Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00060-CR

OCTAVIANO L. ARREDONDO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 232nd District Court
Harris County, Texas
Trial Court Cause No. 776,780

O P I N I O N

Octaviano Arredondo appeals a conviction for felony assault on a public servant on the grounds that: (1) his trial counsel's failure to pursue the issue of appellant's competency constituted ineffective assistance of counsel; (2) the trial court committed reversible error in failing to *sua sponte* conduct a competency hearing; (3) trial counsel's failure to pursue an insanity defense constituted ineffective assistance of counsel; and (4) appellant received ineffective assistance of counsel at the penalty stage due to cumulative error. We affirm.

Background

Responding to a call, Officer J. D. Ramirez of the Houston Police Department had seen appellant running out of some bushes with a knife, thrusting it towards another individual. Ramirez called for appellant to stop and drop the weapon. However, after spotting Ramirez, appellant began running away and eventually threw the knife over a fence. When Ramirez attempted to take him into custody, appellant took a swing at Ramirez and they began struggling. During the struggle, appellant was hitting Ramirez in the face, kicking him, and yelling "Shoot me. Shoot me. Shoot me." Appellant also attempted to retrieve another knife holstered to his waist. Ramirez finally subdued appellant and took him into custody.

Appellant was charged with the felony offense of aggravated assault, enhanced with one prior felony conviction. Appellant waived his right to a jury trial and pleaded not guilty. After appellant was found guilty, he pled true to the enhancement paragraph and was sentenced to ten years confinement.

Trial Court's Duty Under 46.02

We address appellant's second point of error first. That point argues that because his mental illness was apparent to the trial court, the trial court abused its discretion by failing to *sua sponte* conduct a pretrial competency hearing or abate the trial proceedings for a competency hearing.

A person is incompetent to stand trial if he does not have sufficient present ability to consult with his attorney with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against him. *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, §1(a) (Vernon 1979).[1] A defendant is presumed competent to stand trial unless proved incompetent by a preponderance of the evidence. *See id*. §1(b). If evidence of a defendant's incompetency comes to the attention of the trial court at any point before sentencing, the trial court must conduct a hearing on the defendant's competency. *See* TEX. CODE CRIM. PROC. ANN. art. 46.02 §(2)(a), (b), 4(a), (c) (Vernon 1979).

In determining whether there is sufficient evidence to conduct a competency hearing, the trial court is to consider only the evidence tending to show incompetency, and not evidence showing competency. *See Moore v. State*, 999 S.W.2d 385, 393 (Tex. Crim. App. 1999), *cert. denied*, 120 S. Ct. 2220 (2000). The same standard is applied whether the issue of competency is presented pre-trial or during trial.

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[1] References to statutes will be to the versions in effect at the relevant times.

See id. A trial court's decision whether to conduct a competency hearing is reviewed for abuse of discretion. *See id.*

Information necessary to sufficiently raise the issue of appellant's incompetency must be specific and illustrative of counsel's present inability to communicate with the defendant. *See id.* at 394. It is not enough for counsel to allege unspecified difficulties in communicating with the defendant. *See id.* Moreover, prior hospitalization and treatment for depression do not *per se* warrant a competency hearing. *See id.* at 395. To raise the issue of competency by means of a defendant's past mental health history, there generally must be evidence of recent severe mental illness or bizarre acts by the defendant or of moderate retardation. *See id.* A trial court is within its power to find a defendant competent without a hearing despite evidence of prior hospitalization when such evidence fails to indicate adequately either severe mental illness or recent impairment. *See id.* Furthermore, evidence of mental impairment alone does not require a competency hearing where no evidence indicates that a defendant is incapable of consulting with counsel or understanding the proceedings against him. *See id.* It is within the purview of the trial judge to distinguish evidence showing only impairment from that indicating incompetency as contemplated by the law. *See id.* at 396.[2]

In this case, appellant asserts that the "record as a whole" should have raised a bona fide doubt as to his competency.[3] The record, according to appellant, consisted of his two motions for competency evaluations, motions for sanity evaluations, and records from and recent history at Rusk State Hospital. Appellant's motions requesting psychological examination lists three reasons for his requests: (1) appellant's recent history at Rusk State Hospital; (2) appellant's having received serious blows to his head and face; and (3) appellant's claim to not remember anything. Although the evidence relied on by appellant indicates a history of mental illness, it is not probative of whether he was able to effectively consult with his

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[2] A trial judge's appointment of a disinterested expert is also dependent on a finding of evidence which raises the issue of appellant's incompetence. *See Collier v. State*, 959 S.W.2d 621, 625 (Tex. Crim. App. 1997).

