Opinion of November 18, 1999 withdrawn. Affirmed and opinion on Rehearing filed February 3, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-97-01191-CR

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KEVIN EUGENE STEVENS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 739,495

O P I N I O N O N R E H E A R I N G

Our opinion of November 18, 1999 is withdrawn, and we issue this corrected opinion.

This is an appeal from a conviction of aggravated robbery. TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). A jury found appellant guilty and sentenced him to fifty years confinement in the Institutional Division of the Texas Department of Criminal Justice. In seven points of error, appellant complains that the trial court erred by denying him the right to counsel, by failing to hold a so called *Garcia* hearing, by being denied effective assistance

from his counsel, and by failing to properly instruct the jury in the charge. We affirm and will support our conclusion by examining each of appellant's complaints in turn.

To place the offense in context we briefly examine the underlying facts. The record shows that on December 5, 1996, the complainant worked as a route driver for T.D. Rowe. He was responsible for filling vending machines and collecting money from those machines. After he completed his route for the day, the complainant drove to Rowe's warehouse to deliver the money he had collected. When he arrived, a green Ford Explorer parked behind him. The complainant got out of his truck and walked over to the Explorer. Appellant, who was driving the Explorer, got out of the car, and pulled out a gun. He told the complainant to get back into the truck. Appellant took the keys to complainant's truck and had the complainant sit in the passenger side. Appellant drove the truck away from the warehouse and was followed by another man driving the Explorer. Appellant pointed a gun at the complainant's head and told him he would kill him if he did not open the safe inside the truck. Rather than comply, the complainant elected to jump out of the moving truck and as a result, suffered severe injuries to his arm and hip. Appellant was eventually stopped and confessed to his role in the robbery on videotape.

In his first point of error, appellant contends that the trial court erred by not appointing him new counsel when a conflict arose with his appointed attorney. Appellant filed a motion to withdraw, in which his trial attorney joined.

During the hearing on appellant's motion, the trial judge allowed appellant and his attorney, Mr. Spurling, to voice their concerns. Appellant testified that he did not want Spurling off his case, but claimed that Spurling did not follow through with his work. Spurling claimed that the problem was not that he was unprepared, but that appellant had filed a grievance against him with the State Bar of Texas.[1] Spurling said that in preparing for

[1] Because trial counsel and appellant may be adversaries in other legal proceedings does not create an actual conflict of interest per se. *See Dunn v. State*, 819 S.W.2d 510, 519 (Tex. Crim. App. 1991), *cert. denied*, 506 U.S. 834 (1992)(legal malpractice action); *Perry v. State*, 464 S.W.2d 660, 664 (Tex. Crim. App. (continued...)

appellants' case he had reviewed the State's file, filed motions for disclosure of prior convictions and discovery, talked to witnesses about the facts of the case, reviewed appellant's video confession, and talked to appellant in excess of three to four hours.

After both sides concluded, the judge felt appellant was attempting to delay the trial. Appellant had previously hired another attorney to represent him, and later became unhappy with him and the trial judge allowed the earlier attorney to withdraw. The judge then appointed Spurling. The judge found that appellant's rights were not being compromised and denied the motion to withdraw.

If a defendant is displeased with his appointed counsel, he must bring the matter to the court's attention. Then, he carries the burden of proving that he is entitled to a change of counsel. *See Malcom v. State*, 628 S.W.2d 790, 791 (Tex. Crim. App. 1982). An actual conflict of interest arises if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing another interest (perhaps his own) to the detriment of his client's interest. *See Ex parte Marrow*, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997), *petition for cert. filed*, 66 U.S.L.W. (U.S. Dec. 24, 1997)(No. 971061). The record does not show such a conflict.

