Opinion issued May 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00897-CR

JAMAILE BURNETT JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1532340

CONCURRING OPINION

I join the majority opinion, which holds that appellant Jamaile Burnett Johnson's trial attorney provided him ineffective assistance of counsel under the constitutional standards set out in *Strickland v. Washington*, 466 U.S. 668, 687–88,

694 (1984), and *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986), by failing to secure the admission into evidence of Johnson's medical records, which were relevant to the issue of his intent to commit theft. I also agree with the majority that Johnson argues on appeal "that his trial counsel did not provide him with effective assistance because counsel did not properly prepare and offer [Johnson's] medical records into evidence in admissible form when the medical records directly related to whether [Johnson] formed the requisite intent to commit the offense of theft." Maj. Op. at 21–22. And I agree with the majority that Johnson's medical records were admissible under Texas Rule of Evidence 803(6)—the business records exception—had defense counsel laid the proper predicate. Maj. Op. 22–26. But I would go further than the majority opinion.

The opinion misses the heart of Johnson's appellate counsel's argument: Johnson's trial counsel was constitutionally ineffective not simply because he failed to lay the predicate for the admission of Johnson's medical records under the business records exception to the hearsay rule but because he failed to lay the predicate for the *relevancy* of those records because he did not plead the insanity defense—an affirmative defense that must be pleaded. Thus, trial counsel could not show that these medical records, showing Johnson's extensive history of treatment for mental illness, were evidence relevant to Johnson's ability to form the intent to commit the crime with which he was charged because of his insanity. *See* TEX.

PENAL CODE ANN. § 8.01(a) (setting out insanity defense and providing that it is affirmative defense to prosecution); TEX. CODE CRIM. PROC. ANN. art. 46C.051(a) (providing that defendant planning to offer evidence of insanity defense must file with trial court pre-trial notice of intention to offer that evidence). By not pleading insanity and by not naming an expert witness to testify to the relevancy of Johnson's medical records as reflecting insanity, Johnson's trial counsel failed to establish a predicate for admission of the records in response to the State's relevancy objection, as both the State and the trial court attempted to remind him.

As the majority opinion shows, the State objected to the admission of Johnson's medical records on the basis that they were not admissible because they were not relevant. Defense counsel responded that "[t]hese medical records support what Mr. Armstead stated earlier that [Johnson] is schizophrenic and that he has mental health issues" and that the current records were not complete "because he's under consistent monitoring they're not—this stamp says incomplete because they're updating daily several times a day." The State then replied, "*[I]f we were in an insanity case or something and they had some expert to testify about these records maybe it would be relevant, but right now there is no relevancy or foundation for this to come in in the case in chief, guilt or innocence*." (Emphasis added). The trial court then sustained the State's objection to the records "*on the basis of foundation*." (Emphasis added.) And still, despite this, Johnson's counsel did not plead the

insanity defense or produce an expert witness to lay the foundation for the relevancy of the records.

The radical failure of Johnson's trial counsel to plead the insanity defense that would have made Johnson's medical records relevant to his ability to form the mens rea of the crime charged was not lost on Johnson's appellate counsel. All of the above exchange underlies Johnson's argument on appeal that

> [w]hile Appellant's medical records are not a part of this record, it is apparent from the statement of defense counsel, which went unchallenged, what they contained – evidence of Appellant's schizophrenia. *It is also clear that Defense counsel's strategy was to get the records before the jury as he offered them. Defendant's trial counsel was constitutionally ineffective*; that is, that counsel was deficient and that the deficiency prejudiced Defendant to the extent that a reasonable person would lose faith in the confidence of the outcome of the trial.

(Emphasis added.) Johnson's full argument on appeal is thus that Johnson's trial counsel could not get Johnson's medical records before the trial court because he did not know how to lay the predicate to establish their relevance. This would have required pleading the affirmative defense of insanity and securing an expert to testify about Johnson's mental history and mental state at the time of the charged crime, thus making the medical records relevant as evidence material to his insanity defense.[1] But his trial counsel did not do the things necessary to lay the foundation for the admission of this evidence.

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[1] To the extent the dissenting justice argues that this argument regarding Johnson's appellate ineffective assistance claim is invalid because it was not expressly made

A defendant cannot be convicted of a criminal offense if he is legally insane at the time of the crime. TEX. PENAL CODE ANN. § 8.01(a); *Dashield v. State*, 110 S.W.3d 111, 113 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (en banc). Insanity is an affirmative defense, and the defendant bears both the burden of proof and the burden of persuasion to demonstrate, by a preponderance of the evidence, that (1) because of a severe mental disease or defect, (2) he did not know that his conduct was wrong at the time of the conduct charged. TEX. PENAL CODE ANN. § 8.01(a); *Afzal v. State*, 559 S.W.3d 204, 207 (Tex. App.—Texarkana 2018, pet. ref'd). "The test for determining insanity is whether, at the time of the conduct charged, the defendant—as a result of a severe mental disease or defect—did not know that his conduct was 'wrong.' Under Texas law, 'wrong' in this context means

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by appellate counsel in support of his ineffective assistance of trial counsel claim, I can only respond that I beg to differ.

