In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00178-CR

BRANDON MICKELLE HOWARD, APPELLANT

V.

STATE OF TEXAS, APPELLEE

On Appeal from the 47th District Court
Potter County, Texas
Trial Court No. 07-1883-A, Honorable Dan L. Schaap, Presiding

March 20, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

"When all else fails, blame the attorney."[1] A strategy too often used. We affirm the trial court's judgment.

Background

Having been convicted of fraudulently using or possessing from 5 to 10 items of identification, Brandon Mickelle Howard (appellant) decided to blame her accompanying

[1] Lizzy.

sixty-five-year prison sentence on her attorney.[2] He purportedly afforded her ineffective assistance of counsel during the punishment phase of the trial. In her view, he conducted little to no investigation into the existence of mitigating evidence. Nor did he contact her children who would have testified on her behalf. Had he done so, he would have encountered friends and family willing to testify about her bad childhood, her being raped twice while much younger, her drug addiction since youth, how she was a good person and parent when not high, how her grandchildren missed her, how she exhibited remorse for committing this crime, and how her undergoing drug treatment in lieu of a prison term would benefit her. In her view, such testimony would have dissuaded the jury from simply accepting the State's portrait of her as "nothing more than a career criminal, with no family or friends, who runs from cops when caught red-handed and does nothing but take from the community, never giving anything back."

Appellant incorporated her complaint into an amended motion for new trial on the issue of punishment, on which motion the trial court conducted an evidentiary hearing. Though given the opportunity to present friends and family purportedly willing to speak about her history and qualities when not high on drugs, she called none, thereby preventing anyone from developing or testing his or her supposedly beneficial testimony.

Instead, her defense counsel testified about not only his knowing of her purported status as a sexual assault victim and drug addiction but also the identity of some witnesses willing to speak favorably of her. He also informed the trial court that he spoke with appellant about having available several mitigation witnesses to testify on her behalf

[2] According to the record, appellant was about forty-eight when apprehended (this time) after attempting to use a forged instrument to buy food at a local Taco Bell. When the police arrived, she tried to speed away in her car only to "high-center[]" on a rock near the establishment. At a subsequent hearing on her motion for new trial, she would admit to having been "very high on drugs" when the offense occurred.

during the punishment phase of the trial and how appellant made the ultimate decision to forgo using them. When he broached the topic with her, the jury had not heard about appellant's drug use, and counsel feared that raising it would have an adverse impact upon the jury. So too did he believe the State would have asked questions of those witnesses further focusing the jury's attention on appellant's past crimes and bad acts. Needless to say, there were many such instances. As evinced by the State's pretrial notice per Texas Rule of Evidence 404, there were at least fifteen prior convictions or extraneous offenses which it reserved the option to parade before the jury. They included the two felony convictions already averred as enhancement paragraphs in the indictment and for which appellant served multiple years in both state and federal prisons. But, again, appellant opted to forgo calling those witnesses due to the risk posed.

That defense counsel had basis for his fears was confirmed by the State. The prosecutor informed the trial court that:

> so what [appellant] is calling mitigating factors, I'm going to tell a jury in punishment are aggravating factors . . . . [I]f Ms. Howard testified to those things at trial or those family members took the stand at trial, they're going to get crossed aggressively, and I think that jury is going to give me more than 65 when they hear her not accepting responsibility for the things that happened in her past, when they hear family members making excuses based on substance abuse, and I know that to be true and [defense counsel] who is a trial lawyer knows that to be true, because he's had juries do that on both sides as a prosecutor and as the defense.

Ultimately, upon hearing the evidence and argument of counsel, the trial court denied the motion. Appellant now asserts that the trial court erred in doing that. We affirm.

Law

In *Burch v. State,* our Court of Criminal Appeals reiterated the test used in determining whether a defendant was denied the effective assistance of counsel. There it said the defendant must establish both the defectiveness of counsel's performance and a reasonable probability of a different outcome but for counsel's performance. *Burch v. State*, __S.W.3d__, __, 2017 Tex. Crim. App. LEXIS 1171, at *5-6 (Tex. Crim. App. Nov. 15, 2017) (designated for publication). A reasonable probability that the outcome would have differed is one sufficient to undermine the confidence in the result, the court continued. *Id.* at *6. Elsewhere, it reiterated that the complainant's burden as to both prongs of the test had to be satisfied through a preponderance of the evidence. *Ex parte Ruiz*, __S.W.3d __, __, 2016 Tex. Crim. App. LEXIS 1341, at *21-22 (Tex. Crim. App. Nov. 9, 2016); *accord Alfano v. State*, No. 05-16-01426-CR, 2018 Tex. App. LEXIS 781, at *2 (Tex. App.—Dallas Jan. 26, 2018, no pet. h.) (mem. op., not designated for publication); *Peake v. State*, 133 S.W.3d 332, 334 (Tex. App.—Amarillo 2004, pet. ref'd). And, if he failed to meet that burden with regard to either prong, the court's job was over. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (stating that a complainants failure to satisfy one prong relieves the court from having to consider the other prong); *Alfano v. State*, *supra* (stating the same).

