Affirmed and Opinion filed July 27, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-01135-CR

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JOSE CESAR VELEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 805,503

O P I N I O N

Jose Cesar Velez pled guilty to the offense of intoxication manslaughter. The trial court assessed twelve years confinement. He raises two issues on this appeal: (1) his plea was not voluntary because he is a Spanish speaker and the plea papers he signed were in English; and (2) he was denied effective assistance of counsel because trial counsel did not conduct an adequate investigation of the facts, primarily by failing to contact witnesses to the alleged offense. We affirm.

Facts

While driving with a blood alcohol content of well over double the legal limit, appellant struck two vehicles, killing Raul Garcia, the complainant. After the State refused to agree to a recommendation for probation, appellant decided to enter a plea of guilty without a recommendation for punishment. He signed a document containing the full complement of plea admonishments, which were printed in English. One provision in the document stipulated that the admonishments, statements, waivers, and judicial confession were "read by me or read to me and were explained to me in the language that I read, write or understand by my attorney and/or an interpreter, namely Spanish." Also included in the plea papers were statements initialed by appellant that his plea was "freely, knowingly, and voluntarily entered," that he understood the nature and consequences of his plea, and that he waived the right to a reporter to record the plea hearing. In the PSI report was a statement written by appellant in Spanish and a recommendation that appellant attend the "English as a Second Language Program." Also in the report was a notation under appellant's education history that he "is able to speak, write and read in English" and that he attended a local high school into the tenth grade. Finally, the PSI report notes that appellant has been a legal resident of the U.S. since 1990.

After he was sentenced, appellant filed a motion for new trial, alleging ineffective assistance of counsel. At the hearing, trial counsel testified that he had consulted with appellant on numerous occasions. He advised appellant that there was very little or no chance that he would win on the facts of the case and the only two options were "basically go to the jury for punishment or go to the judge." Counsel testified that he discussed the possibility of disputing the facts, but since it was a rear end collision, there was "not too much to go on." He also discussed disputing the chain of custody of the blood alcohol evidence but, again, he believed there was not much hope for a positive outcome. Counsel stated he negotiated for probation, but the State was adamant that it would not consent to it. Counsel testified that he did not contact any witnesses to the collision. Rather, he relied in large part on his discussions with the State about the witnesses in concluding appellant could not win.

Counsel testified that on the day before and the day of the guilty plea he explained the full range of punishment and each admonishment to appellant through an interpreter and that he felt comfortable appellant understood each admonishment. The court denied the motion for new trial.

Voluntariness of Guilty Plea

The standard of review when an appellant contends that his plea was not knowingly and voluntarily given is whether the record discloses that defendant's plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The voluntariness of a guilty plea is determined by the totality of the circumstances. *See Griffin v. State*, 703 S.W.2d 193, 196 (Tex. Crim. App. 1986); *Edwards v. State*, 921 S.W.2d 477, 479 (Tex. App.–Houston [1st Dist.] 1996, no pet.). When the record shows that the defendant received an admonishment on punishment, it is a prima facie showing that the plea was knowing and voluntary. *Ex parte Williams*, 704 S.W.2d 773, 775 (Tex. Crim. App. 1986); *Forcha v. State*, 894 S.W.2d 506, 509 (Tex. App.–Houston [1st Dist.] 1995, no pet.). The burden then shifts to the defendant to show that he entered his plea without understanding the consequences. *See Fuentes v. State*, 688 S.W.2d 542, 544 (Tex. Crim. App. 1985). Once an accused attests that he understands the nature of her plea and that it was voluntary, he has a heavy burden on appeal to prove otherwise. *See Crawford v. State*, 890 S.W.2d 941, 944 (Tex. Crim. App. 1994). Once a plea is entered, the decision to allow an accused to withdraw his plea is within the sound discretion of the trial court. *See Parker v. State*, 626 S.W.2d 738 (Tex. Crim. App. 1982). Without a reporter's record from the plea hearing, there is a presumption of truthfulness and regularity in that proceeding. *See Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984).[1]

Appellant contends his plea was involuntary because, "according to the record, [he] spoke and wrote fluently in Spanish, and not English." Appellant also claims that he was not

[1] Appellant waived a reporter's record.

admonished of the mandatory 120-day mandatory incarceration for the offense of which he was convicted. *See* TEX. CODE CRIM. PROC. ANN., art. 42.12, § 13(2)(b).

