NOS. 2-02-498 & 2-02-499

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

BARTON RAY GAINES, Petitioner

v.

THE STATE OF TEXAS, Respondent

Appeal from Tarrant County

*****

PETITION FOR DISCRETIONARY REVIEW

FROM THE COURT OF APPEALS FOR THE

SECOND JUDICIAL DISTRICT OF TEXAS AT FORT WORTH

JOHN TATUM
Attorney for Appellant
990 S. Sherman Street
Richardson, Texas 75081
(972) 705-9200
BAR NO. 19672500

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OF THE STATE OF TEXAS

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APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

*****

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the Petitioner, by and through his attorney, John Tatum, and respectfully urges the Court to grant discretionary review of the above named cause.

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not request oral argument.

STATEMENT OF CASE

The Petitioner, Barton Ray Gaines, pleaded guilty to two charges of Aggravated Robbery before the Honorable Robert K. Gill, Judge Presiding of 213th Judicial District Court of Tarrant County, Texas and a jury. (Rep. R. Vol. 3 p. 5) The jury assessed punishment at 35 years confinement in the Institutional Division of the Texas Department of Criminal Justice and a fine of $10,000.00. (Rep. R. Vol. 5 p. 20)

STATEMENT OF PROCEDURAL HISTORY

The Court of Appeals, Second District of Texas at Fort Worth, Texas affirmed the conviction in an opinion delivered on October 14, 2004. Appellant now files his Petition for Discretionary Review.

GROUNDS FOR REVIEW

1. The Court of Appeals erred holding that Petitioner's plea of guilty was not voluntary because the trial court failed to sua sponte hold a competency hearing at the time Petitioner entered his plea of guilty.

2. The Court of Appeals erred in holding that Petitioner did not receive ineffective assistance of counsel.

3. Petitioner did not receive effective assistance of counsel on appeal.

REASONS FOR REVIEW

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

STATEMENT OF RELEVANT FACTS

On February 21, 2002, Petitioner and two friends went to a housing development known as the Rice Paddy, where Petition spoke with two men about buying a pound of marijuana. Petitioner and his friends followed the men to an apartment complex to buy the marijuana. Petitioner and his friends then robbed one man and shot at him as he fled the scene. (Rep. R. Vol. 3 p. 67-70) Petitioner and his friends also robbed the second man and Petitioner shot him as they drove away. (Rep. R. Vol. 3 p. 102-195)

Tara Green ,testifying for the State, said she told the police that the Petitioner had been acting strange and his behavior was not what she was used to seeing. (Rep. R. Vol. 3 p. 202-205) Petitioner's mother testified that when her son was 13 years old, he became withdrawn and had a number of people he was close to commit suicide. (Rep. R. Vol. 4 p. 31) He was put on the drug Paxil for his depression. (Rep. R. Vol. 4 p. 46-47) She testified that on February 15th and 16th he was acting hyper and his speech was rambling. (Rep. R. Vol. 4 p. 55) She said he was extremely agitated and loud. (Rep. R. Vol. 4 p. 57-58) She said the next day he was still agitated, loud and slurred his speech. She was alarmed by his behavior. (Rep. R. Vol. 4 p. 64) She spoke with him on the telephone during the next two days and stated that he sounded "like a wild man." (Rep. R. Vol. 4 p. 65) She said when she saw him on Saturday his eyes were the size of eggs, he was bouncing around, speaking loudly and slurring his speech. (Rep. R. Vol. 4 p. 67-69)

Dr. Edwin John Stone, MD testified that Petitioner had attention deficit disorder and in his opinion should not have been prescribed Paxil. (Rep. R. Vol. 4 p. 175) He said the actions of the Petitioner in the days preceding the incident exhibited symptoms of hypomania in which Paxil contributed to and induced the conduct. (Rep. R. Vol. 4 p. 170-180)