[3] Although appellant filed a motion requesting a psychiatric examination for the purpose of determining his competency to stand trial, and the court ordered the examinations, that order did not constitute a determination that appellant's competency was an issue. *See Rodriguez v. State*, 816 S.W.2d 493, 495 (Tex. App.– Waco 1991, pet. ref'd).

attorney or to understand the nature of the proceedings against him. *See Moore*, 999 S.W.2d at 394-95. Because the evidence is thus insufficient to establish that the trial court abused its discretion by failing to conduct a competency hearing, appellant's second point of error is overruled.

Ineffective Assistance of Counsel

Appellant's first, third, and fourth points of error argue that he was denied effective assistance of counsel for various reasons. We begin by reciting the principles common to these three points.

Standard of Review

To prevail on a claim of ineffective assistance of counsel, an appellant must show first, that counsel's performance was deficient, *i.e.*, his assistance fell below an objective standard of reasonableness, and second that appellant was prejudiced in that 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. 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). The sufficiency of an attorney's assistance is measured by the totality of the representation. *See Thompson*, 9 S.W.3d at 813. Also, the record of the case must affirmatively demonstrate the alleged ineffectiveness. *See id.* An appellate court is not required to speculate on trial counsel's actions; when the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude that his performance was deficient. *See Jackson v. State*, 973 S.W.2d 954, 957-58 (Tex. Crim. App. 1998).

Appellant's first point of error complains of his trial counsel's failure to "vigorously pursue" the issue of appellant's competency to stand trial. Although a court appointed psychologist found appellant competent, he asserts that the evidence of his severe and chronic mental illness, a diagnosis of chronic schizophrenia, his prescriptions for antipsychotic and other medications, and his confusion and mental illness apparent on the face of the record during trial reflect that his trial counsel's failure to "vigorously" pursue incompetency constitutes ineffective assistance of counsel.

Appellant's trial counsel filed a pre-trial Motion for Psychiatric Examination: Competency on March 3, 1998, which was granted by the court. Appellant was examined by Dr. Laval, a court appointed psychologist, who determined that appellant was competent to stand trial.[4] Appellant's trial counsel filed a second pre-trial motion on May 19, 1998, requesting an independent psychiatric examination to determine appellant's competency to stand trial.[5] Although the motion was granted, appellant was again examined by Dr. Laval[6] who again determined appellant was competent to stand trial.[7] Prior to trial, defense counsel also had appellant's medical records from Rusk State Hospital admitted in to the record. At the conclusion of the State's case, defense counsel called two witnesses, appellant and appellant's sister, who both testified regarding appellant's previous hospitalization, behaviors, and medications.

There is no indication in the record as to trial counsel's reasons for not pursuing the issue of appellant's competence further.[8] Nor has appellant cited any evidence refuting Laval's determinations of competence or otherwise showing that counsel's failure to contest them further was unreasonable.[9]

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4 A similar motion was filed requesting that appellant be examined to determine the appellant's sanity at the time of the offense. The motion was granted and the resulting evaluation, also dated April 1, 1998, concluded that appellant was sane at the time of the offense.

5 In this motion, among the reasons listed for requesting the examination was "defense counsel has lingering doubts" about appellant's competency based upon, among other things, appellant's "somewhat incredible claims" that various people were trying to kill him.

6 Appellant does not assign error to trial counsel's decision to allow the second exam to be performed by Laval, rather than a different doctor.

7 A second motion was also filed to determine appellant's sanity and, again, Dr. Laval concluded appellant was sane at the time of the offense.

8 *See, e.g.*, *Thompson*, 9 S.W.3d at 813-15 (concluding that because the record was silent as to why appellant's trial counsel failed to object to the State's attempts to elicit inadmissible hearsay, the record was insufficient to determine the effectiveness of counsel); *Jackson*, 973 S.W.2d at 957 (concluding that the appellant had not met his burden to develop the record to establish his claim).

9 *See Durst v. State*, 900 S.W.2d 134, 141 (Tex. App.– Beaumont 1995, pet. ref'd) (finding that trial counsel had sufficiently pursued defendant's competency by filing the appropriate motions for psychiatric examinations and concluding that counsel's reliance on the results of those evaluations was reasonable). Moreover, appellant's counsel was obviously in a position to appreciate whether appellant could communicate effectively with him and understand the nature of the proceedings.

