Affirmed and Opinion filed November 1, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01095-CR

R.T. HARDGE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 822,277

O P I N I O N

Mr. R.T. Hardge appeals his March 2, 2000, conviction for unauthorized use of a motor vehicle. Mr. Hardge argues his state and federal constitutional rights were violated when he was left without counsel on appeal. Mr. Hardge requests that we abate his appeal and remand his cause to the trial court, thereby providing him with the opportunity to file a motion for a new trial with the assistance of counsel. We deny this request and affirm the judgement below.[1]

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[1] We are aware that our sister court has recently granted a similar request. *See Jack v. State*, 42 S.W.3d 291 (Tex. App.—Houston [1st Dist.] 2001, no pet. h.).

Background

Five days after conviction and sentencing, Mr. Hardge filed a *pro se* Motion for New Trial, a *pro* se Motion to Obtain Transcript Records, and a *pro se* Notice of Appeal. In his Motion for New Trial, Mr. Hardge stated ineffectiveness of trial counsel as a ground for relief and specifically requested that trial counsel be dismissed. Nothing in the record shows that trial counsel withdrew or was dismissed. The Motion for New Trial was overruled by operation of law. Appellate counsel was appointed July 26, 2000.

Issues on Appeal

Mr. Hardge alleges that he was without counsel for the first four months after his conviction or, to the extent he had counsel, Mr. Hardge argues that such counsel was ineffective, in violation of his Amendments VI and XIV of the United States Constitution, as well as Article I, Section 10 of the Texas Constitution. Mr. Hardge primarily argues that the lack of counsel during the first 30 days following conviction compromised his ability to present a proper motion for new trial.

Waiver

The state first argues that by failing to provide separate authority for his state and federal claims, Mr. Hardge waives his state constitutional claims. *See generally Heitman v. State, 815 S.W.2d 681, 690 n. 23* (Tex. Crim. App. 1991), *citing McCambridge v. State*, 712 S.W.2d 499 (Tex. Crim. App. 1986), *aff'd after remand*, 778 S.W.2d 70 (Tex. Crim. App. 1989), *cert. denied*, 495 U.S. 910, 110 S.Ct. 1936 (1990). The decision to deem a multifarious point of error waived has always been discretionary. *See, e.g. Hicks v. State*, 815 S.W.2d 299, 301 (Tex. App.—Houston [1st Dist.] 1991). Mr. Hardge and the State agree that the federal and state constitutions are not different in any relevant sense as applied to this case.[2] We decline to deem Mr. Harge's state claims waived.

[2] Indeed, the parties are correct. *See Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986).

A. No Counsel at All

There is a rebuttable presumption that Mr. Hardge was represented by counsel and that counsel acted effectively. *Hanson v. State*, 11 S.W.3d 285, 288 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). This presumption arises, in part, because appointed counsel remains as a defendant's counsel for all purposes until expressly permitted to withdraw, even if the appointment is for trial only. *Id., citing Ward v. State*, 740 S.W.2d 794, 796 (Tex. Crim. App. 1987).

Mr. Harge was indisputably represented by counsel at trial. The record contains no notice of withdrawal from Mr. Hardge's trial counsel.[3] Mr. Hardge's argument rests entirely on his belief that his filing of *pro se* motions after his conviction constitutes affirmative evidence that he was without representation. Binding authority provides for the opposite presumption. There is nothing in the record to suggest that Mr. Hardge was not counseled by his attorney regarding the merits of a motion for new trial. We therefore assume that Mr. Hardge considered this option and rejected it. *Smith v. State*, 17 S.W.3d 660, 663 (Tex. Crim. App. 2000), *citing Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998); *see also Hanson v. State*, 11 S.W.3d 285 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). As in *Oldham* and *Smith* and *Hanson*, the fact that Mr. Hardge filed a *pro se* notice of appeal and motion for new trial is evidence that he was informed of at least some of his appellate rights. We therefore cannot find that Mr. Hardge was not adequately counseled regarding his right to file a motion for new trial.

