Affirmed and Opinion filed November 24, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00137-CR

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RICK BROWN A/K/A RITCHIE WATTERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 94-13810

O P I N I O N

In this appeal from his conviction for aggravated robbery, the appellant, Ritchie Watterson, raises four broad issues for our review, all of which relate to his punishment for the crime. Indicted for aggravated robbery, appellant pled guilty without an agreed recommendation. The court deferred a finding of guilt and placed appellant on probation for a period of ten years. When appellant failed to comply with the terms of his probation, the court found him guilty and sentenced him to forty-five years in the Institutional Division of the Texas Department of Criminal Justice. Appellant now challenges the conviction on four points

of error: (1) the trial court committed reversible error by assessing punishment without allowing appellant to present mitigating punishment evidence after adjudication of guilt; (2) appellant received ineffective assistance of counsel when trial counsel failed (a) to properly investigate and present mitigation evidence prior to and at his punishment hearing and (b) to properly request a punishment hearing in light of appellant's request for time to retain new counsel; (3) the trial court exercised judicial vindictiveness in violation of the due process provisions of the United States and Texas Constitutions; and (4) the punishment assessed violates appellant's constitutional rights under the Eighth Amendment of the United States Constitution. We overrule all points of error and affirm the decision of the trial court.

BACKGROUND

In July 1994, the State indicted appellant, under the alias name of Rick Brown, for the first degree felony offense of aggravated robbery. The indictment alleged that appellant did unlawfully "while in the course of committing theft of property owned by Leroy Henderson and with intent to obtain and maintain control of the property, intentionally and knowingly threaten and place Leroy Henderson in fear of imminent bodily injury and death" by using and exhibiting a deadly weapon, namely a firearm. In May 1995, appellant pled guilty without an agreed recommendation and received ten years deferred adjudication with community supervision. The record has neither a pre-sentence investigation ("PSI") report nor a statement of facts from the plea proceeding. The State later alleged that appellant had violated three of the conditions of his community supervision, namely (1) changing his place of residence, (2) not participating in community service, and (3) not participating in the Harris County Adult Probation Department's Tier II Program. At the sentencing hearing, appellant stipulated to the evidence and initially agreed to a twenty year sentence; however, after a recess, appellant apparently changed his mind and the hearing proceeded with no agreed recommendation. The trial court adjudicated appellant's guilt and sentenced him to forty-five years confinement. Appellant filed and presented a motion for new trial, which was overruled by operation of law.

Three different attorneys represented the appellant in connection with the charge of aggravated robbery. Two attorneys represented him at different times before and during the original plea proceeding; a third lawyer represented the appellant during the hearing to adjudicate guilt.

In September 1992, appellant, using his true name, Ritchie Watterson, received deferred adjudication with community supervision for unauthorized use of a motor vehicle. In that case, appellant violated the conditions of his community supervision by not reporting to his probation officer and the court subsequently sentenced him to three years confinement.

MITIGATING PUNISHMENT AFTER ADJUDICATION OF GUILT

In his first point of error, appellant contends the trial court committed reversible error by refusing to allow him to present mitigating punishment evidence after adjudication of guilt. Once a trial court adjudicates a previously deferred finding of guilt, it must conduct a second, punishment phase of trial during which the accused can put on evidence. *See Issa v. State*, 826 S.W.2d 159, 161 (Tex. Crim. App. 1992). The record does not support appellant's factual contentions that the court denied him the opportunity to present evidence; instead, the record demonstrates that appellant chose not to do so. After finding the appellant guilty, the court asked the parties if they had anything to offer during the punishment phase. Defense counsel consulted with appellant and then indicated that appellant did not want to testify and that he had no other witnesses on punishment. It is clear from this record that the court gave appellant the opportunity to present punishment evidence and that he failed to take advantage of that opportunity. We overrule his first point of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his second point of error, appellant contends he failed to receive effective assistance of counsel at the time the court imposed deferred adjudication community supervision and,

again, when the court revoked deferred adjudication community supervision. Specifically, appellant claims his counsel failed to properly (1) investigate and present mitigation evidence prior to and at the punishment hearing and (2) request a punishment hearing in light of appellant's request for time to hire new counsel.

