YEAR 2004 CASE SUMMARIES

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There was no ineffective assistance show in counsel's failure to move for dismissal of criminal charges because of underage [Robles v. State] (04-4-11).

On May 20, 2004, the Corpus Christi-Edinburg Court of Appeals held that respondent had failed to prove his lawyer was ineffective in not moving to dismiss criminal charges because of underage.

04-4-11. Robles v. State, UNPUBLISHED, No. 12-02-726-CR, 2004 WL 2335195, 2004 Tex.App.Lexis ____ (Tex.App.-Corpus Christi-Edinburg 5/20/04) Texas Juvenile Law (6th Ed. 2004).

Facts: Appellant, Israel Ricardo Robles, a/k/a Benjamin Reyes, a/k/a Benjamin Lopez Reyes, was indicted for burglary of a habitation. Appellant waived his right to a jury trial and entered a plea of guilty. The trial court found appellant guilty, assessed punishment at ten years imprisonment, probated for ten years, and placed appellant on community supervision. Appellant did not appeal at that time. Subsequently, the State filed a motion and an amended motion to revoke appellant's probation. Appellant waived his right to a hearing and pleaded "true" to the allegation that he returned to the United States illegally. [FN1]

FN1. Alleged violations included returning to the United States illegally, committing the offense of unlawful use-theft of a motor vehicle, intentionally or knowingly possessing a controlled substance, and committing assault on a public servant.

The trial court found appellant had violated the terms of his community supervision, revoked appellant's probation, and assessed punishment at ten years imprisonment. Appellant appeals from that judgment. The trial court has certified that this case "is not a plea bargain case, and the defendant has the right of appeal." See Tex.R.App. P. 25.2(a)(2).

Appellant's attorney filed a brief in which he concluded the appeal is wholly frivolous and without merit. Appellant has filed a pro se brief asserting ineffective assistance of counsel as his sole issue. We affirm the trial court's judgment.

Held: Affirmed.

Opinion Text: This is a memorandum opinion not designated for publication, and the parties are familiar with the facts. Therefore, we will not recite the facts except as necessary to advise the parties of the Court's decision and the basic reasons for it. See Tex.R.App. P. 47.4.

Appellant's court-appointed counsel filed a brief in which he has concluded the appeal is frivolous. Anders v. California, 386 U.S. 738, 744 (1967). Counsel's brief meets the requirements of Anders. Id. at 744 45; see High v. State, 573 S.W.2d 807, 812 (Tex.Crim.App. [Panel Op.] 1978). In compliance with Anders, counsel presented a professional evaluation of the record and referred this Court to what, in his opinion, is the only possible error in the record that might arguably support an appeal. See Anders, 386 U.S. at 744; High, 573 S.W.2d at 812; Currie v. State, 516 S.W.2d 684, 684 (Tex.Crim.App.1974). Counsel certified to this Court that: (1) he diligently reviewed the record for error and researched the law applicable to the facts and issues contained therein; (2) he was unable to find any error which would arguably require a reversal of the trial court's judgment; (3) in his opinion, the appeal is without merit and is frivolous; (4) he served a copy of this brief on appellant with a letter informing appellant of his right to examine the entire appellate record and to file a brief on his own behalf. See Anders, 386 U.S. at 744 45; see also Stafford v. State, 813 S.W.2d 503, 509 (Tex.Crim.App.1991); High, 573 S.W.2d at 813.

As directed by Anders, counsel raises one possible issue for our review: the trial court did not have jurisdiction over appellant because at the time of the alleged offense, appellant was a juvenile, subject to the jurisdiction of the juvenile court. The appeal from an order revoking probation is limited to the propriety of the revocation. Corley v. State, 782 S.W.2d 859, 861 (Tex.Crim.App.1989); see Burns v. State, 832 S.W.2d 695, 696 (Tex.App.-Corpus Christi 1992, no pet.). We may, however, review the original conviction if it is void. See Corley, 782 S.W.2d at 861.

In this case, appellant is challenging the jurisdiction of the district court. Under article 4.18 of the Texas Code of Criminal Procedure, a claim that the district court does not have jurisdiction over a party because the jurisdiction is in juvenile court must be made by a timely-filed written motion, or it is waived. See Tex.Code Crim. Proc. Ann. art. 4.18 (Vernon Supp.2004). Counsel notes appellant did not, however, challenge the trial court's jurisdiction. Without filing a written motion, appellant entered a plea of guilty, thereby waiving any challenge to the court's jurisdiction. See Rushing v. State, 85 S.W.3d 283, 286 (Tex.Crim.App.2002) (article 4.18 prevents claim of underage from being raised in any context if statute's preservation requirements not met). Because appellant did not comply with the requirements of article 4.18, he failed to preserve any complaint for appeal. See id. Based on this analysis, counsel is of the opinion that this issue is without merit. We agree.

Appellant filed a pro se brief and, by a single issue, complains of ineffective assistance by his trial counsel. Specifically, appellant asserts that, at the time of trial, he was thirteen years of age, and because his trial counsel failed to object and preserve appellant's juvenile rights, counsel was ineffective.

