Opinion issued July 16, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00947-CR

KARIS EDWARD STARR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1499661

MEMORANDUM OPINION

Appellant, Karis Edward Starr, was charged with felon in possession of a firearm.[1] Appellant pleaded guilty. The trial court deferred a finding of guilt and placed appellant on community supervision for five years. Several months later, the

---

1 TEX. PENAL CODE § 46.04.

State of Texas filed a motion to adjudicate guilt, alleging that appellant had violated multiple conditions of his community supervision. After a hearing, the trial court adjudicated appellant guilty and sentenced him to 35 years' confinement. In a single issue, appellant contends that his trial counsel provided ineffective assistance.

We affirm.

Background

On February 20, 2016, appellant was charged with felon in possession of a firearm. Appellant had two previous convictions for felony possession of a controlled substance. Appellant entered a plea of guilty, but the trial court deferred a finding of guilt and placed appellant on community supervision for five years. Included in the conditions of community supervision were, among other things, the requirements that appellant refrain from committing additional offenses and possessing or consuming illegal drugs.

On July 31, 2017, the State filed a motion to adjudicate appellant's guilt. The State alleged in the motion that appellant had committed numerous violations of the terms and conditions of his community supervision, including a new arrest for burglary of a building and testing positive on three occasions for marijuana or cocaine or both.

Several months before its motion to adjudicate guilt was heard, the State filed, and the trial court granted, a motion for psychiatric examination for competency due

to defense counsel's claims of "family history of mental illness and . . . concerns about [appellant]'s competency." Barbra Martinez, a licensed psychologist with the Harris Center for Mental Health and IDD[2], evaluated appellant's competency to stand trial. In her report, Dr. Martinez noted that appellant stated he had received psychiatric treatment as a child but not as an adult. Dr. Martinez also noted that medical records from the county jail indicated appellant had not sought or received mental health services during his current or previous detention periods and appellant denied mental health concerns during his most recent intake health assessment. Dr. Martinez found that appellant did not "exhibit significant pathology to warrant a mental health diagnosis." Finally, Dr. Martinez opined that appellant "possesse[d] sufficient present ability to consult with the defense attorney with a reasonable degree of rational understanding, and he possesse[d] a rational as well as factual understanding of the proceedings against him" and, therefore, was competent to stand trial.

The State's motion to adjudicate guilt was scheduled for October 9, 2018. That morning, before hearing the motion to adjudicate guilt, the court held an *Ake* hearing. *See Ake v. Oklahoma*, 470 U.S. 68, 74 (1985) (holding that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State

[2] Intellectual and Developmental Disabilities

provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one"). At that hearing, defense counsel testified that he had previously approached the judge on an *Ake* motion on January 8, 2018, after he "realize[d] that [his] client had a mental issue." Counsel testified that the trial court authorized the expenditure of $2500 for a mental health expert. Counsel further testified that he spoke with no fewer than six psychologists about evaluating appellant but none would perform the evaluation for less than $3250, which was $750 more than the trial court had authorized. Counsel acknowledged that it had been "a long time" (10 months) since he received the $2500 and admitted this was not the first setting but explained that he had suffered a family emergency and has three children. Counsel requested that the trial court award an additional $750 and grant a one-week continuance of the motion-to-adjudicate hearing to allow him additional time to secure a mental health evaluation of appellant. After noting that counsel had not asked for the additional funds before the day of the motion-to-adjudicate hearing, the trial court denied the motion.

Although the facts related to the January 2018 *Ake* motion are not disputed by the parties, the appellate record does not include any transcript from that *Ake* hearing (if a hearing was held), a written *Ake* motion filed by appellant, or a written order from the trial court on said motion.

