Affirmed and Opinion filed January 6, 2000.

In The

Fourteenth Court of Appeals

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NOS. 14-98-01228-CR
14-98-01229-CR

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ERNEST LEON, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 779,278 & 780,412

M E M O R A N D U M O P I N I O N

Appellant Ernest Leon, Jr. (Leon) pleaded guilty to two counts of aggravated assault with a deadly weapon. Following his guilty plea, the trial court assessed his punishment at 30 years incarceration in the Texas Department of Criminal Justice, Institutional Division. In this appeal, Leon brings one point of error claiming his plea was not voluntary because he was denied effective assistance of counsel. We affirm

I.
Factual Background

Leon pleaded guilty to two counts of aggravated assault with a deadly weapon stemming from a home invasion during which the complainants were pistol-whipped, kicked, robbed, and threatened with being shot. The complainants and a police officer who was called to the scene identified Leon as one of the assailants.

II.
Voluntariness of the Plea

In his sole point of error, Leon complains that his guilty plea was involuntary because he received ineffective assistance of counsel. Leon alleges his trial counsel was ineffective by failing to inform him of the availability of an alibi defense prior to entering his plea. In determining the voluntariness of the plea, we consider the entire record. *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975).

When a defendant enters his plea upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel, the voluntariness of such plea depends on (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and if not, (2) whether there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 56 and 59 (1985) (holding the two part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to challenges to guilty pleas based on ineffective assistance of counsel); *Ex Parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). Additionally, the burden falls on the appellant to show ineffective assistance of counsel by a preponderance of the evidence. *See Moore v. State*, 694 S.W.2d 528, 531 (Tex.Crim.App.1985); *see also Beyince v. State*, 954 S.W.2d 878,879 (Tex.App.—Houston [14th Dist.] 1997, no pet.). Therefore, the question posed in this case is whether appellant has met his burden and proven that: (1) counsel's

alleged failure to inform appellant of the viability of his alibi defense was outside the range of competence demanded of attorneys in criminal cases; and (2) that but for defense counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial. *See Morrow*, 952 S.W.2d at 536.[1]

We do not reach the merits of this appeal because the Texas Court of Criminal Appeals has recently undermined the viability of a direct appeal based on ineffective assistance of counsel, noting "[a] substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation." *Thompson v. State*, 1999 WL 812394*9, *10 (Tex. Crim. App. 1999).

The same is true in the instant case. We have no record of counsel's advice or the rationale, if any, underlying that advice, to guide us in our evaluation of his performance. Thus, we can only speculate as to whether Leon's trial counsel discussed defenses with him or whether in trial counsel's judgment there was no defense available. This we will not do. *See McCoy v. State*, 996 S.W.2d 896, 900 (Tex.App.—Houston [14 Dist.] 1999) (citing *Jackson v. State*, 877 S.W.2d 768, 771-72 (Tex.Crim.App.1994) for the proposition that an appellate court is not required to speculate on the trial counsel's actions when confronted with a silent record).

Moreover, in a document signed by appellant and his lawyer and entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," appellant agreed with the following statement: "I am satisfied that the attorney representing me today in court has properly represented me and I have fully discussed this case with him."Appellant also signed a document dated August 7, 1998, the same date as the "Confession," entitled "Admonishments" which contains the following statements:

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[1] The *Morrow* court applied the preponderance of the evidence standard to determine whether appellant had met his burden of proving his plea was involuntary.

I fully understand the consequences of my plea herein, and after having consulted with my attorney, request that the trial court accept said plea.[2]

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I am totally satisfied with the representation provided by my counsel and I received effective and competent representation.

Thus, because we have no record to support his allegations, and he signed multiple papers attesting to the sufficiency of his trial counsel, we are unpersuaded that Leon's guilty plea was involuntary.

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John S. Anderson
Justice

Judgment rendered and Opinion filed January 6, 2000.

Panel consists of Chief Justice Murphy, Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] *See Enard v. State*, 764 S.W.2d 574, 575 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (holding appellant's guilty plea was not involuntary because it was based on his attorney's erroneous advice where, among other things, appellant's plea papers reflected he entered his guilty plea voluntarily).