The United States Supreme Court and the Texas Court of Criminal Appeals have promulgated a two-prong test to determine whether representation was so inadequate that it violated a defendant's sixth amendment right to counsel. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Hernandez v. State, 726 S.W.2d 53, 54-55 (Tex.Crim.App.1986); Munoz v. State, 24 S.W.3d 427, 433 (Tex.App.-Corpus Christi 2000, no pet). To establish ineffective assistance of counsel, appellant must show: (1) his attorney's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for his attorney's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687; Stone v. State, 17 S .W.3d 348, 349-50 (Tex.App.-Corpus Christi 2000, pet. ref'd). In assessing a claim of ineffective assistance of counsel, there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Garcia v. State, 57 S.W.3d 436, 440 (Tex.Crim.App.2001). In the absence of evidence of counsel's reasons for the challenged conduct, an appellate court will assume a strategic motivation and will not conclude the conduct was deficient unless the conduct was so outrageous that no competent attorney would have engaged in it. See Ex parte Cruz, 739 S.W.2d 53, 59 (Tex.Crim.App.1987); Thompson v. State, 9 S.W.3d 808, 814 (Tex.Crim.App.1999). Moreover, a claim of ineffective assistance of counsel must be firmly supported by the record. Ex parte Cruz, 739 S.W.2d at 59. [FN2]

FN2. We note that an appellant whose attempt at a direct appeal is unsuccessful because of an undeveloped record is not without a potential remedy. Challenges requiring development of a record to substantiate a claim such as ineffective assistance of counsel, may be raised in an application for writ of habeas corpus. See Tex.Code Crim. Proc. Ann. art. 11.07 (Vernon Supp.2004); Rylander v. State, 110 S.W.3d 107, 110 (Tex.Crim.App.2003); Cooper v. State, 45 S.W.3d 77, 82 (Tex.Crim.App.2001); Ex parte Torres, 943 S.W.2d 469, 476 (Tex.Crim.App.1997); see also Ex Parte Nailor, No.1109 03, 2004 Tex.Crim.App. LEXIS 518, *14 (Tex.Crim.App. March 24, 2004) (specific allegations of deficient attorney performance rejected on direct appeal not cognizable on habeas corpus as larger ineffective assistance claim when defendant does not offer additional evidence to support specific claim in habeas proceeding).

Based on the record before us, we conclude that appellant has failed to establish that his trial counsel was ineffective. At the revocation hearing, appellant testified he was born November 7, 1985 and was thirteen in 1999 when he pleaded guilty to the burglary charge. Prior to the revocation hearing, however, the trial court communicated by letter to counsel for the State and for appellant. The court informed counsel that it was "clear from the evidence introduced at the [plea] hearing [on October 1, 1999,] that [Reyes aka Robles] had given the police a 1980 birth date which would have made him 18 at the time of the offense and 19 at the time of the plea. The same date also appears on the pre-sentence investigation report." This letter from the court appears in the appellate record as does an investigator's report dated July 29, 1999, where appellant is described as looking "younger than his age." Also the court's information sheet completed approximately a week after the plea hearing reported appellant's birth date as August 5, 1980. We further note that on cross-examination at the revocation hearing, appellant acknowledged that he has used several different names: (1) Benjamin Reyes when in the Texas Youth Commission; (2) Lopez in county jail; (3) Israel Robles when on probation "because immigration gave [him] that name;" (4) Benjamin Reyes when he "reported in Harlingen PD;" and, in Florida, Benjamin Lopez Reyes when arrested for stealing a car and deported. Appellant did not dispute that he also used different birth dates with each name. At the revocation hearing counsel for the State also reported she believed "the juvenile probation department determined [appellant's] date of birth was August 5th of 1985. However, based on the record before us, we do not know whether counsel had accurate information regarding appellant's date of birth, information upon which he could have made a decision to file a motion regarding jurisdiction in juvenile court.

Therefore, due to the lack of evidence in the record concerning trial counsel's reasons for not challenging jurisdiction, we are unable to conclude that trial counsel's performance was deficient. See Jackson v. State, 877 S.W.2d 768, 771 (Tex.Crim.App.1994). Appellant has not rebutted the presumption he was adequately represented, see Garcia, 57 S.W.3d at 440, and his ineffective assistance of counsel argument fails.

The Supreme Court advised appellate courts that upon receiving a "frivolous appeal" brief, they must conduct "a full examination of all the proceeding[s] to decide whether the case is wholly frivolous." Penson v. Ohio, 488 U.S. 75, 80 (1988); see Ybarra v. State, 93

S.W.3d 922, 926 (Tex.App. Corpus Christi 2003, no pet.). Accordingly, we have carefully reviewed the propriety of the revocation and the validity of the original conviction. See Corley, 782 S.W.2d at 861. We have found nothing that would arguably support an appeal. See Stafford, 813 S.W.2d at 509. We agree with counsel that the appeal is wholly frivolous.

Additionally, we order counsel to notify appellant of the disposition of his appeal and of the availability of discretionary review. See Ex parte Wilson, 956 S.W.2d 25, 27 (Tex.Crim.App.1997).