

Abated, Remanded, and Order filed June 23, 2020.



In the

Fourteenth Court of Appeals

NO. 14-18-00948-CR

BILLY RAY PARKER, Appellant

v.

THE STATE OF TEXAS, Appellee

**On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1497040**

ORDER OF ABATEMENT

Appellant Billy Ray Parker was convicted by a jury of first-degree felony aggravated robbery, and the trial court assessed punishment at 38-years imprisonment. *See* Tex. Penal Code Ann. §§ 12.42(d), 29.02, 29.03(a), (b). On the day appellant was convicted and sentenced, the trial court permitted his appointed trial counsel to withdraw and granted appellant's request for court-appointed appellate counsel. The trial court, however, did not appoint appellate counsel until almost two months later. In his sole issue, appellant contends that he was denied his

right to counsel under the Sixth Amendment during the critical 30-day period for filing a motion for new trial and requests an abatement so he can file an out-of-time motion for new trial. We abate the appeal and remand the case for the limited purpose of allowing appellant the opportunity to file and present a motion for new trial, the trial court the opportunity to hear and rule on such a motion, and the record to be supplemented.

I. BACKGROUND

Appellant was indicted for aggravated robbery of a person 65 years of age or older, alleged to have taken place on or about January 30, 2016. *See id.* § 29.03(a)(3)(A). His indictment included two enhancement paragraphs alleging that appellant had been convicted of two prior felony offenses. Appellant represented that he was indigent and requested the appointment of counsel. The trial court granted appellant's request and appointed an attorney with the Harris County Public Defender's Office as trial counsel.

Appellant was tried and convicted by a jury. Appellant elected to have the trial court assess punishment. On October 18, 2018, after the trial court found appellant's enhancement paragraphs to be true during punishment, it sentenced him to imprisonment for 38 years. *See id.* § 12.42(d) (minimum punishment for felony when defendant has two prior felonies is 25-years imprisonment up to 99-years or life imprisonment). That same day, the trial court certified appellant's right to appeal; appellant filed a notice of appeal, represented his indigence, and moved that the trial court appoint appellate counsel; and appellant's trial counsel moved to withdraw. Also, that same day, the trial court found appellant indigent, granted appellant's motion for appellate counsel to be appointed, and granted appellant's trial counsel's motion to withdraw.

However, in its October 18 order, the trial court did not appoint appellate

counsel for appellant, stating that appellate counsel was “to be decided.” It was not until December 17, 2018, that the trial court appointed “HCPDO” (the Harris County Public Defender’s Office) to represent appellant on appeal.¹

II. ANALYSIS

In his first issue, appellant argues that he was denied his Sixth Amendment right to counsel when the trial court failed to appoint appellate counsel until almost two months after his sentence was imposed. Appellant further contends that harm is presumed.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to have counsel present at all “critical” stages of his criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (citing *United States v. Wade*, 388 U.S. 218, 227–228 (1967), and *Powell v. Alabama*, 287 U.S. 45, 57 (1932)); see U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”). One such critical stage is the 30-day period for filing a motion for new trial. *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007); see Tex. R. App. P. 21.4(a) (defendant has 30 days after trial court “imposes or suspends sentence in open court” to file motion for new trial). If a defendant is deprived of counsel during this stage of his prosecution, then the defendant’s constitutional rights are violated. *Cooks*, 240 S.W.3d at 911.

If a defendant was represented by counsel at trial, then there is a rebuttable presumption that trial counsel continued to represent the defendant after trial, including during the critical motion-for-new-trial stage. *Id.* If a defendant was

¹ Appellant does not raise an issue regarding the trial court’s not appointing a specific lawyer on December 17, 2018. We accept that date for the purposes of this order but express no opinion whether federal or state law requires the appointment of a specific lawyer.

represented by counsel at trial and counsel does not file a motion for new trial, then we assume it was because the defendant, with the benefit of counsel's continued representation, considered and rejected that option. *Id.* at 911 n.6.

The defendant bears the burden of presenting evidence to rebut the presumption of continued representation during this critical stage. *See Oldham v. State*, 977 S.W.2d 354, 361–63 (Tex. Crim. App. 1998). If the defendant was deprived of counsel for some but not all of this critical stage, *i.e.*, there was a gap in representation, then the deprivation was only partial, and the defendant must show harm. *Cooks*, 240 S.W.3d at 911–12 (partial deprivation of right to counsel during 30–day critical stage for filing motion for new trial is subject to “harmless beyond reasonable doubt” standard); *Carnell v. State*, 535 S.W.3d 569, 572 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *see Simon v. State*, 554 S.W.3d 257, 267 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (considering critical stage of sentencing). When a defendant was deprived of counsel for part of the 30-day period, and as a result, failed to file a motion for new trial, the defendant must show harm by alleging a “facially plausible” claim that the defendant could have developed in a motion for new trial. *See Cooks*, 240 S.W.3d at 912.

