NUMBER 13-16-00026-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JAMES ANDREW SIMPSON, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 13th District Court
of Navarro County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Benavides, and Perkes
Memorandum Opinion by Justice Rodriguez

This case involves the granting of the State's motion to revoke community supervision by the trial court. By one issue that we construe as two, appellant, James Andrew Simpson contends: (1) the trial court abused its discretion because the greater weight of the credible evidence does not create a reasonable belief that appellant

intentionally violated a single condition of his community service; and (2) his counsel was ineffective because he failed to request a continuance and a statement of findings regarding the revocation. We affirm.[1]

I. BACKGROUND

On January 28, 2011, appellant pleaded guilty to the offense of aggravated assault with a deadly weapon. *See* TEX. PENAL CODE Ann. § 22.02 (West, Westlaw through 2015 R.S.). After finding the evidence substantiated guilt and deferring adjudication, the court placed appellant on community supervision for six years.

On June 10, 2015, the State filed its third motion to adjudicate, alleging appellant had:

(1) Failed to pay the $50 per month probation fee;

(2) Failed to pay $623 in court costs;

(3) Failed to pay a $500 fine;

(4) Failed to pay a drug test fee;

(5) Failed to pay a $5 Crime Stoppers fee;

(6) Failed to pay $200 in attorney fees;

(7) Failed to report to his Navarro County Adult Probation Officer;

(8) Consumed alcohol on May 8, 2015; and

(9) Failed to report a change of address.

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[1] This case is before the Court on transfer from the Tenth Court of Appeals in Waco pursuant to an order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through 2015 R.S.).

Appellant entered pleas of "not true" to all nine allegations. After hearing testimony and argument of counsel, the court found allegations one through eight to be "true" and allegation nine to be "not true." Following a pre-sentence investigation, the trial court adjudicated appellant guilty and sentenced him to ten years' confinement. This appeal followed.

II. MOTION TO REVOKE PROBATION

By his first issue, appellant contends that the trial court abused its discretion in revoking his community supervision. Appellant claims the greater weight of the credible evidence does not create a reasonable belief that appellant intentionally violated a single condition of his community service.

A. Standard of Review and Applicable Law

We review an order revoking probation under an abuse of discretion standard. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006). A probation revocation proceeding is neither a criminal nor a civil trial, but rather an administrative hearing. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993) (en banc). The State must prove by a preponderance of the evidence that a defendant violated the terms of his probation. *Id.* The trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we review the evidence in the light most favorable to the trial court's ruling. *See Cherry v. State,* 215 S.W.3d 917, 919 (Tex. App.—Fort Worth 2007, pet. ref'd).

If a single ground for revocation is supported by a preponderance of the evidence and is otherwise valid, an abuse of discretion is not shown. *Sanchez v. State*, 603

S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1982); *Burns v. State*, 835 S.W.2d 733, 735 (Tex. App.—Corpus Christi 1992, pet. ref'd). In other words, a single violation of a probation condition is sufficient to support the trial court's decision to revoke probation. *See Garcia v. State,* 387 S.W.3d 20, 26 (Tex. Crim. App. 2012); see *also Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980). To successfully obtain reversal of a revocation order, "the appellant must successfully challenge each ground on which the trial court relied to support revocation." *Sterling v. State*, 791 S.W.2d 274, 277 (Tex. App.—Corpus Christi 1990, pet. ref'd) (en banc).

B. Discussion

Appellant does not dispute that he failed to report to his probation officer for one of his monthly appearance days. Appellant testified that his failure to report was due to him "hiding out" from drug dealers who moved in next door to his home and that two detectives could testify on his behalf. The detectives did not appear before the court during the revocation proceeding and could not be reached during the court's pre-sentencing investigation. Additionally, appellant told the pre-sentence investigator that he failed to report to community supervision because his doctor told him to stay off his feet for a month. However, no testimony from his physician appears in the record, and appellant provides no other support for his asserted justification. Instead, appellant's probation officer testified at the hearing that she received no contact or update from appellant related to the supposed drug dealers or physician advisement, and she was unable to locate appellant or reach him at any point following his failure to appear.

