Affirmed and Opinion filed May 4, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00485-CR

BRANDON DANIEL GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 262nd District Court
Harris County, Texas
Trial Court Cause No. 786,237

O P I N I O N

Brandon Daniel Garcia appeals a conviction for aggravated sexual assault of a child on the grounds that: (1) he was denied his right to an evidentiary hearing on his motion for new trial because it alleged issues not determinable from the record; (2) his plea was involuntary because he relied on erroneous advice from his trial counsel regarding probation; and (3) he received ineffective assistance of counsel because his trial counsel failed to investigate the case and incorrectly advised him concerning his eligibility for probation. We affirm.

Background

Appellant was charged by indictment with aggravated sexual assault of a child. He pleaded guilty to the charge without an agreed punishment recommendation from the State. The trial judge found sufficient evidence to substantiate appellant's guilt, but withheld a formal finding of guilt until a presentence investigation could be conducted.[1] Subsequently, the trial judge found appellant guilty and sentenced him to sixteen years confinement. Appellant filed a motion for new trial, which was denied without a hearing.

Hearing on Motion for New Trial

In his first point of error, appellant contends that the grounds contained in his motion for new trial gave him the right to an evidentiary hearing because there is evidence which is not determinable from the record. He requests that we abate the appeal and order the case back to the trial court for a hearing on the motion for new trial.

The right to a hearing on a motion for new trial is not an absolute right. *See Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993). Prior to obtaining a hearing on a motion for new trial, the motion must have been timely filed and properly presented to the trial judge and, if the motion alleges grounds not already in the record, it must be supported by an affidavit either of the accused or someone else specifically showing the truth of the grounds of attack. *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994); *Reyes*, 849 S.W.2d at 816. The requirement of a sufficient affidavit in support of the motion prevents "limitless fishing expeditions." *See Vyvial v. State*, 111 Tex. Crim. App. 111, 115, 10 S.W.2d 83, 85 (1928). If the motion is not supported by an affidavit made by someone with knowledge of the applicable facts, it is hearsay and is insufficient to support the motion. *See id.* at 114-15, 10 S.W.2d at 84;[2] *see also* TEX. R. EVID. 602. Although the affidavit is not required to reflect every

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[1] Appellant waived his right to a court reporter at the plea hearing.

[2] In *Vyvial*, the Court stated:

> We do not believe it should be held that one convicted of crime who makes a motion for new trial pointing out extraneous matters as grounds thereof, all of which are hearsay as to the accused, and to which he necessarily swears on information and belief, is entitled to have such motion considered without attaching the affidavit of some person who has knowledge of such matters, or unless the motion named some person as the source of the information and belief of the accused in making the

component legally required to establish relief, it must reflect that reasonable grounds exist for holding that such relief could be granted. *See Reyes*, 849 S.W.2d at 816. A conclusory affidavit does not establish reasonable grounds entitling a defendant to a hearing on the motion. *See Jordan*, 883 S.W.2d at 665. A trial court's denial of a hearing on a motion for new trial is reviewed for abuse of discretion. *See Reyes*, 849 S.W.2d at 815.

In this case, appellant filed his motion for new trial alleging ineffective assistance of counsel on various grounds.[3] The motion was timely filed,[4] properly presented to the trial judge,[5] and was supported by a single verification, signed and sworn to by appellant's appellate attorney, stating "I have read the foregoing Motion for New Trial and swear that all of the allegations of fact contained therein are true and correct."

However, each of the allegations contained in the motion is expressly based on information and belief. In addition, neither the motion nor the affidavit establish a foundation for the attorney's knowledge

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> allegations of the motion, or without stating some reason or excuse for failure to have supporting affidavits or for not procuring the names of the parties upon whose statements of fact appellant relied as the source of his information. It seems to us to hold otherwise would authorize in every case the making of general indefinite motions for new trials upon information and belief without specific averment of fact or supporting affidavit . . . .

See Vyvial, 111 Tex. at 114-15, 10 S.W.2d at 84.

3 The motion contends ineffective assistance because the trial attorney: (1) did not properly investigate the case; (2) did not properly advise appellant of the consequences of a guilty plea regarding the registration of sex offenders; (3) threatened to withdraw if appellant did not plead guilty, thus forcing appellant to plead guilty; (4) allowed inadmissible testimony of a prior out of state act that was never adjudicated; (5) failed to negotiate a plea bargain; and (6) failed to properly advise appellant that the court could not grant probation following a plea of guilty to aggravated sexual assault of a child.

4 *See* TEX. R. APP. P. 21.4 (stating that a defendant must file a motion for new trial within thirty days of the date the trial court imposes or suspends sentence in open court).

