NUMBER 13-15-00438-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

SHAUNNA MICHELLE REYES, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 36th District Court of San Patricio County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez

A San Patricio County grand jury indicted appellant Shaunna Michelle Reyes for the offense of theft with two previous theft convictions, a state jail felony. *See* TEX. PENAL CODE ANN. § 31.03 (West, Westlaw through Ch. 49, 2017 R.S.). Reyes pleaded guilty to the theft charge, and the trial judge sentenced her to two years in state jail. By two issues, Reyes contends that: (1) she had a right to withdraw her guilty plea because the trial

judge rejected a prior plea agreement; and (2) her plea counsel rendered ineffective assistance. We affirm.

I. BACKGROUND

The record shows that Reyes originally plea-bargained with the State for probation on the theft charge. At the plea hearing, the trial judge informed Reyes that she had the right to withdraw any plea of guilty to the theft charge if the judge were to reject the plea agreement. Reyes then pleaded guilty to the theft charge, and the judge stated that the plea agreement for probation would be followed. The judge then reset the case for a presentence investigation.

Before the sentencing hearing on the theft charge, a trial judge out of Nueces County sentenced Reyes to jail time on unrelated criminal charges. After being sentenced to jail in Nueces County, Reyes returned to San Patricio County to be sentenced on the theft charge.

At the start of the sentencing hearing, Reyes asked the judge not to follow the original plea agreement for probation and to instead sentence her to jail time because she was already serving jail time in Nueces County. After a short recess, the prosecuting attorney stated, and Reyes's plea counsel affirmed, that the parties reached an amended plea agreement to remove probation as a sentencing option without specifying a duration of jail time. The State then recommended two years in jail. Reyes did not request less jail time but instead reiterated that she wanted jail time, not probation. The trial court then sentenced Reyes to two years in jail on the theft charge and ran the sentence consecutive with her jail sentence in Nueces County. Reyes never asked the trial judge for permission to withdraw her guilty plea prior to or after the sentencing hearing. This appeal followed.

II. WITHDRAWAL OF GUILTY PLEA

By her first issue, Reyes contends that she had a right to withdraw her guilty plea on the theft charge pursuant to article 26.13(a)(2) of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2) (West, Westlaw through Ch. 49, 2017 R.S.) (providing that a defendant shall be permitted to withdraw her guilty plea if the trial judge rejects a plea bargain agreement). According to Reyes, the trial judge rejected the original plea agreement for probation by sentencing her jail time, and therefore, she had a right to withdraw her guilty plea under article 26.13(a)(2). We disagree.

The original plea agreement called for probation, but Reyes specifically asked the trial judge not to follow it. The parties then reached an amended plea agreement to remove probation as a sentencing opinion, and the trial judge sentenced Reyes in accordance with that agreement. The trial judge did not reject a plea agreement; instead, the judge followed an amended agreement that the parties reached at the sentencing hearing.[1] Because the trial judge did not reject the original plea agreement, article 26.13(a)(2) did not provide Reyes a basis to withdraw her guilty plea.[2] *Cf. Zinn v. State*, 35 S.W.3d 283, 286 (Tex. App.—Corpus Christi 2000, pet. ref'd) (holding that the trial

[1] Reyes also claims that the trial court rejected a plea agreement for eighteen months jail before imposing the two-year jail sentence. We disagree. The record shows that, at the outset of the sentencing hearing, Reyes's plea counsel represented to the judge that there was an agreement for eighteen months jail, but the prosecuting attorney never specifically affirmed that the agreement was for eighteen months. The judge then suggested that the parties confer in private about the plea agreement, and the parties did so. After a short recess, both parties represented that there was an amended agreement to remove probation as a sentencing opinion, but there was no specification as to the duration of jail time. After carefully reviewing the record, we do not construe the judge's suggestion that the parties confer about the plea agreement as a rejection of a plea agreement for eighteen months jail.

[2] Although article 26.13(a)(2) did not afford Reyes an absolute right to withdraw her guilty plea, we would note that the trial judge had discretion to permit Reyes to withdraw her plea upon request. *See Jackson v. State*, 590 S.W.2d 514, 515 (Tex. Crim. App. 1979) (holding that the trial judge has discretion to permit a defendant to withdraw his guilty plea prior to pronouncing judgment); *see also Cano v. State*, 846 S.W.2d 525, 527 (Tex. App.—Corpus Christi 1993, no pet.). However, Reyes never asked the trial judge for permission to withdraw her plea.

judge's rejection of negotiated plea agreement vested the defendant with an absolute right to withdraw his guilty plea under article 26.13(a)(2)). We overrule Reyes's first issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

By her second issue, Reyes contends that her plea counsel rendered ineffective assistance.

A. Standard of Review

To obtain relief, Reyes shoulders the burden to demonstrate that her plea counsel performed deficiently. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the record is silent as to why trial counsel engaged in the action being challenged as deficient, there is a strong presumption that counsel's performance fell within the range of reasonable professional assistance. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Direct appeal is usually an inadequate vehicle for raising an ineffective-assistance claim because the record is frequently undeveloped. *See Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012). If trial counsel has not been afforded an opportunity to explain the challenged conduct, a finding of deficient performance will not lie unless the conduct "was so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

B. Analysis

First, Reyes alleges that plea counsel performed deficiently by failing to advise that she could withdraw her guilty plea as a matter of right under article 26.13(a)(2), and by failing to file a motion for new trial to vindicate that right. However, as explained in Part II above, article 26.13(a)(2) did not provide Reyes a basis to withdraw her guilty plea. Plea counsel did not perform deficiently for failing to advise Reyes of a statutory right she

did not possess. *See Strickland*, 466 U.S. at 687; *see also* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(2).

Next, Reyes alleges that plea counsel performed deficiently by failing to warn that any jail sentence on the theft charge could potentially run consecutively with her jail sentence in Nueces County, as happened in this case. However, Reyes provides no evidence that plea counsel failed to advise that she could receive a consecutive sentence. We cannot find deficient performance on a silent record such as the one before us. *See Thompson*, 9 S.W.3d at 813; *see also Gutierrez v. State*, No. 13-09-00700-CR, 2011 WL 3821666, at *3 (Tex. App.—Corpus Christi Aug. 24, 2011, no pet.) (mem. op., not designated for publication).

Finally, Reyes alleges that plea counsel performed deficiently by initially brokering a plea agreement for probation on the theft charge when Reyes was likely to receive a jail sentence on the Nueces County charges. It is true that the original plea agreement called for probation at a time when Reyes faced potential jail time for charges pending in another county. However, plea counsel has not been afforded an opportunity to explain his reason for initially securing a plea agreement for probation, and Reyes does not explain why the original plea agreement was so outrageous that no competent attorney would have secured it under the circumstances. *See Goodspeed*, 187 S.W.3d at 392.

We conclude that Reyes has not met her burden to demonstrate that plea counsel performed deficiently. *See Strickland*, 466 U.S. at 687. Therefore, Reyes cannot obtain relief on her ineffective-assistance claim. We overrule Reyes's second issue.

IV. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

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

Delivered and filed this
13th day of July, 2017.