We apply a single standard of review for claims of ineffective assistance of counsel regardless of whether the actions forming the basis of the claim occur at the guilt/innocence or the punishment phase of the trial process. *See Hernandez v. State*, 988 S.W.2d 770, 774 (Tex. Crim. App. 1999). The standard is the two-step analysis articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). In the first step, appellant must demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To make this showing, appellant must (1) rebut the presumption that counsel is competent by identifying the acts or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts and omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation but will judge the claim based on the totality of the representation. *See Strickland*, 466 U.S. at 695. In the second step, appellant must show prejudice from the deficient performance of his attorney. *See id.* at 688. To establish prejudice, appellant must prove that but for counsel's deficient performance, the result of the proceeding would have been different. *See McFarland*, 928 S.W.2d at 502.

In analyzing appellant's ineffective assistance of counsel claim, we begin with the strong presumption that defense counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). The burden is on appellant to rebut this presumption by presenting evidence illustrating why his trial counsel did what he or she did. *See id.* Appellant cannot meet the burden of rebutting the strong presumption that counsel was effective if the record does not affirmatively support the claim. *See Jackson v. State,* 973 S.W.2d 954, 955 (Tex.

Crim. App. 1998) (inadequate record on direct appeal to evaluate whether trial counsel provided ineffective assistance); *Phetvongkham v. State,* 841 S.W.2d 928, 932 (Tex. App.—Corpus Christi 1992, pet. ref'd, untimely filed) (inadequate record to evaluate ineffective assistance claim).

Counsel's Effectiveness at Imposition of Deferred Adjudication

Appellant claims that both of the attorneys that represented him during the original plea proceeding failed to properly investigate appellant's case and background. Recently, the Texas Court of Criminal Appeals held that a defendant placed on deferred adjudication community supervision cannot collaterally attack issues relating to the original plea proceeding after he has been adjudicated guilty. *See Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999). In *Manuel*, the defendant pled guilty, and the trial court deferred a finding of guilt. *See id*. at 659. Nearly three years later, the defendant violated the terms of his community supervision, and the court adjudicated him guilty. *See id*. at 660. The defendant then filed a general notice of appeal on the sufficiency of the evidence produced at the original plea proceeding. *See id*. The court decided it was not the legislature's intent "to permit two reviews of the legality of a deferred adjudication order, one at the time deferred adjudication community supervision is first imposed and another when, and if, it is later revoked." *Id*. at 662. In this case, appellant waited until the trial court revoked his community supervision and formally adjudicated him guilty of the crime before he appealed. Thus, we do not reach the merits of appellant's claim because he cannot collaterally attack issues relating to the original plea proceeding after he has been adjudicated guilty.

Counsel's Effectiveness at Revocation of Deferred Adjudication

In his first of two complaints about his counsel's performance during the punishment phase of trial, appellant claims that counsel failed to properly investigate and present mitigation evidence prior to and at the punishment hearing. An attorney must make reasonable investigations or make a "reasonable decision that makes particular investigation unnecessary."

Johnston v. State, 959 S.W.2d 230, 236 (Tex. App.—Dallas 1997, no pet.) (citing *Strickland*, 466 U.S. at 691). Appellant claims that his counsel was ineffective because he failed "to call defense witnesses who were available for trial in the form of [a]ppellant's mother, aunt, grandmother and religious leaders," all of whom appellant contends were able to provide "positive testimony" about him. An attorney's failure to produce witnesses can be the basis of an ineffective assistance of counsel claim *only if* appellant shows that the witnesses were available and would have testified on his behalf. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983); *Rangel v. State*, 972 S.W.2d 827, 835-36 (Tex. App.—Corpus Christi 1998, pet. ref'd); *Johnston*, 959 S.W.2d at 236. Here, the record neither indicates that the witnesses were available nor that they would have testified on appellant's behalf. In the absence of affidavits or sworn testimony, a list of potential witnesses in a motion for a new trial is not sufficient to support a claim that an attorney was unreasonable in not contacting them. Assuming for the sake of argument, however, that counsel's performance was ineffective, appellant still could not prevail on his ineffective assistance claim because he failed to satisfy the second step of the *Strickland* analysis. Specifically, appellant failed to produce evidence that *had* defense counsel investigated further, there is a reasonable probability that the result of the proceeding would have been different.