GROUND FOR REVIEW NO. 1

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S PLEA OF GUILTY WAS NOT VOLUNTARY BECAUSE THE TRIAL COURT FAILED TO SUA SPONTE HOLD A COMPETENCY HEARING AT THE TIME PETITIONER ENTERED HIS PLEA OF GUILTY

Appellant submits to this Honorable Court that the testimony of Petitioner's mother and Dr. Edwin Johnstone fairly raises a fact issue concerning the Defendant's competency to stand trial. Dr. Johnstone testified that Petitioner had attention deficit disorder, borderline personality disorder, low average IQ, illegal drug use and the prescribed drug use of Paxil, which in his opinion contributed to Petitioner's irrational behavior which precipitated the incident. Petitioner was taking Paxil during the trial. His mother testified as to his bazaar behavior in the days preceding the incident, which continued up to the time of plea. The testimony presented in the punishment hearing should have raised a red flag and alerted the trial court that there was a serious question as to the competency of the Petitioner to stand trial.

A defendant is incompetent to stand trial if he lacks either: (1) sufficient present ability to consult with trial counsel with a reasonable degree of rational understanding; or (2) if he lacks a rational as well as factual understanding of the proceedings against him. *See Brown v. State,* 960 S.W.2d 772, 774 (Tex.App.--Dallas 1997, pet ref'd). The trial court must hold a competency hearing if the evidence raises a bona fide doubt as to the defendant's competency.

In *Marbut v. State*, 76 S.W. 3rd 742 (Tex. App.- Waco, 2002) the issue was discussed:

> The Code of Criminal Procedure assumes the defendant is mentally competent during proceedings in the trial court; there is a statutory right to be competent at trial: (a) article 46.02 requires that the defendant be competent to participate in the "trial," and (b) article 42.07 precludes the pronouncement of sentence if the defendant is incompetent. Tex.Code Crim. Proc. Ann. arts. 42.07, 46.02 (Vernon Supp.2002); *Casey v. State,* 924 S.W.2d 946, 949 (Tex.Crim.App.1996). In addition, the question of competency to stand trial applies at a hearing to adjudicate guilt. *Gilbert v. State,* 852 S.W.2d 623, 626 (Tex.App.-Amarillo 1992, no writ); *contra Arista v. State,* 2 S.W.3d 444, 445-46 (Tex.App.-San Antonio 1999, no pet.). Furthermore, sentencing is part of the "trial," and therefore both articles should be read together. *Casey*, 924 S.W.2d at 949.

In this case as in the *Marbut* case there was no motion or request made regarding Marbut's competency to participate in the hearing. Even Marbut testified and gave no hint that she might be having difficulty understanding the proceedings.

Section 2(b) of article 46.02 states: "If during the trial evidence of the defendant's competency 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 incompetency to stand trial." Tex.Code Crim. Proc. Ann. art. 46.02, § 2(b). Marbut asserts that the evidence she presented at the hearing from three mental-health professionals and her own testimony, adduced to persuade the trial court to continue community supervision, doubles as the evidence that triggers the

section 2(b) inquiry. She says it should have occurred to the trial court, based on the testimony, that Marbut's competency at the revocation hearing was in question.

The Court of Criminal Appeals discussed section 2(b) in *Alcott v. State,* 51 S.W.3d 596 (Tex.Crim.App.2001). Due process precludes an incompetent person from being brought to trial. *Id.* at 598 (citing *Drope v. Missouri,* 420 U.S. 162, 171-72, 95 S.Ct. 896, 903-04, 43 L.Ed.2d 103 (1975)). The Court drew a distinction between a "competency inquiry" and a "competency hearing." *Id.* at 601. Section 2(b) refers to a "competency inquiry," which is a proceeding, either *sua sponte* or based on a motion, conducted by the trial court, out of the presence of the jury, to determine if a "competency hearing" before a jury must be held to determine if the defendant is competent to stand trial. *Id.* The trial court must conduct a "competency inquiry" only if there is evidence sufficient to create a *bona fide* doubt in the judge's mind about the defendant's competency to stand trial. *Id.* If so, then in conducting the "competency inquiry," the trial court must decide if there is "some evidence" to support a jury finding of incompetency to stand trial; if there is, the court must hold a "competency hearing" before a jury. *Id.;* Tex.Code Crim. Proc. Ann. art. 46.02, § 4(a) (Vernon Supp.2002).

