

COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS AT
AMARILLO

Natasha Marie Heller v. State

No. 07-06-0466-CR · No. 07-06-0466-CR · Decided March 9, 2007

SUMMARY

This is a per curiam, unpublished order from the Texas Court of Appeals for the Seventh District at Amarillo directing the trial court to file a certification of Natasha Marie Heller's right to appeal. The order notes that the clerk's record lacked the certification required by Texas Rule of Appellate Procedure 25.2(d) and sets a deadline for a supplemental clerk's record. The supplied text also contains a separate, unrelated appellate opinion concerning aggravated robbery and post-adjudication issues.

CASE DETAILS

COURT	Court of Appeals for the Seventh District of Texas at Amarillo
WRITING FOR THE COURT	Mackey K. Hancock; Campbell, J.; Hancock, J.; Pirtle, J.
JURISDICTION	Texas
DECIDED	March 9, 2007
DOCKET	07-06-0466-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a judgment adjudicating appellant guilty following deferred adjudication proceedings, sentencing appellant to fifty-five years' incarceration, and ruling on post-adjudication matters.
STANDARD OF REVIEW	Ineffective-assistance claims are reviewed under Strickland v. Washington. Counsel's performance is reviewed deferentially, with a presumption that counsel provided reasonable professional assistance and acted as a matter of sound trial strategy. Issues not preserved under Texas Rule of Appellate Procedure 33.1(a), and issues inadequately supported by record citations, are waived.
PRECEDENTIAL VALUE	Unpublished and designated do not publish; limited precedential value.
PARTIES	Natasha Marie Heller v. The State of Texas

TOPICS

appellate jurisdiction

criminal procedure

ineffective assistance

plea bargaining

preservation of error

PRACTICE AREAS

Texas criminal appellate procedure

criminal procedure

ineffective assistance of counsel

plea bargaining

QUESTIONS PRESENTED

1. Whether Reed rendered ineffective assistance by failing to communicate the State's ten-year plea offer.
2. Whether the court of appeals had jurisdiction to review Reed's appointment and alleged conflict of interest when Reed's representation ended before adjudication.
3. Whether appellant's parole eligibility was improperly calculated as though an affirmative deadly-weapon finding existed.
4. Whether Hinshaw rendered ineffective assistance by failing to include alleged constitutional errors in appellant's motion for new trial.

HOLDINGS

1. The court of appeals lacks jurisdiction to review a trial court's determination to adjudicate guilt, but may review proceedings conducted after adjudication, including sentencing and post-adjudication motions.
2. Reed's efforts to communicate the State's ten-year plea offer were within objectively reasonable professional norms and did not constitute ineffective assistance.
3. The court lacked jurisdiction to review Reed's appointment and withdrawal because they occurred before adjudication; to the extent the issue affected post-adjudication matters, appellant failed to preserve the specific conflict for review.
4. Appellant was not entitled to reformation of the judgment based on the claimed parole-eligibility calculation because the judgment contained no affirmative deadly-weapon finding and the record contained no evidence showing how parole eligibility was calculated; the inadequately supported issue was waived.
5. Appellant failed to establish ineffective assistance based on Hinshaw's failure to include alleged constitutional errors in the motion for new trial.

KEY QUOTATIONS

“The Code of Criminal Procedure expressly denies a criminal defendant the right to appeal from a trial court's determination to adjudicate guilt.” (unpaginated)

“We fail to see, and appellant has failed to show, how Reed's efforts to convey the ten year offer to appellant fell below an objective standard of professional reasonableness.” (unpaginated)

FACTUAL BACKGROUND

Counsel Reed attempted to communicate a ten-year plea offer by telephone, by obtaining appellant's contact information from the bail bonds company, and by mailing a letter to appellant's last known address. Appellant

refused to recognize Reed as counsel and sought Reed's removal based on a perceived conflict arising from Reed's prior prosecution of appellant's wife; the trial court then appointed Curtis Hinshaw. After appellant rejected a later twenty-year offer and pleaded not true to the alleged violations, the trial court found thirteen violations true, adjudicated appellant guilty of aggravated robbery, and sentenced appellant to fifty-five years' incarceration. Hinshaw later advised appellant regarding appeal and habeas-corpus remedies and filed a motion for new trial.

PROCEDURAL HISTORY

The trial court adjudicated appellant guilty after finding thirteen of nineteen alleged violations true and, after a separate sentencing hearing, imposed a fifty-five-year sentence. Appellant raised issues concerning ineffective assistance of counsel, an alleged conflict of interest, parole eligibility, and counsel's performance in connection with a motion for new trial. The court of appeals held that it lacked jurisdiction to review the adjudication decision itself but could review sentencing and post-adjudication matters, rejected the preserved claims, and affirmed.

