Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00512-CR

RICARDO ROJAS RODRIGUEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 780,731

O P I N I O N

After entering a plea of nolo contendere and waiving his right to a jury trial, the trial court found Ricardo Rojas Rodriguez, appellant, guilty of possession of sexual assault of a child. *See* TEX. PEN. CODE ANN. § 22.011(A)(2)(A) (Vernon Supp. 2000). The trial court assessed punishment at twelve years' confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant appeals his conviction on one point of error, claiming that he was deprived of counsel at a critical stage of judicial proceedings. Because we find that appellant has not demonstrated that he was deprived of counsel during a critical stage of the judicial proceedings, we affirm the trial court's judgment.

FACTUAL BACKGROUND

Appellant was found guilty of sexual assault of a child and sentenced on March 25, 1999. On April 21, 1999, appellant filed a *pro se* notice of appeal, which included a request for another attorney to represent him. Appellant's retained trial counsel did not file a motion to withdraw from representation. On May 4, 1999, the trial court set a hearing to determine whether appellant was indigent and had a right to a court-appointed attorney on appeal. The District Clerk's office sent a letter to the trial court on May 17, 1999, indicating that appellant's case was assigned to this court, and noting that counsel on appeal was "to be determined." On May 26, 1999, appellant signed a paper's oath on appeal, indicating his indigence and requesting that the court appoint appellant counsel. The same day, sixty-three days after appellant's judgment, the trial court appointed appellate counsel for appellant.

DISCUSSION AND HOLDINGS

In his sole point of error, appellant argues that he was denied his right to due process of law under the Texas Constitution because he was deprived of counsel at a critical phase of the judicial proceedings. He urges this court to abate the appeal so that he may file a motion for new trial.[1] Appellant claims he was denied counsel during the critical time limit for filing a motion for new trial because appellate counsel was not appointed until sixty-three days after his judgment. We disagree.

A defendant may file a motion for new trial no later than thirty days after the trial court imposes its sentence in open court. *See* TEX. R. APP. P. 21.4. The hearing on a motion for new trial is a critical stage of the judicial proceedings. *See Treviño v. State*, 565 S.W.2d 938, 940 (Tex. Crim. App. 1978). A defendant has a right to counsel during the time limit for filing a motion for new trial. *See Hanson v. State*, 11 S.W.3d 285, 288 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Thus, a trial court errs if it refuses to appoint counsel for a hearing on a motion for new trial. *See id.*

To prevail on a claim for deprivation of counsel, an appellant must affirmatively prove that he was not represented by counsel during a critical phase of the proceedings. *See Oldham v. State*, 977

[1] Appellant relies on rule 2(b) of the Texas Rules of Appellate Procedure to argue that this court should abate the appeal to allow him additional time to file a motion for new trial. However, the Texas Court of Criminal Appeals has expressly declined to apply rule 2(b) to abate an appeal for the purpose of allowing an out-of-time motion for new trial. *See Oldham v. State*, 977 S.W.2d 354, 360 (Tex. Crim. App. 1998).

S.W.2d 354, 363 (Tex. Crim. App. 1998); *Hanson*, 11 S.W.3d at 288. Trial counsel has the "duty, obligation, and responsibility to consult with and fully advise his client concerning . . . his right to appeal from th[e] judgment, and the necessity of giving notice of appeal and taking other steps to pursue an appeal, as well as expressing his professional judgment as to possible grounds for appeal and their merit, and delineating advantages and disadvantages of appeal." *Oldham*, 977 S.W.2d at 362 (quoting *Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988)). Appellant must overcome the presumption that he was represented by counsel, and that counsel acted effectively according to his duty. *See Oldham*, 977 S.W.2d at 363. Appellant's claim must also be firmly founded in the record, and appellant has the burden to demonstrate from the record that he was deprived of counsel and had no opportunity to file a motion for new trial. *See Burnett v. State*, 959 S.W.2d 652, 659 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

Appellant's claim of deprivation of counsel is not firmly founded in the record; no evidence in the record demonstrates that appellant was not represented by counsel at all times during litigation. Appellant relies on four factors to argue he was denied counsel during a critical phase of the proceedings: (1) his *pro se* notice of appeal requesting another attorney, (2) the court's docket sheet entry setting his case for an indigent inquiry, (3) he was not appointed appellate counsel until sixty-three days after judgment, and (4) the letter from the clerk's office indicating counsel is "to be determined."

The Texas Court of Criminal Appeals has addressed this precise issue, where the appellant relied on substantially similar factors to prove he was denied counsel during a critical stage of the proceedings.[2] *See Oldham*, 977 S.W.2d 354. There, the Court of Criminal Appeals held that three of the facts present in this case do not rebut the presumption that appellant was represented by counsel and that counsel acted effectively. *See id.* at 363. The Court reasoned that nothing in the record suggested that the "attorney did not discuss the merits of a motion for a new trial with the appellant, which the appellant rejected." *Id.* It relied on the rebuttable presumption that when a motion for new trial is not filed, appellant has considered

[2] In *Oldham*, the appellant relied on the following facts to support his argument that he was denied counsel: (1) appellant filed a *pro se* notice of appeal and indigency on the twenty-eighth day after his sentencing; (2) the letter of assignment from the trial court noted that attorney of record on appeal is "to be determined;" and (3) appellate counsel was appointed sixty-two days after sentencing.

and rejected it. *See id.* Additionally, the Court reasoned that because appellant filed a *pro se* notice of appeal, he must have been informed of at least some of his appellate rights and was adequately counseled unless the record affirmatively indicated otherwise. *See id.*

Here, as in *Oldham*, the record does not affirmatively show that appellant was denied counsel during the critical time period for filing a motion for new trial. As we noted, appellant filed a *pro se* notice of appeal, which is some evidence that appellant was counseled and informed of at least some of his appellate rights. *See id.* Additionally, Appellant's trial counsel did not file a motion to withdraw from representation. Appellant argues that his case is distinguishable from *Oldham* because, on appeal, he has indicated grounds he would raise in a motion for new trial, and in his notice of appeal he asserted that his trial counsel was so ineffective that his guilty plea was not voluntary.[3] However, these things do not rebut the presumption that his trial counsel continued to represent him and inform him of his appellate rights during the time limit for filing a motion for new trial. *See Cantu v. State*, 988 S.W.2d 481, 483 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). Nor do they rebut the presumption that trial counsel discussed the merits of a motion for new trial with appellant, who considered and rejected such a motion. *See Oldham*, 977 S.W.2d at 363. The simple fact is that this record does not contain any information that would enable us to conclude - rather than to speculate - that appellant was not represented by counsel.

In short, appellant did not overcome the presumption that he was represented by counsel during the time after his sentencing. We overrule appellant's sole point of error and affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

[3] If appellant's counsel were ineffective, we cannot tell from this record. That would be a matter he would have to raise in a writ of habeas corpus. *See Ex Parte Duffy*, 607 S.W.2d 507, 513 (Tex. Crim. App. 1980).

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Yates, Fowler and Edelman.

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