Affirmed and Opinion filed March 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00745-CR

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STANLEY LOMONTE SNOWDEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 767,607

O P I N I O N

Appellant, Stanley Lomonte Snowden, appeals his conviction for aggravated robbery. A jury found him guilty and sentenced him to twenty years confinement. He argues on this appeal that (1) the trial court abused its discretion in failing to hold a pre-trial competency hearing based on a pre-trial motion for psychiatric examination and the allegations therein, and that (2) he was denied effective assistance of counsel. We affirm.

Background

Appellant and two accomplices endeavored to rob a "dope house." The complainant, Sean Anthony Davis, lived at the house they selected. Davis freely admitted using his house for the sale of narcotics. He heard a disturbance and went to investigate. When Davis first noticed a gun shoved between his eyebrows, he thought it just a toy. When reality set in, he grabbed the barrel, but couldn't quite wrest it free. He successfully retreated to his bedroom. There serendipity found his AK-47 laying on the bed. Freshly fortified and barrel blazing, Davis re-entered the fray. In the meantime, suspecting their welcome worn out, appellant and company hastily made their exit. Davis eagerly followed and peered out the front door, where he saw two parting shots come from the car of his erstwhile guests. Not to be outdone, Davis retaliated with some fifteen rounds. When the shooting ended, one of appellant's accomplices lay dead and appellant was wounded. He was found on the porch of a nearby house, blood spattered his face, and clenching a wad of money.

Competency Hearing

Appellant filed a pre-trial motion requesting a psychiatric examination for competency. The motion stated:

> [Appellant has] been shot in head (sic) and bullet fragments still remain inside of it. As a result of this injury, he has periodic loss of memory and seizures which has cause (sic) a guardian to be appointed for him. He has a problem remembering the factual account of the offense charged.

No evidence was attached to the motion. It was granted by the court, however, the record does not reflect that a psychiatric exam was ever conducted. Appellant argues the court should have held a competency hearing because, by granting the motion, it "implicitly found that the issue of appellant's competency to stand trial was sufficiently in question to raise a *bona fide* doubt and require psychiatric evaluation." He further submits that "the allegations in appellant's motion caused the court to doubt appellant's competence to stand trial."

We apply an abuse of discretion standard in deciding whether the court erred in not conducting a competency hearing. *Ainsworth v. State,* 493 S.W.2d 517, 521 (Tex. Crim. App. 1973); *Thompson v. State,* 915 S.W.2d 897, 901 (Tex. App.–Houston [14th Dist.] 1996, pet ref'd). The test for competency is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether the accused has a rational as well as a factual understanding of proceedings. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1(a). A defendant is presumed competent to stand trial unless he proves his incompetency by a preponderance of the evidence. TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1(b); *Sallings v. State,* 789 S.W.2d 408, 411 (Tex. App.--Dallas 1990, pet. ref'd). Article 46.02, § 2 requires the trial court to conduct a nonjury hearing on whether to hold a jury trial on the defendant's competency if "evidence of the defendant's incompetency is brought to the attention of the court from any source." *Collier v. State,* 959 S.W.2d 621, 625 (Tex. Crim. App.1997). A competency hearing is only required if evidence brought to the judge's attention raises a bona fide doubt in the judge's mind as to the defendant's competency to stand trial. *See Collier*, 959 S.W.2d at 625. A bona fide doubt is raised only if evidence indicates recent severe mental illness, at least moderate mental retardation, or truly bizarre acts by the defendant. *Id*. The trial court may rely on personal observations, known facts, evidence presented, motions, affidavits, or any other reasonable claim or credible source creating a bona fide doubt of the defendant's competency to stand trial. *Thompson,* 915 S.W.2d at 902.