Immediately after the October *Ake* hearing, the trial court heard the State's motion to adjudicate guilt. The State presented the testimony of four witnesses: (1) Dedria Hunter, the probation officer in the 179th District Court; (2) Cheston Oliver, a community supervision technician; (3) Steve Harris, the director of One Source Technology, a forensic toxicology lab; and (4) Irving Lira, a police officer with the Houston Police Department. Hunter testified that appellant had violated the terms and conditions of his community supervision by committing additional violations of the law and by failing various drug tests, among other things. Hunter also testified that appellant's probation officer, Jonathan Nunn, was no longer employed with the Harris County Community Supervision and Correction Department. Oliver provided testimony related to the collection of urine samples from appellant for his court-ordered drug testing, and Harris testified that appellant's samples tested positive for marijuana or cocaine on three separate occasions. Finally, Officer Lira testified about the circumstances surrounding appellant's arrest for burglary, and the State presented a video showing appellant and two others attempting to steal an ATM machine.

At the conclusion of the State's evidence, appellant's counsel, relying on the State's subpoena, attempted to call appellant's probation officer, Jonathan Nunn. However, Nunn was not present at the courthouse. Appellant's counsel objected to moving forward with the remainder of the hearing, arguing that Nunn was a material

witness and that the defense's inability to cross-examine him violated the Confrontation Clause. The trial court overruled the objection, and the defense rested. After closing statements, the trial court adjudicated appellant guilty and sentenced him to 35 years' confinement.

Ineffective Assistance

In one issue, appellant argues that his counsel rendered ineffective assistance by failing to: (1) timely request additional funds to hire a mental health expert; (2) present the testimony of a mental health expert at the hearing on the State's motion to adjudicate guilt; (3) secure the testimony of a critical witness; and (4) object to his 35-year sentence as cruel and unusual punishment. We address each of these arguments in turn.

A. Applicable law and standard of review

The United States Constitution and the Texas Constitution guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. This right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). To prevail on a claim of ineffective assistance of counsel, an appellant must prove that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable

probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687.

In reviewing counsel's performance under *Strickland*'s first prong, we look to the totality of the representation to determine the effectiveness of counsel, indulging a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance and was motivated by sound trial strategy. 466 U.S. at 689. To defeat this presumption, any allegation of ineffectiveness must be firmly founded in the record so that the record affirmatively shows the alleged ineffectiveness. *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017). Generally, counsel should be given an opportunity to explain his actions before being found ineffective. *Id.* In most cases, direct appeal is an inadequate vehicle for raising an ineffective assistance claim because the record is undeveloped and does not adequately reflect the motives behind counsel's actions. *See Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003). In the face of a silent record, we cannot know trial counsel's strategy, so we will not find deficient performance unless the challenged 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).

Under *Strickland*'s second prong, in reviewing whether there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have

been different, a "reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. With respect to claims of ineffective assistance during the punishment phase, the appellant must show a reasonable probability that the assessment of punishment would have been less severe in the absence of counsel's deficient performance. *Bazan v. State*, 403 S.W.3d 8, 13 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). It is not enough to show that counsel's errors had some conceivable effect on the outcome of the punishment assessed; rather, the likelihood of a different result must be "substantial." *Id.*

The appellant has the burden to establish both prongs by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). The appellant's "failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009); *see also Strickland*, 466 U.S. at 697.

B. Failure to timely request additional funds for mental health expert

Appellant first argues that his counsel was ineffective because counsel failed to timely request additional funds necessary to hire a mental health expert before the hearing on the motion to adjudicate guilt. Specifically, appellant asserts that counsel's failure to request additional funds until the morning of the hearing on the motion to adjudicate guilt amounted to no request at all. In response, the State contends that the record is silent as to counsel's strategy for waiting to request funds.

The State argues that although counsel testified to a family emergency, he "never actually articulate[d] why he waited to request additional funds." Therefore, the State asserts, because counsel did not "directly" explain his strategy, appellant's ineffective-assistance claim is not firmly grounded in the record.