5 *See* TEX. R. APP. P. 21.6 ("Defendant must present the motion for new trial to the trial court within 10 days of filing it, unless the trial court in its discretion permits it to be presented and heard within 75 days from the date the court imposes or suspends sentence in open court"). A certificate of presentation was attached to the motion reflecting that the motion had been properly presented to the trial court. The portion of the motion provided for the trial court to set a hearing date was marked "denied."

of the allegations contained in the motion.[6] Under these circumstances, the motion and verification did not establish that there was a witness who could testify to any of the facts alleged in the motion. Without such a witness, there was no reason to conduct a hearing. Therefore, denial of a hearing on appellant's motion for new trial was not an abuse of discretion, and appellant's first point of error is overruled.

Involuntary Plea and Ineffective Assistance of Counsel

Appellant's second and third points of error contend that his plea was involuntary and that he was denied effective assistance of counsel because his trial counsel misinformed him that he was eligible for probation, and appellant relied on the misinformation in entering his plea. Further, appellant argues that the trial court was obligated to inform him that he was not eligible for probation and its failure to do so also rendered his plea involuntary. In support of his argument, appellant cites to the record of the punishment hearing wherein he acknowledged that he was seeking probation and where his trial counsel requested, in his closing statement, that appellant be given shock probation or boot camp.

Generally, to prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that his counsel's performance was deficient, *i.e.*, his assistance fell below an objective standard of reasonableness, and, second, that the appellant was prejudiced, *i.e.*, there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The burden falls on the appellant to show ineffective assistance of counsel by a preponderance of the evidence. *See Thompson*, 9 S.W.3d at 813. The sufficiency of an attorney's assistance is measured by the totality of the representation. *See id.* Also, the record of the case must affirmatively demonstrate the alleged ineffectiveness. *See id.* An appellate court may not speculate on the reasons for trial counsel's actions; when the record contains no evidence of those reasons, we cannot conclude that counsel's performance was deficient. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). In reviewing claims of ineffective assistance of counsel, scrutiny of counsel's performance must be highly deferential. *See Strickland*, 466 U.S. at 689; *Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999), *cert. denied*, 120 S.Ct. 803 (2000).

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[6] *See* TEX. R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter").

Defense counsel's misinformation concerning probation may render a guilty plea involuntary if the defendant shows that his plea was actually induced by the misinformation. *See Brown v. State*, 943 S.W.2d 35, 42 (Tex. Crim. App. 1997). However, a defendant's claim that he was misinformed, standing alone, is not enough for us to find a plea involuntary. *See Fimberg v. State*, 922 S.W.2d 205, 208 (Tex. App.–Houston [1st Dist.] 1996, pet. ref'd). Rather, when a defendant enters his plea on advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and, if not, whether a reasonable probability exists that, but for counsel's errors, the defendant would not have entered a guilty plea and would have insisted on going to trial. *See Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

In this case, appellant's allegations rest primarily on his argument that he was not eligible for *any* form of probation under section 3g, article 42.12, of the Texas Code of Criminal Procedure (the "Code").[7] There are essentially three forms of probation available under the Code: (1) "regular" probation or community supervision; (2) "shock" probation; and (3) deferred adjudication probation. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12 (Vernon 1979 & Supp. 2000); *West v. State*, 702 S.W.2d 629, 634 (Tex. Crim. App. 1986), *withdrawn on procedural grounds, Domanski v. State*, 725 S.W.2d 718 (Tex. Crim. App. 1987). All three forms are independent of the others in that a defendant may be eligible for one or two of them, but not the other. *See West*, 702 S.W.2d at 634. The term "probation" is used to refer to each form interchangeably. *See id.*; *Rodriguez v. State*, 939 S.W.2d 211, 220 (Tex. App.–Austin 1997, no pet.). Persons adjudged guilty of aggravated sexual assault of a child, such as appellant, are not eligible for regular probation, or community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g(a)(1)(E) (Vernon Supp. 2000). Nor is a defendant adjudged guilty of this crime eligible for "shock probation" or for shock "boot camp." *See id.* art. 42.12, §§ 6, 8. However, a defendant convicted of aggravated sexual assault of a child *is* eligible for deferred adjudication probation

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[7] Section 3g provides that a defendant adjudged guilty of certain offenses under the Penal Code is ineligible for community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3g. Aggravated sexual assault is one of those offenses. *See id.*

under article 42.12, section 5. *See id*. § 5; *Cabezas v. State*, 848 S.W.2d 693, 694 (Tex. Crim. App. 1993). Therefore, although appellant is correct in his assertion that he was ineligible for community supervision probation under section 3g, he *was* eligible for deferred adjudication probation under section 5.

