Affirmed and Opinion filed February 15, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00214-CR

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FRANK VIRGIL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 793,102

O P I N I O N

A jury found appellant, Frank Virgil, guilty of the third degree felony offense of injury to an elderly person and found two enhancement paragraphs true. The jury assessed punishment at confinement for thirty years in the Institutional Division of the Texas Department of Criminal Justice. In one point of error, appellant contends his trial attorney rendered ineffective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Texas Constitution. We affirm.

In his sole point of error, appellant contends his trial counsel rendered ineffective

assistance by (1) eliciting from him testimony about a remote conviction that would be otherwise inadmissible; (2) failing to move for an instructed verdict; (3) failing to object to the omission of an instruction on the lesser-included offense of assault in the jury charge; and (4) failing to challenge the validity of appellant's arrest. We address only appellant's first allegation of ineffective assistance because his other allegations are without merit.[1]

Appellant had been previously convicted of four offenses—theft in 1972, burglary of a building to commit theft in 1975, delivery of cocaine in 1989, and burglary of a habitation in 1990. The State sought to enhance appellant's punishment for the present offense by alleging in the indictment two paragraphs regarding the 1975 and 1989 convictions. The State offered no evidence regarding these two convictions in its case-in-chief during the guilt-innocence phase of trial. Appellant's trial counsel, however, elicited the following testimony regarding the 1975 and 1989 convictions during the guilt-innocence phase:

> Q. Mr. Virgil, you have been to the penitentiary in the State of Texas on two different occasions, have you not?
>
> A. Yes, sir.
>
> Q. Were you in the penitentiary from the 338th District Court here in Harris County, Texas for a drug case in 1989?
>
> A. Yes, sir.
>
> Q. Were you in the penitentiary for you breaking into a building in 1975?
>
> A. Yes, sir.
>
> Q. Okay. Have you ever been accused of lying at any time in these cases or in any other cases?
>
> A. No, sir.
>
> Q. Are you telling the truth today?
>
> A. Yes, sir.

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[1] The record reflects that appellant's trial attorney moved for an instructed verdict after the State rested its case and requested a lesser-included offense instruction on assault, which the trial court denied. Appellant fails to adequately brief his ineffectiveness claim regarding a challenge to the validity of his arrest. He does not specify why his arrest was invalid nor state how his trial counsel could or should have challenged the arrest. We decline to make the argument for him.

On cross-examination, the State elicited additional testimony from appellant regarding his conviction for burglary of a habitation in 1990.

As with any other witness, an accused puts his character for veracity in issue by testifying; thus, he may be impeached in the same manner as any other witness. *Hammett v. State*, 713 S.W.2d 102, 105 (Tex. Crim. App. 1986). When attacking the credibility of a witness, evidence of a prior conviction is admissible if the prior conviction involved a felony or a crime of moral turpitude, and the court determines the probative value outweighs its prejudicial effect. TEX. R. EVID. 609(a). Evidence of a prior conviction may not be used for the purpose of attacking the credibility of a witness if more than ten years has elapsed since the date of the conviction unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. TEX. R. EVID. 609(b). Subsequent convictions for felonies or misdemeanors involving moral turpitude, however, may remove the taint of remoteness from prior convictions. *See Hernandez v. State*, 976 S.W.2d 753, 755 (Tex. App.—Houston [1st Dist.]) *pet. ref'd*, 980 S.W.2d 652 (Tex. Crim. App. 1998). In such a circumstance, the rule 609(a) "outweigh" standard is appropriate because the "tacking" of the intervening convictions renders a conviction older than ten years not remote. *Jackson v. State*, 11 S.W.3d 336, 339 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd).