We cannot agree with the State that the record is completely silent as to counsel's strategy. Unlike cases where the record contains no explanation in the record for counsel's actions (or inactions), appellant's trial counsel did provide some testimony, albeit limited, as to why he did not seek additional funds for a mental health evaluation at an earlier date:

Q. Now, this seems like a long time because it's now October 9th?

A. Yes.

Q. And this is not the first setting?

A. No.

Q. So did you have a family emergency?

A. Yes.

Q. And I -- you have three children?

A. I do.

Q. Their ages?

A. 12, 9, and 7.

Q. And their mommas work?

A. Yes, their mommas work.

Q. And you've been dealing with that as well?

A. (Nodding head in the affirmative.).

It is apparent from this exchange that counsel's justification for failing to request additional funds sooner was due, at least in part, to a family emergency and childcare issues.

However, we cannot say that the record affirmatively shows the alleged ineffectiveness.[3] Appellant's ineffective-assistance claim centers around counsel's failure to timely request additional funds for a mental health expert under *Ake*. In *Ake*, the United States Supreme Court held that due process may require that the State provide access to a psychiatrist's assistance when an indigent defendant has made a "preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial." 470 U.S. at 74. "Before an indigent defendant is entitled to appointment and payment by the State for expert assistance, he must make a pretrial 'preliminary showing' that is based upon more 'than undeveloped assertions that the requested assistance would be beneficial.'" *Ex parte Jimenez*, 364 S.W.3d

[3] We note that appellant did not move for a new trial. When there is no proper evidentiary hearing on a motion for new trial, it is difficult to show counsel's performance was so deficient as to overcome the presumption that counsel's conduct was reasonable and professional. *Morrison v. State*, 132 S.W.3d 37, 47 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (citing *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002)).

866, 881 (Tex. Crim. App. 2012) (quoting *Williams v. State*, 958 S.W.2d 186, 192 (Tex. Crim. App. 1997)). To make this showing, "the defendant necessarily has to explain his theories and describe with some specificity how an expert would assist him." *Williams*, 958 S.W.2d at 193.

The record does not show that appellant's counsel erred by failing to timely request additional funds for a mental health expert because there is no evidence that appellant's mental health would have been a significant factor at the hearing on the motion to adjudicate guilt. Although appellant claims that had "the Court [] heard convincing expert testimony that the appellant was mentally ill . . . the Court most likely would have reinstated [his] probation, amended the conditions of probation, and placed [him] on the Mental Health caseload," nothing in the record suggests that appellant has a mental illness, other than statements by his counsel at the adjudication hearing that his client hears voices and "has documented illness going back to elementary school." In a case like this, where funds for a mental health expert have already been awarded, we would expect to see in the record a written *Ake* motion setting forth the reasons why appellant believed his mental illness would be a significant factor at trial, accompanied by affidavits or other evidence in support of this theory, as well as a written order from the trial court granting such a request. *See Jimenez*, 364 S.W.3d at 881.

But as noted above, the record on appeal does not contain a written *Ake* motion, a transcript for the January 2018 *Ake* hearing (if held and transcribed), or an order granting appellant $2500 for a mental health expert. Although the fact that all these things occurred is undisputed in the parties' briefing, there is nothing in the record related to that first *Ake* motion or hearing for this Court to review. Neither does the record reflect what favorable evidence, if any, a psychiatric evaluation would have shown nor how that evidence would have altered the trial court's adjudication of guilt or resulted in a lesser sentence. Moreover, the trial court was aware of Dr. Martinez's report and conclusions that appellant had no mental disability. Even if appellant had obtained a favorable psychological evaluation from another expert, the trial court could have disbelieved appellant's expert and believed Dr. Martinez. *See Canseco v. State*, 199 S.W.3d 437, 439 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (noting that trial court is exclusive judge of witness credibility).

