Affirmed and Opinion filed March 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00446-CR

RODERICK JAMAIL WEBBER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 272nd Judicial District Court
Brazos County, Texas
Trial Court Cause No. 28,293-272

O P I N I O N

Appellant, Roderick Jamail Webber, was charged by indictment with the offense of aggravated assault with a deadly weapon. A jury convicted appellant of the charged offense and assessed punishment at thirty years' confinement in the Institutional Division of Texas Department of Criminal Justice and a $3000 fine. On appeal, appellant brings three points of error. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Witnesses testified that on the night in question an argument transpired between Anthony Williams and Terrence Leggett in front of Natasha Nutall's apartment. After the argument, Williams left the apartment complex only to return with appellant. Upon their arrival, Leggett and appellant got into an argument. Appellant pushed Leggett's girlfriend, Nutall, when Nutall tried to get involved in the altercation. Williams jumped in the fight, getting between appellant and Leggett in order to assist appellant. Leggett then pulled out a gun and fired four or five shots into the air, causing Williams and appellant to leave.

A few minutes later, witnesses testified that appellant's car pulled up and stopped in front of Nutall's apartment. Leroy Sandle, Jr., testified that he saw appellant exit the vehicle and fire three or four shots towards the apartment building. As a result of appellant's gunfire, Dacorious, Nutall and Leggett's one-year old child who was in Nutall's apartment at the time, suffered a gunshot wound.

Appellant was charged with and convicted of aggravated assault with a deadly weapon and sentenced to thirty years' confinement. After his conviction, appellant filed a motion for new trial alleging ineffective assistance of counsel. The trial court denied his motion and this appeal ensued.

II. POINTS OF ERROR ON APPEAL

Appellant asserts three points of error on appeal. First, appellant argues that he did not receive effective assistance of counsel during the guilt/innocence phase of trial. Second, appellant asserts he was denied effective assistance of counsel during the punishment phase of trial. Last, appellant argues the trial court abused its discretion in denying appellant's request for new trial counsel, in denying him access to his family at the time he had to decide to accept appointed counsel, and in pressuring him to accept appointed counsel. Because appellant's first two points of error will be analyzed under the same standard of review, we will address them together.

III. INEFFECTIVE ASSISTANCE, GUILT/INNOCENCE PHASE AND PUNISHMENT PHASE

A. STANDARD OF REVIEW

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). The right to counsel necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-prong test to determine whether counsel is ineffective. *Id*. First, appellant must demonstrate counsel's performance was deficient and not reasonably effective. *Id*. at 688–92. Second, appellant must demonstrate the deficient performance prejudiced the defense. *Id*. at 693. Essentially, appellant must show that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*.; *Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and we are to indulge the strong presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We presume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id*. Moreover, it is the appellant's burden to rebut this presumption, by a preponderance of the evidence, via evidence illustrating why trial counsel did what he did. *Id*. Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *overruled on other grounds by, Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998).

If appellant proves his counsel's representation fell below an objective standard of reasonableness, he must still affirmatively prove prejudice as a result of those acts or omissions. *Strickland*, 466 U.S. at 693; *McFarland*, 928 S.W.2d at 500. Counsel's errors, even if professionally unreasonable, do not warrant setting the conviction aside if the errors had no effect on the judgment. *Strickland*, 466 U.S. at 691. Appellant must prove that counsel's errors, judged by the totality of the representation, denied him a fair trial. *McFarland*, 928 S.W.2d at 500. If appellant fails to make the required showing of either deficient performance or prejudice, his claim fails. *Id*.

A trial court's denial of a defendant's motion for new trial based on ineffective assistance of counsel is reviewed under an abuse of discretion standard. *State v. Gill*, 967 S.W.2d 540, 541 (Tex. App.—Austin 1998, pet. ref'd). Therefore, we do not apply the aforementioned *Strickland* test *de novo*. *Id*. at 542. Rather, we review the trial court's application of the *Strickland* test under the abuse of discretion standard. *Id*. As such, we determine whether the trial court's decision was clearly wrong as to lie outside the zone of reasonable disagreement. *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).

B. GUILT/INNOCENCE PHASE

In his brief to this court, appellant alleges his trial counsel was ineffective during the guilt/innocence phase of trial because he failed to (1) prepare for trial, (2) interview possible witnesses, and (3) develop a sound trial strategy. Prior to filing this appeal, however, appellant filed a motion for new trial alleging various grounds, but limited his claim of ineffective assistance to the contention that his trial counsel was ineffective because he failed to ascertain that appellant is mildly mentally retarded and schizophrenic and present this mitigating evidence at the punishment phase of trial. The trial court held a hearing on his motion, and appellant's new counsel presented John Barron, appellant's trial counsel, as a witness. At the end of the proceeding, the trial court denied appellant's motion for new trial. Appellant concedes that the grounds he raises on appeal for his ineffective assistance of counsel claim were not presented to the trial court.