DISPOSITION

affirmed

CASES CITED

- Thomas v. State, 129 S.W.3d 158 (Tex. App.—Eastland 2003)
- Connolly v. State, 983 S.W.2d 738, 741 (Tex. Crim. App. 1999)
- Olowosuko v. State, 826 S.W.2d 940, 942 (Tex. Crim. App. 1992)
- Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- Hernandez v. State, 988 S.W.2d 770, 770 (Tex. Crim. App. 1999)
- Stafford v. State, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991)
- Ex parte Lemke, 13 S.W.3d 791, 795 (Tex. Crim. App. 2000)
- Butler v. State, 872 S.W.2d 227, 236 (Tex. Crim. App. 1994)
- Lawton v. State, 913 S.W.2d 542, 558 (Tex. Crim. App. 1995)
- Smith v. State, 959 S.W.2d 1, 7 (Tex. App.—Waco 1997, pet. ref'd)

OPINION

PER CURIAM.

NO. 07-06-0466-CR IN THE COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS AT AMARILLO PANEL A MARCH 9, 2007 _____
NATASHA MARIE HELLER, APPELLANT V. THE STATE OF TEXAS, APPELLEE
_____ FROM THE 47TH DISTRICT COURT OF RANDALL
COUNTY; NO. 17,957-A; HONORABLE HAL MINER, JUDGE
_____ Before CAMPBELL and HANCOCK and PIRTLE, JJ.

ORDER Appellant Natasha Marie Heller appeals her conviction for the offense of aggravated assault.

The clerk's record was filed January 16, 2007. Because it did not contain a certification of appellant's right to appeal as required by Rule of Appellate Procedure 25.2(d) the clerk of this court notified the parties and the trial court of the omission the same day, requesting that a certification be filed within 30 days and included in a supplemental record.

See Tex. R. App. P. 37.1. No response has been received. Examination of the clerk's record reveals no bar to appellant's statutory right of appeal. The case was tried to a jury on appellant's plea of not guilty. Rule 25.2(a)(2) imposes a mandatory duty on the trial court to enter a certification of the defendant's right to appeal in every case in which it enters a judgment of guilt or other appealable order.

The trial court is directed to comply with that requirement and enter a certification of appellant's right to appeal, which shall be included in a supplemental clerk's record to be filed in this court no later than Wednesday, March 21, 2007. Tex. R. App. P. 34.5(c)(2), 37.1; see *Thomas v. State*, 129 S.W.3d 158 (Tex.App.-Eastland 2003) (similar order to trial court).

Per Curiam Do not publish. him the offer and that they would further discuss the matter at that time. Reed then sent a letter conveying the offer to appellant's last known address. In late September of 1999, Reed became aware that appellant was in the county jail.

However, before Reed made any contact with appellant, the trial court informed Reed that appellant wished to have him removed and new counsel appointed. As a result of this information, Reed filed a motion to withdraw as counsel, which was granted by the trial court. From the time of Reed's appointment as appellant's counsel, appellant refused to recognize Reed as his attorney.

Appellant felt that Reed's prosecution of appellant's wife for an unrelated charge created a conflict of interest. As a result of this perceived conflict, appellant made no attempt to contact Reed and requested the trial court remove Reed as counsel and appoint new counsel.

After the trial court granted Reed's motion to withdraw, it appointed Curtis Hinshaw to represent appellant. When Hinshaw contacted the State, the first plea offer that the State made was for 20 years incarceration. Appellant rejected this offer and, ultimately, pled "not true" to the alleged violations. Following the adjudication hearing, the trial court found 13 of the 19 alleged violations true and adjudicated appellant guilty of aggravated robbery.

After a separate sentencing hearing, the trial court sentenced appellant to 55 years incarceration in the Texas Department of Criminal Justice, Institutional Division. By four issues, appellant appeals. By his first issue, appellant contends that he was denied effective assistance of counsel by Reed's failure to communicate the ten year plea offer to him. By his second issue, appellant contends that

he was denied due process of law by Reed's appointment when Reed had previously represented the State in his prosecution.

By his third issue, appellant contends that he is being denied equal protection and due process because his parole eligibility date is being calculated as though an affirmative finding of a deadly weapon had been made, even though no such finding was made.

Finally, by his fourth issue, appellant contends that he was denied effective assistance of counsel by Hinshaw's failure to allege certain constitutional errors in appellant's motion for new trial. Initially, we note that the Code of Criminal Procedure expressly denies a criminal defendant the right to appeal from a trial court's determination to adjudicate guilt.

Tex. Code Crim. Proc. Ann. art. 42.12, § 5(b) (Vernon 2003); (1) *Connolly v. State*, 983 S.W.2d 738, 741 (Tex.Crim.App. 1999). Thus, to the extent appellant challenges the trial court's order adjudicating him guilty, we have no jurisdiction to address the issue.

However, we may review all proceedings conducted after the adjudication of guilt on the original charge as if the adjudication had not been deferred. See article 42.12, § 5(b); *Olowosuko v. State*, 826 S.W.2d 940, 942 (Tex.Crim.App. 1992).