There is no evidence to show that counsel did not follow through with suggestions made by appellant. Appellant only made conclusory statements about counsel's failure to communicate with him. We cannot determine if this lack of communication had a negative impact on the representation afforded appellant. Furthermore, the hearing occurred two days before trial was to begin. Neither appellant nor Spurling renewed their objections to continuing with the trial prior to jury selection.[2] It appears that any conflict that existed

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[1] (...continued)
1971), *cert. denied*, 404 U.S. 953 (1971) (lawsuit under Civil Rights Act); *Garner v. State*, 864 S.W.2d 92, 99 (Tex. App.–Houston [1st Dist.] 1993, pet. ref'd (complaint letter to bar association). Of particular concern is the possibility of a defendant filing lawsuits and grievances to delay legal proceedings or force a change of counsel. *See Dunn*, 819 S.W.2d at 519; *Perry*, 464 S.W.2d at 664.

[2] The trial judge told Spurling that he could file a handwritten or typed motion to withdraw. (continued...)

between the two was resolved prior to trial. We cannot conclude from the record that appellant satisfied his burden to show that he was entitled to a change of counsel. We overrule appellant's first point of error.

In his second point of error, appellant contends that the trial court erred by failing to hold a *Garcia* hearing after being informed of the presence of a conflict of interest between appellant and his trial counsel. We disagree.

When a conflict of interest arises, a trial court must conduct a hearing to ensure the defendant (1) is aware that a conflict of interest exists; (2) realizes the potential hazards to his defense by continuing with such counsel under the onus of a conflict; and (3) is aware of his right to obtain counsel. *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *United States v. Casiano*, 929 F.2d 1046, 1052 (5th Cir. 1991). However, the necessity for a hearing of this type is triggered only by an actual conflict. We have previously found from the testimony at the hearing did not show a conflict of interest between appellant and his appointed attorney that would warrant a full scale Garcia type hearing. Appellant's second point of error is overruled.

In his fourth point of error, appellant complains that the trial court failed to appoint counsel to represent him during the pretrial motion to withdraw hearing. Specifically, appellant contends that the pre-trial hearing should be classified as a "critical stage." We disagree.

Not every event following the inception of adversary judicial proceedings constitutes a "critical stage" so as invoke the Sixth Amendment. *Green v. State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994); *United States v. Ash*, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). To determine whether such proceedings constitute a "critical stage," the court must find that the accused required aid in coping with legal problems or assistance in meeting his

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[2] (...continued)
However, the judge explained that she would deny the motion. Spurling filed the motion two days later, and it was denied. Neither Spurling nor appellant reurged the motion orally or in writing. The fact that the motion was filed after the hearing, but before trial, does not mean the motion was reurged. Counsel was only following the courts instruction to file a written motion.

adversary. *Green*, 872 S.W.2d 720. In essence, we must scrutinize any pre-trial event with a view to ascertaining whether the presence of counsel is necessary to assure fairness and the effective assistance of counsel at trial.

Nothing occurred during appellant's motion to withdraw hearing that would require the aid of counsel to cope with any legal problems or assistance in meeting his adversary. The prosecutor was not involved, and did not participate in the hearing. Appellant did not make any admission or statement that could damage his case. The court allowed appellant and his attorney to fully air their reasons for the motion. Appellant does not provide sufficient evidence to show that he was limited during the hearing and that a new attorney would have changed the outcome. He made no request for such an attorney. Mr. Spurling later provided adequate representation during the trial. Under the circumstances, we hold that the trial court did not err by not appointing appellant another attorney during his motion to withdraw hearing. Appellant's fourth point of error is overruled.

In his third point of error, appellant contends that he was denied effective assistance from counsel when his attorney did not file a motion for probation or application for probation as required by TEX. CODE CRIM. PROC. ANN. Art. 42.12, § 4(e) (Vernon Supp. 1997). Appellant has the burden to show that his counsel's representation fell below an objective standard of reasonableness and to show that the probability, but for counsel's errors, that the trial would have resulted in a different outcome. We find that appellant was unable to discharge either burden.

