Affirmed and Opinion filed March 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00764-CR

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MOSES TORRES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 812,461

O P I N I O N

Appellant was charged by information with the felony offense of robbery. Appellant executed a waiver of indictment and entered a plea of guilty. The court found appellant guilty as charged, and assessed punishment in accordance with a plea bargain agreement at confinement in the Institutional Division of the Texas Department of Criminal Justice for eighteen years.

Appellant's court-appointed counsel filed a motion to withdraw from representation of appellant along with a supporting brief in which he concludes that the appeal is wholly frivolous

and without merit. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The brief meets the requirements of *Anders* by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d 807, 811 (Tex. Crim. App. 1978).

A copy of counsel's brief was delivered to appellant. Appellant was advised of the right to examine the appellate record and to file a *pro se* response. Appellant has filed a *pro se* response claiming four points of error. In his first two points of error, appellant contends he received ineffective assistance of counsel at trial because of counsel's failure to request a hearing on appellant's competence to stand trial. In his third point of error, appellant claims the trial court erred by failing to *sua sponte* conduct a competency hearing. In his fourth point of error, appellant alleges ineffective assistance of counsel on appeal because of appellate counsel's failure to raise on appeal the issues presented in appellant's *pro se* points of error one, two, and three.

Although appellant does not specifically challenge the voluntariness of his plea, a liberal reading of appellant's *pro se* response reveals that he is essentially claiming that his guilty plea was involuntary because he was undergoing the severe effects of sudden withdrawal from drug addiction at the time of his plea to such an extent that the plea was entered without knowledge and understanding of its consequences. Voluntariness of a plea can always be challenged on appeal as a fundamental right. *See Moore v. State*, 4 S.W.3d 269, 272 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

The burden of proving ineffective assistance of counsel falls on the appellant and such a contention must be proven by a preponderance of the evidence. *See Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984). In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel. *See Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998).

There exists a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 693 (1984). To defeat the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See McFarland v. State,* 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Indeed in a case such as this, where the alleged derelictions primarily are errors of omission rather than commission, collateral attack may be the only vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed in a record. *See Jackson v. State*, 973 S.W.2d at 957.

Because competence to enter a plea is presumed, appellant must show he lacked the ability to consult with his lawyer with a reasonable degree of rational understanding, or lacked a rational and factual understanding of the proceedings against him. *See Arista v. State*, 2 S.W.3d 444, 446 (Tex. App.–San Antonio 1999, no pet.). The record in the case at bar is silent as to why appellant's trial counsel failed to request a hearing on appellant's competence to stand trial and indeed, we can find nothing in the record indicating counsel had any reason to question appellant's competency. Counsel may not have raised the issue because he ultimately concluded appellant was competent to stand trial. *See Ryan v. State,* 937 S.W.2d 93, 104 (Tex. App.–Beaumont 1996, pet. ref'd).

Appellant waived the right to have a court reporter record his plea proceedings. The documents filed include a form in which appellant swore that he was satisfied that the attorney representing him in court that day had properly represented him and fully discussed the case. Without something in the record to indicate otherwise, appellant has failed to rebut the presumption that counsel's failure to request a competency hearing was a reasonable decision. *See Thompson v. State,* 915 S.W.2d 897, 905 (Tex. App.–Houston [1st Dist.] 1996, pet. ref'd).

We appreciate the difficulty faced by an appellant on direct appeal, where it is common for the record to be sparse in these matters. However, appellant did not seek a hearing on this issue at trial and has not sought habeas corpus relief. Without a factual basis preserved in the record, appellant has not met his burden. We cannot conclude trial counsel's inaction constituted ineffective assistance of counsel. *See Ryan v. State*, 937 S.W.2d at 104. We overrule appellant's points of error one and two.

Similarly, the record fails to demonstrate error in the trial court's failure to hold a hearing *sua sponte* on competence to stand trial. A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, sec. 1A(b) (Vernon 2000). The Texas Code of Criminal Procedure provides that if during the trial evidence of the defendant's incompetence is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetence to stand trial. *See* TEX.CODE CRIM. PROC. ANN. art. 46.02, sec. 2(b) (Vernon 1979).

In determining whether evidence is sufficient to raise a question of appellant's competency, the trial court examines only the evidence tending to show incompetence to see whether there exists some evidence, a quantity more than none or a scintilla, that may rationally lead to a conclusion of incompetence. *See Sisco v. State,* 599 S.W.2d 607, 613 (Tex. Crim. App. 1980); *Doherty v. State,* 892 S.W.2d 13, 17 (Tex.App.--Houston [1st Dist.] 1994, pet. ref'd). The trial court may rely upon personal observations, known facts, evidence presented, motions, affidavits, or any reasonable claim or credible source creating a bona fide doubt of the defendant's competency to stand trial. *See Thompson v. State,* 915 S.W.2d at 902. Each case is examined on its own facts to determine if there is evidence of recent severe mental illness, bizarre acts, or moderate retardation giving rise to incompetency. *See id.*

Appellant entered into the plea bargain in this case and signed written admonishments indicating that he was competent. In its judgment, the trial court stated that it found appellant mentally competent. The trial court's representations in the judgment raise a strong presumption that the trial court found appellant to be mentally competent and that he was acting freely and voluntarily when he entered his plea. *See Rachuig v. State*, 972 S.W.2d 170, 177 (Tex. App.–Waco 1998, pet. ref'd). These recitations are binding on appellant in the absence of direct evidence to the contrary, and appellant has the burden of overcoming the presumptions raised by the record. *See Singleton v. State*, 986 S.W.2d 645, 652 (Tex. App.–El Paso 1998, pet. ref'd). Having reviewed the record, we conclude that appellant has not overcome the presumptions raised by the recitations and other evidence in the record. Therefore, we hold that the trial court adequately satisfied itself that appellant was mentally competent and that his plea was free and voluntary. *See Rachuig v. State*, 972 S.W.2d at 177. We find that there was no abuse of discretion by the trial court in not conducting a competency hearing. We overrule appellant's third point of error.

In a fourth point of error, appellant argues that his appellate counsel rendered ineffective assistance of counsel because he filed an *Anders* brief instead of raising the above-discussed points of error. A defendant's right to assistance of counsel does not include the right to have an attorney urge frivolous claims. *See Johnson v. State*, 885 S.W.2d 641, 645 (Tex. App–Waco 1994, pet. ref'd). In cases in which counsel cannot, in good faith, advance any arguable grounds of error, counsel must file a brief containing a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d at 811. Inasmuch as we have determined that no evidence in the record supports appellant's *pro se* claims of incompetence to stand trial, appellate counsel is not ineffective for failing to assert such grounds on appeal. We overrule appellant's fourth point of error.

We have reviewed the record and appellant's *pro se* response to appellate counsel's brief. We agree with appellate counsel that the appeal is frivolous and without merit.

Appellant's *pro se* response to appellate counsel's motion to withdraw and the brief in support of the motion does not raise any arguable points of error, and our review of the record reveals none.

Accordingly, we grant counsel's motion to withdraw and affirm the judgment of the court below.

PER CURIAM

Judgment rendered and Opinion filed March 2, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
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