Therefore, appellant may appeal issues relating to sentencing and any post-adjudication motions. Keeping in mind the aforementioned limitation on our jurisdiction, we will review appellant's first issue to the extent that Reed's alleged failure to convey the ten year plea offer may have had an effect on the trial court's sentencing of appellant.

We evaluate the effectiveness of counsel by the standard enunciated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *Hernandez v. State*, 988 S.W.2d 770, 770 (Tex.Crim.App. 1999).

To establish reversible ineffectiveness of counsel, appellant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's errors, the result would have been different. See *Strickland*, 466 U.S. at 687-88, 694. Our review of counsel's performance is highly deferential and we presume counsel provided reasonable professional assistance and that counsel's actions were the result of sound trial strategy.

See *Stafford v. State*, 813 S.W.2d 503, 506 (Tex.Crim.App. 1991). We note that, as a result of the State's motion to determine appellant's knowledge of what plea offers had been made, the record is sufficiently developed in the present case to allow our review of appellant's first issue on direct appeal. Appellant correctly contends that failure of defense counsel to inform a criminal defendant of plea offers made by the State is an omission that falls below an objective standard of professional reasonableness.

See *Ex parte Lemke*, 13 S.W.3d 791, 795 (Tex.Crim.App. 2000). However, while we acknowledge that Reed was unsuccessful in informing appellant of the ten year offer, we conclude that his efforts to convey this offer were within reasonable professional norms.

The record reflects that, at or about the time that the State extended the ten year offer, Reed attempted to contact appellant by phone, but discovered that he did not have a good phone number for appellant. Reed also contacted appellant's bail bonds company to obtain appellant's correct contact information, but the representative of the company was either unwilling or unable to provide that information.

Finally, Reed sent a letter to appellant's last known address informing appellant of the State's ten year offer. The letter sent by Reed to appellant was not returned to Reed nor did appellant contact Reed's office.

We fail to see, and appellant has failed to show, how Reed's efforts to convey the ten year offer to appellant fell below an objective standard of professional reasonableness. This is especially true when Reed's efforts are coupled with appellant's refusal to recognize Reed as his counsel and appellant's lack of cooperation with Reed. By his second issue, appellant contends that Reed's appointment as appellant's counsel created a conflict because Reed had previously represented the State in the case.

However, Reed's appointment and withdrawal occurred prior to the trial court's decision to adjudicate. Thus, we lack jurisdiction to consider the issue. See article 42.12, § 5(b); *Connolly*, 983 S.W.2d at 741. However, to the extent that the issue had any bearing on post-adjudication matters, appellant failed to inform the trial court of this specific conflict and, therefore, this issue was not preserved.

(2) See Tex. R. App. P. 33.1(a); *Butler v. State*, 872 S.W.2d 227, 236 (Tex.Crim.App. 1994). Appellant's third issue contends that his parole eligibility is being calculated as though an affirmative finding of a deadly weapon had been made.

As appellant correctly indicates, the judgment adjudicating appellant guilty of aggravated robbery does not include an affirmative finding of a deadly weapon. As the judgment is not in error, we may not reform the judgment as requested by appellant. Further, there is no evidence in the record reflecting how appellant's parole eligibility is being calculated.

Appellant has failed to adequately cite the record in support of his issue. See Tex. R. App. P. 38.1(h); *Lawton v. State*, 913 S.W.2d 542, 558 (Tex.Crim.App. 1995). Failure to provide adequate citations to the record waives an issue. See *Smith v. State*, 959 S.W.2d 1, 7 (Tex.App.-Waco 1997, pet. ref'd). Appellant's fourth issue contends that Hinshaw's representation was ineffective because Hinshaw was aware of, but did not include, several constitutional errors in appellant's motion for new trial.

We refer to the standard of review for claims of ineffective assistance of counsel, discussed above in reference to appellant's first issue, but specifically highlight the presumption that counsel provided reasonable professional assistance and that counsel's actions were the result of sound trial strategy. See *Stafford*, 813 S.W.2d at 506.

In the present case, the record contains a letter that Hinshaw sent appellant advising appellant that his best opportunity to obtain relief would be by filing an application for writ of habeas corpus. In this letter, Hinshaw further advised appellant of his right to appeal, identified the rules and deadlines applicable to a criminal appeal, advised appellant of the process for obtaining appellate counsel, identified potential issues that appellant might want to raise in either an appeal or an application for writ of habeas corpus, and enclosed a copy of a motion for new trial which Hinshaw filed on appellant's behalf.

Appellant does not explain how this advice so deviated from professional norms as to constitute ineffective assistance of counsel. Thus, we conclude that appellant has failed to overcome the presumption that Hinshaw provided appellant effective assistance of counsel in his post-adjudication motion for new trial.

For the foregoing reasons, we affirm the judgment of the trial court. Mackey K. Hancock Justice Do not publish. 1. Further reference to provisions of the Texas Code of Criminal Procedure will be by reference to "article ____." 2. During the time of Reed's representation of appellant, the only alleged conflict that appellant identified for the trial court was that Reed had previously prosecuted appellant's wife on an unrelated charge.