For counsel to be ineffective at either the guilt/innocence or punishment phase of trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires a defendant to show: (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) the probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App.1999). In looking at these requirements, a court is

to keep in mind that the right to counsel does not guarantee an error-free counsel or counsel whose competency is judged by hindsight. *See Hernandez v. State*, 726 S.W.2d 53, 58 (Tex. Crim. App.1986).

We must first determine whether counsel's representation fell below an objective standard of reasonableness. When an appellant claims that counsel was ineffective because he failed to file an application for probation pursuant to TEX. CODE CRIM. PROC. ANN. Art. 42.12, §4(e) (Vernon Supp. 1997), he bears the burden of demonstrating: (1) that appellant was initially eligible to receive probation; (2) that counsel's advice to go to the trial judge was not given as part of a valid trial strategy; (3) that appellant's decision to have the jury assess punishment was based on counsel's erroneous advice; and (4) his decision would have been different had counsel correctly advised him about the law. *See State v. Recer*, 815 S.W.2d 730, 731-732 (Tex. Crim. App. 1991).[3]

The record shows that appellant may only have been convicted of a misdemeanor offense and would have been eligible to receive probation from a jury. It appears that counsel believed that appellant's prior conviction was a felony. Even so, the record does not provide any evidence of whether counsel's decision to go to the jury for punishment without the option of probation was part of trial strategy, or whether appellant's decision would have been different if counsel advised him of the law.

Appellant argues that the only strategical choice to be made is to obtain the lowest possible punishment. However, this is not always true. Appellant may not have been able to fulfill the obligations imposed on probation, and hoped for a lighter prison sentence from a jury, rather than a stiffer sentence from the judge on a revocation of probation. But rather than speculate as to trial counsel's strategy, the record must clearly show why counsel did not file the application. Without such evidence, we cannot determine whether his action was based on

[3] We adopt the standard used in *Recer* to evaluate the objective standard of reasonableness of counsel. We find the standard applicable to either judge or jury ordered community supervision cases under Art. 42.12 of the Code of Criminal Procedure.

strategy or the result of negligent conduct. *See Thompson v. State*, 1999 WL 812394 (Tex. Crim. App.).

Based on the record before us, we hold that appellant did not discharge his burden to show that counsel's representation, under these circumstances, fell below an objective standard of reasonableness. Furthermore, the record does not show the probability that, but for counsel's errors, the result of the proceeding would have been different. Regardless of whether the conviction was for a felony or misdemeanor, it could still be introduced into evidence during the punishment phase. Appellant did not file a motion for new trial, nor has there been a habeas corpus proceeding, in which appellant could further develop the record in this respect. We overrule appellant's third point of error.

In his fifth and sixth points of error, appellant contends that the trial court erred in failing to instruct the jury on the state's burden of proof on extraneous crimes and to provide a limiting instruction in the charge.

During the punishment phase, the State introduced an offense report, Municipal Court Journal Entry, and complaint for appellant's unauthorized use of a vehicle charge in Ohio. Appellant did not request an instruction on the burden of proof applicable to the extraneous offense, nor object to its absence at trial.

The trial court should not be reversed unless the defendant brings the error to the attention of the trial court. *See Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999); *See Huizar* v. State, 1999 WL 974272 (Tex. Crim. App. October 27, 1999); *See Gholson v. State*, 1999 WL 627930 (Tex. App.–Houston [14th Dist.] 1999). Since appellant failed to request any instruction, we hold that he failed to preserve error for appellate review. We overrule appellant's fifth and sixth points of error.

In his seventh point of error, appellant contends that the trial court erred by failing to define reasonable doubt for the jury in the punishment phase of the trial. Again, the record

shows that appellant neither requested a definition of "reasonable doubt" to be included in the punishment charge, nor objected to the absence of the definition. Absent a request, a reasonable doubt instruction is not required to be given at the punishment phase. *See Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999). We overrule appellant's seventh point of error.

We affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed February 3, 2000
Panel consists of Justices Draughn, Lee, and Hutson-Dunn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe L. Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.