The general rule is that an alleged error must be brought to the attention of the trial court before a complaint can be heard on appeal. TEX. R. APP. P. 33.1. However, an ineffective assistance of counsel claim will generally not be foreclosed because of an appellant's inaction at trial. *Robinson v. State*, 16 S.W.3d 808, 809 (Tex. Crim. App. 2000). The *Robinson* court articulated two reasons for holding ineffective assistance of counsel claims were not subject to procedural default. First, a defendant is not required to alienate his trial lawyer by raising ineffective assistance of counsel at the time of trial, and because many errors by counsel are of a technical nature, a defendant may not even know errors are occurring, and cannot possibly object. *Id.* Second, there is not generally a realistic opportunity to adequately develop the record for appeal in post-trial motions. *Id*.

Ineffective assistance of counsel claims may, nevertheless, be subject to procedural default when the claim is litigated in the trial court. *Henderson v. State*, 962 S.W.2d 544, 558 (Tex. Crim. App. 1997). In *Henderson*, appellant chose to litigate her ineffectiveness claim in the trial court rather than wait and develop her argument post-trial. *Robinson*, 16 S.W.3d at 810 n.3. When an appellant chooses this path, she must be cautious to fully develop the claim in the first instance. *Id*. Specifically, in *Henderson*, appellant argued her counsel rendered ineffective assistance when he revealed to law enforcement that appellant had drawn a map to the location of the victim's body. *Henderson*, 962 S.W.2d at 557–58. On appeal she maintained counsel's performance was deficient because (1) counsel had no legitimate trial strategy for revealing the information, and (2) revealing the information violated the attorney-client privilege. *Id*. at 558. The ineffective assistance issue was litigated in the trial court in a pre-trial motion to suppress, but only raised on the second theory to support her claim. *Id.*

The *Henderson* court held that appellant had procedurally defaulted on her first argument by failing to present that argument to the trial court. *Id*. Thus, the rule in *Henderson* can be stated as, if appellant chooses to litigate ineffective assistance of counsel claims in the trial court, appellant must present all claims of ineffective assistance to

preserve these complaints for appeal; the claims not litigated are procedurally defaulted and may not be argued on appeal. *Id*.

Here, appellant litigated in a motion for new trial the question of whether Mr. Barron's failure to ascertain that appellant was a long term patient of the Mental Health and Mental Retardation Authority of the Brazos Valley and suffered from schizophrenia at the time of his arrest, and present this mitigating evidence during the punishment phase constituted ineffective assistance of counsel. However, appellant did not litigate in that post-trial hearing the ineffective assistance issues he now brings on appeal in point of error one: failure to prepare for trial, interview possible witnesses and develop a sound trial strategy for defending appellant. Applying the *Henderson* exception to the *Robinson* rule, we hold that appellant failed to preserve for appellate review the three allegations of ineffective assistance now asserted in point of error one. Accordingly, we overrule appellant's first point of error.

C. PUNISHMENT PHASE

In point of error two appellant contends his trial counsel was ineffective at the punishment phase of trial because trial counsel "failed to perform due diligence in representing the appellant." More specifically, appellant argues his trial counsel was ineffective because he (1)"failed to provide a defensive theory," and (2) failed "to interview witnesses or question some witnesses further." Appellant also asserts that his counsel was ineffective for (3) failing to ascertain that appellant is mildly retarded and schizophrenic.

1. *Henderson* Claims

As noted in our discussion of appellant's point of error one, a defendant is not usually required to raise a claim of ineffective assistance of counsel at the trial court level. However, when an appellant litigates the ineffective assistance claim in the trial court, the claim must be fully developed in that proceeding. *Robinson*, 16 S.W.3d at 810 n.3. Claims of ineffective assistance not litigated at that time are procedurally defaulted and may not be

presented on appeal. *Henderson*, 962 S.W.2d at 558. The only basis appellant presented to the trial court in support of his ineffective assistance of counsel claim was his trial counsel's failure to ascertain appellant is mildly mentally retarded and schizophrenic and present this mitigating evidence during the punishment phase. Therefore, appellant has, by not litigating all of his claims of ineffective assistance claims in the motion for new trial hearing, procedurally defaulted his ineffective assistance claims (1) and (2) set out in the immediately preceding paragraph.

2. Non-*Henderson* Claims

The only claim of ineffective assistance of counsel litigated in the motion for new trial hearing was appellant's claim that trial counsel should have discovered and investigated appellant's mental health, and presented such evidence in mitigation at the punishment phase of appellant's trial. This claim has been preserved for our review. *See Henderson*, 962 S.W.2d at 558.

At the hearing on appellant's motion for new trial, Mr. Barron testified that he was not aware appellant had been a patient of the Mental Health and Mental Retardation Department, had been diagnosed with mild mental retardation, explosive disorder, and schizophrenia. However, when asked if he would have done things differently during appellant's trial had he known these facts, Mr. Barron replied that he might not have brought them out because the jury might have considered appellant dangerous and, as a result, impose greater punishment.