Unlike many other situations, the claim of ineffectiveness at bar came in the form of a motion for new trial denied by the trial court. This is consequential for it affects the pertinent standard of review. We may not decide the matter anew. Rather, our task is restricted to assessing whether the trial court abused its discretion in ruling as it did. *See Burch*, 2017 Tex. App. LEXIS 1171, at *5 (stating that "[a]n appellate court reviews a trial

court's denial of a motion for new trial for an abuse of discretion"). This means that we may reverse the decision only if no reasonable view of the record could support the trial court's ruling. *Id.* The standard being quite deferential, it obligates us to view the evidence in the light most favorable to the trial court's ruling. *Id.* And, as long as the decision falls within the zone of reasonable disagreement it does not constitute an abuse of discretion. *Id.* (stating that a ruling is within the zone of reasonable disagreement if there are two reasonable views of the evidence).

Application

Upon reading appellant's brief, we encountered an obstacle fatal to her success. It involved the element of prejudice. To succeed, appellant had the obligation to provide us with substantive argument and cite to the record in support of it. TEX. R. APP. P. 38.1(i). So, satisfying that burden entailed her directing us to the evidence allegedly establishing a reasonable probability that the outcome would have differed had the mitigation evidence in question been developed and tendered at trial. Yet, little was said about that in her brief. Admittedly, she wrote: "[g]iven that [appellant] received a lengthy sentence, and no mitigation evidence was offered, it is extremely likely that the proffered evidence would have had *some* impact on the jury's decision." (Emphasis in original). We were referred to no evidence purporting to support that speculative conclusion, though. More importantly, our own review of that record uncovered none.

The State was not prosecuting a first-time offender but rather a forty-eight year old female with an extensive criminal background. That background included both the commission of and convictions for misdemeanors and felonies. So too had she served several extended stints in prison. Upon release therefrom, she resumed both her criminal

conduct and drug abuse despite her purported yearning to mend her relationships with her children. Indeed, her own mother who supposedly would have told a jury that appellant was a good person worthy of another chance conceded in her affidavit that 1) she (the affiant) was "weary of this process," 2) did "not want to be involved in [her] daughter's legal issues anymore," and 3) it hurt to "give up on your only child [but] I am close to that point." Appellant did not attempt to explain why or offer evidence suggesting that a jury may be sympathetic to a "career criminal" when that criminal's own mother had grown weary and was on the precipice of giving up on her child. Appellant did not attempt to explain why or offer evidence suggesting that a jury may be sympathetic to a "career criminal" who purportedly underwent treatment for her psychological issues and drug abuse only to continue her wayward path. Maybe jurors would have been, but that is mere speculation given the utter absence of evidence to that effect.

On the other hand, the trial court heard appellant's defense attorney testify about his experience with jurors upon the interjection of drugs into the case. They opted to punish defendants.[3] Given this, appellant's criminal history, the opportunities previously afforded her but nonetheless rejected, our duty to view the record in a light most favorable to the trial court's decision, our recognition of the fact that the same judge who denied a new punishment hearing also presided over the trial, and the utter absence of evidence suggesting that the mitigation attempts now mentioned by appellant would have had any affect upon the jury's punishment decision, we cannot say the trial court's decision fell outside the zone of reasonable disagreement. It may have been just as likely that the

[3] Appellant admitted at the new trial hearing that 1) her drugs of choice were normally methamphetamine and cocaine, and 2) she was high on methamphetamine when she committed the crime for which she was being tried.

prosecutors words would have come true "if Ms. Howard testified to those things at trial or those family members took the stand at trial, they're going to get crossed aggressively, and I think that jury is going to give me more than 65 when they hear her not accepting responsibility for the things that happened in her past, when they hear family members making excuses." At the very least, that likelihood could not be discounted given the actual evidence of record.