A *bona fide* doubt is measured by whether the evidence raises a doubt that the defendant "has a sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding or ... possesses an understanding of the proceedings against [her]." *Alcott v. State,* 26 S.W.3d 1, 3 (Tex.App.-Waco 1999), *aff'd,* 51 S.W.3d 596 (Tex.Crim.App.2001) (citing *Mata v. State,* 632 S.W.2d 355, 358-59 (Tex.Crim.App.1982)). "[Evidence raising a *bona fide* doubt] need not be sufficient to support a [jury's] finding of

incompetence and is qualitatively different from such evidence." *Alcott,* 51 S.W.3d at 599 n. 10 (quoting *Mata,* 632 S.W.2d at 358). Evidence of (1) recent severe mental illness, (2) at least moderate retardation, or (3) truly bizarre acts by the defendant are generally sufficient to create a *bona fide* doubt. *Id.* However, the fact that a defendant has been treated by a psychiatrist, standing alone, is insufficient to create a *bona fide* doubt. *Alcott,* 26 S.W.3d at 3.

The record contains sufficient indicia of evidence of the Defendant's incompetency to stand trial that should have been recognized by his attorney and the court.

GROUND FOR REVIEW NO. 2

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner submits that his counsel failed to obtain the assistance of qualified mental health professionals when Petitioner's mental health was an obvious issue. Trial counsel failed to properly investigate Petitioner's mental history and if he had done so, Petitioner's competency to stand trial would have been questioned and determined. Trial counsel made no effort to have Petitioner examined to determine if Petitioner's prescribed medication, Paxil, was hindering Petitioner's ability to defend himself or if other medication could have been beneficial. Petitioner further submits that trial counsel failed to file pretrial motions to have Petitioner examined.

Trial counsel's closing arguments to the jury can only be described as detrimental to Petitioner's cause. Trial counsel told the jury that he had a problem believing that the defensive "Paxil Theory" ; which completely negated the defense strategy that this

drug induced Petitioner's manic behavior at the time of the offense. (Rep. R. Vol. 5 p. 9) There is no trial strategy in which describing the Defendant as an inherently dangerous bird who should not be let out of the shoe box is judged to be effective strategy and not egregiously harmful.(Rep. R. Vol. 5 p. 11)

Petitioner further submits that his trial counsel failed to investigate the case, and instead relied heavily on the State's file. Trial counsel also failed to file pretrial motions on the admissibility of extraneous offenses, stating that "We admit it." (Rep. R. Vol. 5 p. 11-12) Trial counsel further failed to introduce critical testimony concerning Petitioner's molestation as a child and other pertinent family history. Trial counsel did not investigate the behavior of Petitioner while in jail which would have been brought out in trial that he was continuously in "lock down" for behavioral problems.

Claims of ineffective assistance are analyzed under the rule set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by *Hernandez v. State*, 726 S.W.2d 53, 56-56 (T4x. Crim.App. 1986). The appellant must show: (1) that his trial counsel's performance was not reasonably effective, falling below an objective standard of reasonableness under the prevailing profession norms, and (2) this deficient performance prejudiced his defense to the extent that the result of the proceeding would have been different. *Strickland*, 455 U.S. at 694, 104 S.Ct. 20052; *Washington v. State*, 771 S.W.2d 537, 545 (Tex. Crim. App. 1989). "A reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 20052; *Ex parte Walker*, 777 S.W.2d 427, 430 (Tex. Crim. App. 1989). A showing of deficiency requires a demonstration that the trial counsel

made error so serious that he was not functioning as the "counsel" guaranteed a defendant under the Sixth Amendment. The prejudice element requires a showing that trial counsel's errors were so serious as to deprive the defendant of a fair trial; one whose result is reliable. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2025. The totality of the representation is evaluated from counsel's perspective at trial, not his isolated acts or omissions in hindsight. *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990); *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986); *Mayhue v. State*, 969 S.W.2d 503, 510 (Tex. App–Austin 1998, no pet.). The "reasonably effective assistance" standard does not mean errorless counsel. *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991); *Hernandez v. State*, 799 S.W.2d 507, 508 (Tex. App. - Corpus Christi 1991, pet. ref'd).

