

No. 01-24-00389-CR

**IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS**

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DEBORAH M. YOUNG
Clerk of The Court

KENRIC HENRY

Appellant

v.

THE STATE OF TEXAS

Appellee

On Appeal from Cause Number 21-DCR-098040
From the 268th District Court of Fort Bend County, Texas

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

NICOLE DeBORDE HOCHGLAUBE

Harris County, Texas

TBN. 00787344

COREY FAWCETT

TBN. 24136820

3515 Fannin Street

Houston, Texas 77004

Phone: (713) 526-6300

Fax: (713) 808-9444

**Counsel for Appellant,
Kenric Henry**

IDENTITY OF PARTIES AND COUNSEL

APPELLANT:

Kenric Henry
TDCJ #02506218
Coffield Unit
2661 FM 2054
Tennessee Colony, TX 75880

TRIAL PROSECUTOR:

Jacqueline McElroy
Assistant District Attorney
1422 Eugene Heimann Circle
Richmond, Texas 77469

DEFENSE COUNSEL AT TRIAL:

Sean Darvishi
1235 N Loop W Suite 1125
Houston, Texas 77008

PRESIDING JUDGE:

Hon. Steve Rogers
268th District Court of Fort Bend County
1422 Eugene Heimann Cir.
Richmond, Texas 77469

APPELLATE COUNSEL:

Nicole DeBorde Hochglaube
Corey Fawcett
Hochglaube & DeBorde, PC
3515 Fannin Street
Houston, Texas 77004

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STATEMENT OF THE CASE

Appellant was charged by indictment with Aggravated Assault of a Family Member with a Deadly Weapon on April 4, 2022. (C.R. 36). Appellant entered a plea of guilty on June 20, 2023, with punishment to be assessed by the court at a hearing following a presentence investigation. (C.R. 103). A hearing on punishment took place on April 29th and 30th, 2024. (1 R.R. 1). The trial court assessed punishment at 30 years in the Texas Department of Corrections – Institutional Division. (C.R. 510). Appellant filed a timely notice of appeal on May 24, 2024. (C.R. 519).

The Trial Court's Certification of Defendant's Right of Appeal ensures Appellant has the right to appeal. (Supp. C.R. 4). This Court ordered Appellant's brief due by December 23, 2024, therefore this brief is timely filed.

REQUEST FOR ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39.7, Appellant requests oral argument in this cause.

ISSUE PRESENTED

THE TRIAL COURT ERRED BY SENTENCING APPELLANT WITH AN INCOMPLETE PRESENTENCE INVESTIGATION REPORT, WHICH WAS MISSING STATUTORILY REQUIRED INFORMATION REGARDING APPELLANT'S MENTAL IMPAIRMENT AND MILITARY HISTORY.

STATEMENT OF FACTS

This is an appeal from a hearing on punishment after Appellant pled guilty to the offense of Aggravated Assault of a Family Member with a Deadly Weapon. He pled guilty without an agreement on punishment on June 20, 2023. (C.R. 103). Prior to his plea, Appellant moved for a continuance on June 15, 2023, citing counsel's need to hire a psychiatrist to testify to "an essential element in the case." (C.R. 57). No order was entered on the continuance, and Appellant entered his guilty plea on June 20, 2023.

Appellant is a veteran, and has a history of mental illness including Major Depressive Disorder (MDD), Post-Traumatic Stress Disorder (PTSD), and substance abuse. (4 R.R. 68). He has received treatment for mental illness from the Department of Veteran's Affairs. (4 R.R. 68). He has been prescribed medications relating to mental illness, including Gabapentin and Sertraline (4 R.R. 68). Leading up to the punishment hearing, several issues related to Appellant's mental health were litigated before the trial court. The State moved for the trial court to order the production of medical records by the Department of Veterans Affairs, citing

Appellant's diagnosis of PTSD. (C.R. 244-45). This motion was filed November 15, 2023. The trial court granted the State's motion on November 20, 2023. (C.R. 256). A technical deficiency in the language of the order led to the State again moving for the production of Appellant's medical records on December 1, 2023. (C.R. 260). On December 12, 2023, the trial court granted the State's second motion on the production of Appellant's mental health records by the V.A. (C.R. 270). On January 3, 2024, the trial court ordered that Appellant's mental health records from the V.A. be disclosed to Appellant. (C.R. 277).

The PSI Report was completed on August 3, 2023. (4 R.R. 80). It included:

1. The circumstances of the offense, from the perspective of Appellant, the complainant, and law enforcement. (4 R.R. 81-83).
2. The criminal and social history of Appellant. (4 R.R. 83-85).
3. A proposed supervision plan. (4 R.R. 85-86).

