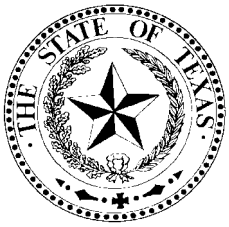
Affirmed and Opinion filed April 13, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00011-CR

CHRISTOPHER LEE GILBERT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 769,734

O P I N I O N

Appellant entered a plea of guilty to the offense of aggravated robbery. He was convicted and the trial court assessed punishment at confinement for ten years in the Institutional Division of the Texas Department of Criminal Justice. In three points of error, appellant claims he received ineffective assistance of counsel. We affirm.

In his first point of error, appellant claims his trial counsel provided ineffective assistance of counsel in failing to object to an extraneous offense, which was considered by the court in the pre-sentence investigation report. 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. *See 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).

Appellant pleaded guilty to the charge of aggravated robbery without an agreed recommendation on punishment. The trial court held a hearing to determine appellant's punishment. Prior to the hearing, the trial court ordered a pre-sentence investigation report, which was read in part at the hearing. The pre-sentence investigation report contained a reference to a prior robbery of a pizza delivery establishment. Appellant, who testified at the hearing, admitted being the gunman in the prior robbery, but testified that the charge had been dismissed.

During the punishment hearing, some confusion arose as to appellant's role in the instant offense, a robbery of a Burger King restaurant. Appellant and his codefendant, Albert Neal, both testified that appellant drove the getaway car and never went into the restaurant. The manager of the Burger King, however, identified appellant as the gunman in the robbery. In an attempt to clear up the confusion, the trial court asked the prosecutor if codefendant DeWayne Smith's statement mentioned a gun. The prosecutor responded:

> No, ma'am, it didn't say anything about the gun and how it was – it says he was at the house when they were planning to commit the robberies and that they had committed other robberies, but it doesn't say anything about the gun and who was the gunman.

Appellant claims that his counsel was ineffective in that she failed to object to the testimony about the pizza delivery robbery and about the plans to commit other robberies.

Extraneous offenses are generally admissible at the punishment stage of a non-capital criminal trial. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a) (Vernon Supp. 1999).

Article 37.07, section 3(a) provides that evidence as to any matter may be offered during the punishment phase of a trial if the trial court deems it relevant to sentencing. Evidence of extraneous crimes or bad acts is admissible if they are shown beyond a reasonable doubt by evidence to have been committed by the defendant or if he could be held criminally responsible for them, regardless of whether he was previously charged with or finally convicted of the crime or act. *See id.* When the trial court assesses punishment, as here, the judge acts as fact finder. Therefore, when the court assesses punishment, it may determine that an extraneous offense is relevant to punishment and admit such evidence. *See Williams v. State,* 958 S.W.2d 844, 846 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd). Unadjudicated Misconduct is like any extraneous offense. Evidence introduced during the sentencing stage is admissible if it is clearly proved, relevant, and more probative than prejudicial. *See Rachal v. State,* 917 S.W.2d 799, 806 (Tex. Crim. App. 1996). The trial judge has wide latitude in admitting or excluding such evidence, whether it is adjudicated or unadjudicated. *See id.* The State, however, must clearly prove that an offense was committed and the accused was its perpetrator. *See Mitchelll v. State,* 931 S.W.2d 950, 954 (Tex. Crim. App. 1996). Further, the State must show the evidence is relevant to sentencing and its admission is more probative than prejudicial. *See Rachal,* 917 S.W.2d at 807.

Here, appellant admitted to being identified as a gunman in a pizza delivery establishment. Further, there was some confusion at appellant's punishment hearing as to whether he had been the gunman in the Burger King robbery for which he was being sentenced. Therefore, the trial court did not err in admitting those portions of the pre-sentence investigation report relating to the pizza delivery robbery because it was relevant to appellant's sentence. Counsel cannot be held ineffective for failing to object to admissible evidence. *See Yzaguirre v. State,* 957 S.W.2d 38, 39 (Tex. Crim. App. 1997). Appellant's first point of error is overruled.