When viewing the evidence in the light most favorable to the trial court's ruling, we

conclude this evidence supports a reasonable belief that appellant violated the condition of reporting to his probation officer and, thus, that the trial court did not abuse its discretion by granting the State's motion to revoke appellant's probation. *See Rickels,* 202 S.W.3d at 764. This sole violation is sufficient to sustain his revocation. *See Garcia,* 387 S.W.3d at 26. We overrule appellant's first issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

By his second issue, appellant contends that his trial counsel provided ineffective assistance when he failed to request a continuance in order to present testimony from two detectives and his doctor at the hearing on the State's motion to revoke. Additionally, appellant asserts that counsel was ineffective because he failed to request a statement of findings regarding the evidence the trial court relied upon and its reasons for revoking community supervision.[2]

A. Applicable Law and Standard of Review

Claims of ineffective assistance of counsel are governed by the Supreme Court's decision in *Strickland v. Washington.* 466 U.S. 668, 684 (1984); *see also Hernandez v. State,* 988 S.W.2d 770, 770 (Tex. Crim. App. 1999) (en banc) (holding that the *Strickland* standard applies in noncapital sentencing proceedings). Under the two-pronged *Strickland* standard, an appellant must show that (1) counsel's performance was deficient,

[2] Appellant also complains that counsel was ineffective because he did not object to the trial court's failure to investigate appellant's ability to pay a $500 fine. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 21(c) (West, Westlaw through 2015 R.S.). However, we need not address this argument because it is not dispositive of this appeal, as we have concluded that another violation supports the revocation of appellant's community supervision. *See Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1982); *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. 1980); *Burns v. State*, 835 S.W.2d 733, 735 (Tex. App.—Corpus Christi 1992, pet. ref'd); *see also* TEX. R. APP. P. 47.1.

and (2) counsel's deficient performance prejudiced the defense, resulting in an unreliable or fundamentally unfair outcome. *See Strickland,* 466 U.S. at 687.

To show deficient performance under the first prong of *Strickland,* an appellant must demonstrate that counsel's performance fell below an objective standard of reasonableness. *See id*. at 688. The review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within a wide range of reasonable professional assistance. *Tong v. State,* 25 S.W.3d 707, 712 (Tex. Crim. App. 2000) (en banc). To overcome the presumption of reasonable professional assistance, "[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State,* 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). The record on direct appeal will only in rare circumstances be adequate to show that counsel's performance fell below an objectively reasonable standard of performance. *See Calamaco v. State*, 462 S.W.3d 587, 596 (Tex. App.—Eastland 2015, pet. ref'd); *Andrews v. State,* 159 S.W.3d 98, 102 (Tex. Crim. App. 2005) (indicating that claims of ineffective assistance of counsel are normally best left for habeas corpus proceedings); *see also Bone v. State,* 77 S.W.3d 828, 833 (Tex. Crim. App. 2002) ("Under normal circumstances, 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 presumption that counsel's conduct was reasonable and professional.").

An appellant establishes prejudice under the second prong of *Strickland* if he shows there is a reasonable probability that, but for the counsel's unprofessional errors,

the outcome of the proceeding would have been different. *See Strickland,* 466 U.S. at 694; *see also Bone,* 77 S.W.3d at 833. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694.

We gauge effective assistance of counsel by the totality of the representation, and the trial as a whole must be reviewed—not isolated incidents of counsel's performance. *See Ex parte Walker,* 777 S.W.2d 427, 431 (Tex. Crim. App. 1989) (en banc); *Cannon v. State,* 668 S.W.2d 401, 403 (Tex. Crim. App. 1984) (en banc); *Sanders v. State*, 346 S.W.3d 26, 33 (Tex. App.—Fort Worth 2011, pet. ref'd). The "totality of the representation" test is to be applied as of the time of trial, and not through hindsight. *Ex Parte Flores,* 387 S.W.3d 626, 633–34 (Tex. Crim. App. 2012); *see also Butler v. State,* 716 S.W.2d 48, 55 (Tex. Crim. App. 1986) (en banc). The right to effective counsel is not the right to error-free counsel. *See Robertson v. State,* 187 S.W.3d 475, 483 (Tex. Crim. App. 2006); *see also Hernandez v. State,* 726 S.W.2d 53, 58 (Tex. Crim. App. 1986) (en banc).

