Affirmed and Opinion filed December 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01533-CR

MARY LOUISE TYLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 823,164

O P I N I O N

Appellant, Mary Louise Tyler, pleaded guilty to the felony offense of murder without an agreed recommendation as to punishment. The trial court assessed punishment at fourteen years' confinement. In two points of error, appellant contends that she received ineffective assistance of counsel and that her plea was involuntary because trial counsel guaranteed that appellant would receive felony deferred adjudication probation. We affirm.

On July 26, 2000, appellant pleaded guilty to murdering her husband, whom she claimed had physically abused her during their ten-year relationship. The trial court ordered a pre-sentence investigation and held a sentencing hearing on October 30, 2000.

At the hearing, the trial court advised both parties that the court had received a letter from appellant's mother indicating that trial counsel promised appellant she would receive deferred adjudication probation if she pleaded guilty. Appellant's trial counsel stated he told appellant and her mother that in his "evaluation," he thought the case would be appropriate for deferred adjudication but he denied making any promises. The trial court asked appellant if her lawyer's statements were true, and she responded, "[C]lose to it, Your Honor, but he did say that I would get probation."

After further questioning, the trial court asked appellant if she wanted to withdraw her plea or go forward with sentencing. Appellant replied that she was "comfortable" with going forward with sentencing. The trial court also asked appellant if it were true that she wanted to give up her right to a jury trial when she entered her plea and appellant responded: "[N]ot at the time, it really wasn't." Appellant's trial counsel then suggested that appellant be allowed to withdraw her plea. However, appellant again informed the trial court that she wanted to proceed with sentencing. The trial court advised her of the range of punishment, asked her if she wanted to give up her right to a jury trial and, in response to appellant's affirmative response, inquired, "[A]re you sure?" Appellant stated, "[Y]es, ma'am." Thereafter, appellant again pleaded guilty and agreed that no one promised her anything to enter her plea. She stated she was acting on her own free will.

In his final argument, appellant's trial counsel asked the trial court to consider granting deferred adjudication probation based on appellant's good record and the fact that the complainant had been violent and physically abusive against her. After hearing the evidence and argument of trial counsel, the trial court assessed punishment at fourteen years' confinement.

Appellant filed a motion for new trial on November 28, 2000, claiming the "judgment and sentence" on October 30, 2000, "were contrary to the law and the evidence." On December 1, 2000, thirty-two days after appellant's sentence was imposed in open court, appellant filed a "second" motion for new trial, claiming trial counsel was ineffective and

that her plea was involuntary. The trial court heard evidence and denied the "second" motion for new trial on December 13, 2000.

In two related points of error, appellant asserts that (1) her plea was involuntary due to erroneous guarantees by her trial counsel that she would receive deferred adjudication probation and (2) her trial counsel rendered ineffective assistance in making such guarantees.

In reviewing claims of ineffective assistance of counsel, we employ the standard of review set out in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *See Hernandez v. State*, 988 S.W.2d 770, 770 (Tex. Crim. App. 1999) (holding that the *Strickland* two-prong test applies to ineffective assistance claims throughout trial, including punishment). To reverse a conviction based on ineffective assistance of counsel, the appellate court must find (1) counsel's representation fell below objective standards of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996) (citing *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064 (1984)). This two-prong standard applies to challenges of guilty pleas. *See Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). To satisfy the second prong of the test in *Strickland*, appellant must show there is a reasonable probability that, but for counsel's errors, she would not have pleaded guilty, but would have insisted on going to trial. *See id*; *Ex parte Moody*, 991 S.W.2d 856, 857-58 (Tex. Crim. App. 1999). A claim of ineffective assistance of counsel must be affirmatively supported by the record. *Jackson v. State*, 973 S.W.2d 954, 955 (Tex. Crim. App. 1998).