Therefore, appellant has failed to demonstrate that his counsel's failure to pursue his incompetency further was deficient or harmful,[10] and his first point of error is overruled.

Sanity

Appellant's third point of error argues that because of the amount of evidence establishing his mental illness, such as ongoing auditory hallucinations, bizarre behavior, memory problems and paranoia, and the fact these problems were diagnosed close to the time of the charged offense, trial counsel's failure to pursue an insanity defense constituted reversible error. Unlike appellant's first point of error, the record does indicate why counsel did not pursue an insanity defense. After closing arguments, the following discussion took place:

> THE COURT: [J]ust for clarification you're not offering this as evidence in (sic) insanity, are you?
>
> COUNSEL: In an abundance of caution, I filed a notice of intent to offer that defense. I don't think in light of Mr. – Dr. Laval's evaluation, I don't think the evidence supports that. That would be my summation of the evidence.

Again, although it may be apparent from the record that appellant had a history of mental illness, this does not establish that he was insane. There is no evidence in the record to indicate that appellant did not know his assault against Ramirez was wrong.[11] After requesting two evaluations, both indicating that appellant was sane, trial counsel declined to pursue an insanity defense further, making a judgment that

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[10] Although appellant asserts that the result of the trial would "probably have been different but for trial counsel's failure to pursue the incompetency issue," he also argues that a harm analysis is inappropriate in this context because the failure to pursue a defendant's incompetency is a "structural defect," tainting the entire trial process. However, he has cited no authority so holding, and ineffective assistance claims are generally regarded as "trial errors" rather than "structural defects"in the trial process. *See Starr v. Lockhart*, 23 F.3d 1280, 1291-92 (8th Cir. 1994).

[11] For this purpose, a defendant is insane if, at the time of the conduct charged, he did not know that his conduct was wrong as a result of severe mental disease or defect. *See* TEX. PEN. CODE ANN. § 8.01(a) (Vernon 1994). "Mental disease or defect" does not include an abnormality manifested by repeated criminal or otherwise antisocial behavior. *See id.* § 8.01(b).

further pursuit of the issue was futile.[12] We cannot conclude on the basis of this record that this decision amounted to deficient performance or that further pursuit of an insanity defense would have been successful. Therefore, we overrule appellant's third point of error.

Cumulative Error

Appellant's fourth point of error contends that he was denied effective assistance of counsel at the penalty stage of trial due to cumulative error.[13] The errors complained of are: (1) failing to object to, or eliciting, inflammatory, prejudicial, and irrelevant evidence during the guilt-innocence phase of trial; (2) stipulating to prior criminal convictions which should have been challenged as void due to the absences in the records of jury trial waivers; and (3) failing to object to, and assenting to, improper and prejudicial argument by the State.[14] As appellant acknowledges, both prongs of the *Strickland* test are applied to ineffective assistance of counsel claims alleging deficiency of attorney performance at non-capital sentencing proceedings. *See Hernandez v. State*, 988 S.W.2d 770, 770 (Tex. Crim. App. 1999). Therefore, appellant is required to show prejudice in addition to deficient performance. *See id*. at 772.

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[12] *See Durst*, 900 S.W.2d at 141 (concluding that trial counsel's reliance on a court-appointed expert's report, which stated that the appellant was both competent and sane, was not ineffective assistance of counsel).

[13] Although appellant claims ineffective assistance during the penalty stage, each alleged error occurred during the guilt-innocence phase of the proceeding rather than the penalty stage. We thus interpret appellant's argument as being that he received a greater sentence because of alleged errors of counsel during the guilt-innocence stage.

[14] Roughly a week before the submission date of this case, appellant moved for leave to file an amendment to his brief. This amendment sought to add another category of convictions to which appellant claims his trial counsel was deficient in failing to object. We deny leave to file this untimely amendment asserting a new ground for relief.

