteenth Court of Appeals

**NO. 14-09-00867-CR**

**CURTIS LYNN MILLS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 184th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1161713**

## M E M O R A N D U M  O P I N I O N

Appellant Curtis Lynn Mills pleaded guilty to aggravated assault. He received deferred adjudication and was placed on community supervision for five years. Based on appellant's subsequent violation of his community supervision terms, the trial court adjudicated appellant guilty. The trial court sentenced appellant to imprisonment for eight years for the underlying aggravated assault. We affirm.

## BACKGROUND

Appellant was indicted for aggravated assault. *See* Tex. Penal Code Ann. § 22.02(a) (Vernon 2003). Appellant pleaded guilty to the offense, and the trial court

granted appellant deferred adjudication and placed him on community supervision for five years. *See* Tex. Code Crim. Pro. Ann. art. 42.12 § 5(a) (Vernon 2006). While on community supervision, appellant pleaded guilty to and was convicted of criminal trespass. The State filed a motion to adjudicate appellant's guilt in the aggravated assault case and alleged that appellant violated his community supervision terms by committing the crime of trespass. The State also alleged a number of other violations in the motion.

The State initially offered to recommend a sentence of imprisonment for three years if appellant would enter a plea of "true" to the alleged violations. The offer was reduced to two years. Appellant rejected the plea agreement. The trial court held a hearing on the motion to adjudicate appellant's guilt; the State introduced evidence of appellant's trespass conviction and abandoned the other alleged violations.[1] The trial court found that appellant violated the terms of his deferred adjudication, adjudicated appellant guilty of aggravated assault, and sentenced him to imprisonment for eight years. *See id*. § 5(b); *see also* Tex. Penal Code Ann. § 12.33 (Vernon 2003).

Appellant filed a motion for new trial based on alleged ineffective assistance of counsel; he claimed in his motion that his trial counsel was ineffective for failing to explain that his community supervision could be revoked with proof of his trespass conviction alone.[2] The trial court denied the motion after considering affidavits from appellant, his trial counsel, and another attorney acquainted with trial counsel. Appellant's appeal is based on the same ineffective assistance of counsel claim raised in his motion for new trial.

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[1] The trial court's judgment indicates that appellant pleaded "true" to the allegations. However, the record from the hearing on the State's motion to adjudicate reveals that the appellant pleaded "not true."

[2] The State argues that appellant's motion for new trial was not timely filed. Appellant's motion was due on or before October 26, 2009. *See* Tex. R. App. P. 21.4(a). The file stamp on appellant's motion for new trial in the clerk's record is dated October 27, 2009. However, the figure "26" appears over the file stamp date next to what appears to be the clerk's signature; October 26 matches the date recited in the certificate of service. Therefore, we conclude that the motion for new trial was timely filed.

## ANALYSIS

Appellant claims in his only issue on appeal that the trial court abused its discretion in overruling appellant's motion for new trial. He argues that his trial counsel was ineffective for failing to properly explain the effect of appellant's trespass conviction on his deferred adjudication.

Appellant attached an affidavit to his motion for new trial, in which he states:

> I know that they alleged that I committed a misdemeanor trespass and I had pled guilty to that offense. I also knew that I wanted to go home and that if I accepted a plea for two years, I would be eligible for release almost immediately [based on credit for time served].
>
> I honestly had trouble understanding my attorney and I requested the court appoint me another attorney. I have trouble understanding people and with my attorney's accent, I think it was much worst [sic].
>
> * * *
>
> If I understood that the hearing was going to be based just upon my violation for trespass, I would have pled true and taken the 2 year offer by the [S]tate. I just did not understand what my lawyer was saying about my case.
>
> * * *
>
> If I knew they could revoke me based upon my trespass plea, I would not have had [a] hearing.

Appellant also submitted an affidavit of another attorney who said she is familiar with appellant's trial counsel; the attorney states in her affidavit:

> I am acquainted with [trial counsel] . . . and have talked with her on several occasions.
>
> In my experience, it is difficult to understand [trial counsel] due to her accent. Particularly, I have had discussions with her regarding the law, and despite my training and education in the law, I found it difficult to understand her.