Appellant also claims his counsel failed to properly request a punishment hearing in light of appellant's request for time to hire new counsel. There is no evidence in the record demonstrating why appellant's counsel did not request a punishment hearing. Therefore, appellant cannot overcome the strong presumption that counsel's actions and decisions were reasonably professional and motivated by trial strategy; the first step of the *Strickland* analysis is not satisfied.

Because both of appellant's claims regarding ineffective assistance of counsel during the hearing to adjudicate guilt fail the *Strickland* analysis and appellant's claim regarding ineffectiveness of counsel during the original plea proceeding fails for procedural reasons, we overrule the second point of error.

JUDICIAL VINDICTIVENESS

In his third point of error, appellant contends the trial court indulged in judicial vindictiveness in violation of the due process provisions of the United States and Texas Constitutions. Before addressing the substance of the third point of error, we conclude that we need not address appellant's Texas constitutional claims. "State and federal constitutional claims should be argued in separate grounds, with separate substantive analysis or argument provided for each ground." *See Muniz v. State*, 851 S.W.2d 238, 251 (Tex. Crim. App. 1993) (en banc) (citations omitted). Absent an argument supported by authority that the Texas Constitution provides more protection or different protection than the United States Constitution, we will not address the state constitutional claim. *See id*. Appellant does not argue the Texas Constitution provides more protection than the United States Constitution; therefore, we will not address the state constitutional claim.

Presumption of Vindictiveness

In certain cases, due process requires us to presume vindictiveness when action is taken against the defendant after he exercises a legal right. *See United States v. Goodwin*, 457 U.S. 368, 373 (1982). For example, there is a presumption of vindictiveness when the trial judge imposes a harsher sentence on retrial after the defendant successfully attacks his original conviction on appeal. *See North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). The presumption, however, does not apply where there is not a reasonable likelihood of vindictiveness. *See Goodwin*, 457 U.S. at 373. The Texas Court of Criminal Appeals has found the presumption does not apply "where the first sentence was by a plea agreement and the second sentence occurs after the plea agreement is not accepted by the defendant." *Wiltz v. State*, 863 S.W.2d 463, 464 (Tex. Crim. App. 1993) (citing *Goodwin*, 457 U.S. 368 (1982)).[1]

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[1] We note the exact holding of *Goodwin* is that a prosecutor was not presumed vindictive when he (continued...)

Here, appellant's attorney initially informed the court that appellant would accept the twenty-year sentence the prosecution had recommended. When the court asked appellant if this was what he wanted to do, appellant answered affirmatively. Before the court accepted the plea agreement, appellant changed his mind, believing that if he pled true to the charges, he would abdicate his right to an appeal. Appellant asked for a hearing but still pled true to the charges.

During the hearing, the court learned that appellant had violated the conditions of a prior deferred adjudication. The court also learned that appellant had used a false name in the current plea proceedings, presumably to avoid a harsher sentence due to his previous record. Appellant's conduct during the hearing may well have given the court additional insights into his moral character and suitability for rehabilitation.

After the hearing, the court imposed a harsher sentence than the one proposed by the State in the plea bargain appellant had refused to accept. Because the first sentence was recommended by a plea agreement and the second sentence occurred after the plea agreement was rejected, the presumption of vindictiveness does not apply here. A mere possibility that the judge might have been vindictive is not enough to raise a presumption of vindictiveness.

Actual Vindictivenss

When the presumption does not apply, the burden is on the defendant to prove actual vindictiveness. *See Wiltz*, 863 S.W.2d at 465 (citing *Alabama v. Smith*, 490 U.S. 794, 799

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[1] (...continued)
recommended a first sentence pursuant to a plea agreement and recommended the second sentence after a trial on the merits when the defendant rejected the plea agreement. *Id.* at 373-85. We presume the *Wiltz* court meant to annunciate a rule of law based on *Goodwin* in general. There is no reasonable likelihood of vindictiveness when the first sentence is recommended by the State in a plea agreement and the second sentence is imposed after the plea agreement is rejected. Before trial, a prosecutor may not have a well developed sense of the extent of the prosecution. *See id.* at 381. After trial, a host of factors can explain the increased sentence, including the judge's fuller appreciation of all the circumstances surrounding the case. *See Alabama v. Smith*, 490 U.S. 794, 801 (1989). For example, a defendant's conduct during trial might assist the judge in assessing his "moral character and suitability for rehabilitation." *Id.*

