Affirmed and Memorandum Opinion filed March 10, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00676-CR

JANICE POE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Court Cause No. 08-08-07927-CR

MEMORANDUM OPINION

Appellant Janice Poe contends the trial court erred in failing to hold a hearing on her motion for new trial, in which she argued that she received ineffective assistance of counsel at a probation-revocation hearing. Because the record does not show that the motion was timely presented, we conclude that the trial court did not abuse its discretion in failing to hear it. We therefore affirm the trial court's judgment.

I. BACKGROUND

Appellant was charged with two counts of aggravated assault with a deadly weapon. She pleaded guilty to one count pursuant to a plea agreement, and the trial court assessed

punishment consisting of a $1,000 fine and confinement for five years in the Texas Department of Criminal Justice, Institutional Division. The sentence initially was fully probated, but appellant failed to comply with the terms of her release, and the State filed a motion to revoke her community supervision. She accordingly was arrested in March 2010, and after a hearing on June 3, 2010, the trial court revoked her community supervision and sentenced her to five years' confinement, applying credit for the time already served. The next day, her court-appointed trial attorney filed a notice of appeal and a motion to withdraw. The trial court granted the motion and appointed appellate counsel.

On July 2, 2010, the appellate attorney filed a motion for new trial on the ground that appellant's prior representative rendered ineffective assistance. Between the appellate attorney's signature on the motion for new trial and the motion's certificate of service is a "certificate of presentment," representing that "a true and correct copy of the above and foregoing has been hand-delivered to the Office for the 359th District Court, on this day, 2nd of July, 2010." The record also contains a blank proposed order setting the motion for a hearing. No hearing was scheduled, and the motion was overruled by operation of law.

In her sole issue on appeal, appellant argues that the trial court erred in failing to hold a hearing on her motion for new trial. We review the trial court's action for abuse of discretion, and reverse only if the failure to hold a hearing was arbitrary or unreasonable. *Daniels v. State*, 63 S.W.3d 67, 69–70 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd).

II. Analysis

To prevail on a claim of ineffective assistance of counsel, an appellant must prove by a preponderance of the evidence that counsel's representation fell below the objective standard of prevailing professional norms, and there is a reasonable probability that, but for

counsel's deficiency, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 690–94, 104 S. Ct. 2052, 2066–68, 80 L. Ed. 2d 674 (1984). An appellate court's review begins with a strong presumption that the attorney's actions were reasonably professional and were motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). When the record is silent as to the attorney's strategy, the reviewing court will not conclude that the appellant received ineffective assistance unless the challenged conduct was "'so outrageous that no competent attorney would have engaged in it.'" *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). In most cases, however, the lack of a clear record prevents the appellant from establishing that trial counsel's conduct fell below professional norms, because the reasonableness of counsel's choices and motivations during trial can be proven deficient only through facts that do not normally appear in the appellate record. *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007).

Evidence that trial counsel's actions were not strategically motivated usually is developed through a hearing on a motion for new trial. A criminal defendant has a right to such a hearing if the new-trial motion raises matters that cannot be determined from the existing record. *See Reyes v. State,* 849 S.W.2d 812, 816 (Tex: Crim. App. 1993).

There are, however, requirements that must be satisfied. The criminal defendant not only must request a hearing, but also must "present the motion for new trial to the trial court within 10 days of filing it, unless the trial court in its discretion permits it to be presented and heard within 75 days from the date when the court imposes or suspends sentence in open court." TEX. R. APP. P. 21.6. Such presentment serves "'to put the trial court on actual notice that a defendant desires the trial court to take some action on the motion for new trial such as a ruling or a hearing on it.'" *Stokes v. State*, 277 S.W.3d 20, 21 (Tex. Crim. App. 2009) (quoting *Carranza v. State*, 960 S.W.2d 76, 78 (Tex. Crim.

App. 1998)). But the trial court is not required to conduct a hearing if the motion for new trial is not timely presented. *Gardner v. State*, 306 S.W.3d 274, 305 (Tex. Crim. App. 2009).

We will not conclude that the trial court erred in failing to conduct a hearing on the motion unless it is apparent from the record that the motion was timely presented. *Id.* Where the record shows only defense counsel's statement that the motion had been or would be presented, but does not indicate that counsel in fact communicated the request for a hearing in a timely manner to a person capable of acting on it, we cannot conclude that the presentment requirement was satisfied. *See id.* (defense counsel's "certificate of presentment" that the motion "would be hand-delivered to the trial court" held insufficient to demonstrate timely presentment where the record did not show it was "hand-delivered to the trial judge" or that "the trial judge ever saw the motion"); *Burrus v. State*, 266 S.W.3d 107, 115 (Tex. App.—Fort Worth 2008, no pet.) (defense counsel's certificate of presentment and notation on docket sheet that counsel filed a motion for new trial held insufficient to demonstrate timely presentment); *Longoria v. State*, 154 S.W.3d 747, 762–63 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (holding that defendant's "Notice of Presentment" was insufficient to meet the presentment requirement absent evidence that the motion or notice actually was presented to the trial court or the court coordinator); *cf. Butler v. State*, 6 S.W.3d 636, 638, 641 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (op. on reh'g) (presentment requirement satisfied where the record showed that defense counsel informed the court coordinator that the motion was filed, asked that it be set for hearing, and the coordinator scheduled and rescheduled the hearing).

Unlike the *Butler* case,[1] the record here does not indicate whether defense counsel notified the trial coordinator of the motion and requested a hearing. Defense counsel did

[1] In *Butler*, the appellant asserted in a motion for rehearing that he presented the motion for new trial to the court coordinator and scheduled a hearing within ten days of judgment. *Butler*, 6 S.W.3d at 638. The First Court of Appeals remanded the case to the trial court for the limited purpose of establishing

include a notice of hearing with the motion, but our record does not indicate to whom, if anyone, the motion was presented. Montgomery County, like Harris County, uses trial coordinators to schedule hearings.[2] If the record indicated that counsel presented the motion to the trial coordinator and requested a hearing, our holding might be different.

Because it is not apparent from the record that the motion for new trial was timely presented, we cannot conclude that the trial court abused its discretion in failing to hear it. *See Gardner*, 306 S.W.3d at 305. We therefore overrule appellant's sole point of error and affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Frost and Christopher.

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the facts related to this allegation. *Id*. The appellant in this case, however, makes no similar assertion.

[2] The Local Rules for the District Courts of Montgomery County indicate that trial coordinators coordinate all setting requests in civil cases. *See* MONTGOMERY COUNTY (TEX.) DIST. CT. LOC. R. 3.5. The rule is silent as to settings for criminal cases, but the daily printed docket referenced in Rule 3.5 contains both civil and criminal cases. *See, e.g.*, *Daily Docket Listing*, 359TH DISTRICT COURT, http://www.co.montgomery.tx.us/dcourts/dockets/359thdaily.txt (last visited Mar. 1, 2011).