Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00878-CR

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PATRICK ALLEN JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 29,583

O P I N I O N

Patrick Allen Jones (Appellant) appeals from the trial court's habeas corpus judgment. Appellant was convicted of the second degree felony offense of sexual assault. *See* TEX. PENAL CODE ANN. § 22.011(a), (b)(9) (Vernon Supp. 1999). The trial court sentenced Appellant to ten years' probation. Appellant filed a post-conviction application for writ of habeas corpus, contending that he was denied effective assistance of trial counsel, he was entitled to file an out-of-time appeal, and the statute under which he was convicted was applied

ex post facto and is otherwise void for vagueness. The trial court denied Appellant's requested relief. We affirm.

STANDARD OF REVIEW

The trial court's ruling in a habeas corpus proceeding should not be overturned absent a clear abuse of discretion. *See Brashear v. State*, 985 S.W.2d 474, 476 (Tex.App.–Houston [1st Dist.] 1998, pet. ref'd). Whether discretion was so abused depends upon whether the trial court acted without reference to any guiding rules or principles. *Id.* In making this determination, we view the evidence in the light most favorable to the trial court's ruling. *See id.*

DISCUSSION

Ex Post Facto

In his third point of error, Appellant contends that the trial court erred in denying his application for writ of habeas corpus because his conviction of sexual assault violated the constitutional prohibition against *ex post facto* criminalization. He contends that he was convicted under section 22.011(b)(9) of the Penal Code, which provides, in part, that a "sexual assault . . . is without the consent of the other person if: . . . the actor is a *health care services provider . . . .*" *See* TEX. PENAL CODE ANN. § 22.011(b)(9) (Vernon Supp. 1999) (emphasis added). Subsection (b)(9) of section 22.011 was amended in 1997 to make an offense under section 22.011(a) to have been committed without the consent of the other person where the actor is a "health care services provider." *See id.* (Historical and Statutory Notes). The effective date of the amendment was September 1, 1997. *See id.* Appellant maintains that because his offense occurred in June 1997, his conviction under this statutory provision is unconstitutional.

Appellant ignores the plain language contained in his indictment and the jury charge. His indictment alleges that Appellant committed the offense of sexual assault against the

victim in his capacity as a "*mental health services provider*."[1] (emphasis added). The jury charge provides that a person commits the offense of sexual assault "without the consent of the other person if the actor is mental health services provider . . . ." The charge asks the jury to determine from the evidence beyond a reasonable doubt whether Appellant committed the offense of sexual assault against the victim while in his capacity as a "mental health services provider, to wit a licensed vocational nurse at a Mental Hospital . . . ." Before the 1997 amendment, noted above, section 22.011(b)(9) provided, in part, that a sexual assault is committed without the consent of the other person if "the actor is a *mental health services provider . . . .*" *See* TEX. PENAL CODE ANN. § 22.011(b)(9) (Vernon Supp. 1996) (emphasis added).

The record shows that Appellant was not convicted under the 1997 amendment to section 22.011(b)(9) of the Penal Code, relating to "health care services provider." Rather, he was convicted under the version of section 22.011(b)(9) in effect at the time of the offense, relating only to "mental health services provider."[2] Consequently, there was no *ex post facto* application of the amended Penal Code against Appellant. Habeas corpus relief was therefore not warranted. Point of error three is overruled.

Ineffective Assistance of Trial Counsel

In his first point of error, Appellant contends that the trial court erred in denying his application for writ of habeas corpus because the evidence showed he received ineffective assistance of trial counsel in that his counsel failed to move to quash the indictment and failed to object to the jury charge on guilt/innocence. Specifically, he contends that his trial counsel was ineffective for not challenging the indictment and jury charge because the statute under

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[1] We note that Appellant was employed as a licensed vocational nurse at West Oaks Hospital, a mental health hospital.

[2] The 1997 amendment to section 22.011(b)(9) provides, in part, that a sexual assault is committed without the consent of the other person if "the actor is a mental health services provider *or* a health care services provider . . . ." TEX. PENAL CODE ANN. § 22.011(b)(9) (Vernon Supp. 1999) (emphasis added).

which the alleged offense was applied against him *ex post facto* and because the statute was void for vagueness.

In evaluating a claim of ineffective assistance of counsel, we apply the *Strickland* test, which requires that the defendant demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hernandez v. State*, 726 S.W.2d 53, 56 (Tex.Crim.App. 1986). These two prongs must be established by a preponderance of the evidence. *See Moore v. State*, 694 S.W.2d 528, 531 (Tex.Crim.App. 1985). Accordingly, the allegation of ineffective assistance must be firmly founded and affirmatively demonstrated in the record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex.Crim.App. 1996); *Brown v. State*, 974 S.W.2d 289, 292 (Tex.App.–San Antonio 1998, pet. ref'd). Furthermore, we must indulge in a strong presumption that the counsel's conduct was reasonable. *See Strickland*, 466 U.S. at 689.

