Affirmed and Opinion filed July 27, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-01211-CR

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JOHNATHAN EUGENE WALLACE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 230th District Court
Harris County, Texas
Trial Court Cause No. 801,677

O P I N I O N

Johnathan Eugene Wallace appeals a conviction for criminally negligent homicide on the grounds that: (1) he received ineffective assistance of counsel; and (2) his plea of *nolo contendere* was involuntary. We affirm.

Background

On December 6, 1998, appellant was involved in a two-car accident in which the driver of the other vehicle, Lee Ellis, was killed. Although Ellis was later found to have been legally intoxicated at the time of the accident, two witnesses claimed that appellant ran a red light causing the collision. After a grand jury returned an indictment of criminally negligent

homicide against appellant, he pleaded *nolo contendere*, was convicted, and was sentenced to two years state jail time, probated for four years. He was also ordered to work 300 hours of community service, pay the decedent's wife restitution in the amount of $10,187.79, and maintain a valid driver's license throughout his probation.[1]

Ineffective Assistance

Appellant's first point of error alleges ineffective assistance of counsel. Appellant argues that his attorney failed to: (1) interview the State's witnesses; (2) interview a witness who would allegedly testify that appellant did not run the red light; and (3) hire an accident reconstruction expert. Appellant also asserts that he explained to his attorney the importance of the investigation of the witnesses and the reconstruction expert to his defense and that he expressed concerns with counsel's lack of preparation of his case.

Generally, to prevail on a claim of ineffective assistance of counsel, an appellant must show first, that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and, second, that appellant was prejudiced in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The burden falls on the appellant to show ineffective assistance of counsel by a preponderance of the evidence. *See Thompson*, 9 S.W.3d at 813. In reviewing claims of ineffective assistance of counsel, scrutiny of counsel's performance must be highly deferential. *See Strickland*, 466 U.S. at 689; *Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999) *cert. denied*, 120 S. Ct. 803 (2000). Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *See Strickland*, 466 U.S. at 691. Such a decision must, in turn, be assessed for reasonableness under all of the circumstances and with heavy deference to trial counsel's judgment. *See id.* Also, the record of the case must affirmatively

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[1] At the time of the accident, appellant's driver's license had been suspended for canceled insurance.

demonstrate the alleged ineffectiveness. *See Thompson*, 9 S.W.3d at 813. An appellate court is not required to speculate on trial counsel's actions; when the record contains no evidence of the reasoning behind those actions we cannot conclude counsel's performance was deficient. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

In this case, appellant's affidavit[2] alleges that his attorney failed to interview a key witness who would testify that it was Ellis who failed to yield to the red light, causing the accident. Appellant did not offer a name or any other information to identify this witness or substantiate what his testimony would have been. Moreover, trial counsel's affidavit stated that there were no witnesses to testify on appellant's behalf.

Appellant also alleges ineffective assistance because his attorney failed to interview the State's witnesses and failed to hire an accident reconstruction expert. Trial counsel states in his affidavit that he reviewed the witness statements in the State's files. His affidavit also states that he returned to the accident scene to note the traffic light sequence and the general area of the accident and that he consulted with other attorneys who agreed that an accident reconstruction expert would not be favorable to appellant's case. Counsel's affidavit suggests that he made a decision that made the investigation suggested by appellant unnecessary, *i.e.*, that the resulting information would not be favorable to appellant. Appellant has cited no evidence to the contrary. Because appellant's first point of error thus fails to satisfy either prong of the *Strickland* standard, it is overruled.

Involuntary Plea

Appellant's second point of error alleges that his plea of *nolo contendere* was involuntary because it was induced by misinformation from his trial counsel and his counsel's lack of trial preparation.

When a defendant enters a plea on advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance, the voluntariness of the plea

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[2] At the hearing on the motion for new trial, the court instructed the lawyers that it wished to "proceed by affidavits." Appellant did not object and does not complain on appeal of being denied an opportunity to present live testimony or cross-examine opposing witnesses at the hearing.

depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases, and, if not, whether a reasonable probability exists that, but for counsel's errors, the defendant would not have entered a guilty plea but would have instead insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). A plea is voluntary if the defendant was aware of the direct consequences of his plea, unless the plea was induced by threats, misrepresentations, or improper promises. *See Brady v. United States*, 397 U.S. 742, 755 (1970).

In this case, to establish that his plea was involuntary appellant relies on his affidavit which states that his attorney misinformed him that: (1) his only choice was to plea bargain or risk being sent to prison for a long time because a jury would likely find him guilty; (2) the decedent's wife's testimony would result in a jury being very sympathetic to the State's case; and (3) by pleading *nolo contendere* he would not be terminated from his job. He also asserts that he pleaded *nolo contendere* because he had no other choice due to his attorney's lack of trial preparation and investigation.[3]

Appellant's trial counsel also submitted an affidavit which stated that he explained to appellant the possible outcomes of trial and denied telling appellant that his only choice was to enter a plea bargain. Trial counsel admitted discussing with appellant that Ellis's wife, having three children all under the age of ten, would be a sympathetic witness for the State. However, he denied advising appellant that the most likely outcome of a jury trial would be a conviction. He also denied advising appellant that he would not be terminated from his job by entering the plea, but instead told appellant only that a *nolo contendere* plea would not be admissible in any civil action.

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[3] Although the alleged lack of investigation and trial preparation would have occurred before appellant entered his plea, appellant signed the written plea documents stating that he was knowingly and voluntarily doing so after the consequences were fully discussed with him and that he was satisfied with the representation provided by his counsel.

Presented with this conflicting evidence, the trial court could have concluded that trial counsel's performance was not deficient. Appellant has thus failed to establish that the trial court erred in failing to conclude that his plea was rendered involuntary due to ineffective assistance of counsel. Accordingly, appellant's second point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed July 27, 2000.
Panel consists of Justices Fowler, Edelman, and Baird.[4]
Do not publish — TEX. R. APP. P. 47.3(b).

[4] Former Judge Charles F. Baird sitting by assignment.