IN THE
TENTH COURT OF APPEALS

No. 10-19-00414-CR

PHILLIP LEE HUSKINS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 40th District Court
Ellis County, Texas
Trial Court No. 44207CR

MEMORANDUM OPINION

In three issues, appellant, Phillip Lee Huskins, challenges his conviction for evading arrest with a motor vehicle. *See* TEX. PENAL CODE ANN. § 38.04. Specifically, Huskins contends that: (1) the trial court erred by failing to conduct a sua sponte competency inquiry; (2) the trial court erred by disallowing Huskins to assert an insanity defense; and (3) trial counsel was ineffective by failing to provide timely notice of the insanity defense. We affirm.

I. COMPETENCY HEARING

In his first issue, Huskins argues that the trial court erred by failing to conduct a sua sponte inquiry into his competency.

The prosecution and conviction of a defendant while legally incompetent violates due process. *Morris v. State*, 301 S.W.3d 281, 299 (Tex. Crim. App. 2009). "A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence." TEX. CODE CRIM. PROC. ANN. art. 46B.003(b). A defendant is incompetent to stand trial for a criminal offense if he does not have (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or (2) a rational, as well as factual, understanding of the proceedings against him. *See id.* art. 46B.003(a); *Petetan v. State*, No. AP-77,038, 2017 Tex. App. LEXIS 286, at **85-86 (Tex. Crim. App. Mar. 8, 2017).

Article 46B of the Code of Criminal Procedure implements the constitutional standard for competency to stand trial and notes the "circumstances that require, and procedures for making, a determination of whether a defendant is competent to stand trial." *Turner v. State*, 422 S.W.3d 676, 689 (Tex. Crim. App. 2013). If evidence suggesting a defendant may be incompetent to stand trial comes to the trial court's attention, "the court on its own motion shall suggest that the defendant may be incompetent to stand trial" and "shall determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand

trial." TEX. CODE CRIM. PROC. ANN. art. 46B.004(b)-(c). The threshold requirements for an informal inquiry is a "suggestion of incompetency," and it "may consist solely of a representation from any credible source that the defendant may be incompetent." *Id.* art. 46B.004(c-1). A further evidentiary showing is not required to initiate the inquiry, and the court is not required to have a bona fide doubt about the competency of the defendant. *Id.* "Evidence suggesting the need for an informal inquiry may be based on observations made in relation to one or more of the factors described by Article 46B.024 or on any other indication that the defendant is incompetent within the meaning of Article 46B.003." *Id.* These factors include the capacity of the defendant to (a) rationally understand the charges against him and the potential consequences of the pending criminal proceeding; (b) discuss with counsel pertinent facts, events, and states of mind; (c) engage in a reasoned choice of legal strategies and options; (d) understand the adversarial nature of criminal proceedings; (e) exhibit appropriate courtroom behavior; and (f) testify. *Id.* art. 46B.024(1)(A)-(F).

We review a trial court's decision regarding an informal competency inquiry for an abuse of discretion. *Montoya v. State*, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009), *superseded on other grounds by statute as recognized in Turner*, 422 S.W.3d at 692 n.31. In conducting our review, we do not substitute our judgment for that of the trial court, but rather determine whether the trial court's decision was arbitrary or unreasonable. *Id.*

On the second day of trial, the trial court was informed that Huskins reached a plea agreement with the State. After the trial court provided various admonishments about Huskins's right to continue with the trial, Huskins indicated that he did not want to have a jury trial. Rather, Huskins wanted a bench trial before the trial judge. The trial court then informed Huskins that the State had to agree to waive a jury. Huskins stated that he did not know that.

Thereafter, the trial court provided additional admonishments, and Huskins repeated that he understood the rights, but complained that he was unable to call his doctor as a witness until the punishment phase. Specifically, Huskins stated, "I just need my right to plead NGRI," which he had done in a previous case in Navarro County, Texas. Huskins then mentioned that he was "getting punished for a spiritual—for a spiritual—they say it's a gift, but it's really not." Subsequently, when the trial judge responded, "I'll be glad to go forward with a jury trial," Huskins noted that he wanted "to go just ahead and thumbprint."

After hearing Huskins's statements in open court, the trial court had an off-the-record conversation with the attorneys and then made the following ruling:

> Mr. Huskins, I'm listening carefully to everything you are saying. Everything that you have said I feel that you are still very much anchored to some of your earlier positions, which is absolutely permissible and is absolutely your right.
>
> I feel that based upon some of your responses to the Trial Court's questions that this plea may not be completely free and voluntary. Under the totality of circumstances, sir, I believe that the most prudent course of

> action, the fairest course of action to you, and the most legally correct course of action would be for the Trial Court Judge not to accept your plea and for us to simply go forward with a jury trial, unless the standard [sic] Defense Counsel have a serious objection to that, that's what we will do.

