
YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

[2005 Summaries](#) [2004 Summaries](#) [2003 Summaries](#) [2002 Summaries](#) [2001 Summaries](#) [2000 Summaries](#) [1999 Summaries](#)

A juvenile adjudication for delinquent conduct that constitutes a felony offense is not a final felony conviction with respect to illegibility for probation in adult court. [Ex Parte Rodney Keith Cash](06-1-1A)

On November 16, 2005, the Court of Criminal Appeals stated that the Texas Family Code § 51.13(d) provides, in relevant part, that a juvenile adjudication for delinquent conduct that constitutes a felony offense is a final felony conviction only for habitual offender sentencing purposes.

¶ 06-1-1A. **Ex Parte Rodney Keith Cash**, ___ S.W.3d ___, No. AP-75,108, 2005 Tex.Crim.App.Lexis 1964 (Tex.Crim.App., 11/16/05).

Background: Petitioner applicant filed a writ of habeas corpus from Harris County, Texas, claiming ineffective assistance of counsel.

Facts: Before trial, the applicant's trial counsel timely filed an unsworn motion for community supervision (probation). The unsworn motion stated that the applicant was not a convicted felon. The applicant's trial counsel also requested a jury instruction on probation at the punishment phase of the applicant's murder trial. The trial court denied the requested jury instruction because the applicant had a previous juvenile delinquency adjudication for an unauthorized use of a vehicle which the trial court believed made the applicant ineligible for probation. The reviewing court determined that the issue was whether counsel was ineffective for failing to properly file a motion for probation prior to trial, and whether the applicant was entitled to consideration for probation had the motion been filed. The reviewing court held that the applicant had not proven his claim.

Held: Habeas corpus relief was denied.

Opinion: Before trial, applicant's trial counsel timely filed an unsworn motion for community supervision (probation). n2 This unsworn motion stated that applicant was not a convicted felon. n3 Applicant's trial counsel also requested a jury instruction on probation at the punishment phase of applicant's murder trial. The trial court denied this requested jury instruction, not because appellant's motion for probation was unsworn, but because applicant had a previous juvenile delinquency adjudication for an unauthorized use of a vehicle which the trial court believed made applicant ineligible for probation. n4 Applicant complained of this ruling on direct appeal, but the Court of Appeals declined to review the merits of this ruling because applicant's motion for probation was unsworn. *See Cash v. State*, 2001 Tex. App. LEXIS 3029 at *5-7, No. 14-00-00308-CR slip op. at 3-4 (Tex.App.-Houston [14th Dist.], May 10, 2001, pet. ref'd) (not designated for publication) (applicant's unsworn motion for probation failed to preserve for appellate review the trial court's ruling that applicant was ineligible for

probation). n5

n2 Applicant's brief accurately describes this motion as follows:

More specifically, trial counsel failed to file a **sworn** motion for probation with the trial court prior to proceeding to trial. Defense counsel filed a pre-trial motion for community supervision, but did not have Applicant swear to its contents. The "Application for Community Supervision from the Jury" consisted of three pages. The affidavit was attached as the third page of the three-page document (C.R.-51-53). Applicant's signature appears nowhere on the affidavit page of the motion, but rather appears only on the first page of the motion next to an "X" (C.R.-51). Moreover, a mark was made above the line designated for the notary's signature, but it does not bear the notary's seal. Additionally the term "Notary Public" has been stricken and the document was dated January 18, 1999, eight months prior to Applicant's indictment date of September 13, 1999 (C.R.-53).(Emphasis in Original).

n3 *Article 42.12, § 4(e), TEX. CODE CRIM. PROC.*, provides that:

A defendant is eligible for community supervision under this section only if before the trial begins the defendant files a written sworn motion with the judge that the defendant has not previously been convicted of a felony in this or any other state, and the jury enters in the verdict a finding that the information in the defendant's motion is true.

n4 *But see TEX. FAM. CODE, § 51.13(d)* (providing, in relevant part, that a juvenile adjudication for delinquent conduct that constitutes a felony offense is a final felony conviction **only** for habitual offender sentencing purposes).

n5 The Court of Appeals also decided that applicant suffered no harm from the trial court's failure to submit a jury instruction on probation because the jury sentenced applicant to more than 10 years in prison. *See Cash, 2001 Tex. App. LEXIS 3029 at *8 n.7; see also Article 42.12, § 4(d)(1), TEX. CODE CRIM. PROC.*, (defendant not eligible for probation if jury sentences him to more than 10 years in prison); *Mercado v. State, 615 S.W.2d 225, 228 (Tex.Cr.App. 1981)* (rejecting defendant's ineffective assistance of counsel claim based on counsel's failure to file probation motion because jury would not have considered this motion in light of its sentence of 17 years).