A guilty plea determined to be involuntary must be set aside. *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 1713 (1969); *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975). "Misinformation concerning a matter, such as probation, about which a defendant is not constitutionally or statutorily entitled to be informed, may render a guilty plea involuntary if the defendant shows that his guilty plea was actually induced by the

misinformation." *Brown v. State*, 943 S.W.2d 35, 42 (Tex. Crim. App. 1997). Therefore, in determining the voluntariness of a guilty plea, the court should examine the record as a whole. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998).

In this case, appellant testified at the sentencing hearing that her trial counsel promised she would receive deferred adjudication probation if she pleaded guilty. Appellant's trial counsel denied this allegation. Appellant's mother testified that trial counsel told her the "[J]udge almost promised deferred adjudication." However, appellant must present independent corroborating evidence to rebut trial counsel and support her allegation; her mother's testimony is insufficient. *See Fimberg v. State*, 922 S.W.2d 205, 208 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (holding independent corroborating evidence other than the testimony of defendant's son was needed to support claim of trial counsel's misinformation). Further, "a defendant's claim he was misinformed by counsel, standing alone, is not enough for us to hold his plea was involuntary." *Id.*

Appellant acknowledged during the sentencing hearing that prior to her guilty plea, the trial court explained (1) there were no promises from the trial court as to what her sentence would be; (2) she could be sent to prison for a term between five years and life, and (3) the trial court would consider the possibility of probation because there were no promises made. Appellant also acknowledged in her original written plea papers, that she was "satisfied" that her trial counsel "properly represented me and I have fully discussed this case with him." Such an attestation of voluntariness at the plea hearing creates a heavy burden for appellant to show involuntariness at a subsequent hearing.[1] *Jones v. State*, 855

[1] On appeal, appellant relies in part on testimony heard during the second motion for new trial hearing to support her ineffectiveness claims. However, this motion was made more than 30 days after sentencing and therefore was untimely and cannot form the basis for points of error on appeal. *See* TEX. R. APP. P. 21.4(b). Therefore, we may not consider this testimony. *See Rangel v. State*, 972 S.W.2d 827, 838 (Tex. App.—Corpus Christi 1998, pet. ref'd) (finding affidavit testimony produced in untimely motion may not be considered on appeal); *see also Dugard v. State*, 688 S.W.2d 524, 529-30 (Tex. Crim. App. 1985), *overruled on other grounds by Williams v. State*, 780 S.W.2d 802, 803 (Tex. Crim. App. 1989).

Furthermore, even if we were to consider it, we would nevertheless find the testimony from that hearing likewise fails to demonstrate ineffective assistance that would affect the voluntariness of appellant's

S.W.2d 82, 84 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). The portion of the record properly before us does not support appellant's allegations of ineffective assistance of counsel.

At sentencing, the trial court twice informed appellant she could withdraw her original plea and have a jury trial, but appellant declined. Appellant again pleaded guilty to the murder of complainant. She told the trial court that no one forced or threatened her to enter this plea; no one promised her anything to enter this plea, and that she was acting on her own free will. "Having assured the court that his plea was voluntary and not based on any promises or inducements, and having stood by silently while the court assessed [her] punishment at the sentencing hearing, appellant cannot now complain that his counsel was ineffective in advising [her] about the court's intent in assessing punishment." *Reissig v. State*, 929 S.W.2d 109 (Tex. App.—Houston [14th Dist.] 1996, no pet.).

We are unable to say with a reasonable probability that, but for counsel's errors, if any, appellant would not have entered a plea of guilty but would have insisted on going to trial. Accordingly, we overrule appellant's first and second points of error.

We affirm the judgment of the trial court.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed December 20, 2001.
Panel consists of Justices Yates, Edelman, and Wittig.[2]
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plea. At the second hearing, appellant again alleged her trial counsel promised deferred adjudication probation. However, as noted above, this testimony is insufficient to carry her burden. *See Fimberg*, 922 S.W.2d at 208.

[2] Senior Justice Wittig sitting by assignment.