Although appellant claims that he was improperly advised by trial counsel as to his eligibility for probation, there is no evidence in the record to indicate what, if anything, counsel's advice had been on that. Appellant did not file a motion for probation and, because he waived the court reporter's presence during the plea hearing, there is nothing in the record to reflect the type of probation appellant sought or what his expectations regarding probation were at the time of entering his plea. Appellant later testified during the punishment hearing that he was seeking "probation"; however it is not apparent whether that was deferred adjudication, under section 5, or, erroneously, community supervision under section 3.[8] Also, although it is true that trial counsel requested shock probation or boot camp at the punishment hearing and that appellant was not eligible for either, the making of such a request does not itself establish that trial counsel had erroneously advised appellant that he was eligible for those types of probation.[9] On the basis

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[8] Relying on *Harrison v. State*, 688 S.W.2d 497 (Tex. Crim. App. 1985), appellant contends that requesting "probation" cannot be interpreted to mean a request for deferred adjudication. In *Harrison*, the appellant had pleaded guilty to aggravated robbery and was ineligible for regular probation. The appellant argued that the trial court had improperly admonished him when it advised him that he might or might not be given probation. *See id*. at 498. The State argued that it was a proper admonishment because the trial court *could have* been considering deferred adjudication. *See id*. at 499. The court rejected the State's argument because there was no evidence in the record that any party was considering deferred adjudication and to conclude the admonishment was proper on that basis would require "pure speculation." *See id*. Therefore, we disagree with appellant's reading of *Harrison*, particularly in light of current case law which acknowledges that these terms are used interchangeably. *See Rodriguez v. State*, 939 S.W.2d 211, 220 (Tex. App.–Austin 1997, no pet.). As in *Harrison*, we decline to speculate as to what type of probation the parties intended.

[9] We are unaware of any cases holding - based on similarly scarce records - that an inappropriate or inopportune request to the court sufficed as evidence of erroneous advice and thus ineffective assistance under *Strickland*. Although appellant refers us to several cases in support of his argument, the record in appellant's case differs significantly from the facts of those cases. *See Turner v. State*, 755 S.W.2d 207 (Tex. App.–Houston [1st Dist.] 1988, no pet.) (appellant's desire for probation was clearly evidenced in the record, having filed a motion for probation and election for the jury to assess punishment, having successfully challenged several venire members for cause because of their inability to consider probation, and having testified during punishment to establish his eligibility for

of this record, appellant has not met his burden under *Strickland* to establish his claims of ineffective assistance by a preponderance of the evidence.

Further, because there is no evidence as to what counsel's advice may have been, there is no evidence that appellant's guilty plea was induced by the advice. Thus, we cannot determine if counsel's advice was within the range of competence demanded of attorneys or whether a reasonable probability exists that, but for counsel's errors, the defendant would not have entered a guilty plea.[10] Nor is there evidence in the record indicating that the plea was entered into with an understanding that probation was available. Additionally, although appellant stated during the punishment phase that he was *then* seeking probation, this did not reflect the voluntariness of his previous plea.

The record similarly fails to support appellant's additional claims of ineffective assistance of counsel. There is no indication in the record as to how trial counsel failed to adequately investigate the case, nor is there any information about any witnesses he failed to call or what they might have contributed to appellant's defense. There is likewise nothing in the record to evidence his claims that trial counsel failed to pursue a plea bargain or whether he even discussed the matter with appellant.

Finally, appellant asserts that because it was clear during the punishment phase that he was seeking probation, the court had a duty to admonish him at that point of its unavailability and the court's failure to do so contributed to the involuntariness of his plea. Generally, a trial court has no duty to admonish a defendant as to the possibility of probation. *See Harrison v. State*, 688 S.W.2d 497, 499 (Tex. Crim. App. 1985). However, a trial judge is required however to warn a defendant concerning his ineligibility for probation if the defendant hopes to receive and actively seeks probation. *See Gomez v. State*, 681

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probation); *Ex parte Canedo*, 818 S.W.2d 814 (Tex. Crim. App. 1991) (a post-conviction writ case wherein appellant had an affidavit from his trial counsel which stated that he had erroneously advised appellant that he was eligible for shock probation); *Ex parte Battle*, 817 S.W.2d 81 (Tex. Crim. App. 1991) (a post-conviction writ case wherein the appellant supported his claims of ineffective assistance with sworn affidavits from his trial counsel and himself).

10 Even assuming, for the sake of argument, that trial counsel had erroneously advised appellant that he was eligible for either of the unavailable forms of probation, appellant has failed to establish that this advice prejudiced him, particularly because he has failed to show that deferred adjudication, the form of probation he was eligible for, is less desirable than shock probation or boot camp, and that he would have therefore withdrawn his plea had he known that he was eligible only for deferred adjudication and not for shock probation or boot camp.

S.W.2d 814, 816 (Tex. App.–Houston [1st Dist.] 1984, no pet.). In this case, because there is no record of the original plea hearing, we cannot determine what type of probation appellant was then seeking, if any, and therefore, whether the court had any duty in the matter. Because the record is therefore insufficient to support appellant's assertions under his second and third points of error, those points are overruled, and the judgment of the trial court is affirmed.

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Richard H. Edelman
Justice

Judgment rendered and Opinion filed May 4, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
Do not publish — TEX. R. APP. P. 47.3(b).