In this proceeding, the convicting court found that applicant's trial counsel performed deficiently by filing an unsworn motion for probation which resulted in the Court of Appeals not reviewing the merits of the trial court's ruling that applicant was ineligible for probation. The convicting court also found that, had the Court of Appeals reviewed the merits of this ruling, there is a reasonable probability that it would have reversed applicant's sentence and remanded the case for a new punishment hearing. We filed and set this case to decide "whether counsel was ineffective for failing to properly file a motion for probation prior to trial, and whether Applicant was entitled to consideration for probation had the motion been filed."

We decide only that applicant has failed to establish prejudice from any deficient performance by his trial counsel making it unnecessary to decide the latter question of whether applicant was entitled to consideration for probation had the motion been properly filed. n6 *See* Footnote 4. The familiar *Strickland* standard for establishing prejudice requires applicant to prove that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *See Strickland, 466 U.S. at 694.* Applicant alleges that he was prejudiced in two ways from trial counsel's filing an unsworn motion for probation. He alleges that his sentencing jury was prevented from considering probation during its deliberations. n7 He also alleges that the Court of Appeals did not

review the merits of the trial court's ruling that applicant was ineligible for probation because of his prior juvenile delinquency adjudication for the unauthorized use of a motor vehicle offense. n8

n6 *See Strickland, 466 U.S. at 697* (court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies, and, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed).

n7 We note that the trial court would not have submitted trial counsel's requested jury instruction on probation even had trial counsel filed a sworn motion for probation.

n8 Applicant apparently agrees with the convicting court's finding that the result of the proceeding in the Court of Appeals would have been different had applicant's counsel filed a sworn motion for probation.

Applicant's allegations of prejudice in this case do not address the central issue of prejudice under *Strickland*, which is whether there is a reasonable probability that applicant's sentencing jury would have recommended probation had the issue been submitted to it. *See Warden v. Visciotti, 537 U.S. 19, 22-23, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)* (when it is alleged that counsel performed deficiently at the punishment phase of trial, defendant must prove that there is a reasonable probability that, but for counsel's errors, the sentencing jury would have reached a more favorable penalty-phase verdict). n9 Such a finding in this case would be based on pure conjecture and speculation. *See Strickland, 466 U.S. at 693* (not enough for a defendant to show that counsel's errors had some conceivable effect on the outcome of the proceeding). This is especially true when the record reflects that the jury sentenced applicant to 40 years in prison, which is considerably more than 10 years in prison. *See Article 42.12, § 4(d)(1)* (defendant not eligible for probation if jury sentences him to more than 10 years in prison); *Mercado, 615 S.W.2d at 228* (rejecting defendant's ineffective assistance of counsel claim based on counsel's failure to file probation motion because jury would not have considered this motion in light of its sentence of 17 years).

n9 If no such probability exists, we do not see the point under *Strickland* of addressing whether the Court of Appeals would have reversed applicant's sentence and remanded the case for a new punishment hearing. In any event, applicant has not established that there is a reasonable probability that, had trial counsel filed a sworn motion for probation thereby requiring the Court of Appeals to address the merits of the issue of applicant's eligibility for probation, the result of the proceeding in the Court of Appeals would have been different. The Court of Appeals also decided that applicant suffered no harm from the trial court's failure to submit a jury instruction on probation. *See Cash, 2001 Tex. App. LEXIS 3029 at *8 n.7* (deciding that "even if it were error for the trial court to deny [applicant's] request for community supervision, no harm occurred as a result thereof").

Conclusion: Habeas corpus relief is denied.