In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00117-CR

CRESENCIO HASTINGS GEE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 251st District Court
Potter County, Texas
Trial Court No. 67,638-C; Honorable Ana Estevez, Presiding

January 25, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

Appellant, Cresencio Hastings Gee, was convicted following a jury trial of unauthorized use of a motor vehicle[1] enhanced.[2] The trial court sentenced Appellant to

[1] *See* TEX. PENAL CODE ANN. § 31.07 (West 2011) (a state jail felony).

[2] Appellant had prior felony convictions for aggravated sexual assault of a child, TEX. PENAL CODE ANN. § 22.011(f) (West 2011) (a second degree felony) and failure to register as a sex offender. *See* TEX. CODE CRIM. PROC. ANN. art. 62.102(a) (West Supp. 2015) (a third degree felony). As such, Appellant's punishment for the unauthorized use of a motor vehicle could be enhanced to a second degree felony punishable by confinement for not more than twenty years but not less than two years and a fine not to exceed $10,000. *See* TEX. PENAL CODE ANN. §§ 12.425(c), 12.33 (West Supp. 2015, West 2011).

eight years confinement and assessed a fine of $500. The trial court also assessed "Court Costs: As per attached Bill of Cost." By the *Bill of Cost* prepared by Potter County District Clerk Caroline Woodburn and attached to the judgment, Appellant was assessed $2,500 in court-appointed attorney's fees for an "Original Plea Agreement."[3] In a single issue, Appellant asserts he was denied the effective assistance of counsel because his court-appointed attorney led him to believe the trial court could order community supervision.[4] We modify the trial court's judgment to delete the assessment of attorney's fees and affirm the judgment as modified.

BACKGROUND

In September 2013, an indictment was filed alleging that, on or about August 8, 2013, Appellant intentionally or knowingly operated a Ford Explorer without the effective consent of its owner, Randy Smith. Enhancement paragraphs one and two alleged Appellant had been convicted of two felony offenses: (1) aggravated sexual assault in December 1999 and (2) a violation of his duty to annually register as a sexual offender in July 2007.

On March 3, during a pretrial hearing with Appellant present, the trial court asked if there was an application for community supervision. Defense counsel answered, "No, ma'am." The trial court inquired whether Appellant qualified for community supervision and defense counsel responded, "No. No ma'am." On March 5, Appellant filed a *Pro Se Request for Probation/Community Supervision* and an election to have the trial court

[3] Nowhere in the record is there any indication there was a plea agreement in this case.

[4] A defendant convicted of a state jail felony is ineligible for community supervision if punishment is assessed by the trial court under § 12.35 of the Texas Penal Code. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3(e)(2) (West Supp. 2015).

assess punishment. Thereafter, following a jury trial, Appellant was found guilty of unauthorized use of a motor vehicle.

During the punishment hearing, Appellant pleaded true to the two enhancements in the indictment. During Appellant's examination, his counsel asked: "Well, if the Judge were to decide to keep you on probation—which you have admittedly not done well on—you would spend . . . in a halfway house, and then you would have the rest of your probation to do?" Appellant responded, "Uh-huh." The State asked, "Why should the Court put you on probation now, when twice you have been put on felony probation and clearly didn't do well?" Appellant responded, "I don't want to spend twenty years in the penitentiary."

After considering a presentence report, a second hearing was held wherein the trial court sentenced Appellant to eight years confinement and assessed a fine of $500. This appeal followed.

INEFFECTIVE ASSISTANCE OF COUNSEL

Appellant asserts he was denied effective assistance of counsel because he was under the impression that he was eligible for community supervision as punishment when he made his election to be sentenced by the trial court. As a result, Appellant contends that, because he thought he was eligible for community supervision, he "might have" changed his trial strategy or refused a favorable plea offer in favor of a "slight" chance of community supervision. There is, however, no evidence of record that, had he known the trial court was prohibited from sentencing him to community supervision, he or his counsel would have done anything different.

To prevail on an ineffective assistance of counsel claim, an appellant must show (1) deficient performance by trial counsel and (2) prejudice arising from the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012). To establish deficient performance, an appellant must prove by a preponderance of the evidence counsel's representation fell below the "objective standard of reasonableness." *Jimenez,* 364 S.W.3d at 883 (citing *Strickland*, 466 U.S. at 688). Further, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional competence. *Strickland*, 466 U.S. at 690; *Ex parte Niswanger*, 335 S.W.3d 611, 619 (Tex. Crim. App. 2011).

To overcome this presumption, an appellant must establish counsel's ineffectiveness is "firmly founded in the record" and "the record must affirmatively demonstrate" the alleged ineffectiveness. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)). Otherwise, the strong presumption that a trial counsel acted within the proper range of reasonable and professional assistance and had a sound trial strategy in mind is not overcome. *Badillo v. State*, 255 S.W.3d 125, 129 (Tex. App.—San Antonio 2008, no pet.).