In considering Appellant's contentions that his trial counsel was ineffective for not challenging the *ex post facto* application of section 22.011(b)(9) of the Penal Code, we note that these contentions are not supported by the record. Consequently, we find that Appellant's trial counsel was not ineffective for failing to make such a challenge in the trial court because the result of the proceedings would not have been different had trial counsel made such a challenge. *See Hernandez*, 726 S.W.2d at 56.

We also conclude that the result of the proceedings would not have been different had Appellant's trial counsel made a constitutional "void for vagueness" challenge against section 22.011(b)(9) of the Penal Code. Appellant's complaint is that the phrase "mental health services provider," contained in section 22.011(b)(9) of the Penal Code, is ambiguous and unclear because it is not specifically defined. We find that there is no question as to the meaning of the phrase "mental health services provider" in the record before us. As to this

Appellant, the statute is not vague because the record clearly shows, and it is not disputed, that at the time of the offense, Appellant was a licensed vocational nurse employed by a mental hospital, providing mental health services to the victim and others. In *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), the United States Supreme Court held: "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker*, 417 U.S. at 756, 94 S.Ct. at 2562. In addition, when challenging the constitutionality of a statute, it is incumbent upon a defendant to show that in its operation the statute is unconstitutional to him in his situation; that it may be unconstitutional as to others is not sufficient. *See Parent v. State*, 621 S.W.2d 796 (Tex.Crim.App. 1981); *Briggs v. State*, 740 S.W.2d 803 (Tex.Crim.App. 1987). We find that the record contains clear and definite evidence relating to the nature of Appellant's employment, showing that, as a licensed vocational nurse employed by a mental hospital, he was a "mental health services provider." *See Whittington v. State*, 781 S.W.2d 338, 342-43 (Tex.App.–Houston [14th Dist.] 1989, pet. ref'd). Accordingly, we hold that Appellant's trial counsel was not ineffective for not asserting a "void for vagueness" challenge against section 22.011(b)(9) of the Penal Code.

Appellant was not entitled to habeas corpus relief on the basis that he received ineffective assistance of trial counsel. Point of error one is overruled.

Out-of-Time Appeal

In his second point of error, Appellant contends that the trial court erred in denying his application for writ of habeas corpus because the trial court failed to appoint appellate counsel to challenge his conviction. He contends that his appeal was not timely perfected because of the trial court's failure to appoint appellate counsel and that he is therefore entitled to an out-of-time appeal.

Appellant maintains that he was entitled to court-appointed appellate counsel because he was indigent.[3] It is true that indigent criminal defendants are entitled to court-appointed appellate counsel. *See Ward v. State*, 740 S.W.2d 794, 798 (Tex.Crim.App. 1987); *Johnson v. State*, 894 S.W.2d 529, 532 (Tex.App.–Austin 1995, no pet.). However, an indigent defendant must manifest his desire to appeal so as to apprise the trial court of the need to appoint appellate counsel. *See Ward*, 740 S.W.2d at 798. This manifestation is best accomplished by filing a notice of appeal. *See id.* Article 1.051(c) of the Texas Code of Criminal Procedure expressly provides that a court shall appoint counsel to represent an indigent criminal defendant upon request. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(c) (Vernon Supp. 1999); *see also* TEX. R. APP. P. 20.2.

In this case, Appellant did not manifest his desire to appeal his conviction by filing a notice of appeal. The record shows that Appellant was sentenced by the trial court on July 10, 1998. Following his sentencing hearing, Appellant was acutely aware that his retained trial counsel had withdrawn from any further representation. We note that while Appellant's retained trial counsel's motion to withdraw included a statement in its prayer requesting "court-appointed counsel for Defendant," the motion also stated "Defendant will fill out a financial document and affidavit of indigency and ask the court to appoint counsel for the purpose of a motion for new trial, appeal and ask for a copy of the court reporter's notes." No such request was made to the trial court. Further, no motion for new trial was filed; thus, Appellant was required to prefect an appeal of his conviction by August 10, 1998. *See* TEX. R. APP. P. 26.2(a). As noted, no notice of appeal was filed. Indeed, Appellant took no action in this case following his conviction and sentence until April 30, 1999, when he filed his *pro*

[3] We note that Appellant was represented by retained trial counsel. The record reveals that following his conviction and sentencing hearing, Appellant's trial counsel filed a motion to withdraw. The record shows that the motion was granted by the trial court.

se application for writ of habeas corpus.[4] Thus, within the time permitted to perfect an appeal and approximately eight months thereafter, the trial court had no notice that Appellant desired to appeal his conviction so as to appoint appellate counsel. On this record, we conclude that the trial court did not err in failing to appoint appellate counsel. Accordingly, Appellant was not entitled to habeas corpus relief on this issue. *See Ward*, 740 S.W.2d at 798-99. Point of error two is overruled.

The habeas corpus judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed January 13, 2000.
Panel consists of Justices Yates, Fowler, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[4] On June 24, 1999, Appellant filed an "Application for Appointment of Attorney"so that he would have representation in his habeas corpus proceeding. The trial court granted the motion and appointed counsel to represent Appellant. Appellant's appointed counsel subsequently filed an amended application for writ of habeas corpus.