As part of Appellant's history, the PSI Report included three sentences about Appellant's health. It read, in full:

"The Defendant reported he has been seeing a psychiatrist and therapist since 2018. He reports he is diagnosed with Post-Traumatic Stress Disorder, Severe Depression, Anxiety, Panic Disorder, Bipolar Disorder, and Alcoholism. The Defendant is currently prescribed Sertraline HCL for Depression and Gabapentin for alcohol cravings." (4 R.R. 84).

There is no mention of a psychological evaluation performed as part of the PSI, nor is there any information about Appellant's IQ or adaptive behavior score. Similarly,

there is very little information about Appellant's military history in the PSI report. There is a heading titled "Military" in the report. (4 R.R. 84). Within the heading, in bold letters, the Report has the parenthetical,

“(to include if current or former member of the military, served or was deployed in a combat zone, has a previous diagnosis of post-traumatic stress disorder or traumatic brain injury as a result of such military service) whenever possible a copy of the defendant's DD 214 (discharge) and 201(service record) should be included in the PSI” (4 R.R. 84) (emphasis in original).

The heading of the military section is longer than its substance. (4 R.R. 84). The substance is one sentence: “The Defendant enlisted in the United States Army for a period of 4 years from 1996 to 2000 and was honorably discharged at the completion of the term.” (4 R.R. 84). There is no information about whether Appellant saw combat. It is silent as to whether he has a traumatic brain injury. It does not include his DD 214 or his DD 201.

At the hearing, Appellant's mental health was a recurring topic. First, on cross of the complainant, trial counsel brought up mental health treatment and Post-Traumatic Stress Disorder. (2 R.R. 86-87). Next, on cross examination of the complainant's son, trial counsel asked if the witness was aware of Appellant receiving mental health treatment from the V.A. (2 R.R. 114). The PSI writer acknowledged on direct examination that Appellant had been diagnosed with alcohol dependence by the V.A. (2 R.R. 130). The PSI writer also testified that Appellant self-reported diagnoses of “PTSD – post-traumatic stress disorder – severe

depression, anxiety, panic disorder, bipolar disorder, and alcoholism.” (2 R.R. 130). The PSI writer further testified that the records showed that the mental illnesses described by Appellant were diagnosed by “a different individual” outside of the V.A. (2 R.R. 131). Most of trial counsel’s cross of the PSI writer had to do with Appellant’s mental health. She was asked about mental health concerns and medication. (2 R.R. 137). She was asked about trauma and blackout events. (2 R.R. 138).

Appellant presented a psychiatrist expert to testify about his diagnoses in mitigation. (3 R.R. 11). Appellant’s psychiatrist, Dr. Martin, presented a report to the court, which was entered into evidence as Defense Exhibit 5. (3 R.R. 15; 4 R.R. 62). Dr. Martin testified that she both interviewed Appellant and reviewed his medical records. (3 R.R. 16). Upon her review of Appellant’s V.A. records, Dr. Martin saw that he had been diagnosed with PTSD, major depressive disorder, and alcohol abuse disorder. (3 R.R. 27). Dr. Martin also performed a personality test on Appellant, “showing an individual that is experiencing significant distress, depressive symptoms, even some indications of problems with thinking and concentration. There were also, in terms of depressive symptoms, thoughts of worthlessness and hopelessness.” (4 R.R. 30). Dr. Martin herself diagnosed Appellant with alcohol use disorder, moderate to severe, under remission; major

depressive disorder, recurrent, moderate; unspecified anxiety disorder; and noted Appellant's history of PTSD. (3 R.R. 34).

In rebuttal, the State called their own psychiatrist, Dr. Jenine Boyd. (3 R.R. 97). She reviewed Dr. Martin's evaluation, the V.A. mental health records, and sat through Dr. Martin's testimony. (3 R.R. 98). The State, through Dr. Boyd, called into question whether Appellant was actually diagnosed with PTSD or not. (3 R.R. 100-101). These two competing views were the only psychological evaluations before the court. There is no independent evaluation conducted as part of the PSI in the record.

