Opinion issued July 21, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00027-CR

SYRKNOREON DEWUNTREL PILGRAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 426th District Court
Bell County, Texas
Trial Court Case No. 77641

MEMORANDUM OPINION

A jury convicted appellant, Syrknoreon Dewuntrel Pilgram, of the state jail felony offense of possession of less than one gram of a controlled substance, methamphetamine, and the jury sentenced appellant to the maximum penalty of two years' confinement in state jail and a $10,000 fine. *See* TEX. HEALTH & SAFETY

CODE ANN. § 481.115(a), (b); TEX. PENAL CODE ANN. § 12.35(a), (b). Appellant contends on appeal that the trial court abused its discretion by "failing to inquire into why [he] was dissatisfied with his court-appointed counsel," which appellant further contends without argument "possibly" violated his Sixth Amendment right to effective assistance of counsel.

We affirm.

Background

On June 7, 2017, police officers executed a no-knock search warrant at an apartment in Bell County from which police had probable cause to believe drugs were being sold.[1] Appellant did not live at the apartment and he was not a target of the investigation resulting in the search warrant, but he was visiting the occupants of the apartment when police executed the warrant. Police detained appellant, searched him, and found less than a gram of methamphetamine in a coin purse hidden under his shirt. Appellant was arrested and indicted for possession of a controlled substance.

Five days after his arrest, the trial court appointed attorney Andrew Wolfe to represent appellant. Four months later, in October 2017, Wolfe filed a motion to

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[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Third District of Texas to this Court pursuant to its docket equalization powers. *See* TEX. GOV'T CODE ANN. § 73.001; Misc. Docket No. 18-9166 (Tex. Dec. 20, 2018). We are unaware of any conflict between the precedent of the Third Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

withdraw as appellant's counsel, and the trial court heard the motion the same day. At the hearing, Wolfe told the court that his relationship with appellant "ha[d] come to an impasse as far as discussing the case" and that Wolfe did not believe he could proceed without affecting the case. The State had no objection, and appellant agreed that Wolfe should withdraw as his attorney. Appellant told the court that Wolfe had not shown him "any way out other than a plea agreement."

The court asked appellant if he intended to hire another attorney, but appellant denied that he needed one "[b]ecause [he] ha[d] evidence showing here that [his] case [was] disjunctive." The court told appellant that he "definitely need[ed] an attorney" and appellant eventually asked the court to appoint him another one. The court asked appellant how many attorneys he believed he was entitled to, to which appellant responded, "Just enough to get justice." Appellant acknowledged the court's admonishment that "these attorneys don't tell you what you want to hear. They tell you what your legal position is." The court asked appellant what would happen if the next attorney could not find appellant "a way out," and appellant responded, "Well then, I have to be appointed another." The court told appellant that it would not "keep appointing [him] an attorney until [appellant] [found] one who [told] him what [he] want[ed] to hear," but it granted Wolfe's motion to withdraw. The court told appellant to "make every effort to communicate with the next attorney that's appointed to represent [him] . . . because [the court] [did] not intend to just

keep appointing attorneys." The same day, the court appointed attorney Michael Magana to represent appellant.

Six months later, in April 2018, the trial court ordered a competency assessment of appellant. Dr. Frank Pugliese, a psychologist, examined appellant and filed a report of his examination with the trial court. Dr. Pugliese determined that appellant was competent to stand trial, but he also made a few statements about appellant's relationship with his counsel that are relevant here. The report stated:

> An assistant to Mr. Magana indicated Mr. Pilgram experienced significant difficulty communicating effectively and seemed unusually self-absorbed and confused. He said Mr. Magana concluded a Competence Assessment was essential to ascertain whether Mr. Pilgram possesses the necessary resources to assist him in the preparation of his defense.

The report also stated:

> Mr. Pilgram contended he has met with Mr. Magana on two occasions and admitted he has experienced some frustration with his attorney regarding the management of his case. He said he was very interested in meeting with Mr. Magana again to discuss options available to him in resolving his legal differences and was hopeful his attorney will follow through on some of the requests he presented to him at their last meeting approximately three months ago.

On June 11, 2018, appellant appeared before the trial court for a nonjury trial. Magana announced not ready because appellant believed there was a defect in the cause number, which he was confusing with the complaint number as Magana had tried to explain to appellant. Magana confirmed the cause number, and the court asked appellant if he understood what his attorney had said. Appellant responded,

"It's not making sense to me." The court asked appellant if he wished to proceed with the trial. Appellant answered "no" and told the court, "I would like [my attorney] off my case, too." The court told appellant that the issue was not before the court that day, that only the nonjury trial was before the court that day, and that if appellant did not want a nonjury trial, the court would reset the case for a jury trial and "take up any other matters or a jury trial at a later date." Appellant again stated, "I'd like [my attorney] off my case." The trial court reset the case for a jury trial tentatively scheduled for August 2018. Neither appellant nor his counsel filed a written motion for Magana to withdraw.