There is a strong presumption that trial counsel's conduct was reasonable and constitutes sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. The appellant has the burden of overcoming this presumption by demonstrating his trial counsels performance was unreasonable under prevailing professional norms, and that the challenged action was not sound trial strategy. Id. at 688, 104 S.Ct. 2052; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991); *Mayhue v. State*, 969 S.W.2d 503, 511 (Tex. App. -Austin 1998, no pet.).

Petitioner submits that a review of the record will demonstrate that trial counsel's performance was ineffective and denied Petitioner's constitutional right to a fair trial; which would overcome the various stated presumption to the contrary. The mental issue evidence as presented showed that there was a genuine issue of competency and/or

diminished capacity that contributed to the Defendant's conduct that was only partially explored or investigated.

GROUND FOR REVIEW NO. 3

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

In filing an "Anders" or "frivolous brief" in this case, Appellate counsel did enumerate "arguable" issues pursuant to the requirements of *High v. State*, 573 S.W.2d 807 (Tex. Cr. App. 1978), *Jeffrey v. State*, 903 S.W.2d 776 (Tex. Ct. App. - Dallas-1995) and *Johnson v. State*, 885 S.W.2d 641 (Tex. Ct. App. -Waco, 1994)

A review of the following arguable issues shows that Appellate counsel and the Court of Appeals misjudged these meritorious issues that should have been raised and argued by Appellate counsel, not as arguable issues but as bona fide issues, fully briefed, on direct appeal.

Two issues raised as arguable in "Frivolous Brief":

1. The trial court committed error in striking two prospective jurors at the request of the State.
2. The trial court committed error in failing to strike a juror at the request of Appellant.

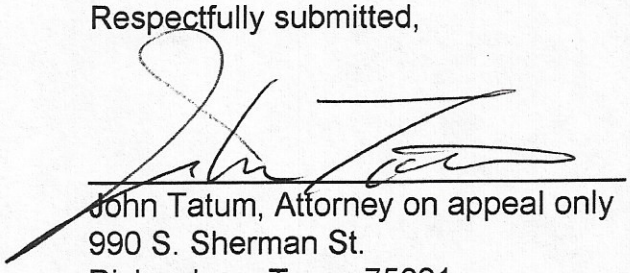
These two issues were deemed not to be meritorious to raise in a conventional brief on direct appeal because of waiver by trial counsel's actions which acts in themselves could be argued and presented as meritorious issue of ineffective assistance of counsel at trial during the crucial stage of jury selection. Therefore, Appellant did not receive effective

assistance of counsel on appeal by the filing of the "Anders" brief that was feted despite its purported compliance with the case of *High v. State*, supra.

PRAYER

For the reasons stated, it is respectfully submitted that the Court of Criminal Appeals should review the grounds of error on Petition for Discretionary Review then reverse the judgment of the Court of Appeals, set aside the conviction of Appellant, and dismiss the case, or, in the alternative, grant Appellant a new trial, with the ruling that the complained of evidence should have been suppressed.

Respectfully submitted,



John Tatum, Attorney on appeal only
990 S. Sherman St.
Richardson, Texas 75081
Ph. # (9720 705-9200
State Bar No. 19672500

CERTIFICATE OF SERVICE

I, JOHN TATUM, do hereby certify that a true and correct copy of the foregoing Petition for Discretionary Review was delivered to Charles M. Mallin, Assistant District Attorney, 401 W. Belknap St., Fort Worth, Texas 76196 on this 14 day of January, 2005.

JOHN TATUM

APPENDIX A