With no further objections, the trial proceeded.

In the instant case, there is no evidence suggesting that Huskins may have been incompetent to stand trial. The record indicates that Huskins had already successfully undergone a competency evaluation prior to trial and was determined to be competent by Philip R. Taft, Psy.D. of PLLC & Associates. Huskins did not have any outbursts or exhibit any bizarre behavior. Defense counsel never indicated that Huskins had difficulty consulting with him.

Defense counsel did raise the specter of mental illness as a potential defense. However, mental illness alone does not raise a suggestion of incompetency. *Moore v. State*, 999 S.W.2d 385, 395 (Tex. Crim. App. 1999) ("Prior hospitalization and treatment for depression do not *per se* warrant the trial court empaneling a separate jury to conduct a competency hearing. To raise the issue of competency by means of the defendant's past mental health history, there generally must be evidence of recent severe mental illness or bizarre acts by the defendant or of moderate retardation."). Only a recent mental illness severe enough to interfere with a defendant's present ability to understand the proceedings or evidence of recent bizarre acts is enough to raise a suggestion of incompetency. *Id.* ("Lower courts have held that a trial court is within its power to find a defendant competent without a section 2 hearing despite evidence of depression or

prior hospitalization when such evidence fails to indicate adequately either severe mental illness or recent impairment. We agree. A defendant's propensity toward depression does not necessarily correlate with his ability to communicate with counsel or his ability to understand the proceedings against him." (citing *Ryan v. State*, 937 S.W.2d 93, 105-06 (Tex. App.—Beaumont 1996, pet. ref'd); *State v. Thompson*, 915 S.W.2d 897, 902 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd))); *see also Euan v. State*, No. 05-16-00252-CR, 2017 Tex. App. LEXIS 3894, at *15 (Tex. App.—Dallas Apr. 27, 2017, pet. ref'd) (mem. op., not designated for publication) ("Competency to stand trial involves evaluation of the defendant's present mental state." (internal citations omitted)).

Moreover, the record also shows that Huskins assured the trial court that his extreme behavior that led to prior findings of not guilty by reason of insanity in Navarro County, Texas, were due to a medication problem that has since been rectified. In other words, there is nothing in this record suggesting that Huskins was incompetent to stand trial. *See* TEX. CODE CRIM. PROC. ANN. arts. 46B.003(a), 46.024(1)(A)-(F); *see also Petetan*, 2017 Tex. App. LEXIS 286, at **85-86.

Nevertheless, Huskins urges on appeal that his behavior that led the trial court to reject his plea was enough to raise a suggestion of his incompetence because such behavior could be "characterized as bizarre behavior." However, Huskins has not explained how his behavior in the trial court was bizarre. The record shows that Huskins understood the nature of the proceedings against him. He asked pertinent questions

regarding his ability to call his expert medical witness; he requested an insanity defense; and he expressed his desire to have a bench, rather than a jury, trial. Further, the record is devoid of evidence that Huskins was incapable or had difficulty consulting with defense counsel regarding this case. In fact, defense counsel affirmed that Huskins "appears to know what he's doing today" and was "conscious about it." Finally, after viewing Huskins's behavior firsthand, the trial judge stated that Huskins was "still very much anchored to some of [his] earlier positions" about raising an insanity defense; that Huskins knew what he was doing; and that Huskins "want[ed] to have your cake and eat it, too." *See Montoya*, 291 S.W.3d at 425 ("Thus, those who observed the behavior of the defendant at the hearing were in a better position to determine whether she was presently competent." (citing *McDaniel v. State*, 98 S.W.3d 704, 713 (Tex. Crim. App. 2003) ("We cannot ignore the trial court's first-hand factual assessment of appellant's mental competency. His factual findings, that appellant understood the nature of the proceedings and assisted his counsel in his defense, are entitled to great deference by the reviewing court."))).

Regardless, Huskins's responses to the trial judge's questions at the plea hearing either showed Huskins's ignorance of the consequences of his plea or, as the trial judge stated, may have been evidence of manipulation such that Huskins was trying to "have [his] cake and eat it, too." Neither of these explanations, when coupled with the evidence

before the trial judge at the time of the plea hearing, suggests that Huskins may have been incompetent to stand trial at the time of the plea hearing.