Contrary to appellant's claim, the court of criminal appeals has specifically held that "the fact that psychiatric examinations are ordered by the court does not constitute a determination that an issue as to the defendant's competency exists." *Gardner v. State,* 733 S.W.2d 195, 200 (Tex. Crim. App. 1987). Nor were the bare allegations in appellant's motion sufficient to trigger the requirement to hold a competency hearing. "A motion, sworn or otherwise, is not evidence." *Nelson v. State,* 629 S.W.2d 888, 890 (Tex. App.–Fort Worth 1982, no pet.) (trial court did not abuse its discretion in failing to hold competency hearing where sworn, unsigned motion not supported by evidence). Further, mere allegations that a

defendant has problems remembering events concerning the crime are insufficient to raise the issue of incompetency. *See Kirby v. State*, 668 S.W.2d 448,450 (Tex. App.–Corpus Christi 1984, no pet.).

In light of the record, we are unable to conclude there was sufficient evidence before the trial court to raise a bona fide doubt that appellant was incompetent. Therefore, we hold the trial court did not abuse its discretion in failing to hold a competency hearing. Appellant's first issue is overruled.

Ineffective Assistance of Counsel

Next, appellant contends he was denied effective assistance of counsel. In support, he cites the following alleged shortfalls:

1. Counsel failed to file a pre-trial request for the State's intention to introduce extraneous offenses at the punishment phase.
2. Counsel failed to investigate an extraneous offense and prepare a defense of it at the punishment stage.
3. Counsel failed to object to damaging inadmissible evidence and elicited inadmissible evidence from the extraneous offense complainant at the punishment phase.
4. Counsel argued to the jury at the punishment phase that they did not deliberate fairly on guilt and accused them of not being fair.[1]

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a

[1] The appellant makes no claim of any alleged errors by counsel that adversely affected him at the guilt/innocence stage.

reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See id.*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992).

Judicial scrutiny of counsel's performance must be highly deferential and we are bound to indulge the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). In *Jackson*, the court of criminal appeals refused to hold counsel's performance deficient given the absence of evidence concerning counsel's reasons for choosing the course he did. *Jackson*, 877 S.W.2d at 772; *see also Jackson v. State*, 973 S.W.2d 954, 956-957 (Tex. Crim. App.1998) (inadequate record on direct appeal to evaluate that trial counsel provided ineffective assistance).

In this case, though appellant filed a motion for a new trial, he did not raise ineffectiveness of counsel as an issue, nor does he offer any reason for not doing so. He failed to develop evidence of trial counsel's strategy. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.–Houston[1st Dist.] 1994, pet. ref'd) (generally, trial court record is inadequate to properly evaluate ineffective assistance of counsel claim; in order to properly evaluate an ineffective assistance claim, a court needs to examine a record focused specifically on the conduct of trial counsel such as a hearing on application for writ of habeas corpus or motion for new trial). As the court of criminal appeals recently pointed out:

> A substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. In the majority of instances, the record on direct

> appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel.

Thompson v. State, No. 1532-88-CR 1999 WL 812394*9, *10 (Tex. Crim. App. October 13, 1999).

Because the record is silent as to the reasons appellant's trial counsel chose the course he did, any finding he was ineffective based on the alleged grounds would be grounded in speculation. We decline to speculate. *See Thompson* at *9*; Jackson*, 877 S.W.2d at 771.[2] Due to lack of evidence in the record concerning trial counsel's reasons for his alleged shortfalls, we are unable to conclude that his performance was deficient. Appellant has therefore not rebutted the strong presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment.

Appellant's issues claiming ineffective assistance of counsel are overruled. The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed March 2, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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[2] We note, however, that prior to the complained-of hearsay testimony about appellant's involvement in drugs, counsel properly objected to similar testimony. The judge sustained the objection and ordered the jury to disregard, but denied a mistrial. Because of this, counsel may have soundly believed further objections would be of little value or would just draw unwanted attention to the testimony. *See Ponce v. State,* 901 S.W.2d 537, 541 (Tex.App.-El Paso 1995, no pet.).