Again, it was appellant's burden to establish, through a preponderance of the evidence, a reasonable probability that the outcome would have differed. That requires evidence establishing a link between trial counsel's supposed default and a different outcome had the default not happened. We find no evidence of such a link or of a different outcome. There was just speculation, hope and desire, but none of those were or are evidence. Consequently, we cannot but hold that the trial court's decision fell within the scope of its legitimate discretion. While this holding relieves us from having to consider the first prong of the ineffective assistance test, *Williams v. State, supra*, we nonetheless feel compelled to make several other observations.

Defense counsel knew of the purported mitigating circumstances in question. Appellant wrote him a letter revealing them. So too did he have various witnesses ready to speak on appellant's behalf regarding some, if not all, of those topics. One of them (i.e., appellant's former mother-in-law) had no familial ties to appellant and could not have been painted as biased had she been called. Indeed, trial counsel described her as "a great witness" because she "was not personally related anymore and had no dog in the fight for lack of a better way to put it." But, when it came time to decide whether to present her, counsel observed that the State had not interjected the topic of drug use into the

proceeding. Nor had the State presented evidence, during the punishment phase of the trial, of anything other than documentation of seven of appellant's prior convictions. To call witnesses in effort to portray appellant as someone worthy of sympathy and thereby risk inviting the State to discredit them by eliciting from them evidence of other of appellant's bad acts and drug abuse became the question of the moment. Counsel discussed the situation with appellant, and she agreed to forgo the presentation of additional evidence. That was a tactical decision on counsel's part, pure and simple.

Yes, counsel's tactical decisions must be informed by a reasonable preliminary investigation, as suggested by appellant. *See Harper v. State*, 526 S.W.3d 811, 813 (Tex. App.—Amarillo 2017, no pet.) (quoting *Ex parte Bowman*, 533 S.W.3d 337 (Tex. Crim. App. 2017)) (acknowledging counsel's obligation to undertake a reasonable preliminary investigation prior to making strategic decisions). On the other hand, defense counsel need not present mitigating evidence in every case to be deemed reasonably effective. *Id.* Here, trial counsel may not have interviewed appellant's children and mother about her, but he knew of the maladies encountered by his client earlier in life. He knew of her drug abuse. And, he had at least one "great witness" who could not be painted as biased (unlike appellant's children and parents) available who could address some if not all of those areas, but at a risk.

The evidence before us distinguishes this case from the situation in *Wiggins v. Smith* wherein 1) the accused had no prior convictions or "aggravating factors" in his background, 2) defense counsel had "rudimentary knowledge" of his client's personal background, and 3) defense counsel's limited investigation had uncovered no evidence suggesting that a mitigation case would have been fruitless. *Wiggins v. Smith*, 539 U.S.

510, 518-26, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). So, contrary to appellant's protestation, *Wiggins* is hardly controlling here. The same is no less true of *Miller v. Dretke*, wherein the defendant had little history of prior criminal conduct and evidence was available to show she suffered from mental illnesses sufficient to reduce her moral culpability for shooting into a trailer home. *Miller v. Dretke*, 420 F.3d 356, 358-66 (5th Cir. 2005). Appellant had been afforded chances to correct her persistent criminal conduct, remove herself from the purported hold of drugs, and take responsibility for her life and actions. Yet, she continually opted otherwise; even her mother was ready to give up on her. It would not be unreasonable to categorize her as the "career criminal" to which she alluded in her brief, and being a career criminal who had opportunities to remove herself from the road she opted to travel was a highly pertinent factor in assessing whether counsel could minimize her moral culpability for her latest crime. These factors were taken into consideration by trial counsel in forgoing the presentation of relevant and available mitigating evidence. So, again contrary to appellant's suggestion, the holding in *Miller* hardly controls here.

As previously stated, a trial court's ruling is within the zone of reasonable disagreement and, therefore, not an instance of abused discretion if there are two reasonable views of the evidence. It may be that appellant has her own reasonable view of the evidence suggesting that counsel should have called her children to testify about unavailable punishment alternatives like probation and drug treatment in lieu of a prison sentence.[4] Yet, the evidence permits another reasonable view that suggests counsel made an informed tactical choice or that the mitigation evidence in question would have

[4] The punishment range was 25 years to life due to her recidivism.

done nothing to help appellant's circumstances. In either case, we cannot say that the trial court abused its discretion in forgoing the new punishment hearing sought by appellant.

We overrule appellant's sole issue and affirm the trial court's judgment.

Brian Quinn
Chief Justice

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