Additionally, we note that the facts of this case do not fall squarely within the ambit of *Burnett v. State*, 959 S.W.2d 652, 658-59 (Tex. App.—Houston [1st Dist.] 1997, no pet.) In *Burnett*, the court examined prior decisions and observed, *inter alia*, that a *pro se* notice of appeal and request for appointment of counsel are an indication that trial counsel no

[3] Deprivation of counsel has been found where counsel filed notice of withdrawal immediately after conviction and new counsel was not appointed until two weeks later. *See Massengill v. State*, 8 S.W.3d 733 (Tex. App.—Austin 1999, no pet.)

longer represents an appellant, even in the absence of an official withdrawal by trial counsel. *Id., citing Boyette v. State*, 908 S.W.2d 56, 59 (Tex. App.–Houston [1st Dist.] 1995, no pet.).[4] Under the facts presented here, we decline to give the same effect to a *pro se* request for dismissal of trial counsel in a motion for new trial as has been given to a motion for appointment of counsel.[5] The request for dismissal was not ruled upon. We therefore conclude, as we must, that trial counsel continued to serve as required. *Hanson*, 11 S.W.3d at 288.

B. Ineffective Assistance of Counsel

To the extent he had counsel, Mr. Hardge appears to argue that such counsel was ineffective. This court has previously held the statutory time period for filing a motion for new trial to be a critical stage of the proceedings during which a criminal defendant is constitutionally entitled to assistance of counsel. *Hanson v. State*, 11 S.W.3d at 288.

Texas courts apply the *Strickland* test to determine whether counsel's representation was so inadequate as to violate a defendant's Sixth Amendment right to counsel. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). *See generally Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must first show by a preponderance of the evidence that counsel's performance was deficient, *i.e.*, that his assistance fell below an objective standard of reasonableness. *Id.* Next the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Any allegation of

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[4] We also note that *Burnett* predates *Oldham* and *Smith*, which we rely upon today.

[5] We are aware our sister court has elected to treat the situation presented differently. *See, e.g., Prudhomme v. State*, 28 S.W.3d 114 (Tex. App.—Texarkana 2000, no pet.) (Filing of *pro se* motion to withdraw plea, treated as motion for new trial, affirmatively rebuts presumption of inadequate counseling where motion included allegation of ineffective assistance); *But see Yarborough v. State*, No. 06-00-00066-CR, 2001 WL 568576, at *3 (Tex. App.—Texarkana) May 29, 2001, no pet. h.) (No affirmative rebuttal where motion for new trial did not allege ineffective assistance).

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), *cert. denied*, 519 U.S. 1119, 117 S.Ct. 966 (1997). *See also Burnett*, 959 S.W.2d at 659 (There is a stronger basis in this type of case for requiring allegations of lack of representation to be firmly founded in the record than in routine ineffective assistance of counsel cases.).

As noted above, we find no affirmative evidence showing ineffectiveness in the record. This finding best comports with the Court of Criminal Appeals decisions in *Smith* and *Oldham*. We therefore hold that Mr. Hardge cannot show that counsel's assistance fell below an objective standard of reasonableness, as required under *Strickland*. [6]

Moreover, even if such evidence were present in the record, Mr. Hardge could not show that the result of the proceeding would have been different had appellate counsel been appointed earlier. Where the absence of counsel does not pervade the entire proceeding, Sixth Amendment violations are subject to a harmless error analysis. *Hanson v. State*, 11 S.W.3d at 289, *citing Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). In *Hanson*, we held that the delay in the appointment of counsel to be harmless because the defendant failed to identify points of error that were lacking in his *pro se* motion. *Id.* Mr. Hardge likewise fails to identify any such points of error. We therefore hold that Mr. Hardge could not show that the result below would have been different, as required under the second prong of *Strickland*. Mr. Hardge's points of error are overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

[6] In most cases it is likely that no affirmative evidence will appear in the record to support the conclusion that an appellant is without counsel during an appeal. It is reasonably apparent that the preferred manner of raising this issue is through a writ of *habeas corpus*. *See Oldham*, 977 S.W.2d at 360.

Judgment rendered and Opinion filed November 1, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.[7]

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

[7] Senior Justice Don Wittig sitting by assignment.