For each of appellant's claim's, including that counsel failed to object to[15] and elicited inadmissible

[15] The complained of testimony consisted of the following:

> PROSECUTOR: [W]as there anything before [the charged offense] that you had an altercation with [appellant]?
>
> WITNESS: I had spoken with him.
>
> * * * *
>
> PROSECUTOR: You mentioned that you called the police. Was it regarding anything that happened right at that time?
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> * * * *
>
> WITNESS: Why did I call [the police]? Because . . . that week they had threatened my grandfather to shoot him with a gun and I was – I approached an officer as I was pumping gas and he said you need to file a complaint so it will be on record. In case something ever does happen it will be on record so that was my reason for calling the police on Saturday.

testimony,[16] there is no indication in the record why trial counsel acted as he did and we cannot speculate as to his actions. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

In addition, regarding his second claim, defense counsel filed a stipulation of evidence regarding various prior convictions which the prosecution had intended to use, pursuant to Rules 404(b) and 609 of the Texas Rules of Evidence and article 37.07 of the Texas Code of Criminal Procedure. These prior convictions[17] included several which appellant claims were void such that his trial attorney's failure to challenge them was ineffective assistance of counsel. Appellant asserts that these convictions were void

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[16] Appellant complains of several portions of testimony elicited by defense counsel including the following:

> DEFENSE COUNSEL: Did you remember I asked – I asked one of the police officers who was here earlier about something that happened up on a roof. Did you have a situation –
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> APPELLANT: I got mad cause my neighbor kept going across the street. . . . After his wife took him to work he would go across the street every day and drink coffee and I can't do that. They won't let me in the house that's why I 'm getting mad.
>
> DEFENSE COUNSEL: And what did you do because of that?
>
> APPELLANT: I went on top of his roof and started tearing up his roof.
>
> DEFENSE COUNSEL: All right. What were you wearing while you were up on the roof?
>
> APPELLANT: I took everything off but my shorts. I took everything off.
>
> DEFENSE COUNSEL: All right. And do you remember what month that happened?
>
> APPELLANT: No. It was a month before I got arrested, I think . . . .

Additional testimony which appellant complains of is as follows:

> DEFENSE COUNSEL: Now, you told the judge about his reputation for stealing things. Are you aware of any reputation he might have for, you know, not being all there?
>
> WITNESS: No. I have – there's not only a stealing reputation but, I mean, there's just things that I heard from the girls that day at the scene that to me that I would perceive someone to be a pedophile – where you say he was going to an elementary school asking for a little girl and the teachers come out, "Who are you," and "What do you want this girl for," . . . .

Such testimony could indicate that defense counsel was attempting to elicit testimony regarding appellant's mental illness in an attempt to mitigate punishment. Additional testimony elicited by defense counsel, and complained of on appeal, similarly indicated that appellant had been trespassing in order to steal roses, puppies, and tools.

[17] These offenses include resisting arrest, DWI, and possession of marijuana.

and inadmissible because the language in each judgment and sentence are insufficient to indicate a proper jury waiver.[18] However, the convictions which appellant complains of were not used for enhancement purposes, and appellant has failed to cite authority to establish that such a deficiency would render the prior convictions void or that they could be collaterally attacked in this proceeding on the grounds asserted by appellant.

Appellant lastly complains that counsel was ineffective for failing to object to the following argument by the State:

> PROSECUTOR: [T]his is one of the cases where it doesn't rest so much on punishment as it does rest on protecting the public. This gentleman was a menace to his neighbor. Attacking with knives and I would ask you just to speculate a little bit what might have happened if the officer might not have arrived at the moment he did. . . . for the sake of the safety of the citizens of that neighborhood and the State of Texas I just ask for a protection from the – for the citizens.

A proper jury argument must fall within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and, (4) plea for law enforcement. *See Guidry v. State*, 9 S.W.3d 133, 154 (Tex. Crim. App. 1999). Here, the overall comment made by the State fell within the category of a plea for law enforcement, and the suggestion to "speculate" as to what might have happened had Ramirez not come along called for a reasonable deduction from the evidence. Because appellant has thus failed to establish any of his grounds for cumulative error, the cumulative effect of those non-errors do not create error. *See Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999), *cert. denied*, 120 S. Ct. 805 (2000). Accordingly, appellant's fourth point of error is overruled, and the judgment of the trial court is affirmed.

Richard H. Edelman
Justice

[18] Appellant relies on *Samudio* as authority that these convictions are inadmissible for lack of a jury waiver. *See Samudio v. State*, 648 S.W.2d 312 (Tex. Crim. App. 1983). However, *Samudio* dealt with the adequacy of jury waiver on direct appeal.

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Edelman, Draughn, and Lee.[19]

Do not publish — TEX. R. APP. P. 47.3(b).

[19] Senior Justices Joe L. Draughn and Norman R. Lee sitting by assignment.