SUMMARY OF THE ARGUMENT

Appellant argues that the trial court erred by sentencing Appellant with an incomplete Presentence Investigation Report, in violation of the requirements of Texas Code of Criminal Procedure Art. 42A.253(a)(6). That section requires that the PSI report include a psychological evaluation that includes, at a minimum, the IQ of the defendant and his adaptive behavior score if he is convicted of a felony offense and if it appears to the judge, through the judge's own observation or on the suggestion of a party, that the defendant has a mental impairment. Here, the trial judge was on notice of Appellant's mental impairments through the filings prior to the punishment hearing. Even so, the PSI report failed to include the required psychological evaluation. The PSI report was also incomplete with respect to

Appellant's military history. Texas Code of Criminal Procedure Art. 42A.253(a)(7) and (8) requires specific information about a veteran's military history to be included in a PSI report. Here, those elements were missing. These failures were statutory error affecting Appellant's substantial rights, entitling him to a new hearing on punishment.

ISSUE ONE

THE TRIAL COURT ERRED BY SENTENCING APPELLANT WITH AN INCOMPLETE PRESENTENCE INVESTIGATION REPORT, WHICH WAS MISSING STATUTORILY REQUIRED INFORMATION REGARDING APPELLANT'S MENTAL IMPAIRMENT AND MILITARY HISTORY.

Applicable Law

Before a trial court may impose a sentence on a defendant in a felony case, the Texas Code of Criminal Procedure requires a written presentence investigation ("PSI") report. Tex. Code. Crim. Proc. art. 42A.253. A presentence investigation conducted on any defendant convicted of a felony offense who appears to the judge through its own observation or on suggestion of a party to have a mental impairment shall include a psychological evaluation which determines, at a minimum, the defendant's IQ and adaptive behavior score. *Id.* at 42A.253(a)(6). The results of the evaluation shall be included in the report to the judge as required by Subsection (a) of this section. *Id.*

Article 42A recodified article 42.12 of the Texas Code of Criminal Procedure, becoming effective on January 1, 2017. Article 42A.253 is a mandatory statute. *Garrett v. State*, 818 S.W.2d 227, 229 (Tex. App.- San Antonio 1991, no pet.). "[T]he legislative intent of article 42.12, section 9 is that in all felony cases, a trial court is required to direct a probation officer to prepare and provide to the court a written PSI report before the court imposes a sentence on the defendant." *Wright v. State*, 873 S.W.2d 77, 81 (Tex. App. - Dallas 1994, no pet.). The ordinary meaning of 'shall' or 'must' is of a mandatory effect. Tex. Gov't Code § 311.016(2). By enacting this statute, the legislature made the decision that such evaluations are necessary to determine an accurate sentence. Failure to comply with this mandatory provision is error. *Wright*, 873 S.W.2d 77, 81.

A presentence investigation report must also include "information regarding whether the defendant is a current or former member of the state military forces or whether the defendant currently serves or has previously served in the armed forces of the United States in an active-duty status and, if available, a copy of the defendant's military discharge papers and military records." Tex. Code Crim. Pro. Ann. art. 42A.253(a)(7). If the defendant has served in the armed forces of the United States in an active-duty status, the report must include a determination as to whether the defendant was deployed to a combat zone and whether the defendant

may suffer from post-traumatic stress disorder or a traumatic brain injury. Tex. Code Crim. Pro. Ann. art. 42A.253(a)(8).

Analysis

As a threshold matter, this Court must first consider the preservation of this error. Under *Marin*, there are three distinct types of rules: (1) absolute requirements and prohibitions; (2) rights of litigants that must be implemented by the system unless expressly waived; and (3) rights of litigants that are to be implemented upon request. *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993). Only where this third category of rules is involved may the defendant forfeit his right by the failure to exercise it. *Id.*

In *Garrett*, the San Antonio Court of Appeals considered whether the trial court erred in failing to order that a PSI report including a psychological evaluation be prepared prior to sentencing where the record reflected that the defendant may have suffered from mental impairment. *Garrett*, 818 S.W.2d at 228. The State argued that *Garrett* waived any complaint under article 42.12, section 9(i) by failing to object to the lack of a PSI report. *Id.* at 229. The San Antonio court observed that the provisions of article 42.12, section 9(i) constitute an express legislative mandate, which courts may not judicially rewrite. *Id.* Thus, the court concluded that when evidence of mental impairment exists, the mandatory provisions of article 42.12, section 9(i) cannot be forfeited by a defendant's failure to object. *Id.*

The court's reasoning in *Garrett* establishes that when the record reflects evidence of mental impairment, the mandatory provisions of the statute cannot be forfeited through a defendant's inaction or failure to object. Article 42A.253 represents an express legislative mandate that courts are bound to follow. The statutory language ("must" and "shall") is mandatory, leaving no discretion for the trial court when a mental impairment is suggested. The trial court's obligation to order the evaluation arises from the legislature's intent to ensure fairness and accuracy in sentencing, particularly for defendants with mental impairments. The trial court's duty is independent of defense requests or objections.