Though the record indicates that appellant's primary language is Spanish, it also contains, as outlined above, ample evidence that he did indeed understand English at the time of his plea. We also note the conspicuous absence of appellant's sworn testimony at his motion for new trial that he does not adequately speak, read or understand English. Apart from appellant's ability to understand English, the record shows that he was also given his admonishments in Spanish and that his lawyer was confident that he understood the nature of his plea.

Appellant's claim that his plea was involuntary because he was not given the 120-day admonishment on incarceration is also without merit. There is no requirement that a defendant be given an admonishment regarding the 120-day incarceration. Further, there is nothing in the record showing that appellant was misled or harmed by any ignorance he may have had of this aspect of the law.

Appellant affirmatively attested in the plea documents that he understood the nature of his plea and that it was voluntary. In light of the significant evidence that this was indeed the case and the lack of any meaningful evidence to the contrary, we hold appellant has failed to carry his heavy burden on appeal to prove his plea was involuntary. *See Crawford*, 890 S.W.2d at 944. We therefore overrule appellant's first issue.

Ineffective Assistance of Counsel

The U.S. Supreme Court established a two prong test to determine whether counsel is ineffective. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance

prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Essentially, appellant must show: (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.; Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and we are bound to indulge the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

If the defendant proves his counsel's representation fell below an objective standard of reasonableness, he must still affirmatively prove prejudice as a result of those acts or omissions. *Strickland*, 466 U.S. at 693; *McFarland*, 928 S.W.2d at 500. Counsel's errors, even if professionally unreasonable, do not warrant setting the conviction aside if the errors had no effect on the judgment. *Strickland*, 466 U.S. at 691. The defendant must prove that counsel's errors, judged by the totality of the representation, denied him a fair trial. *McFarland*, 928 S.W.2d at 500. If the defendant fails to make the required showing of either deficient performance or prejudice, his claim fails. *Id*.

Appellant generally contends that he was denied effective assistance of counsel because his trial counsel failed to adequately investigate the facts of the case. The gist of his argument, though, is that counsel was ineffective because he did not attempt to contact fact witnesses concerning his guilt or innocence. According to the State (during the motion for new trial),

there were "witnesses" to the collision asserting that appellant was at fault. One witness was the driver of one of the cars appellant struck. The record reveals little more about this or the other witnesses. In *Diaz v. State*, 905 S.W.2d 302 (Tex. App.–Corpus Christi 1995, no pet.), the court stated:

> Counsel has the duty to make an independent investigation of the facts of his client's case and prepare for trial. It is fundamental that an attorney must have a firm command of the facts of the case as well as the governing law before the attorney can render reasonabl[y] effective assistance of counsel. A natural consequence of this notion is that counsel has the responsibility to seek out and interview potential witnesses. That duty cannot be sloughed off to an investigator, nor may counsel rely exclusively upon either the prosecutor's representations of the facts or the veracity of the defendant's version of the facts.

Id. at 307-08 [citations omitted].

We agree with appellant that trial counsel should have at least made the effort to independently contact the fact witnesses to the collision. The record reveals that, based on his conversations with the State, counsel assumed the witnesses would not be able to offer any favorable testimony for his client. While this may very well have been true, we cannot condone counsel's failure to make the slightest effort to contact eyewitnesses to the offense, especially where his client is likely to be subjected to a lengthy imprisonment. Because of this, we find that, in this case, counsel's failure to contact the witnesses to the offense fell below an objective standard of reasonableness. Appellant has thus met the first prong of *Strickland*.

Appellant, however, has failed to demonstrate how trial counsel's failure to interview witnesses prejudiced his defense. If these witnesses had been able to provide exculpatory evidence, then appellant's counsel on appeal should have made a record showing such evidence. In the absence of any proof that these witnesses could have helped appellant's defense, appellant has failed to satisfy the second prong of *Strickland*. Given the strong evidence of guilt, including tested blood alcohol of 0.23 and the negative eyewitness statement by Reuben

Nuncio, we cannot say counsel's performance was so prejudicial that appellant was deprived of a fair trial. We therefore overrule appellant's final issue.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed July 27, 2000.

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

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