



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00339-CR

Lucio **HERNANDEZ**, Jr.,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 399th Judicial District Court, Bexar County, Texas
Trial Court No. 2018CR3904W
Honorable Frank J. Castro, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 10, 2020

AFFIRMED

Lucio Hernandez, Jr. appeals the trial court's judgment revoking his community supervision and sentencing him to three years' imprisonment. Hernandez presents two issues asserting: (1) trial counsel rendered ineffective assistance of counsel; and (2) the three year sentence was unreasonable. We affirm the trial court's judgment.

BACKGROUND

Hernandez was charged with assault causing bodily injury to a member of his family, household, or a person with whom he had a dating relationship. The offense was alleged to have

occurred on or about February 4, 2018 and was also alleged to be a second family violence offense. In pleading guilty to that offense, Hernandez judicially confessed he was convicted of the offense of assault bodily injury – married on May 24, 2017, thereby proving the 2018 offense was a second offense. Pursuant to a plea bargain agreement, Hernandez was sentenced to three years' imprisonment on April 13, 2018; however, the sentence was suspended, and he was placed on four years' community supervision.

On June 6, 2018, the State filed a motion to revoke Hernandez's community supervision. The motion alleged Hernandez failed to register for a Batterer Intervention and Prevention Program (BIPP) on or about May 13, 2018.

On June 11, 2018, the State filed a supplemental motion to revoke Hernandez's community supervision. The supplemental motion alleged Hernandez failed to report to his supervision officer for the month of May 2018.

On August 13, 2018, the trial court signed an order amending the terms and conditions of Hernandez's community supervision by ordering him to enter the Bexar County Substance Abuse Treatment Facility's (SATF) "in-patient (residential) treatment program" for "a minimum of 120-180 days." The order further required Hernandez to participate in SATF's Aftercare Program for a minimum of 120 days upon successful completion of the inpatient program.

On March 14, 2019, the State filed another motion to revoke Hernandez's community supervision. The motion alleged Hernandez failed to report to his supervision officer for the months of January and February of 2019. The motion further alleged that on or about February 22, 2019, Hernandez failed to comply with the rules of SATF's Aftercare Program by failing to attend outpatient treatment.

On May 9, 2019, the State filed a supplemental motion to revoke alleging Hernandez failed to report to his supervision officer for the months of March and April 2019. The supplemental motion further alleged that on or about May 8, 2019, Hernandez failed to attend BIPP.

On May 13, 2019, the trial court held a hearing on the State's motions. At the very beginning of the hearing, the trial court asked Hernandez if he understood the trial court could sentence him to up to three years' imprisonment upon a plea of true to the violations alleged by the State. Hernandez responded, "Yes, sir." Hernandez then pled true to the violations alleged in the State's motion. No plea was entered to the violations alleged in the State's supplemental motion.

After Hernandez pled true to the violations, the trial court asked the State for its recommendation. The prosecutor responded they had an agreed recommendation to continue Hernandez on community supervision but to "amend the conditions to include ISF for either 90 days or six months." In response to another question by the trial court, the State confirmed this was a second motion to revoke filed after the conditions were amended in August of 2018 to add SATF. The trial court next asked the probation department whether Hernandez completed SATF. The probation officer stated Hernandez completed the inpatient program but violated the aftercare requirements. In response to the trial court's question about whether Hernandez stopped reporting to his supervision officer "right around the time" he was released from the inpatient program, the probation officer stated Hernandez was released from the inpatient program on January 4, 2019.

At the conclusion of the hearing, the trial court announced he was sentencing Hernandez to three years' imprisonment, noting this was a second motion to revoke and Hernandez failed to report the same month he was released from the SATF inpatient program. Hernandez appeals the trial court's judgment revoking his community supervision.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first issue, Hernandez contends trial counsel rendered ineffective assistance of counsel by failing to ask the trial court to follow the agreed recommendation and by failing to object to the sentence the trial court imposed. The State responds the record is silent as to trial counsel's reasons for failing to take the actions Hernandez contends he should have taken. The State further responds the trial court would not have erred in overruling any objection to the sentence imposed.

A. Applicable Law

“To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate two things: deficient performance and prejudice.” *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). An appellant “bears the burden of proving by a preponderance of the evidence that counsel was ineffective.” *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

To establish deficient performance, an appellant must show counsel's assistance “fell below an objective standard of reasonableness.” *Id.* at 812. To establish prejudice, an appellant “must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

An appellant must overcome the “strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.” *Id.* at 813. In order to defeat this presumption, “[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness.” *Id.*

“Trial counsel should generally be given an opportunity to explain his actions before being found ineffective.” *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017). “In the face of

an undeveloped record, counsel should be found ineffective only if his conduct was so outrageous that no competent attorney would have engaged in it.” *Id.* (internal quotation marks omitted).

“A substantial risk of failure accompanies an appellant’s claim of ineffective assistance of counsel on direct appeal.” *Thompson*, 9 S.W.3d at 813. “In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel.” *Id.* at 813–14.

B. Analysis

Because the prosecutor announced the recommendation on sentencing was “agreed,” trial counsel’s desire for the recommendation to be followed was implicit in the prosecutor’s announcement. Furthermore, the trial court explained the reasons it was rejecting the agreed recommendation in announcing the reasons for the sentence being imposed. In any event, because the record is silent with regard to the reasons trial counsel failed to take the actions Hernandez contends he should have taken, trial counsel’s conduct is presumed to have fallen within the wide range of reasonable professional assistance. *Thompson*, 9 S.W.3d at 813. As a result, Hernandez has not met his burden to establish ineffective assistance of counsel, and his first issue is overruled.

REASONABLENESS OF SENTENCE

In his second issue, Hernandez contends the sentence imposed by the trial court was not reasonable in view of the nature of his violations. In making this argument, Hernandez minimizes his failure to report to his supervision officer for the two months immediately following his release from the SATF inpatient program and his failure to comply with the rules of the SATF Aftercare Program. Hernandez further minimizes that he pled guilty to a second family violence offense and that this was the second motion to revoke his community supervision after he was previously continued on community supervision with an added condition. In any event, because Hernandez failed to object to the sentence at the hearing, his second issue is not preserved for this court’s

review. *See Thompson v. State*, 243 S.W.3d 774, 775 (Tex. App.—Fort Worth 2007, pet. ref'd) (“An appellant may not assert error pertaining to his sentence or punishment when he failed to object or otherwise raise the error in the trial court.”); *see also* TEX. R. APP. P. 33.1(a); *Lombardo v. State*, 524 S.W.3d 808, 816 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (noting trial court may impose the sentence originally assessed when revoking community supervision).

CONCLUSION

The trial court’s judgment is affirmed.

Patricia O. Alvarez, Justice

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