Although some courts have declined to follow *Garrett* and instead adopted the reasoning in *Nguyen v State* to allow waiver by inaction, *Garrett* more appropriately reflects the legislative intent of Article 42A.253 to safeguard defendants with mental impairments. *Nguyen v. State*, 222 S.W.3d 537, 544 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd). The holding and reasoning in *Nguyen* are materially different from the circumstances in Henry's case and should not apply. In *Nguyen*, the trial court had access to two comprehensive psychological evaluations—a sanity and a competency assessment. *Nguyen*, 222 S.W.3d 537, 542. Although it was not part of the PSI, it addressed much of the same information required by Tex. Code Crim. Proc. art. 42A.253. Additionally, in *Nguyen*, the record did not establish that the defendant suffered from significant mental health

impairments requiring mitigation. The court concluded that any error in omitting a psychological evaluation was harmless because there was no indication that an IQ or adaptive behavior score would have impacted the sentencing. *Id.*

By contrast, here there was substantial evidence of a mental health impairment including PTSD, depression, anxiety, bipolar disorder, panic disorder, and alcoholism. Medical records indicate Henry was prescribed Sertraline and Gabapentin for mental health and substance abuse issues, further acknowledging the need for a detailed and independent evaluation. A prior mental health assessment specifically identified Henry as having a “significant mental illness” and recommended mental health housing and psychiatric referrals, which should have prompted the trial court to order an independent evaluation. While the court had access to a defense-provided psychological evaluation, this report lacked the comprehensiveness and required components of a psychological evaluation as mandated by Article 42A.253(a)(6). The evidence of Henry’s mental impairments distinguishes his case from *Nguyen*, where no significant mental health issues were documented.

The court in *Nguyen* also relied on the older statutory framework of Article 42.12, Section 9(i), under which a psychological evaluation was included as part of a PSI but not emphasized as a distinct and mandatory requirement. The current Article 42A.253(a)(6) contains stronger, mandatory language (“must include”) and

reflects a clear legislative intent to ensure that mental impairments are independently evaluated as part of the sentencing process. This imposes a stricter obligation on trial courts to include a psychological evaluation in the PSI whenever mental impairments are suggested. The trial court in Henry's case failed to meet this mandatory requirement, which cannot be excused as harmless given the substantial evidence of mental illness that was before the court, and its potential mitigating impact.

In *Nguyen*, the court found that the defendant's failure to object to the omission of a psychological evaluation waived the issue on appeal. *Nguyen*, 222 S.W.3d 537, 542. The court reasoned that if the defendant could waive the right to a PSI, they could also waive the right to a specific component of the PSI. *Id.* However, in Henry's case, the statutory duty to order a psychological evaluation under Article 42A.253(a)(6) operates independently of a defendant's actions, inactions, or objections. As argued in *Garrett*, this is a waivable-only right, which requires an explicit and informed waiver. Henry did not explicitly and informally waive this right. For defendants like Henry, where evidence of mental impairment exists, the capacity to knowingly waive this right may be lacking, highlighting the court's duty to act on its own initiative. *Garrett's* emphasis on the non-forfeitable nature of the statutory mandate is directly applicable, and *Nguyen* is distinguishable

based on the lack of sufficient mental health evidence in that case and the outdated statutory framework it applied.

Further distinguishing the present case from *Nguyen*, in this case, Appellant's PSI was also missing statutorily mandated information regarding his military history. The statute requires information regarding whether Appellant was deployed to a combat zone, and whether Appellant may suffer from PTSD or a traumatic brain injury. Tex. Code Crim. Proc. art 42A.253(7) and (8). Here, the PSI contained no such information. The record is nearly silent as to the substance of Appellant's military history, except for two questions from the state that Appellant's V.A. records suggest he never saw combat. (2 R.R. 172; 3 R.R. 52). There is no statement in the PSI about whether Appellant's DD-214 was available, nor does it document any attempts by the writer to obtain Appellant's military records. The PSI's analysis of Appellant's military history is a single sentence, identifying the years he served, and that he was honorably discharged. (4 R.R. 84). This Honorable Court should therefore join the *Garrett* court and find that the rules in 42A.253 are mandatory, and unable to be waived through inaction. Thus, express preservation on the record is not necessary.

