Affirmed and Opinion filed March 29, 2001.

In The

Fourteenth Court of Appeals

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NOS. 14-99-00465-CR & 14-99-00466-CR

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ROSE GOMEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause Nos. 800,125 and 801,548

O P I N I O N

Rose Gomez, appellant, brings this appeal from two separate convictions for misdemeanor theft. In each trial, following a plea of guilty, the trial court found appellant guilty of misdemeanor theft and assessed punishment, enhanced by two prior misdemeanor offenses, at one year confinement in a state jail facility with credit for fifteen days served. The sentences run concurrently. In two points of error, appellant contends first, she was not competent to enter her guilty pleas or alternately she was insane at the time the offenses were committed, and second, she was denied effective assistance of counsel. We affirm.

Factual Background

Appellant was arrested on September 14 and again on December 30, 1998 and charged with the offenses of theft of property with a value less than $1,500. Theft of property with a value of less than $1,500 is a misdemeanor offense; however, it is raised to a state jail felony offense if the defendant has been convicted two or more times of any grade of theft. TEX. PEN. CODE ANN. § 31.03(e)(4)(D) (Vernon Supp. 2000). In each trial court cause, appellant was indicted for a state jail felony because she had been convicted of theft on two prior occasions. On February 26, 1999, following several continuances and after being admonished by the trial court, appellant executed a waiver of constitutional rights and agreement to stipulate and judicial confession, wherein appellant entered a plea of guilty. In addition, appellant filed a motion for community supervision as an alternative to incarceration. Appellant's sentencing was set for March 12, 1999.

On March 12, 1999, appellant filed a motion to submit evidence in affidavit form. Specifically, appellant asked the trial court to consider six affidavits when imposing punishment. The affidavits were executed by a psychiatrist, a psychologist, a family therapist, two family friends, and appellant's sister. These affidavits indicate that appellant, a victim of domestic violence, sustained a skull fracture. They also suggest appellant suffers from depression and may have sustained neurological damage, resulting in poor impulse control. The case was reset for sentencing on March 17, 1999.

After hearing evidence relevant to punishment, the trial court assessed punishment at one year confinement for each offense, with sentences running concurrently. Appellant then brought this appeal.

I.
Appellant's Competency and Sanity

In point of error one, appellant asserts the trial court erred by failing to hold a hearing to determine appellant's competency to stand trial, or in the alternative, failing to order a psychiatric examination. Appellant also contends her due process rights were violated because

the evidence raises some doubt about her competency or sanity, and a hearing was not held to determine either issue. Under article 46.02 of the Code of Criminal Procedure, a defendant is incompetent to stand trial if she does not have either (1) sufficient present ability to consult with her lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against her.[1] TEX. CODE CRIM. PROC. ANN. art. 46.02 §1A (Vernon Supp. 2000). Any evidence, even a scintilla, may raise the issue of incompetency so as to require a separate hearing. *Arnold v. State*, 873 S.W.2d 27, 35 (Tex. Crim. App. 1993).

A. ***Incompetency Under Article 46.02 of the Code of Criminal Procedure.***

Neither appellant nor the State requested a competency hearing. A trial court is required, *sua sponte*, to hold a competency hearing only when sufficient facts or circumstances that raise a bona fide doubt as to competency are brought to the court's attention. *Arnold*, 873 S.W.2d at 36; *Mata v. State*, 632 S.W.2d 355, 358 (Tex. Crim. App. 1982). Evidence raising a bona fide doubt is that which causes a real doubt in the judge's mind as to the defendant's competency. *Mata*, 632 S.W.2d at 358.

The *Mata* court explained the standard of bona fide doubt as follows:

> While the standard of bona fide doubt is easily stated, it is not so easily applied. Each instance must be examined on a case by case basis to determine if a bona fide doubt is raised. Generally, to raise the issue, there must be evidence of recent severe mental illness or bizarre acts by the defendant or of moderate retardation. The evidence must cause the court a bona fide doubt that the defendant has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or that he lacks an understanding of the proceedings against him. The term "evidence" as used in Section 2(b) should not be strictly construed. The statute itself uses the phrase "evidence ... from any source."

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[1] During oral argument, appellant's counsel admitted it was difficult to "bring out the two requirements [found in article 46.02] from the six affidavits" submitted to the trial court by appellant suggesting, among other things, she should be given community supervision instead of confinement.

Id. at 359.

