In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00453-CR
07-16-00168-CR

RYAN RAY HOWARD, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 47th District Court
Randall County, Texas
Trial Court No. 22731-A, Honorable Dan Schaap, Presiding

August 5, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Ryan Ray Howard (appellant) appeals his two convictions for injury to a child. The posture of his appeal is rather odd. He does not contend that the trial court erred in any particular respect. Rather, his sole issue is whether "appellant [is] entitled to abatement and remand for a hearing on his motion for new trial?"[1] We answer "no."

Again, appellant does not argue that the trial court erred in denying his motion for a new trial, though it was obviously denied via operation of law. Nor does he argue that

[1] Alleged in the motion for new trial were claims of ineffective assistance of counsel.

the trial court erred in refusing to conduct a hearing on the motion. Instead, he simply wants us to order the trial court to conduct a hearing on his motion. And missing from his request is citation to authority holding that we may do so without first deciding whether any error occurred.[2] Our review of the record suggests a possible reason for the odd request. That reason concerns preservation of error and noncompliance with Texas Rule of Appellate Procedure 21.6.

To be entitled to a hearing on a motion for new trial, an appellant has to clear various hurdles. For instance, he must present his timely filed motion for new trial and a request for a hearing to the trial court. TEX. R. APP. P. 21.6; *Rozell v. State*, 176 S.W.3d 228, 230 (Tex. Crim. App. 2005). To preserve his complaint about the lack of a hearing he must either secure a ruling on his request, *Oestrick v. State*, 939 S.W.2d 232, 235 (Tex. App.—Austin 1997, pet ref'd), or object to the failure to rule on the request or hold a hearing. *Castro v. State*, No 03-12-00730-CR, 2015 Tex. App. LEXIS 2399, at *15-17 (Tex. App.—Austin March 13, 2015, pet. ref'd) (mem. op., not designated for publication) (overruling the complaint because "[t]he record does not show that appellant timely presented his motion for new trial to the trial court or objected to the trial court's failure to hold a hearing.").

Regarding the matter of presentment, our Court of Criminal Appeals has held that it occurs when the defendant gives "the trial court *actual notice* that he timely filed a motion . . . and requests a hearing on . . . " it. *Rozell v. State*, 176 S.W.3d at 230

[2] Appellant cites *Alafa v. State*, No. 07-00-0113-CR, 2000 Tex. App. LEXIS 5600 (Tex. App.—Amarillo August 21, 2000, order) (per curiam), to suggest that we have the authority to abate the appeal and remand the cause to the trial court with a directive to hear a motion for new trial. Yet, there the appellant actually argued before us that the trial court "erred in failing to grant a hearing on his motion for new trial," *Id.* at *1, and we agreed. Those pivotal circumstances are absent here. So, *Alafa* is inapposite.

(emphasis in original). The obligation is not satisfied simply through counsel's certificate representing that the motion was served or delivered to the trial court. *Rodriguez v. State*, 425 S.W.3d 655, 662-63 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Perales v. State*, No. 07-09-0125-CR, 2010 Tex. App. LEXIS 8532, at *2-3 (Tex. App.—Amarillo October 25, 2010, no pet.) (mem. op., not designated for publication); *accord*, *Oestrick v. State*, 939 S.W.2d at 235 n.5 (acknowledging that a "self-serving statement by defense counsel" that the motion for new trial was presented to the trial court by counsel, "without more, has been held to be insufficient evidence of presentment").

What we have here is counsel's certificate wherein he alleged that the motion including the request for a hearing was presented to the trial court by delivering it to the trial court's secretary. Yet, much like the circumstances in *Bearnth v. State*, 361 S.W.3d 135 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd), the certificate and motion contain only counsel's signature. *Id.* at 145-46. None include any notation from the trial judge or other court personnel authorized to act for the trial court. Since those circumstances do not illustrate that "counsel in fact communicated the request for a hearing in a timely manner to a person capable of acting on it," they do not establish that counsel presented the motion and request as mandated by Texas Rule of Appellate Procedure Rule 21.6. *Id.*; *see Carranza v. State*, 960 S.W.2d 76, 79-80 (Tex. Crim. App. 1998) (holding that the presentment must be directed *to the trial court or another authorized to act on behalf of the trial court*).[3]