(1989) and *Wasman v. United States*, 468 U.S. 559, 569 (1984)). The defendant must produce evidence which objectively proves that the change in sentence was motivated by a desire to punish the defendant for exercising a right. *See Goodwin*, 457 U.S. at 384. Appellant produced no evidence which objectively proves that the judge's imposition of a harsher sentence was motivated by a desire to punish the defendant for not accepting the plea bargain. Inasmuch as appellant failed to meet the burden of proving actual vindictiveness at sentencing, we overrule his third point of error.

CRUEL AND UNUSUAL PUNISHMENT

In his fourth point of error, appellant contends the punishment assessed violates his constitutional rights under the Eighth Amendment of the United States Constitution.

A state criminal sentence does not evade a cruel and unusual punishment analysis merely because it is within the range permitted by statute. *See Solem v. Helm*, 463 U.S. 277, 290 (1983). While we give substantial deference to the legislature's power to determine types and limits of punishments for crimes and to the trial court's discretion, "[n]o penalty is *per se* constitutional." *Id*. The United States Supreme Court has held that "a state criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Id*. In performing a proportionality analysis under *Solem*, consideration is given to objective criteria including "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the same crime in other jurisdictions." *Id*. at 291-92. In revisiting the analysis in *Solem* in 1991, the justices of the Supreme Court could neither agree as to whether proportionality review should exist, nor reach consensus on the appropriate standard to use if it did. *See Harmelin v. Michigan*,[2] 501 U.S. 957 (1991). In the wake of *Harmelin*, the Fifth Circuit determined that

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[2] In writing for the majority, Justice Scalia was joined by Chief Justice Rehnquist in holding that the Eighth Amendment has no proportionality guarantee. *See Harmelin*, 501 U.S. at 965. Justice Kennedy wrote a concurrence in which he was joined by Justices O'Connor and Souter. Kennedy wrote that the (continued...)

the proportionality analysis survived because seven of the nine justices supported it. *See McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir.1992). However, given that five justices rejected the three factor analysis laid out in *Solem*, the Fifth Circuit decided that it can no longer apply the *Solem* analysis. *See id.* Based on Justice Kennedy's opinion in *Harmelin*, which was the only one to propose an alternative to the rejected *Solem* analysis, the Fifth Circuit concluded that the first factor now has become a threshold question, and the reviewing court reaches the second and third factors *only* if it finds that the sentence was grossly disproportionate to the offense. *See id.* Several Texas courts of appeals have found this reasoning to be sound. *See Diaz-Galvan v. State*, 942 S.W.2d 185, 186 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd); *Mathews v. State*, 918 S.W.2d 666, 669 (Tex. App.—Beaumont 1996, pet. ref'd); *Puga v. State*, 916 S.W.2d 547, 549 (Tex. App.—San Antonio 1996, no pet.); *Lackey v. State*, 881 S.W.2d 418, 421 (Tex. App.—Dallas 1994, pet. ref'd). We, too, will follow the Fifth Circuit's modification of the *Solem* analysis.

In comparing the gravity of the offense to the harshness of the penalty, a court must have "a sufficient record by which to evaluate the relative aggravation or mitigation of the particular facts of the case." *Diaz-Galvan*, 942 S.W.2d at 186. In *Diaz-Galvan*, the court found the record was insufficient to perform a proportionality review "without a PSI or a statement of facts from the guilt or punishment hearing." *Id.* Here, the record is also insufficient to perform a proportionality review in that we have no PSI or statement of facts from the original plea proceeding in which appellant pled guilty. The record from the hearing to adjudicate guilt does not address the crime. Accordingly, in the absence of a sufficient record, appellant has not preserved his fourth point of error.

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[2] (...continued)
Eighth Amendment encompasses a narrow proportionality review in which "intrajurisdictional and interjurisdictional analysis are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *See id.* at 1005. Justices White, Blackmun, Stevens and Marshall dissented, stating that proportionality review exists but supporting the full *Solem* analysis. *See id.* at 1009-1019.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed November 24, 1999.

Panel consists of Justices Yates, Fowler and Frost.

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