Despite counsel's frank admission during argument, appellant alleges there was evidence of her incompetence because the affidavits state she suffers from depression and possible neurological damage, resulting in poor impulse control. We disagree. First, the trial court ascertained that appellant was competent. Second, appellant, on February 26, 1999, made sworn statements to the trial court that, among other things, she was mentally competent and understood the charges against her, that she did not have reason to believe that she is now or ever was insane or of unsound mind, that she is fully competent and in full possession of her faculties, and that she had fully discussed the case with her attorney and entered her plea freely and voluntarily. Third, the affidavits submitted by appellant support appellant's competency to stand trial.

The affidavits reveal that although appellant suffers from depression and impulsive behavior, she is quite competent. For example, appellant is employed by and part owner of, Long Point Nutritional and Health Care Center. That facility's development and continued success was accomplished through appellant's hard work. She is an active volunteer for the Boy Scouts of America. She is consistently at the top of her continuing medical and seminar classes at Baylor College of Medicine. Furthermore, her illness is treatable.

None of the affidavits address the alternative bases set out in article 46.02 for assessing a defendant's competency to stand trial. Moreover, art. 46.02 § 1A(b) provides that a defendant is presumed competent to stand trial unless proved incompetent to stand trial by a preponderance of the evidence. TEX. CODE CRIM. PROC. ANN. art. 46.02 § 1A(b) (Vernon Supp. 2000). Here, all of the evidence and written statements signed by appellant and her attorney attested to her competency to stand trial,[2] and no evidence indicated she was

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[2] In each trial appellant placed her initials by the following statements:

I am mentally competent and I understand the nature of the charges against me.

I have no reason to believe that I am now, or ever have been insane or of unsound mind: and I assert that I am now fully competent, and in full possession of my faculties

In each trial appellant's lawyer signed the following statement concerning appellant:

incompetent. Because appellant did not offer any evidence to rebut the presumption of competency under § 1A(b) of art. 46.02, the trial court was not required to hold a hearing on that issue. *Ferguson v. State*, 579 S.W.2d 1, 4-5 (Tex. Crim. App. 1979) (holding trial court is only required to sua sponte hold a competency hearing when sufficient facts or circumstances are brought to the court's attention, from any source, that create a reasonable doubt as to the appellant's competency). Because the affidavit evidence did not create any doubt concerning appellant's competency to stand trial, we overrule the first part of point of error one.

B. ***Insanity Under Article 46.03 of the Code of Criminal Procedure***

In the second half of appellant's first point of error, she contends the trial court failed to order, *sua sponte*, a psychiatric examination of appellant to determine her mental condition at the time of the offense. Appellant relies on the six affidavits she submitted to the trial court as direct evidence of her insanity. Appellant asserts that the affidavits legitimately raise the question of whether she suffers from a severe mental disease or defect, preventing her from knowing, at the time of her theft, that her conduct was wrong.

Section 8.01 of the Texas Penal Code provides:

> (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.
>
> (b) The "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

I believe that [she] is competent to stand trial.

In each trail the court signed the following statement:
It appears that the defendant is mentally competent and [her] plea is free and voluntary.

TEX. PEN. CODE ANN. § 8.01 (Vernon 1994).[3] "The insanity defense provided in Section 8.01 of the Penal Code shall be submitted to the jury only if supported by competent evidence." TEX. CODE CRIM. PROC. ANN. art. 46.03, § 1(a) (Vernon Supp. 2000).

Texas law requires a defendant to file notice of her intention to offer evidence of an insanity defense with the court and the prosecuting attorney at least 10 days prior to the date the case is set for trial. TEX. CODE CRIM. PROC. ANN. art. 46.03, §§ 2(a)(1) (Vernon 1979). In the instant case, appellant did not comply with this requirement. Nevertheless, appellant contends that one statement, found in one sentence of a single affidavit,[4] raised the question of whether appellant was insane at the time of the commission of her offense sufficient for the court, under § 3(a) of article 46.03, to appoint disinterested experts experienced and qualified in mental health to examine the defendant with regard to the insanity defense and to testify at trial or hearing on that issue. TEX. CODE CRIM. PROC. ANN. art. 46.03 § 3(a) (Vernon Supp. 2000)

Appellant neither filed a notice of intention to offer evidence of the insanity defense as required by article 46.03, §2(a)(1), nor specifically alleged she was insane on the date of the offense. In fact, insanity was not an issue at appellant's plea hearing or sentencing; rather, appellant submitted the affidavits to the court for the purpose of obtaining community supervision in lieu of confinement. Accordingly, since notice of an insanity defense was not filed, the issue of appellant's sanity at the time of the offense was not an issue before the trial court, and the court, therefore, had no obligation to order a psychiatric examination of

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[3] Medically, an individual may be insane from mental disease or defect yet, legally, he is not relieved of criminal responsibility for that crime unless his mental condition reached the point where he was unable to distinguish between right and wrong. *Love v. State*, 909 S.W.2d 930, 943 (Tex. App.—El Paso 1995, pet. ref'd).

