Reversed and Remanded on Punishment and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01082-CR

NANCY LYNN HORNELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 770,243

O P I N I O N

After entering a guilty plea and waiving her right to a jury trial, the trial court found Nancy Lynn Hornell, appellant, guilty of theft. *See* TEX. PEN. CODE ANN. § 31.03 (Vernon Supp. 2000). The trial judge assessed punishment at eighteen months' confinement in a state jail facility. In three points of error, appellant complains that she should have been placed on community supervision and is entitled to a new trial on guilt-innocence. Because appellant's punishment resulted from misapplication of the community supervision statute, we reverse and remand for a new hearing. We do not reverse for a new trial on guilt-innocence because this record contains no evidence that appellant pleaded guilty only because she was misled as to the punishment options available to her.

BACKGROUND FACTS

Appellant pleaded guilty to the state jail felony offense of theft. Appellant's punishment was assessed under article 42.12 of the Texas Code of Criminal Procedure, giving the trial court discretion to either place appellant on community supervision or execute her sentence if she had previously been convicted of a felony. Appellant complains that she was punished under the incorrect version of article 42.12.[1] At the time she committed the offense, August 30, 1997, the applicable version of article 42.12 *required* a trial court to sentence a defendant with no prior state jail felonies to community supervision. Although appellant had previously received a deferred adjudication, she had never been convicted of a felony. Rather than applying the statute in effect at the time of the offense, the trial court erroneously applied the newly amended version.

DISCUSSION AND HOLDINGS

In her first point of error, appellant argues that the trial court erred in failing to place her on community supervision. Because she had never previously been convicted of a felony, the applicable version of article 42.12 in effect at the time appellant committed the offense *required* the trial judge to place her on community supervision. We find appellant was convicted under the incorrect version of the statute. Due to the trial court's error, appellant is entitled to a new hearing on punishment.[2]

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[1] Before September 1, 1997, article 42.12 read in pertinent part: "On conviction of a state jail felony . . . the judge *shall* suspend the imposition of the sentence of confinement and place the defendant on community supervision, *unless the defendant has been previously convicted of a felony*, in which event the judge *may* suspend the imposition of the sentence and place the defendant on community supervision or *may* order the sentence to be executed. TEX. CODE CRIM. PROC. ANN. ART. 42.12 § 15(A)(Vernon Supp. 2000) (emphasis added).

This statute was amended on September 1, 1997, to read in pertinent part: "On conviction of a state jail felony . . . the judge *may* suspend the imposition of the sentence and place the defendant on community supervision or may order the sentence to be executed." TEX. CODE CRIM. PROC. ANN. Art. 42.12 § 15(a) (Vernon 1981) (emphasis added). The state concedes that the trial court mistakenly prosecuted appellant under this later version of the statute.

[2] The State concedes that appellant was prosecuted under the incorrect version of the statute, and agrees she should be given a new hearing on punishment.

We now address whether appellant is entitled to a new trial on guilt-innocence. Appellant contends she should receive a new trial on guilt-innocence because ineffective assistance of counsel rendered her plea involuntary. In her second and third points of error, she claims that trial counsel was ineffective in failing to advise the court that she had no prior felony convictions, allowing her to sign plea admonishments stating community supervision law under the incorrect statute, and failing to object to her sentence or advise the court that she was entitled to community supervision.

For trial counsel to be ineffective, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To meet this standard, appellant must show that her counsel's representation fell below an objective standard of reasonableness, and that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hernandez*, 726 S.W.2d at 55. To satisfy the second prong of this test, appellant must show a reasonable probability that, but for counsel's errors, she would not have pleaded guilty, but would have insisted on going to trial. *See Ex parte Moody*, 991 S.W.2d 856, 857- 58 (Tex. Crim. App. 1999). While we agree that trial counsel's representation was unreasonable, we do not find sufficient evidence to determine a reasonable probability that appellant would have pleaded not guilty and insisted on trial.

In determining the voluntariness of appellant's guilty plea, we examine the record as a whole. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). We sustain allegations of ineffective assistance of counsel only if they are firmly founded and affirmatively demonstrated in the record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

The record reflects that trial counsel was mistaken as to the correct statute that applied to appellant's case. Counsel could have easily informed himself of the applicable statute by referring to the Texas Code of Criminal Procedure. From this evidence, we conclude that trial counsel's failure to inform himself of the law applicable to appellant's case fell below an objective standard of reasonableness. We hold trial counsel's representation was unreasonable; appellant has satisfied the first prong of *Strickland*.

Turning to the second prong of *Strickland*, appellant must show a reasonable probability that, but for counsel's errors, she would not have entered a guilty plea, but would have insisted on going to trial. *See*

Moody, 991 S.W.2d at 858; *Ex Parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). Appellant argues that she meets this standard because the most severe sentence she could have received was community supervision, and she had "nothing to lose" by going to trial. She would have gone to trial, she urges, because a jury could have either found her guilty and imposed community supervision or found her not guilty. She asserts that had she not been misinformed about the law applicable to her offense, she also could have entered into a plea bargain with the State calling for no jail time as a condition of community supervision. Appellant further claims her trial counsel's signature on an admonishment form erroneously indicating her eligibility for community supervision is evidence that he misadvised her.

While appellant may have been misled about her available punishment, we do not find sufficient evidence showing a reasonable probability that but for counsel's errors, appellant would have pleaded not guilty and would have insisted on going to trial. The record does not contain any testimony from the appellant about why she pleaded guilty. There are numerous reasons people may choose to avoid going to trial - it may interfere with their job, they may not want to inform family or friends of the trial, they may have such great anxiety associated with going to trial that they choose not to go, and other reasons too numerous to list. Without some indication in the record that appellant would not have gone to trial if she had been properly advised, we are left to speculate. Although many or most people in the same situation as appellant may have chosen to go to trial, on the basis of this record, we still would be speculating were we to say that *appellant* would have chosen to go to trial in this case. *See Ex parte Moody*, 991 S.W.2d 856 858-859 (Tex. Crim. App. 1999). We also note that appellant's brief is full of the opportunities lost to appellant, pointing out that these were opportunities of which she could have availed herself. However, the brief never says that she *would* have taken advantage of them. Lost opportunities alone are insufficient to show a reasonable probability that, but for counsel's erroneous advice, the defendant would not have pleaded guilty. *See id.*

In short, appellant has not shown that she would have pleaded not guilty but for counsel's errors. Based upon this record, we are unable to say with a reasonable probability that, but for counsel's errors, appellant would have pleaded not guilty and insisted on going to trial. Appellant has not satisfied the second prong of the *Strickland* test. We overrule appellant's second and third points of error, and find that she is not entitled to a new trial on guilt-innocence.

Accordingly, we reverse the judgment of the trial court and remand for a new hearing on punishment only.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Yates, Fowler and Edelman.

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