Appellant's counsel also asked Mr. Barron whether he would have proceeded differently if he had known about a doctor's statement that appellant is not a danger to himself or others as long as he takes his medication. Mr. Baron answered that such information might have caused him to change his approach to the jury, but he could not definitively say that he would have done things differently. Further, Mr. Barron testified that his advice to appellant to take the stand during the punishment phase would not have

changed even if he had known appellant was mildly retarded. He reached this conclusion because two eyewitnesses testified during the guilt phase that appellant fired the shots, so appellant's testimony during the punishment phase was necessary, "no matter what." Mr. Barron also testified that there was nothing unusual about appellant when he met with him, and that appellant "seemed normal to [him]."

Other evidence that could have been introduced during the punishment phase in connection with appellant's mental health history included the following: that appellant served eight years of an eight-year sentence on an earlier felony; that he had a long history of multiple physical altercations and a long history of aggressive behavior at TDC; and that appellant stated to an intake person administering a community ability scale, approximately one year before the present offense, that he would "get violent if someone messes with him." Mr. Barron testified regarding this additional evidence and opined that it would have been prejudicial for the jury to have learned these things about appellant.

Further, Mr. Barron testified that he visited appellant at least seven times during his preparation for trial. He also testified that appellant appeared lucid and able to understand what his lawyer was talking about. During these visits with appellant, Mr. Barron testified that appellant never suggested in conversation or by his behavior that he suffered from some sort of disability. Moreover, Mr. Barron testified that appellant actually made efforts to assist him in preparing the case for trial. In fact, Mr. Barron stated that appellant assisted him in locating witness he thought would be helpful to his case.

Mr. Barron testified that it was his trial strategy, with appellant's consent, that appellant did not fire the shots, and that someone else did. The State's theory of the case was that appellant fired the shots during the drive-by assault to retaliate against Leggett for making him retreat from the fight, and for "messing with [appellant's] brother, Anthony Williams." Mr. Barron testified that evidence that appellant becomes violent when people "mess with him" or that he could be dangerous when provoked would actually support, rather than rebut, the State's theory. Mr. Barron also testified that the jury would have been

very likely to reach a guilty verdict if appellant had testified during the guilt phase that he may have committed the shooting because of his mental illness. Finally, Mr. Barron opined that if appellant had testified at the punishment phase: "I did [the shooting] because of mental illness," the jury would not have been inclined to return a verdict with a lesser punishment. Finally, Mr. Barron stated that the only thing he would have done differently if he had known of appellant's mental retardation was that he would have questioned appellant somewhat slower to ensure the jury's understanding of appellant's responses.

In reviewing an ineffective assistance of counsel claim, a court need not determine whether counsel's performance was deficient if it is easier to dispose of the challenge based on lack of prejudice. *Strickland*, 466 U.S. at 697. We find appellant did not prove, by a preponderance of the evidence, that his trial counsel's failure to investigate his mental health and present the evidence of the same at the punishment phase was prejudicial. Accordingly, we dispose of appellant's claim based on the second prong of *Strickland*, prejudice.

At the hearing, appellant's trial counsel testified that he may not have told the jury about appellant's mental health even if he had known because there was information contained in appellant's mental health records which could have aggravated the punishment. For example, the jury would have learned that appellant had a history of violent behavior. Given a range of five to ninety-nine years' confinement, the jury assessed punishment at thirty years in spite of the State's request for a sentence of fifty years. Appellant has failed to demonstrate that there is a reasonable probability that but for his trial counsel's failure to discover and present the mental health evidence, the result of the proceeding would have been different. Ultimately, we find the information appellant complains his trial counsel should have discovered and presented to the jury likely would have resulted in a harsher sentence. Therefore, we hold the trial court did not abuse its discretion when it overruled appellant's motion for new trial. We overrule appellant's second point of error.

IV. DENIAL OF APPELLANT'S REQUEST FOR APPOINTMENT OF NEW COUNSEL AND OTHER RELIEF

Appellant contends the trial court abused its discretion in denying his request for the appointment of new counsel, in denying him access to his family at the time he made his decision, and in pressuring appellant into accepting appointed counsel.

Texas Rule of Appellate Procedure 38.1 requires an appellate brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(h). Appellant fails to provide this Court with any legal analysis regarding why it was an abuse of discretion for the trial court to deny his request, deny him access to his family, or to pressure him into accepting the appointed counsel. Nor does appellant cite any authority in support of his argument that the trial court abused its discretion. Thus, appellant has failed to comply with Texas Rule of Appellate Procedure 38.1. Accordingly, we find appellant has waived these issues and we overrule his third point of error.

Furthermore, at no time on the record did appellant request the trial court to appoint new counsel. Appellant's trial counsel informed the trial court appellant was considering firing him and appellant asked for time to confer with his attorney regarding this matter. The trial court granted appellant's request. However, at no time, before or after the recess, did appellant request the trial court to appoint new counsel. Accordingly, in addition to the reason stated above, we overrule this alleged error under Texas Rule of Appellate Procedure 33.1, which states that an appellant must have presented the complaint to the trial court in order to complain on appeal.

V. CONCLUSION

We overrule all of appellant's points of error and affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed March 7, 2002.

Panel consists of Justices Anderson, Hudson, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).