In his second point of error, appellant claims trial counsel was ineffective in that she failed to object to extraneous multiple offenses and planned robberies that the prosecutor

read from a codefendant's statement at the punishment hearing. Here, appellant complains of the admission of a portion of DeWayne Smith's statement that said appellant was present when other robberies were planned and the commission of other robberies was discussed.

When claiming ineffective assistance for failing to object, an appellant must demonstrate that if trial counsel had objected, the trial judge would have committed error in refusing to sustain the objection. *See Vaughn v. State,* 931 S.W.2d 564, 566 (Tex. Crim. App. 1996). Because the State has wide latitude with respect to the types of evidence that may be admitted during punishment, counsel did not err in not challenging the evidence concerning the extraneous robberies based on relevancy.

Though counsel could have objected that the probative value of the evidence was substantially outweighed by its danger of unfair prejudice, *see* TEX. R. EVID. 403, such an objection in light of the admissibility of unadjudicated extraneous offenses, would most likely have been to no avail. The decision whether to object to evidence, especially evidence that has been made admissible by statute, is a matter of trial strategy. *See Calderon v. State,* 950 S.W.2d 121, 129 (Tex. App.—El Paso 1997, no pet.). When the record reflects little more than the fact that certain evidence was admitted without objection, it is difficult for us to determine whether counsel acted in an ineffective manner. Counsel may have had good reason, based on sound trial strategy, for not objecting to the evidence. Viewing the entire record, we cannot say counsel's failure to object to the evidence of other robberies constituted ineffective assistance. Appellant's second point of error is overruled.

In his third point of error, appellant claims his trial counsel was ineffective in failing to require the trial court to order the community supervision department to provide a community supervision plan for appellant in the presentence investigation report. At the beginning of appellant's punishment hearing, the following colloquy occurred:

> [Defense Counsel]: Under the Texas Code of Criminal Procedure, Article 42.12 Section 9, specific to pre-sentence investigations, there is a requirement

> that the report must contain a proposed client supervision plan. Unless I have not received that report in full, I would make note that there is no such plan incorporated in this document. However, I am certainly willing to waive and go forward with this hearing today with the omission of that plan.
>
> THE COURT: I will tell you that's because I typically tell them that's not something that I am interested in. If I would place somebody on some type of probation I can figure out what to do with them as opposed to P.S.I. writers' ideas on what needs to be done.
> However, if you want one of those done I am certainly not trying –
>
> [Defense counsel]: No, no. I am waiving any objections to that and I appreciate the Court's input as to why that is omitted.

Article 42.12, section 9(a) of the Texas Code of Criminal Procedure states "the [presentence investigation] report must contain a proposed client supervision plan describing programs and sanctions that the community supervision and corrections department would provide the defendant if the judge suspended the imposition of the sentence or granted deferred adjudication." In *Calcote v. State,* 931 S.W.2d 668, 668-69 (Tex. App.—Houston [1st Dist.] 1996, no pet.), the court encountered this issue and found the term "must" gives mandatory, rather than discretionary effect to the statute. Accordingly, the court found the trial court erred in considering the report over the objection of counsel. *See id.* at 670.

Here, appellant and his counsel specifically requested community supervision. Because appellant was ultimately sentenced to ten years in prison, the State claims the omission was harmless. *See Calcote,* 931 S.W.2d at 670 (where trial judge ultimately sentenced defendant to life in prison, any error in failing to include a proposed community supervision plan was harmless). It is conceivable, however, that appellant's request might have been more persuasive if the report had included a proposed plan for community supervision, but it does not follow that counsel was ineffective in failing to pursue her objection to the absence of such a plan. Counsel called appellant's mother who vouched for appellant's good character at the punishment hearing. Further, appellant testified in his own

behalf and stated that he had learned from his mistakes and requested community supervision. Considering the trial court's remarks after counsel made her initial objection, we cannot say counsel was ineffective for failing to pursue the objection. Appellant's third point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed April 13, 2000.
Panel consists of Justices Yates, Fowler, and Edelman.
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