Appellant's jury trial began on November 5, 2018. Appellant did not mention any dissatisfaction with Magana during his two-day trial. Magana asked questions to the voir dire panel and struck several of the venirepersons. He made closing arguments and lodged objections, many of which the trial court sustained. Magana cross-examined each of the state's four witnesses, including two Killeen Police Department (KPD) detectives, one of whom had investigated the drug sales from the apartment at which appellant was arrested and another who had surveilled the apartment prior to the raid, searched appellant after the raid, and found methamphetamine on appellant. Magana also cross-examined the KPD evidence technician, who had received the drugs found on appellant from the KPD detectives and had sent it to be processed, and the Texas Department of Public Safety lab

technician who had tested the substance found on appellant and determined it was methamphetamine. After the jury convicted appellant, Magana argued during the punishment phase that appellant should receive a six-month sentence. The jury sentenced appellant to two years' confinement and a $10,000 fine, the maximum penalty for which the State had asked.

After the trial, the trial court spoke directly to appellant and explained his right to appeal and his right to be appointed an appellate attorney. Appellant acknowledged his rights, but he did not mention any dissatisfaction with trial counsel. Appellant did not file a motion for new trial or any other post-judgment motion, and he timely appealed the judgment of conviction.

Dissatisfaction with Trial Counsel

Appellant contends that he made the trial court aware of his dissatisfaction with his trial counsel at the June 2018 hearing, and the trial court abused its discretion by either not inquiring further into appellant's dissatisfaction with his counsel or by refusing to appoint new counsel. Appellant also argues that his competency report, filed two months before the June 2018 hearing, put the trial court on notice of his dissatisfaction with trial counsel. The State disagrees that appellant's comments at the June 2018 hearing and his comments to the examining psychologist two months earlier were sufficient to make the trial court aware that appellant was dissatisfied with his trial counsel.

A. Standard of Review and Governing Law

Both the federal and Texas constitutions guarantee that a defendant in a criminal proceeding has the right to assistance of counsel. *Gonzalez v. State*, 117 S.W.3d 831, 836 (Tex. Crim. App. 2003); *see* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; *see also* TEX. CODE CRIM. PROC. ANN. art. 1.051(a) (providing accused right to counsel in criminal judicial proceedings). This right encompasses the defendant's right to obtain assistance from counsel of the defendant's choosing. *See Gonzalez*, 117 S.W.3d at 836–37; *see also Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."); *Ex parte Prejean*, 625 S.W.2d 731, 733 (Tex. Crim. App. 1981) (stating that right to assistance of counsel, "of course, includes freedom of choice in the selection of counsel by the accused").

However, the defendant's choice of counsel is neither unqualified nor absolute, and although there is a strong presumption in favor of the defendant's right to retain counsel of choice, "this presumption may be overridden by other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice." *Gonzalez*, 117 S.W.3d at 837; *see also Wheat v. United States*, 486 U.S. 153, 159 (1988) ("[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure

that a defendant will inexorably be represented by the lawyer whom he prefers."). Thus, the defendant's right to counsel of choice must be balanced with the trial court's need for prompt and efficient administration of justice. *Ex parte Windham*, 634 S.W.2d 718, 720 (Tex. Crim. App. 1982).

Trial courts have discretion to determine whether counsel should be allowed to withdraw from a case. *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000); *Johnson v. State*, 352 S.W.3d 224, 227 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) ("We review a trial court's decision on an attorney's motion to withdraw for an abuse of discretion."). If a trial court unreasonably or arbitrarily interferes with the defendant's right to choose counsel, its actions rise to the level of a constitutional violation. *Gonzalez*, 117 S.W.3d at 837. As long as the trial court's ruling falls within the "zone of reasonable disagreement," the trial court does not abuse its discretion and we will uphold the ruling. *Johnson*, 352 S.W.3d at 227 (citing *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997)); *see also Rosales v. State*, 841 S.W.2d 368, 375 (Tex. Crim. App. 1992) ("[U]nder an abuse of discretion standard it is not our role to reweigh the factors [relevant to whether the trial court should have granted a motion for continuance], but to determine whether the trial court could reasonably have balanced them and concluded that the fair and efficient administration of justice weighed more heavily than appellant's right to counsel of his choice."). In determining whether the trial court abused its discretion, we may

consider only the information presented to the trial court at the time of its decision. *Johnson*, 352 S.W.3d at 227–28.