The record is also devoid of any medical records or other documentary evidence of a mental illness or any proffered testimony from medical professionals, family members, or other witnesses who could speak to appellant's mental illness, if any. Without evidence of this sort, we are left only with a record containing counsel's statements that his client suffered from a mental illness and Dr. Martinez's contradictory report, which includes findings that appellant did not "exhibit

significant pathology to warrant a mental health diagnosis," had not been treated for mental illness as an adult, and was competent to stand trial. Without evidence of appellant's sanity being a significant factor at trial, we cannot conclude that counsel was ineffective for failing to request additional funding for one before the day of the hearing. *See, e.g.*, *Maldonado v. State*, No. 14-03-00074-CR, 2004 WL 234377, at *2 (Tex. App.—Houston [14th Dist.] Feb. 10, 2004, pet. ref'd) (mem. op., not designated for publication) (holding that counsel was not ineffective for failing to request mental health expert because appellant had not demonstrated sanity was likely to be significant factor at trial, neutral expert determined appellant was competent to stand trial, and record contained no evidence appellant had mental illness).

We further find the cases relied on by appellant to be distinguishable. In *Hinton v. Alabama*, the United States Supreme Court held that the "trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance." 571 U.S. 263, 274 (2014). However, the Court emphasized that the "only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an

expert that *he himself* deemed inadequate." *Id.* at 275 (emphasis in original). This case does not involve a similar mistake of law.

Appellant also cites two cases in support of his argument that failure to act in a timely manner equates to ineffective assistance of counsel. *See Randle v. State*, 847 S.W.2d 576 (Tex. Crim. App. 1993); *Ex parte Axel*, 757 S.W.2d 369 (Tex. Crim. App. 1988). But neither case involved the attorney's failure to request additional funds for an expert when the record was devoid of evidence establishing a need for such an expert. *See Randle*, 847 S.W.2d at 581 (holding that failure to inform prosecutor of defendant's acceptance of plea bargain in timely manner was ineffective assistance); *Axel*, 757 S.W.2d at 374–75 (holding that failure to file timely notice of appeal was ineffective assistance).

We recognize the possibility that the lack of evidence in the record may be due to counsel's omission. Where the error alleged against counsel is one of omission rather than commission, however, the point is often better made through a habeas corpus proceeding which would allow the defendant to introduce evidence counsel may have neglected. *See Jackson*, 973 S.W.2d at 957 (observing that appellant is not prohibited from raising ineffective assistance claim in habeas corpus proceeding when "direct appeal has not provided an adequate record"); *see also Cortez v. State*, No. 04-98-00645-CR, 1999 WL 1021557, at *3 (Tex. App.—San Antonio June 2, 1999, no pet.) (not designated for publication) (recognizing that lack

of evidence in record on direct appeal could be due to counsel's ineffectiveness but nevertheless holding record did not show counsel erred by failing to obtain approval of funds for investigator).

We overrule appellant's first argument on ineffective assistance.

C. Failure to present testimony of mental health expert

Appellant also argues that his counsel was ineffective because counsel failed to present testimony of an expert psychiatrist that would refute the State's case. Specifically, appellant asserts that although his counsel argued at the motion-to-adjudicate hearing that appellant suffered from "mental issues, he failed to present qualified testimony in support of [appellant's] only viable defense."

To obtain relief on an ineffective assistance claim based on an uncalled witness, an appellant "must show that [the witness] had been available to testify and that his testimony would have been of some benefit to the defense." *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007) (internal quotation omitted); *Crawford v. State*, 355 S.W.3d 193, 199 (Tex. App.—Houston [1st Dist.] 2011 pet. ref'd). Here, as explained in more detail above, the record contains no evidence as to any mental illness suffered by appellant, that a mental health expert was available to testify, or that a mental health expert's testimony would have been beneficial to appellant's defense. As is true of appellant's first argument, without more, we cannot

conclude that counsel was ineffective for failing to present the testimony of a mental health expert at the motion-to-adjudicate hearing.[4]

We overrule appellant's second argument on ineffective assistance.

D. Failure to secure the testimony of appellant's probation officer

Appellant also argues that his counsel was ineffective because counsel failed to secure the testimony of appellant's probation officer, Jonathan Nunn, by deposition. Specifically, appellant asserts that Nunn directly oversaw appellant and that appellant exhibited signs of mental illness that were "almost impossible to miss." As with the failure to call a mental health expert, in order to succeed on his ineffective-assistance claim based on the failure to present testimony from Nunn, appellant needed to show that Nunn was available to testify and that Nunn's testimony would have been of some benefit to appellant's defense. *See Ramirez*, 280 S.W.3d at 853; *Crawford*, 355 S.W.3d at 199.