However, if a defendant was deprived of counsel for all of this critical stage, then the deprivation was total, and harm is presumed. *Carnell*, 535 S.W.3d at 572 (citing *Batiste v. State*, 888 S.W.2d 9, 14 (Tex. Crim. App. 1994) (“[W]ith some varieties of Sixth Amendment violation, such as the actual or constructive denial of counsel altogether at a critical stage of the criminal proceeding, . . . prejudice is presumed.”)); *see Simon*, 554 S.W.3d at 267. If the deprivation was harmful, then the proper remedy is to abate the appeal and remand the case to the trial court to allow the defendant to file an out-of-time motion for new trial. *Carnell*, 535 S.W.3d at 573–74 & n.5 (citing *Ward v. State*, 740 S.W.2d 794, 800 (Tex. Crim. App. 1987)).

The trial court granted appellant’s motion to appoint appellate counsel and trial counsel’s motion to withdraw on October 18, 2018—the same day appellant’s sentence was imposed in open court—but did not appoint appellate counsel that day. Appellant had until November 19, 2018, to file a motion for new trial. *See* Tex. R. App. P. 4.1(a), 21.4(a). However, the trial court did not appoint appellate counsel until December 17, 2018. The facts here are not in dispute, and the State agrees with appellant’s request for abatement and remand.

We conclude appellant has rebutted the presumption of continued representation and shown that he was deprived of counsel for the entire period for filing a motion for new trial. *See Carnell*, 535 S.W.3d at 574. Because appellant was deprived of counsel for the entire period, we presume that he was harmed. *See id.* We therefore hold that appellant is entitled to an abatement of this appeal to file a motion for new trial. *See id.* at 373–74 & n.5.

We sustain his sole issue.²

III. CONCLUSION

Having sustained appellant’s issue, we do not render judgment or order the clerk to issue a mandate at this time, but rather by this order, abate the appeal and remand the case to the trial court for the limited purpose of allowing (1) appellant the opportunity to file and present a motion for new trial, (2) the trial court the opportunity to rule on such a motion, and (3) the trial court clerk and court reporter to supplement the appellate record. *See* Tex. R. App. P. 43.6, 44.4; *Carnell*, 535 S.W.3d at 573–74 & n.5. The case is remanded to the trial court to the point at which appellant’s sentence was imposed, and the 30-day timetable for any motion for new

² Because we presume harm, we need not address appellant’s alternative argument that there are facially plausible issues to be raised in a motion for new trial. *See* Tex. R. App. P. 47.1.

trial shall begin running anew on the date this order is received by the district clerk. *See* Tex. R. App. P. 21.4(a), *Carnell*, 535 S.W.3d at 573–74 & n.5. If the trial court grants any motion for new trial, then the trial court clerk is ordered to supplement the clerk’s record with a copy of the trial court’s written order, and this appeal will be reinstated and dismissed.³ *See* Tex. R. App. P. 21.8, 21.9, 34.5(c); *Carnell*, 535 S.W.3d at 574 n.5. If the trial court overrules any motion for new trial or the motion is deemed denied, then (1) the trial court clerk is ordered to file a supplemental clerk’s record containing any written order, (2) the court reporter is ordered to file a supplemental reporter’s record of the hearing on the motion, (3) this court will reinstate the appeal, and (4) the parties will be permitted to brief issues related to the overruled motion. *See* Tex. R. App. P. 21.8, 33.1, 34.5(c), 34.6(d); *Carnell*, 535 S.W.3d at 574 n.5. We further order the trial court clerk to send the clerk of this court an acknowledgement that it received this order. *Cf.* Tex. R. App. P. 51.2(a)(1).

/s/ Charles A. Spain
Justice

Panel consists of Justices Zimmerer, Spain, and Hassan.

Publish — TEX. R. APP. P. 47.2(b).

³ Any appeal by the State from an order granting appellant a new trial would be a separate proceeding. *See* Tex. Code Crim. Proc. Ann. art. 44.01(a)(3). And such dismissal of course would not affect appellant’s right to appeal from any new sentence imposed.