[4] The sentence is as follows: "It is the opinion of the therapist based on training, counseling, education, and experience that Rose Gomez['s]...taking of things that resulted in [her] being charged with theft before this court is a sickness or illness and not the result of criminal intent to deprive the owner of the things or objects taken." This statement goes to the issue of appellant's lack of mens rea to support a conviction of theft, not the issue of whether she knew the conduct was wrong.

appellant to determine her sanity at the time of the theft. *See Martinez v. State*, 867 S.W.2d 30, 33 (Tex. Crim. App. 1993) (holding sanity is an affirmative defense and because defendant failed to comply with art. 46.03 § 2, insanity of defendant at time of the offense was not an issue before the trial court). Accordingly, we hold the trial court was not required to *sua sponte* order a psychiatric examination of appellant, and the absence of such an inquiry, based on the record here, is not an abuse of discretion *See Wagner v. State*, 687 S.W.2d 303, 306 (Tex. Crim. App. 1984) (holding no abuse of discretion in refusing to allow appellant to present evidence concerning the issue of insanity because the notice under article 46.03, §2(a)(1) was untimely filed). We overrule the second part of appellant's point of error one.

II.

Ineffective Assistance of Counsel

In her second point of error, appellant contends she was denied the effective assistance of counsel because her trial counsel failed to request a competency hearing, or a psychiatric examination, and counsel did not investigate the validity of the prior convictions set out in the enhancement paragraphs of appellant's indictment.

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show her counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for her 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 assume 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 her counsel's representation fell below an objective standard of reasonableness, she 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 her a fair trial. *McFarland*, 928 S.W.2d at 500. If appellant fails to make the required showing of either deficient performance or prejudice, her claim fails. *Id*.

Although the issue of appellant's depression, history of domestic violence, impulsive behavior, and kleptomania were mentioned in the affidavits submitted by appellant, the trial court determined there was insufficient evidence to warrant the appointment of disinterested experts to examine the defendant with regard to the insanity defense. There is a general presumption of sanity and the defendant bears the burden of proving, by a preponderance of the evidence, his insanity at the time of the conduct charged. *Martinez*, 867 S.W.2d at 33. The affidavits submitted by appellant primarily suggest that she has a history of repeated criminal conduct. Penal Code Section 8.01(b) specifically provides an abnormality manifested only by repeated criminal conduct does not constitute a "mental disease or defect." TEX. PEN. CODE ANN. § 8.01(b). Because no direct evidence exists in this record that appellant did not know the conduct of appropriating the property in question was wrong, there was no basis for appellant's trial counsel to file a notice of intent to offer evidence of appellant's insanity. Trial

counsel is under no obligation to do what would amount to a futile act. *Holland v. State*, 761 S.W.2d 307, 319 (Tex. Crim. App. 1988).

Regarding appellant's contention that trial counsel was ineffective for failing to request a competency hearing, there is nothing in the record before us, other than the six affidavits offered by appellant to mitigate her punishment, that appellant is incompetent or was insane at the time of her offense. Moreover, there is no evidence in the record, firmly founded or otherwise, that appellant has any history of incompetence or insanity. Even if appellant does have a history of depression or abuse, these fact alone would not raise the issue of her competency. *See Guzman v. State*, 923 S.W.2d 792, 797-98 (Tex. App.—Corpus Christi 1996, no pet.). In a collateral argument, however, appellant also asserts that her counsel was ineffective because he did not challenge the validity of the enhancement paragraphs. We decline to entertain the notion that counsel's assistance was ineffective, in the absence of any evidence in the record that the enhancement paragraphs were, in fact, invalid. *See Laurant v. State*, 926 S.W.2d 782, 783 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd).

All of appellant's assertions of ineffective assistance of counsel at trial suffer from the same defect: no evidence. Where the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude counsel's performance was deficient. *Jackson v. State*, 877 S.W.2d 768, 771-72 (Tex. Crim. App. 1994). An appellate court is not required to speculate on the trial counsel's actions when confronted with a silent record. *Id*. at 771. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). To defeat the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*. at 814. Where the record is silent as to why appellant's trial counsel failed to request a competency hearing, a psychiatric examination or investigate the validity of the enhancement paragraphs, it constitutes a failure to rebut the presumption that these were reasonable decisions. *Id*. *Thompson* is not to be read as a declaration that no claim

of ineffective assistance of counsel can be brought on direct appeal. *Id* at n. 6. However, in the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*. *Id*. Because we hold the undeveloped record here is insufficient to satisfy the performance prong of *Strickland*, we overrule appellant's point of error two.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed March 29, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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