Although he asserts Nunn was a critical witness, appellant has pointed to no evidence in the record to show that Nunn was available or that his testimony would

---

[4] Appellant relies on the San Antonio Court of Appeals' decision in *Rylander v. State* in support of his argument that the failure to present testimony of a mental health expert to support his only "viable" defense was ineffective. *See* 75 S.W.3d 119 (Tex. App.—San Antonio 2002), *rev'd*, 101 S.W.3d 107 (Tex. Crim. App. 2003). We note, however, that *Rylander* was reversed by the Court of Criminal Appeals on the point on which appellant relies—ineffective assistance of counsel based on failure to present expert testimony on appellant's defense. The Court held that "[b]ased upon the totality of this record, we cannot conclude that appellant has established that trial counsel's performance fell below an objective standard of reasonableness[.]" *Rylander*, 101 S.W.3d at 111.

have been beneficial to the defense. Appellant neither made a formal proffer of Nunn's anticipated testimony, nor provided any explanation as to Nunn's expected testimony had he been called. Instead, appellant's counsel merely claimed that Nunn was the State's primary witness and argued that *if* there were performance issues that led to Nunn being no longer employed, that could affect his ability to effectively oversee his caseload and adjust as necessary *if* there were mental health issues discovered with his probationers. Appellant has failed to demonstrate that Nunn was available or that his testimony would have been favorable.

Appellant cites *Frangias v. State*, 450 S.W.3d 125 (Tex. Crim. App. 2013), in support of this issue. There, multiple affidavits and other evidence submitted in connection with the appellant's motion for new trial demonstrated that the uncalled witness was the only person who could directly corroborate the appellant's version of events. *See Frangias*, 450 S.W.3d at 137 (affidavits demonstrated that missing witness was only witness who could corroborate appellant's account and that trial counsel believed witness's testimony to be "at least 'beneficial,' if not 'critical' to the appellant's defense"). We find *Frangias* distinguishable because the record here contains no evidence as to what Nunn's testimony would have been nor any evidence that such testimony would have been favorable.

We overrule appellant's third argument on ineffective assistance.

E. Failure to object to sentence as cruel and unusual punishment

Finally, appellant argues that his counsel was ineffective for failing to object to his 35-year sentence as cruel and unusual punishment under the Eighth Amendment. The State argues that the record does not support the conclusion that the trial court would have committed harmful error if it had overruled an objection that the sentence was cruel and unusual punishment.

To show ineffective assistance for failing to object, appellant must show that if his counsel had objected the trial court would have erred in overruling the objection. *Jacoby v. State*, 227 S.W.3d 128, 131 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). "Punishment assessed within the statutory limits is generally not cruel and unusual punishment." *Id.* The trial court sentenced appellant to 35 years in prison for felon in possession of a firearm. The range of punishment for felon in possession of a firearm, which is a third-degree felony, is typically between two and 10 years. TEX. PENAL CODE §§ 12.34(a), 46.04(e). However, because he was a habitual offender, appellant was subject to a sentence of 25 to 99 years. *Id.* § 12.42(d). Because appellant's 35-year sentence was within the statutory limits, it was not cruel and unusual and his counsel's failure to object was not ineffective assistance of counsel. *See Gavin v. State*, 404 S.W.3d 597, 606–07 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding sentence imposed was within statutory limits and, therefore, counsel's failure to object was not ineffective assistance of

counsel); *Jagaroo v. State*, 180 S.W.3d 793, 801 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (same).

We overrule appellant's fourth argument on ineffective assistance.

Conclusion

Having overruled each of appellant's arguments challenging whether he received the effective assistance of counsel, we affirm the trial court's judgement.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Landau and Countiss.

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