That the trial court sentenced Appellant with a deficient PSI is error. The statute has requirements which the PSI report in this case failed to meet. Preservation and Harm are the two issues in this appeal, error is inarguable. The PSI

report failed to include mandatory provisions, and despite those failures, the trial court sentenced Appellant anyways.

Harm Analysis

Rule 44(b) applies to errors that are not constitutional and states that such errors are to be disregarded unless they affect the appellant's substantial rights. Tex. R. App. Proc. 44.02(b). A substantial right is affected when the error had a substantial and injurious effect or influence in determining the verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Since Art. 42.253 is a statutory provision, the error is harmless unless it affected appellant's substantial rights. When evaluating the legislative intent behind art. 42A.253 and the sentence that Henry received, Henry's substantial rights were certainly affected. The purpose of a PSI report is to provide a wide range of information to the trial court without relying on the adversarial process, and to that end the report's contents are prescribed by statute. *See Townes v. State*, 572 S.W.3d 767 (Tex. App.—Houston [14th Dist.] 2019).

In this case, there was extensive evidence of Henry's mental health impairments, which should have triggered the court's obligation to order a psychological evaluation. Henry has a documented history of PTSD, depression, anxiety, panic disorder, and bipolar disorder. He has been prescribed Sertraline HGL and Gabapentin, which address mental health conditions and alcohol dependency. Additionally, the mental health assessment conducted on December 22, 2021,

indicated that Henry had a “significant mental illness” as defined by Tex. Health & Safety Code § 571.003 and recommended both mental health housing and psychiatric referrals.

Despite this evidence, the court sentenced Henry to 30 years in prison after he pled guilty. The trial court’s failure to independently order a psychological evaluation under Tex. Code. Crim. Proc. art. 42A.253, together with its failure to consider the required components of Appellant’s military service, caused harm to Henry, affecting his substantial rights and undermining the fairness of the sentencing process. An independent psychological evaluation could have provided detailed insights into Henry’s mental impairments, including how his PTSD, traumatic brain injury, alcoholism, and associated conditions affected not only his behavior, but also his judgment and culpability. It would have been used to evaluate the circumstances surrounding the facts of his case.

The harm is particularly significant because mental health is central to determining punishment and mitigation. Henry’s psychological condition directly relates to his capacity for rehabilitation, which is certainly a crucial factor in determining sentencing. By not having an independent evaluation, the court likely undervalued the extent of Henry’s mental health impairments and their relevance to his sentencing. Without this independent evaluation, the court lacked the tools to meaningfully assess the impact of Henry’s mental health on his offense and consider

mitigation as required by the statute. This had a substantial effect on Henry as it led to a disproportionately harsh sentence that did not fully account for his psychological condition or military service.

Moreover, the statutory requirement of an independent psychological evaluation serves a broader purpose: to ensure that mental health impairments are assessed impartially and comprehensively. Reliance on defense-provided evaluations alone does not fulfill this purpose in this context. Article 42.253 does not contain an exception for an evaluation provided by the parties. The legislature, if they only wanted some kind of evaluation done, could have included such an exception. They did not. Therefore, without the statutorily required evaluation, Henry was denied the full protection intended by the legislature under 42.253. This violated his substantial rights and resulted in an unjust and uninformed sentencing outcome.

PRAYER

For the reasons stated above, Appellant prays this Honorable Court will reverse the trial court and remand for a new hearing on punishment.

Respectfully submitted,

/s/ Nicole DeBorde Hochglaube
NICOLE DEBORDE HOCHGLAUBE

Harris County, Texas
TBN. 00787344
Corey Fawcett
TBN. 24136820
3515 Fannin Street
Houston, Texas 77004
Phone: (713) 526-6300
Fax: (713) 808-9444

**Counsel for Appellant,
Kenric Henry**

CERTIFICATE OF SERVICE

I certify that I provided a copy of the foregoing brief to the Harris County District Attorney via electronic service on the day the brief was filed.

/s/ Nicole DeBorde Hochglaube
NICOLE DEBORDE HOCHGLAUBE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

1. Exclusive of the portions exempted by Tex. R. App. Proc. 9.4 (i)(1), this brief contains 3334 words printed in a proportionally spaced typeface.
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/s/ Nicole DeBorde Hochglaube
NICOLE DEBORDE HOCHGLAUBE

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Corey Fawcett on behalf of Nicole DeBorde Hochglaube

Bar No. 787344

corey@houstoncriminaldefense.com

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Case Contacts

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Baldwin Chin	783823	FBCDA.eService@fortbendcountytexas.gov	12/23/2024 11:24:49 AM	SENT