"[P]ersonality conflicts and disagreements concerning trial strategy are typically not valid grounds for withdrawal." *King*, 29 S.W.3d at 566 (citing *Solis v. State*, 792 S.W.2d 95, 100 (Tex. Crim. App. 1990)). The trial court has no duty to search for counsel agreeable to the defendant. *Id.* "[I]n addition to making the court aware of his dissatisfaction with counsel and stating the grounds for the dissatisfaction, a defendant also bears the responsibility of substantiating his claim." *Hill v. State*, 686 S.W.2d 184, 187 (Tex. Crim. App. 1985) (citing *Malcom v. State*, 628 S.W.2d 790, 792 (Tex. Crim. App. 1982), *King v. State*, 511 S.W.2d 32, 34 (Tex. Crim. App. 1974), and *Stovall v. State*, 480 S.W.2d 223, 223–24 (Tex. Crim. App. 1972)); *see Malcom*, 628 S.W.2d at 791 ("If a defendant is displeased with his appointed counsel, he must bring the matter to the court's attention. Thereupon, the defendant carries the burden of proving that he is entitled to a change of counsel.") (citation omitted). An appellant must bring the matter to the trial court's attention, request a hearing, and make a record supporting his contentions. *Hill*, 686 S.W.2d at 187. A trial court is not required to hold a hearing sua sponte to consider whether to substitute counsel. *See id.* (quoting *Malcom*, 628 S.W.2d at 792).

B. Analysis

Here, appellant first expressed his frustration with counsel—his second court-appointed attorney—to the trial court on June 11, 2018, when the court called appellant's case for a nonjury trial. Appellant refused to announce ready because of his confusion with the cause and complaint numbers and because his counsel's explanation was "not making sense" to him. Appellant also told the court twice that he wanted his attorney off his case. These complaints, alone, do not suffice to meet appellant's burden to obtain substitute counsel. *See Hill*, 686 S.W.2d at 187. Even if these statements made the trial court aware of his dissatisfaction with counsel, appellant did not request a hearing or present any evidence, other than his vague statements to the trial court, relevant to any disagreement he allegedly had with counsel. *See King*, 29 S.W.3d at 566 (holding that disagreement concerning trial strategy is generally not valid ground for withdrawal of attorney from representation). The burden is on appellant, as the party seeking withdrawal of counsel, to request a hearing and to offer evidence in support of his complaint concerning counsel. *See Hill*, 686 S.W.2d at 187.

Appellant argues that the trial court refused to appoint new counsel, but the record does not support his argument. At the June 2018 hearing, the trial court told appellant that the issue with his counsel was not before the court that day. The trial court had previously warned appellant, when it allowed the withdrawal of

appellant's first counsel, that it would not continue appointing new attorneys until appellant found one who would tell him what he wanted to hear. Nevertheless, when appellant told the court that he wanted his counsel off his case at the June 2018 hearing, the court continued appellant's trial for five months, set it for a jury trial, and told appellant the court could "take up any other matters" later—a clear invitation to appellant to raise "any other matters" for consideration. Neither appellant nor his counsel filed a motion to withdraw counsel after the June 2018 hearing, and appellant did not express any dissatisfaction with or request the withdrawal of his trial counsel during his two-day trial in November 2018. *See id.* Appellant's counsel vigorously defended appellant during voir dire and both phases of trial. Appellant did not make the trial court aware of any dissatisfaction with his counsel after the June 2018 hearing, including at his November trial, and he did not state any grounds for dissatisfaction, request a hearing, or support such claims with any evidence. *See id.* (holding that trial court did not err by not holding hearing on appellant's pro se motions to substitute counsel because appellant did not request hearing). Further, appellant did not file a motion for new trial or mention any dissatisfaction with his trial counsel at the end of the trial when the trial court directly explained to appellant his right to appeal and to appointed appellate counsel.

Appellant also argues that his competency report, filed with the court two months before the June 2018 hearing, showed he "had concerns about his lack of

contact with his trial counsel." Appellant relies on two statements in the report: (1) that counsel's assistant had "indicated [appellant] experienced significant difficulty communicating effectively and seemed unusually self-absorbed and confused"; and (2) appellant's statement that he had only met with his attorney twice in the six months since his attorney was appointed. However, appellant did not present the competency report to the trial court, including at the June 2018 hearing, to support his claim of dissatisfaction with counsel. *See Hill*, 686 S.W.2d at 187 (requiring appellant to substantiate claims of dissatisfaction with counsel). Moreover, even if we construe the statements in the competency report as indicating a lack of contact between appellant and his attorney between October 2017 and April 2018, the report says nothing about appellant's contact or satisfaction with his attorney in the seven months between the report's April 2018 issuance and appellant's November 2018 trial.

