Affirmed and Opinion filed September 28, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01198-CR

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KERVIN IRWIN JOHN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 772,554

O P I N I O N

Kervin Irwin John appeals his jury conviction for the unauthorized use of a motor vehicle. TEX. PEN. CODE ANN. § 31.07 (Vernon 1994 & Supp. 2000). The jury assessed his punishment at two years confinement in a state jail facility. In two points of error, appellant contends: (1) the trial court erred in denying his requested jury charge on the issue of probation, and (2) appellant's trial counsel was ineffective because she failed to properly request probation and prove up appellant's eligibility for probation. We affirm.

Because appellant challenges only the denial of a requested jury charge at the punishment stage and ineffective assistance of counsel at the punishment stage, a complete

recitation of the facts is unnecessary. On January 12, 1998, appellant was stopped for running a red light. The officer determined the vehicle was stolen, and appellant admitted to having stolen the vehicle and driving it without the owner's permission. He was charged with unauthorized use of a motor vehicle.

After the jury retired to deliberate the guilt or innocence of appellant, appellant's trial counsel orally requested that "the probation charge be placed in the punishment charge." The trial court denied the request. At the trial of the punishment phase, appellant called the complainant as a witness to testify that he was not opposed to the jury recommending appellant be given probation. Before the complainant could answer appellant's question, the trial court interrupted and told both counsel that the jury could not recommend probation in this case, and suggested that the State object to appellant's line of questioning. The State objected, the trial court sustained the objection, and the trial court heard no further testimony from the complainant.

In point one, appellant contends the trial court erred by not giving the jury the option to recommend that imposition of any confinement as punishment be suspended and that he be placed on community supervision. TEX. CODE CRIM. PROC. ANN. art. 42.12, Sec. 4(a) (Vernon 1979 & Supp. 2000). This contention is without merit.

An offense under section 31.07, Texas Penal Code (unauthorized use of a motor vehicle), is a state jail felony. Punishment for state jail felonies is governed by section 12.35 of the Penal Code. TEX. PEN. CODE ANN. § 12.35 (Vernon 1994 & Supp. 2000). Procedures for state jail felony community supervision are governed by article 42.12, § 15, Texas Code of Criminal Procedure. Section 4(d)(2), of article 42.12, Texas Code of Criminal Procedure provides: "A defendant is not eligible for community supervision under this section if the defendant: . . . is sentenced to serve a term of confinement under Section 12.35, Penal Code [state jail felony]."

Appellant relies on Article 42.12, § 4, which is inapplicable in the present case. Appellant was charged for an offense committed on January 12, 1998, and the 1997 amendments to article 42.12, section 15, Texas Code of Criminal Procedure, apply to his case. Section 15(a) provides: "[O]n conviction of a state jail felony punished under Section 12.35(a), Penal Code, the *judge may suspend* the imposition of the sentence and place the defendant on community supervision or *may* order the sentence to be executed (emphasis added)." *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(a) (effective September 1, 1997); *Rhodes v. State*, 997 S.W.2d 692, 695 (Tex.App.-Texarkana 1999, pet. ref'd). Appellant does not contend that the trial court abused its discretion by failing to suspend the imposition of the jury's assessment of two years. The trial judge clearly had discretion to suspend or impose the sentence under section 15(a), and he chose not to place appellant on community supervision. Finding no error in the procedures applied by the trial court at the punishment stage, we overrule appellant's point of error one.

In point two, appellant contends his trial counsel was ineffective for failing to prove up his eligibility for probation and properly request that the jury be allowed to consider a recommendation for his probation. Appellant cites *Snow v. State*, 697 S.W.2d 693(Tex.App.–Houston[1st Dist.] 1985, no pet.) for the proposition that a "properly requested jury charge on probation may have changed the outcome of the case."

As we discussed above, under point one, the trial court had no authority to allow the jury to consider a recommendation for probation because appellant was charged with a state jail felony. Therefore, the only way appellant could get probation would be if the trial court decided to suspend appellant's sentence and place him on community supervision under section 15, article 42.12. The trial court chose not to do so and imposed sentence based on the jury's assessment of appellant's punishment.

In his brief, appellant assumes that he had a right to have the jury consider recommending his probation. He cites no authority to support this argument, and article 42.12, section 4(d)(2), Texas Code of Criminal Procedure, provides that appellant was not

eligible for community supervision under that section which provides for jury recommended community supervision. We find that point of error two is inadequately briefed, and appellant has not met his burden to overcome the presumption that counsel's representation was reasonable. TEX. R. APP. P. 38.1(h); *see Garcia v. State*, 887 S.W.2d 862, 880-881 (Tex.Crim.App. 1994), *cert. denied*, 115 S.Ct. 1368 (1995). We overrule appellant's point of error two.

The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed September 28, 2000.
Panel consists of Justices Robertson, Sears, and Hutson-Dunn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn, sitting by assignment.