Because the record is devoid of evidence suggesting that Huskins was incompetent at the time of his plea hearing, we cannot conclude that the trial court erred by failing to conduct a competency inquiry. *See Moore*, 999 S.W.2d at 393; *see also Montoya*, 291 S.W.3d at 426. Accordingly, we overrule Huskins's first issue.

II. HUSKINS'S INSANITY DEFENSE

In his second issue, Huskins contends that the trial court erred by disallowing his insanity defense. We disagree.

The Texas Penal Code provides that insanity may be raised as a defense to a criminal prosecution. TEX. PENAL CODE ANN. § 8.01. However, the Code of Criminal Procedure requires that the defendant file notice of his intention to raise the defense at least twenty days before the date the case has been set for trial. TEX. CODE CRIM. PROC. ANN. art. 46C.051(a)-(b). The trial court may, on a finding of good cause for failure to serve timely notice, still allow evidence of insanity. *Id.* art. 46C.052. We review the trial court's determination of good cause for an abuse of discretion. *See Wagner v. State*, 687 S.W.2d 303, 306 (Tex. Crim. App. 1984) ("The trial court has the discretion to decide whether good cause is present for failure to file timely.").

In the instant case, Huskins requested that an expert evaluate him for the insanity defense on June 5, 2019.[1] The trial court granted the request. Defense counsel stated during a pre-trial hearing conducted on August 1, 2019, that he intended to raise an insanity defense. The trial court then notified defense counsel that he should file his notice of the insanity defense, if he so desired, "as soon as possible" and indicated that an additional pre-trial hearing may be necessary "in connection with that matter."

A month later, Mitchell Dunn, M.D., a psychiatrist, filed his report following his examination of Huskins. Dr. Dunn concluded that Huskins was not insane at the time of the offense.

Defense counsel never filed a notice of intent to raise an insanity defense. Nevertheless, on the second day of trial, defense counsel noted that he had given the State notice the previous day of Huskins's prior cases where he had been found not guilty by reason of insanity and that he believed the State had the burden to disprove insanity. The trial court noted that the burden only shifted to the State if Huskins had timely given notice of his intent to raise an insanity defense. In response, defense counsel admitted that he had not given proper notice, but argued that he gave "apparent notice" in light of his request for an examination regarding insanity and Dr. Dunn's report. The trial court

[1] Texas courts have held that the filing of a request for the appointment of an expert to determine sanity is not the same as filing a notice of intent to raise an insanity defense. *See Leyva v. State*, 552 S.W.2d 158, 160-61 (Tex. Crim. App. 1977); *see also Gomez v. State*, Nos. 14-99-00465-CR & 14-99-00466-CR, 2011 Tex. App. LEXIS 2094, at **9-11 (Tex. App.—Houston [14th Dist.] Mar. 29, 2011, pet. ref'd) (not designated for publication).

denied Huskins's request to raise an insanity defense, but noted that Huskins's mental-health issues could be raised in the punishment phase of trial for mitigation purposes, if Huskins was found guilty.

As stated above, the record does not reflect that Huskins timely filed a notice of intent to raise an insanity defense in this case. Thus, Huskins did not comply with the notice requirement under article 46C.051. *See* TEX. CODE CRIM. PROC. ANN. art. 46C.051. Neither did the trial court find that Huskins showed good cause for his failure to serve the requisite notice, which would have allowed the court to consider evidence of insanity. *See id.* art. 46C.052. Moreover, in our review of the record, there is no evidence of good cause for Huskins's failure to timely serve his notice. *See Newsome v. State*, 235 S.W.3d 341, 343 (Tex. App.—Fort Worth 2007, no pet.) (refusing to allow an untimely notice of insanity where the defendant produced no evidence of good cause). We therefore conclude that the trial court acted within its discretion by refusing to allow Huskins to raise an insanity defense during the guilt-innocence phase of trial. *See Wagner*, 687 S.W.2d at 306. Accordingly, we overrule Huskins's second issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

In his third issue, Huskins alleges that his trial counsel was ineffective by failing to provide timely notice of the insanity defense. Once again, we disagree.

To prevail on an ineffective assistance of counsel claim, the familiar *Strickland v. Washington* test must be met. *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156

L.Ed.2d 471 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)); *Andrews v. State*, 159 S.W.3d 98, 101-02 (Tex. Crim. App. 2005) (same). Under *Strickland*, the appellant must prove by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the defense was prejudiced by counsel's deficient performance. *Wiggins*, 539 U.S. at 521, 123 S.Ct. at 2535; *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *Andrews*, 159 S.W.3d at 101. Absent both showings, an appellate court cannot conclude that the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

The right to "reasonably effective assistance of counsel" does not guarantee errorless counsel or counsel whose competency is judged by perfect hindsight. *Saylor v. State*, 660 S.W.2d 822, 824 (Tex. Crim. App. 1983). "Isolated instances in the record reflecting errors of commission or omission do not cause counsel to become ineffective, nor can ineffective assistance of counsel be established by isolating or separating out one portion of the trial counsel's performance for examination." *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990).

Trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). When the record is silent regarding the reasons for counsel's conduct, a finding that counsel was ineffective requires impermissible speculation by the appellate

court. *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). Therefore, absent specific explanations for counsel's decisions, a record on direct appeal will rarely contain sufficient information to evaluate or decide an ineffective-assistance claim. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). "Thus[,] an application for a writ of habeas corpus is the more appropriate vehicle to raise ineffective assistance of counsel claims." *Rylander*, 101 S.W.3d at 110. To warrant reversal without affording counsel an opportunity to explain his actions, "the challenged conduct must be 'so outrageous that no competent attorney would have engaged in it.'" *Roberts v. State*, 220 S.W.3d 521, 533 (Tex. Crim. App. 2007) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)).

At the outset, we note that the record is silent as to defense counsel's trial strategy. Nevertheless, assuming, without deciding, that Huskins established the first prong of *Strickland*, we cannot say that Huskins has demonstrated that the result of the proceeding would have been different but for the alleged error of failing to timely notice the insanity defense.

First, the evidence supporting an insanity defense in this case was weak. As stated above, Dr. Dunn concluded that Huskins was not insane at the time of the offense, which is the pertinent inquiry for an insanity defense. *See* TEX. PENAL CODE ANN. § 8.01(a) ("It is an affirmative defense to prosecution that, *at the time of the conduct charged*, the actor, as

a result of severe mental disease or defect, did not know that his conduct was wrong." (emphasis added)).

On appeal, Huskins relies entirely on his prior cases from February 28, 2013, where he was found not guilty by reason of insanity to show that their existence would have sown doubt in the jury's mind so as to undermine their verdict.[2] The instant offense was committed more than five years later, which undermines the persuasive value of this evidence. Furthermore, Huskins was charged with and convicted of evading arrest with a motor vehicle that was enhanced to a second-degree felony based on Huskins's prior felony conviction for deadly conduct in 2004. *See* TEX. PENAL CODE ANN. §§ 12.33 (providing that the punishment range for second-degree felonies is "for any term of not more than 20 years or less than 2 years"), 12.42(a), 38.04(b)(2)(A). During the punishment phase of trial, Huskins introduced his prior cases where he was found not guilty by reason of insanity, as well as testimony from his treating physician, Steven Barksdale, M.D., who testified extensively about Huskins's mental-health history. Despite the foregoing, the jury sentenced Huskins to eight years' imprisonment—near the middle of the sentencing range. If the jury had found Huskins's evidence persuasive, they could have sentenced him to a term of incarceration much closer to the lower end of the punishment range. However, it appears that the jury believed the testimony of Dr. Dunn,

[2] In the cases referenced above, which date back to February 28, 2013, Huskins was found not guilty by reason of insanity of deadly conduct, three counts of endangering a child, and unlawful possession of a firearm.

who opined that Huskins was not credible and was malingering and exaggerating his symptoms to evade responsibility for his actions on the day in question.[3]

Based on our review of the record, we cannot say that there is a reasonable probability that, but for counsel's failure to timely file his notice of intent to assert an insanity defense, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *see also Thompson*, 9 S.W.3d at 812. We therefore conclude that Huskins has failed to establish both prongs of *Strickland* by a preponderance of the evidence. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *see also Thompson*, 9 S.W.3d at 813. Accordingly, we overrule Huskins's third issue.

IV. CONCLUSION

Having overruled all of Huskins's issues on appeal, we affirm the judgment of the trial court.

JOHN E. NEILL
Justice

Before Chief Justice Gray
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed December 9, 2020
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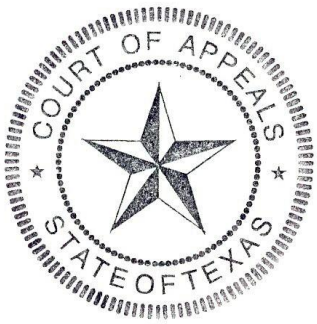

[3] In fact, Huskins told Dr. Dunn that he had been free of symptoms of paranoid schizophrenia from 2015 until ten minutes prior to the evading incident involved in this case. Despite his bizarre behavior at the time of the incident, Huskins told Dr. Dunn that he did not believe that police had any reason to pull him over on the day in question.