Affirmed and Opinion filed July 6, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00676-CR

TONY BAILEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 782,814

O P I N I O N

A jury convicted appellant, Tony Bailey, of delivery of cocaine in an amount greater than four grams and less than two grams. Following their verdict and appellant's plea of "true" to two enhancement paragraphs, the jury sentenced him to eighteen years imprisonment in the Institutional Division of the Texas Department of Criminal Justice. Appellant raises one point of error on appeal: that he received ineffective assistance of counsel at the trial level. Finding that appellant has failed to show that his counsel was ineffective, we overrule this point of error and affirm the judgment

Appellant was arrested following a controlled sale of several cookies of crack cocaine to a Houston Police Department confidential informant. Based on information that the informant received from one of her contacts, she contacted appellant in conjunction with HPD officers and arranged to meet with him to purchase a large quantity of cocaine. Under the arrangements of the transaction, appellant was to meet the informant's "brother," actually an undercover HPD officer, at a fast food restaurant. For some reason, however, appellant changed the location of the sale immediately prior to the time it was to occur, asking to have the exchange occur at a nearby grocery store. Appellant also insisted that the informant, rather than her brother, consummate the deal. The informant complied, proceeded to the grocery store, and, after seeing that appellant had the requested cocaine, informed the HPD officers who were waiting for her signal. The officers rushed in and arrested appellant.

On appeal, appellant claims that his trial counsel was ineffective on at least two occasions. First, appellant alleges that his trial counsel fell below the standard of care by eliciting testimony harmful to him from one of the State's witnesses. He further claims that his counsel was ineffective by arguing during his closing argument that while appellant was not innocent and did not have "clean hands," he was not guilty of this offense.

We apply the two-pronged test elucidated in *Strickland v. Washington*, 466 U.S. 668 (1984), to claims of ineffective assistance of counsel. *See Hernandez v. State*, 988 S.W.2d 770, 772-74 (Tex. Crim. App.1999). Under the *Strickland* test, the appellant must first demonstrate his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. Second, the appellant must prove that but for counsel's deficiency the result of the trial would have been different. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

Under this analysis, trial counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged to be ineffective. *See id.* at 500. The appellant must affirmatively prove that the identified acts fell below the norm of professional reasonableness. *See id.* Appellate courts will not speculate about counsel's effectiveness. *See Huynh*

v. State, 833 S.W.2d 636, 638 (Tex. App.–Houston [14th Dist.] 1992, no pet.). Rather, such a claim must be firmly supported by the record. *See McFarland*, 928 S.W.2d at 500.

Here, appellant has not met either prong of the *Strickland* test. First, appellant has failed to demonstrate how his trial counsel's questioning of the State's witness, Officer Chaison, fell below the norm of professional reasonableness. Although appellant claims that his trial counsel's questions elicited harmful testimony (i.e., that appellant had attempted to locate the informant apparently after his arrest), this claim is not supported by the record. Rather, the record reveals that appellant's trial counsel cross-examined Officer Chaison on this issue to dispel the impression given on direct that appellant had threatened the informant. Thus, this information was already in the record when appellant's counsel further cross-examined the officer about it. More important to the resolution of this issue, however, is the fact that counsel's cross-examination of the officer, as well as the remainder of his representation, was quite strong. Because we must judge claims of ineffectiveness against the totality of counsel's representation rather than isolated instances, *see Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App.1990), we cannot find appellant's trial counsel ineffective.

Appellant has also failed to show that his trial counsel's closing argument fell below the norm of professional reasonableness. In his closing argument, appellant's trial counsel argued that though appellant may not be innocent since he was at the scene where the transaction occurred, his proximity to the crime and apparent willingness to engage in criminal activity did not equate to his guilt of the crime charged in the indictment. This jury argument is clearly within the realm of trial strategy. *See, e.g., Thompson v. State*, 915 S.W.2d 897, 903-04 (Tex. App.-Houston [1st Dist.] 1996, pet. ref'd). We refuse to second-guess an attorney's trial strategy through hind-sight, nor will we find his representation ineffective merely because another attorney would have pursued a different course. *See Wenzy v. State*, 855 S.W.2d 47, 49 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd, untimely filed). Here, the record does not reveal how this tactical decision fell below an objective standard of reasonableness.

Finally, appellant has failed to provide evidence of the second prong of the Strickland analysis. Appellant has not demonstrated how the result of his trial would have been different were it not for the two instances of alleged ineffectiveness of his trial counsel.

Because appellant has failed to demonstrate that his trial counsel's representation was ineffective, we overrule his single point of error and affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed July 6, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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