To determine whether trial counsel's questioning about appellant's remote conviction violated appellant's right to effective assistance of counsel, we look to the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). To show ineffective assistance of counsel, appellant must prove that (1) his trial counsel's performance was deficient, in that counsel made such serious errors he was not functioning effectively as counsel; and (2) the deficient performance prejudiced the defense to such a degree that the defendant was deprived of a fair trial. *Id*. at 687; *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App.1986) (adopting the two-prong *Strickland* standard in

Texas). The first prong of the *Strickland* standard presumes "that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that [counsel] made all significant decisions in the exercise of reasonable professional judgment." *Young v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App.) (quoting *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) and *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992)), *cert. denied*, 528 U.S. 1068 (1999). Under the second prong, appellant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* quoting *Strickland*, 466 U.S. at 694. The second prong of the standard carries a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*

The burden of proving ineffective assistance of counsel rests upon the convicted defendant by a preponderance of the evidence. *Moore v. State*, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985). While no error has been designated per se ineffective assistance of counsel, "it is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). An appellate court should not try to second guess trial counsel's tactical decisions which do not fall below the objective standard of reasonableness. *Young*, 991 S.W.2d at 837. Instead, an appellate court must determine whether the *Strickland* standard has been met by the totality of the representation rather than by isolated acts or omissions of trial counsel and the test is applied at the time of the trial, not through hindsight. *Bridge v. State*, 726 S.W.2d 558, 571 (Tex. Crim. App. 1986).

The record reveals that the State's case centered around the testimony of eighty-three year-old complainant, William Foster, who testified as follows: Appellant, a yard worker, grabbed his grand-nephew's hand and began to take him out of the yard. Foster grabbed appellant around the waist and told him to turn the boy loose. The two men tussled and fell into a ditch of water. Appellant beat Foster "down in the water." Foster sustained injuries to his face, neck, and shoulders. Foster did not hit appellant.

Other witnesses's supported Foster's version of the fight. Foster's grand-nephew confirmed that appellant hit Foster, but the record is unclear whether the grand-nephew saw Foster hit appellant. The attending police officer testified to Foster's injuries and to appellant's intoxication. Foster's sister-in-law, the guardian of the grand-nephew, testified that she did not see the altercation but that the grand-nephew told her that appellant threw Foster in a ditch and hit Foster.

Appellant testified to the following in his own defense: He was taking Foster's grand-nephew to the store when Foster, speaking harshly to the child, reached for the child's hand. The child threw a temper tantrum. Appellant threatened to call Child Protective Services to report Foster, when Foster hit appellant. At that point in his testimony, appellant's trial attorney elicited appellant's admission that he had been to the penitentiary on two occasions, but had never been accused of lying in those or any other cases. He claimed that he was telling the truth now. Appellant then returned to his version of events. He attested that Foster's strike triggered the memory of a previous altercation when appellant was shot in the head and neck. Foster moved and appellant thought Foster was going for a gun so appellant hit Foster in self-defense. After the altercation ended, appellant waited for the police to arrive so that he could explain that he struck Foster in self-defense. He had no intent to harm Foster; he loved Foster and the whole family.

Although the record does not explicitly state why appellant's trial counsel opted to question appellant about the 1975 conviction, such a tactic may, nevertheless, constitute sound trial strategy, particularly where credibility is an issue. A common practice among defense attorneys is to elicit from a "client evidence regarding a prior conviction when counsel knows or reasonably believes that if he does not bring it up first, the State will. The belief is that getting the issue out first will 'pull the sting' from the impact of its coming from the State." *Stone v. State*, 17 S.W.3d 348, 349 (Tex. App.—Corpus Christi 2000, pet. ref'd). Because he testified in his own behalf, appellant faced possible impeachment regarding his prior felony convictions, including possible impeachment of the 1975

conviction under the rule enunciated in *Hernandez*. By eliciting testimony from appellant about these convictions and his propensity for truthfulness regarding the convictions and his testimony in the present case, appellant's trial counsel removed the sting of any attack on appellant's credibility. Appellant presents no evidence to rebut the presumption that his trial counsel made this decision in the exercise of reasonable professional judgment. Consequently, appellant fails to prove that his trial counsel's performance was deficient and that he was denied the effective assistance of counsel. Appellant's first point of error is overruled.

Accordingly, the judgment of the court below is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed February 15, 2001.
Panel consists of Chief Justice Murphy and Justices Hudson and Seymore.
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