Appellant contends in his reply brief that, after the June 2018 hearing, he expressed dissatisfaction with his counsel in inmate-services requests that he had sent to the Bell County indigent defense coordinator. This evidence is not in the appellate record and there is no indication that appellant presented this information to the trial court. Therefore, we cannot consider this evidence on direct appeal. *See Lewis v. State*, 504 S.W.2d 900, 904 (Tex. Crim. App. 1974) ("We have examined

the record in detail and find that appellants' argument is based completely on evidence which is entirely outside the record, which we cannot consider.").

By the time of appellant's trial, the trial court reasonably could have believed, based on appellant's silence, that appellant had resolved whatever dissatisfaction he had with his trial counsel five months earlier. *See Johnson*, 352 S.W.3d at 227. The trial court did not have a duty to search for an attorney agreeable to appellant or to sua sponte hear appellant on the issue of substituting counsel, particularly where appellant remained silent by not filing a motion to substitute counsel and by not stating anything about his dissatisfaction with counsel at his trial, and where appellant did not request a hearing or attempt to substantiate his claims. *See King*, 29 S.W.3d at 566; *Hill*, 686 S.W.2d at 187.

We hold that, under the facts of this case, appellant did not carry his burden to make the trial court aware of his dissatisfaction with counsel, to state the reasons for his dissatisfaction, to request a hearing, or to offer evidence supporting his complaints. *See Hill*, 686 S.W.2d at 187.

We overrule appellant's issue.

Effective Assistance of Counsel

Appellant contends in the summary of his argument that "the failure on the part of the court" "to inquire into why Pilgram was dissatisfied" with counsel is "possibly a Sixth Amendment violation of Pilgram's right to effective assistance of

counsel." We agree with appellant that he was entitled to effective assistance of counsel. *E.g.*, *Strickland v. Washington*, 466 U.S. 668, 684–87 (1984). However, appellant offers no argument on this issue. *See* TEX. R. APP. P. 38.1(i) (requiring "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record").

To show that his counsel provided ineffective assistance, appellant had the burden to show that (1) counsel's performance was deficient and (2) a reasonable probability existed that the result of the proceeding would have been different but for counsel's deficient performance. *Macias v. State*, 539 S.W.3d 410, 415 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (citing *Strickland*, 466 U.S. at 687, *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010), and *Cannon v. State*, 252 S.W.3d 342, 348–49 (Tex. Crim. App. 2008)). Appellant offers no argument regarding either prong. Appellant only speculates generally that the trial court "possibly" violated his constitutional right to effective assistance of counsel by not further inquiring into his dissatisfaction with counsel; he does not argue that his counsel rendered ineffective assistance.

To the extent appellant argues that his reasons for wanting to substitute counsel—including that counsel's explanation about cause and complaint numbers did not make sense to him in June 2018 and that he and counsel had only met twice between October 2017 and April 2018—also show counsel provided ineffective

assistance, we disagree that appellant has met his burden to show counsel's performance was deficient. As we explained above, appellant's trial was in November 2018 and there is no evidence of the frequency of contact between appellant and his attorney from April to November, which is far more probative of counsel's effectiveness at appellant's November trial than is the frequency of contact up to April. Nor is there any indication in the record that appellant continued having any trouble understanding his attorney or that appellant was dissatisfied with his attorney after June 2018. *See Ex parte Brown*, 158 S.W.3d 449, 453 (Tex. Crim. App. 2005) ("As with the vast majority of claims of ineffective assistance of counsel, the trial record is insufficient to allow an appellate court to resolve the issue.").

Any allegation of ineffective assistance of counsel must be affirmatively supported by the record. *Mallet v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *see* TEX. R. APP. P. 38.1(i). When, as here, an appellant does not file a motion for new trial that would have afforded trial counsel an opportunity to explain his trial strategy and no direct evidence in the record establishes why appellant's attorney acted as he did, we presume that counsel had a plausible reason for his actions. *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). Appellant has not rebutted this presumption. We therefore hold that, on this record, appellant has not established a violation of his right to effective assistance of counsel.

Conclusion

We affirm the judgment of the trial court. We dismiss any pending motions as moot.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

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