The State submitted the affidavit of appellant's trial counsel, in which she states:

> I discussed the facts alleged by the State's Motion with . . . [appellant]. I also advised [appellant] of all the violations alleged by the

> State. Additionally, he was served with copies of the violations. I advised him of the possible punishment range. . . . Twice, [appellant] accepted the [two-year] offer and then backed down from the plea. He insisted that he was not going to plead "True" for any violation and he had evidence to prove that the allegations were unfounded.
>
> [A]ppellant never told me that he did not understand me fully. In 2 attempts of plea, he never told the Judge that he was not able to understand my accent or was unable to communicate with me.

Appellant had the right to effective assistance of counsel in connection with the hearing on the State's motion to adjudicate guilt. *See Hill v. State*, 480 S.W.2d 200, 203 (Tex. Crim. App. 1971) (op. denying motion for reh'g). In determining whether his trial counsel's representation was so ineffective that it violated appellant's Sixth Amendment right to counsel, we use the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). To establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

We review the *Strickland* standards "through the prism of an abuse of discretion standard" when analyzing a trial court's ruling on a motion for new trial based on ineffective assistance of counsel. *State v. Gill*, 967 S.W.2d 540, 542 (Tex. App.—Austin 1998, pet. ref'd); *see also Rodriguez v. State*, No. 14-09-00625-CR, 2010 WL 4467632, at *6 (Tex. App.—Houston [14th Dist.] Nov. 9, 2010, no pet.) (citing *Charles v. State*, 146 S.W.3d 204, 207–08 (Tex. Crim. App. 2004), *superseded by statute on other grounds by* Tex. R. App. P. 21.8(b), and *My Thi Tieu v. State*, 299 S.W.3d 216, 223 (Tex. App.—Houston [14th Dist.] 2009, pet ref'd)). We view evidence in the light most favorable to the trial court's ruling, and we will reverse only if no reasonable view of the record could support the trial court's finding. *Rodriguez*, 2010 WL 4467632, at *6 (citing *Charles*, 146 S.W.3d at 208).

We make an assessment of whether a defendant received effective assistance of counsel according to the facts of each case. *Thompson*, 9 S.W.3d at 813. Any allegation

of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*. Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Id*. We look to the totality of the representation and particular circumstances of each case in evaluating the effectiveness of counsel. *Id*. We must be "highly deferential to trial counsel and avoid the deleterious effects of hindsight." *Lane v. State*, 257 S.W.3d 22, 26 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). Trial counsel is strongly presumed to have acted within the wide range of reasonable professional assistance. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010).

Appellant states in his affidavit that he did not understand revocation could be based entirely on his conviction for trespass. The statements in the attorney's affidavit echo appellant's assertion that trial counsel speaks with an accent that makes her difficult to understand. However, when appellant was asked at the hearing on the State's motion to adjudicate guilt whether he understood that he had to follow "all the conditions that the Judge imposed on you to keep your probation," appellant answered, "Yes, I do."

Appellant does not state in his affidavit that trial counsel misled or failed to inform appellant of the effect of the conviction; instead, he merely states that he did not understand what trial counsel told him about the case. Appellant's trial counsel swears in her own affidavit that (1) she advised appellant of all the violations alleged by the State and of the possible punishment range; (2) appellant twice accepted the State's offer, then insisted that he did not wish to plead true to "any" of the allegations because he could disprove them all; (3) appellant never told his trial counsel that he could not understand her; and (4) appellant was able to communicate well enough with trial counsel to coordinate a request for medical records related to another allegation. Viewing the evidence in the light most favorable to the trial court's ruling, we conclude that appellant failed to establish that his trial counsel's performance fell below an objective standard of reasonableness; therefore, the first prong of *Strickland* is not satisfied. *See Thompson*, 9 S.W.3d at 812. The trial court acted within its discretion in denying appellant's motion

for new trial predicated on ineffective assistance of counsel. *See Rodriguez*, 2010 WL 4467632, at *6.

## CONCLUSION

Having overruled appellant's only issue on appeal, we affirm the judgment of the trial court.

/s/ William J. Boyce
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.
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