B. Discussion

1. Continuance

From our review of the record, we find nothing to suggest appellant counsel's failure to request a continuance in order to present testimony was unreasonable or fell below an objective standard of reasonableness. *See Strickland,* 466 U.S. at 687–88. Because appellant did not file a motion for new trial raising this claim, the record has not been developed to provide perspective into the reasons for counsel's actions or inactions. *See Thompson*, 9 S.W.3d at 814. When the record does not contain direct evidence of

an attorney's thought process and conclusions, appellate courts must "assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined." *Lopez v. State,* 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). Strategically, while appellant's doctor and the detectives could have potentially provided an explanation as to why appellant did not appear before his probation officer, they would not have explained why appellant failed to call, mail, or otherwise notify her of why he would not be reporting. *See id*.; *Bone,* 77 S.W.3d at 833.

Based on the above, we conclude that appellant has not satisfied the first prong of *Strickland*. 466 U.S. at 687–88. Because the record does not show a sound deficiency in trial counsel's performance, we presume appellant was afforded reasonable professional assistance. *See Thompson*, 9 S.W.3d at 814; *Calamaco,* 462 S.W.3d at 595; *Bone*, 77 S.W.3d at 833.

2. Trial Court's Statement of Findings

Appellant additionally claims his counsel failed to request a written statement of findings regarding the evidence the trial court relied upon and the trial court's reasons for revoking appellant's community supervision. When a defendant timely requests the entry of specific findings of fact upon which revocation is based, the trial court errs in failing to enter such findings of fact. *See Reasor v. State*, 281 S.W.3d 129, 136 (Tex. App.—San Antonio 2008, pet. ref'd); *see also Whisenant v. State,* 557 S.W.2d 102, 105 (Tex. Crim. App. 1977). The failure to make the requested findings may require reversal if their omission impedes appellate review of the revocation. *See Reasor,* 281 S.W.3d at 136. However, the trial court is not required to issue separate findings if the judgment

or revocation order discloses the grounds for revocation found by the court. *Id.*; *see Joseph v. State,* 3 S.W.3d 627, 640 (Tex. App.—Houston [14th Dist.] 1999, no pet.).[3]

Here, the record reflects that the trial court orally found eight out of the nine allegations to be true. The court's written judgment recites, "While on community supervision, Defendant violated the terms and conditions of community supervision;" the judgment listed the conditions violated by paragraph number and further referenced them "as set out in the State's original motion to adjudicate guilt." Therefore, the record shows appellant was afforded adequate notice of the grounds underlying the court's revocation, and his ability to appeal was not diminished by the absence of further findings. *See Reasor,* 281 S.W.3d at 136.

Because of the information provided by the trial court and available to appellant, even if counsel was deficient in failing to request a written statement of the trial court's revocation findings, appellant suffered insufficient prejudice to warrant setting aside the trial court's decision to revoke his community supervision. *See Strickland*, 466 U.S. at 694–95. These isolated alleged deficiencies do not constitute ineffective assistance of counsel when viewed in the context of the entire record. *See Ex parte Manchaca*, 854 S.W.2d at 133; *Butler*, 716 S.W.2d at 55. Gauging the totality of trial counsel's representation of appellant, we conclude that there is no reasonable probability that the

[3] *See also Payne v. State,* No. 04–00–00659–660–CR, 2001 WL 540303, at *3 (Tex. App.–San Antonio May 23, 2001, no pet.) (not designated for publication) (explaining that a judgment stating that "condition number one was violated" provided the information necessary to determine the basis of revocation, which satisfied due process); *Rivera v. State,* No. 04–99–00119–CR, 2000 WL 566989, at *1 (Tex. App.—San Antonio May 10, 2000, pet. ref'd) (not designated for publication) (concluding that a judgment finding that defendant violated probation conditions "as set forth in State's Motion to Revoke Probation" and attaching a copy of the State's list of eight violations was sufficient to comply with request for findings).

outcome of the proceeding was affected by deficient performance. *See Ex parte Walker*, 777 S.W.2d at 431; *see also Strickland*, 466 U.S. at 694. We conclude, as to this contention, that appellant did not satisfy the second prong of *Strickland*. *See* 466 U.S. at 695.

3. Summary

After viewing trial counsel's performance as a whole, we conclude that the record does not support a conclusion that appellant received ineffective assistance of counsel. *See Cannon,* 668 S.W.2d at 403. We overrule appellant's second issue.

IV. CONCLUSION

We affirm the judgment of the trial court.

NELDA V. RODRIGUEZ
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
30th day of June, 2016.