[3] An example of presenting the motion and request for hearing to one authorized to act for the trial court consists of tendering the documents to the trial judge's court coordinator and having that individual acknowledge receipt in some way. *Estrella v. State*, 82 S.W.3d 483, 485-86 (Tex. App.—San Antonio 2002, pet.dism'd) (wherein the court coordinator acknowledged receipt by scheduling a hearing

Regarding the need to obtain a ruling on the request for a hearing or otherwise object, we find nothing of record indicating that such was done. This is also fatal since it evinces a failure to preserve any complaint about the lack of a hearing. *Castro v. State*, 2015 Tex. App. LEXIS 2399 at *15-16; *Oestrick v. State*, 939 S.W.2d at 235.

We cannot ignore appellant's failure to preserve his request for a hearing given the pivotal role played by the duty to preserve error for review. Preservation of error is a systemic requirement on appeal. *Bekendam v. State*, 441 S.W.3d 295, 299 (Tex. Crim. App. 2014). By simply asking us to abate the appeal and remand the cause for a hearing on his motion for new trial, appellant seems to be minimizing his failure to comply with Rule 21.6. Yet, we opt to heed the role preservation has in the appellate process and reinforce the mandate of Rule 21.6. Thus, we deny appellant's request for us to simply abate the appeal and remand the cause.

To the extent that appellant may actually be arguing in his brief that his conviction should be reversed because he was denied the effective assistance of counsel, we overrule that issue. As stated quite often, the appellate record must support the claim, *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (stating that the claim must be firmly founded in the record), and we must presume that

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and signing a "case setting form"); *Butler v. State*, 6 S.W.3d 636, 641 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (wherein the court coordinator acknowledged receipt by actually scheduling a hearing); *but see Castro v. State*, No 03-12-00730-CR, 2015 Tex. App. LEXIS 2399, at *15-17 (Tex. App.—Austin March 13, 2015, pet. ref'd) (mem. op., not designated for publication) (holding that presentment was not satisfied because, among other things, the certificate executed by counsel was "by a party on a party-generated document rather than a note on a court-generated document like a docket sheet or written by the judge or court personnel—distinctions that weigh against a showing that the motion was presented to the trial court."). This is enough because the coordinator is saddled with the calendaring or scheduling duties of the trial court and acts as agent for that court in those matters. *Id.* While the certificate at bar indicates the motion and request were presented to the trial court's secretary, no signature of the secretary or other indication acknowledging her or his receipt of the document appears of record. Nor does the record indicate that the secretary was charged with the court's scheduling duties or that he or she scheduled a hearing. In other words, the facts before us fall short of those in *Butler* and *Estrella* and liken to those in *Castro*. They do not illustrate presentment.

counsel was effective until appellant proves otherwise. *Scheanette v. State*, 144 S.W.3d 503, 509-10 (Tex. Crim. App. 2004) (stating that "[a]ppellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance" and that "the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision-making as to overcome the strong presumption that counsel's conduct was reasonable and professional."). Upon reviewing the appellate record before us, we conclude that appellant has not rebutted the presumption that his counsel acted within the wide range of reasonable and professional assistance. Nor did he establish that there existed a reasonable probability that the outcome of his revocation hearing coupled with his ensuing conviction and sentence would have differed had counsel did what appellant now says she should have done. *See Cannon v. State*, 252 S.W.3d 342, 349 (Tex. Crim. App. 2008) (stating that the defendant must prove defense counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different). It must be remembered that the cause was before the court via a motion to adjudicate appellant's guilt for two instances of injuring a child. The State alleged multiple examples of appellant violating the terms of his community supervision and appellant pled true to each. Some of those examples (such as failing to report or pay supervision fees) had little to do with the defense that appellant suggests his attorney should have pursued or expert testimony that counsel should have supposedly sought. So, the trial court was within its authority to adjudicate appellant's guilt of the offenses and sentence

him to prison, as it did, even if counsel did what appellant now wants. Again, we cannot say that appellant satisfied either prong of the ineffective assistance test propounded in *Cannon*.

Accordingly, we affirm the judgments of the trial court.

Brian Quinn
Chief Justice

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