But there is an even deeper issue here if, as both the authoring justice and the dissenting justice contend, Johnson's appellate counsel failed to properly raise on appeal the ineffective assistance of Johnson's trial counsel in failing to plead the insanity defense as a necessary predicate to the admissibility of evidence of Johnson's insanity.

One of the most troublesome aspects of current Texas law is that here is no appeal from ineffective assistance in a criminal case committed at the *appellate* level. If counsel is ineffective at *both* the trial and the appellate level the criminal defendant's only remedy is a post-conviction petition for writ of habeas corpus, a proceeding for which the defendant has *no* right to counsel. The result is that if a criminal defendant is deprived of effective counsel at the trial and the appellate level, he is deprived of the right to counsel altogether, in plain violation of his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process of law, and Texas law provides him no remedy for that.

'illegal.'" *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex. Crim. App. 2008); *Pham v. State*, 463 S.W.3d 660, 671 (Tex. App.—Amarillo 2015, pet. ref'd); *see also Afzal*, 559 S.W.3d at 207 ("The purpose of the insanity defense issue is to determine whether the accused should be held responsible for a crime, or whether a mental condition will excuse holding him responsible.") (quoting *Graham v. State*, 566 S.W.2d 941, 948 (Tex. Crim. App. 1978)). The issue of insanity "is not strictly medical in nature"; a person may be "medically insane, yet legally retain criminal responsibility for a crime where a mental condition does not prevent him from distinguishing right from wrong." *Afzal*, 559 S.W.3d at 207.

In determining the issue of sanity, the factfinder "is called on to consider the nonmedical evidence in deciding the ultimate issue of culpability." *Id.* The factfinder may consider the defendant's demeanor before and after the offense. *Dashield*, 110 S.W.3d at 115 (citing *Schuessler v. State*, 719 S.W.2d 320, 329 (Tex. Crim. App. 1986), *overruled on other grounds*, *Meraz v. State*, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990)). And it may consider the defendant's medical records. *See id.* (stating that expert medical testimony may be helpful to factfinder, but ultimate determination of sanity "is outside the purview of medical experts and should be left to the discretion of the trier of fact"); *see also Ruffin*, 270 S.W.3d at 596 ("[R]elevant evidence may be presented which the jury may consider to negate the *mens rea* element [of an offense]. And this evidence may sometimes include evidence of a

defendant's history of mental illness.") (quoting *Jackson v. State*, 160 S.W.3d 568, 574 (Tex. Crim. App. 2005)). Here, the medical evidence of Johnson's mental illness was extensive, but his counsel failed entirely to lay the predicate for its admission.

As the majority opinion states,

> Generally, a silent record that provides no explanation for trial counsel's actions will not overcome the strong presumption of reasonable assistance. However, when trial counsel's ineffectiveness is apparent from the record, an appellate court may address and dispose of the claim on direct appeal. In such instances, the record demonstrates that counsel's performance fell below an objective standard of reasonableness as a matter of law and no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of counsel's subjective reasoning.

Maj. Op. at 21 (citations omitted). Here, trial counsel's ineffectiveness is apparent from the record and no reasonable trial strategy could justify counsel's acts and omissions in failing to get Johnson's medical records into evidence and, above all, in failing to plead the insanity defense to show their relevance.

I join in the majority's reasoning—and in Johnson's appellate counsel's—that "[d]efense counsel must have a 'firm command' of the law governing a case before he can render reasonably effective assistance to his client." Maj. Op. at 26–27 (citing cases). And I fully agree with the majority's (and Johnson's) citation to *Ex parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005), as support for the proposition that "[i]gnorance of well-defined general laws, statutes and legal

propositions is not excusable and such ignorance may lead to a finding of constitutionally deficient assistance of counsel." *See* Maj. Op. at 27.

Here, Johnson's trial counsel's misunderstanding of the predicate for the introduction of Johnson's medical records to show Johnson's inability to see that his conduct was wrong was clearly "not legitimate trial strategy, particularly [in this case] where the medical records directly related to whether [Johnson] formed the requisite intent to commit the offense of theft." Maj. Op. at 27. It was also grounds for concluding as a matter of law that his counsel was ineffective for failing to plead the insanity defense. Clearly, there is sufficient evidence in the record establishing that trial counsel's performance fell below an objective standard of reasonableness not only because of counsel's failure to introduce the medical records in an admissible form but also for his failure to establish a predicate for their relevance by pleading the insanity defense. Hence, as the majority opinion states, there is surely "a reasonable probability, sufficient to undermine confidence in the outcome, that but for [Johnson's] trial counsel's deficiency, the result of the proceeding would have been different." Maj. Op. at 37; *see Strickland,* 466 U.S. at 694; *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Johnson's counsel's failure to plead the insanity defense and then to offer Johnson's medical records to support that pleading is clearly grounds for finding not only the first prong of *Strickland,* but also the second.

Conclusion

I join the majority opinion in reversing the judgment of the trial court and remanding the case for a new trial. I join in much of its reasoning but would supplement it as stated above.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Goodman, and Countiss.

Keyes, J., concurring.

Goodman, J., dissenting.

Publish. TEX. R. APP. P. 47.2(a)