Even if an appellant is able to demonstrate deficient performance, he must still affirmatively prove prejudice by showing a reasonable probability that "but for counsel's unprofessional errors" the outcome at trial would have been different. *Strickland*, 466 U.S. at 694; *Thompson*, 9 S.W.3d at 812. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.

Thompson, 9 S.W.3d at 813 (citing *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)).

Generally, direct appeals are inadequate vehicles for *Strickland* claims because the record is usually undeveloped. *Goodspeed*, 187 S.W.3d at 392; *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). This is true with regard to claims of deficient performance where counsel's reasons for claimed errors do not appear in the record. *Id.* Generally speaking, a reviewing court should not find deficient performance unless trial counsel has had an opportunity to explain his actions or the challenged conduct was "so outrageous that no competent attorney would engage in it." *Id.* S*ee Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). Accordingly, a silent record, such as we have here,[5] provides no explanation for counsel's actions and therefore will not overcome the strong presumption of reasonable assistance. *Freeman v. State*, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003). *See Badillo*, 255 S.W.3d at 129 ("a silent record on the reasoning behind counsel's actions is sufficient to deny relief").

The prejudice prong of the *Strickland* test requires a showing that, "but for counsel's error," there was a reasonable probability that the result of the proceedings would have been different. *Riley v. State,* 378 S.W.3d 453, 458 (Tex. Crim. App. 2012). "'A reasonable probability is a probability sufficient to undermine the confidence in the outcome.'" *Id.* When the claim of ineffectiveness relies upon counsel's misunderstanding of the law regarding community supervision, there must be *evidence* that (1) the defendant was initially eligible for community supervision, (2) counsel's

[5] Appellant did not file a motion for new trial asserting ineffective assistance of counsel and the trial court did not hold a hearing to determine whether Appellant's counsel was ineffective. *See Patterson v. State,* 46 S.W.3d 294, 306 (Tex. App.—Fort Worth 2001, pet. ref'd).

advice was not given as a part of a valid trial strategy, (3) the defendant's election of the assessor of punishment was based upon his attorney's erroneous advice, and (4) the results of the proceeding would have been different had his attorney correctly informed him of the law. *Id.*

There is no evidence of record, here, that the results of the proceeding would have been any different had his attorney informed Appellant that he was ineligible for community supervision in a sentencing proceeding before the trial court. Regardless of whether Appellant had elected to proceed with the jury during the punishment phase, the same possible results were available whether he was sentenced by the trial court or the jury, i.e., eight years confinement and a $500 fine.

Thus, Appellant failed to prove that, had defense counsel properly informed him of his ineligibility for community supervision, there is a reasonable probability that his trial would have produced a different result. Appellant has failed to meet his burden under the second prong of *Strickland*.[6] Accordingly, his single issue is overruled. *See Riley,* 378 S.W.3d at 458-460.

COURT-APPOINTED ATTORNEY'S FEES

The written judgment in this case reflects the assessment of court costs "[a]s per attached Bill of Cost," and the District Clerk's *Bill of Cost* reflects "Attorney Fee(s) Original Plea Agreement . . . $2,500." In order to assess attorney's fees as a court cost, a trial court must determine that the defendant has financial resources that enable him to offset in whole or in part the cost of legal services provided. TEX. CODE CRIM. PROC.

[6] Since Appellant needs to prove all four elements espoused in *Riley*, and we hold that he has failed to establish the last element, we need not address the remaining elements.

ANN. art. 26.05(g) (West Supp. 2015). Here, the record reflects the trial court found Appellant indigent and unable to afford the cost of legal representation both before and after his trial. Unless a material change in his financial resources occurs, once a criminal defendant has been found to be indigent, he is presumed to remain indigent for the remainder of the proceedings. *Id.* at art. 26.04(p) (West Supp. 2014). Therefore, because there is no evidence of record demonstrating that his financial resources had changed, we presume Appellant was indigent at the time of judgment. In order to rebut that presumption, the record must reflect some factual basis to support the determination that the defendant was capable of paying attorney's fees at the time of assessment. *Barrera v. State*, 291 S.W.3d 515, 518 (Tex. App.—Amarillo 2009, no pet.); *Perez v. State*, 280 S.W.3d 886, 887 (Tex. App.—Amarillo 2009, no pet.).

Here, the record does not contain a pronouncement, determination, or finding that Appellant had financial resources that enable him to pay all or any part of the fees paid his court-appointed counsel, and we are unable to find any evidence to support such a determination. Therefore, we conclude that the judgment improperly orders the repayment of attorney's fees. *See Mayer v. State*, 309 S.W.3d 552, 555-56 (Tex. Crim. App. 2010). When the evidence does not support an order to pay court-appointed attorney's fees, the proper remedy is to delete the order. *Id.* at 557. Accordingly, we modify the judgment to include the following sentence: "As used herein, the term 'court cost' does not include attorney's fees." Furthermore, the trial court is ordered to direct the Potter County District Clerk to prepare an amended *Bill of Cost* in accordance with the modified judgment.

CONCLUSION

The trial court's judgment, as modified, is affirmed.

Patrick A. Pirtle
Justice

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