Affirmed and Opinion filed February 24, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00153-CR

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ELVIN OMAR AGUILAR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 780,083

O P I N I O N

Appellant entered a plea of not guilty to the offense of burglary of a habitation with the intent to commit theft. He was convicted and the trial court assessed punishment at ten years confinement in the Texas Department of Criminal Justice—Institutional Division. In two points of error, appellant claims he received ineffective assistance of counsel. We affirm.

James Thomas Jr.s' apartment was burglarized on October 28, 1997. A neighbor reported a disturbance and Huey Leggett, the apartment maintenance man, responded. He heard a noise inside the apartment. When he knocked on the door, the noise stopped. He saw two men come out of the apartment window. Leggett followed appellant and his accomplice and

saw them leave in a red Toyota Celica. Leggett identified appellant at trial as the second man who came out of the window of the complainant's apartment.

When the police arrived, they recovered fingerprints from the broken window. Those prints were determined by the crime lab to belong to Everett Jerome Campos. The police discovered that Everett Jerome Campos was an alias for Elvin Omar Aguilar.

Houston Police Officer Todd Janke was investigating some crimes that involved a red vehicle that had been involved in a burglary. He determined that appellant, under the name Elvin Omar Aguilar, had received several traffic tickets in that vehicle. He learned that appellant had a possible alias of Jerome Everett Campos. A latent print examiner compared the fingerprints of appellant with the known prints of Jerome Everett Campos and the prints found on the broken glass at Thomas's apartment. The print examiner determined that the three sets of fingerprints matched.

In two points of error, appellant contends he received ineffective assistance of counsel. The Sixth and Fourteenth Amendments to the United States Constitution guarantee the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-2064, 80 L.Ed.2d 674 (1984); *Ex parte Jarrett*, 891 S.W.2d 935, 937 (Tex. Crim. App. 1995). The Supreme Court in *Strickland* outlined a two-step analysis to determine whether a defendant has received ineffective assistance of counsel at trial: first, the reviewing court must decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below the objective standard, the reviewing court then must determine whether there is a "reasonable probability" the result of the trial would have been different but for counsel's deficient performance. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Absent both showings, an appellate court cannot conclude the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id.* at 687, 104 S.Ct. at 2064. *See also Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991). We employ the two-prong analysis from *Strickland* when determining

the effectiveness of counsel at the punishment phase of non-capital trials. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999).

A claim of ineffective assistance of counsel must be determined on the particular facts and circumstances of each individual case. *See Jimenez v. State*, 804 S.W.2d 334, 338 (Tex. App.—San Antonio 1991, pet. ref'd). There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See Strickland*, 466 U.S. at 689; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). Stated another way, "competence is presumed and appellant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound trial strategy." *Stafford*, 813 S.W.2d at 506.

Appellant has the burden of proving ineffective counsel by a preponderance of the evidence. *Moore v. State*, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985). Allegations of ineffective assistance of counsel will be sustained only if they are firmly founded. *See Jimenez*, 804 S.W.2d at 338. However, while a defendant must overcome the presumption that the complained of errors are supported by trial strategy, counsel's conduct will not be supported by the presumption of competence where counsel's actions cannot be attributed to any reasonable trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Even "a single error of omission can constitute impermissibly ineffective assistance [of counsel]." *See Howard v. State*, 972 S.W.2d 121, 129 (Tex. App.—Austin 1998, no pet.). A court should not presume from a silent record that counsel had no trial strategy for the particular conduct, but when a "cold record" clearly indicates that no reasonable trial counsel could have made such trial decisions, the court should not hesitate to find ineffective assistance. *See Weeks v. State*, 894 S.W.2d 390, 392 (Tex. App.—Dallas 1994, no pet.). *See also Nelson v. State*, 832 S.W.2d 762, 766 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (based upon trial record, counsel's decision not to challenge unqualified prospective venireman not supported by sound trial strategy).

In his first point of error, appellant claims his trial counsel was ineffective because he failed to request a hearing pursuant to *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Appellant argues that a discrepancy in Officer Janke's probable cause affidavit should have prompted trial counsel to file a *Franks* motion. In his affidavit attached to the complaint in this case, Officer Janke attested to the following: "Affiant stated he learned of the identity of the Defendant by checking the license plate number of the vehicle identified leaving the scene." Officer Janke did not testify at trial that he relied on the license plate number of the vehicle in his identification of appellant.

Franks held that when a defendant makes a substantial preliminary showing that a false statement, made knowingly, intentionally, or with reckless disregard for the truth, is included in the search warrant affidavit and that the false statement was necessary to the finding of probable cause, the Fourth Amendment requires a hearing at the defendant's request. *Franks,* 438 U.S. at 155-56, 98 S.Ct. at 2676; *Hinojosa v. State,* 4 S.W.3d 240, 246-49 (Tex. Crim. App. 1999).

Under *Franks,* to be entitled to an evidentiary hearing on the allegations concerning the veracity of the affidavit, the defendant must:

1. Allege deliberate falsehood or reckless disregard for the truth by the affiant, specifically pointing out the portion of the affidavit claimed to be false. Allegations of negligence or innocent mistake are insufficient, and the allegations must be more than conclusory.

2. Accompany these allegations with an offer of proof stating the supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished. If not, the absence of written support of the allegations must be satisfactorily explained.

3. Show that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant.

Franks, 438 U.S. at 171-72, 98 S.Ct. at 2684-85.

Although appellant might have been able to allege that certain statements were technically inaccurate, there is nothing in the record that indicated that appellant could make a nonconclusory allegation that the affiant made those misstatements intentionally or with reckless disregard for the truth. There is no evidence that the affiant intentionally or recklessly misrepresented that he had used the license plate number to identify appellant. Because appellant did not make his required preliminary showing, he was not entitled to a *Franks* hearing. Any procedural mistake in not requesting a *Franks* hearing, or in not providing a supporting affidavit to try to obtain a *Franks* hearing, was not prejudicial. Appellant's first point of error is overruled.

In his second point of error, appellant contends he received ineffective assistance of counsel when trial counsel allowed Officer Janke to testify regarding an alleged alias of appellant and, by innuendo, refer to other crimes of appellant. Relying on the general rule that the accused is entitled to be tried on the accusation made in the State's pleading and not for some collateral crime or for being a criminal generally, appellant argues the improper admission of this extraneous offense was harmful. During Officer Janke's testimony, he testified that he learned that Jerome Everett Campos was a possible alias for appellant. Appellant objected to that testimony and asked to approach the bench. At that time a discussion was had at the bench off the record. The trial court then excused the jury so the discussion could continue on the record. The court then stated:

> For the record, [defense counsel], you do not want an instruction to disregard the last response which is arguably somewhat ambiguous. I think the State's entitled to show how their investigation proceeded and arrived at your client as a suspect. I do not disagree that the State should not be able to go into any arrests or previous arrests of your client. They have not done that.
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> I would caution the witness on the stand not to mention anything concerning that.
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> And I think that certainly on cross you could establish that prints are taken for people who are arrested on minor Class C traffic violations if you so choose. But at this point, is that agreeable that the State —

From the trial court's comments, it is apparent that trial counsel objected to the officer's testimony concerning the alias. Counsel cannot be found ineffective for failing to object when he did indeed object to the testimony.

Further, this is not an extraneous offense situation. No attempt was made to connect the defendant with the past crime. If the evidence fails to show that the accused was connected to the offense, then evidence of an extraneous offense is not established. *See McKay v. State*, 707 S.W.2d 23, 32 (Tex. Crim. App. 1985), *cert. denied*, 479 U.S. 871 (1986). Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed February 24, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).