Affirmed and Opinion filed August 17, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00634-CR

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MICHAEL WAYNE PENRICE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 794,684

O P I N I O N

Appellant, Michael Wayne Penrice, was convicted of burglary of a habitation and sentenced, as a habitual offender, to serve fifty years in the state penitentiary. On appeal, he contends he was denied effective assistance of counsel. We affirm.

The record shows appellant broke the front window of John Massingil's apartment, ransacked the apartment, and stacked several valuable items near the front door. He then left the apartment, retrieved his car and backed it up to the front door of the apartment. A woman, Felicia Martin, waited in the car while appellant re-entered the victim's apartment. A neighbor who observed these activities called both the police and the apartment manager. In the interim,

appellant took a television set from the apartment, placed it in the car, and then re-entered the apartment. The apartment manager arrived before the police and confronted Ms. Martin, who was still seated in appellant's vehicle. Martin yelled for the appellant; he then ran out of the apartment with a towel over his face, jumped in the car, and drove away.

Appellant claims his counsel made numerous errors. Appellant contends: (1) his counsel had him testify prior to trial that he was currently on parole, an habitual offender, and still wanted to proceed to trial; (2) counsel failed to explain the correct sentencing range facing appellant; (3) counsel failed to object to a comment on the weight of the evidence; and (4) the cumulative effect of these errors rendered counsel ineffective.

Appellant's Pre-trial Testimony

Just before trial was to begin, appellant's attorney called him to the witness stand and elicited the following information:

> THE COURT: Let the record show the defendant and his attorney and the state's attorney are all here in open court, and the jury panel has not even come to the courtroom yet, and I've been informed that they desire to put something on the record. Go ahead, counsel. Do you have any questions at all that you want to put on the record?
>
> [DEFENSE COUNSEL]: Just one or two. Mr. Penrice, you are currently on 50 years parole; is that correct?
>
> A. Yes.
>
> Q. And the state has offered the amount of 50 years as an offer. Have I related that to you?
>
> A. Yes.
>
> Q. And you know that you are charged as what we call a habitual, where they have alleged two prior convictions. You understand that?
>
> A. Yes.
>
> Q. First, if you were found guilty and then if the enhancements proven to be true and correct – and the state has the burden of doing each of those elements – you understand the

minimum the court could give you would be 20, and it could be 20 up to 99 and a fine. You understand that?

A. Yes sir

Q. Do you wish to proceed and go ahead and go with the trial?

A. Yes.

Q. And you and I have discussed this at length. You understand that, correct?

A. Yes.

Appellant contends the above testimony had only one purpose – to protect trial counsel from claims of ineffective assistance should appellant be convicted. He argues the prejudicial effect flowing from the exchange was it: (1) alerted the court to the fact that counsel believed appellant was guilty; (2) signaled that counsel believed appellant should have accepted the State's plea bargain offer; and (3) relieved the State of its burden of proving up the allegations in the enhancement paragraphs.

To be successful in a claim for ineffective assistance of counsel, an appellant must prove two elements: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ramirez v. State*, 987 S.W.2d 938, 942-43 (Tex. App.–Austin 1999, no pet.). In determining whether an appellant satisfied the first element of the test, we decide whether the record establishes that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *See Strickland* at 687.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was effective. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We must presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* The appellant must demonstrate that counsel's performance was

unreasonable under the prevailing professional norms and that the challenged action was not sound trial strategy. *See id.* at 688, 104 S.Ct. 2052; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App.1991). We do not evaluate the effectiveness of counsel in hindsight, but from counsel's perspective at trial. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993); *Stafford*, 813 S.W.2d at 506. Further, we assess the totality of counsel's representation, rather than his or her isolated acts or omissions. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2052; *Ramirez*, 987 S.W.2d at 943.

We do not find counsel's actions to have been deficient; nor do we believe they prejudiced his defense. The claim of ineffective assistance of counsel is perhaps the most common complaint presented in the appeal of a criminal conviction. A defendant has a right to be fully informed about all plea bargain offers, and counsel has an obligation to fully advise his client of the terms and desirability of plea offers by the State. *See Pennington v. State*, 768 S.W.2d 740 (Tex. App.–Tyler 1988, no pet.). Here, it appears counsel sought to make a record demonstrating that his client was aware of the risks in proceeding to trial and had made the decision to do so voluntarily. Appellant's testimony simply precluded him from making subsequent allegations of ineffective assistance based upon the failure to communicate the State's offer. *See State v. Pilkinton*, 7 S.W.3d 291, 292-93 (Tex. App.–Beaumont 1999, pet. ref'd) (holding that counsel was ineffective for failing to communicate the State's plea offer).

The exchange took place outside the presence of the jury, so it had no impact upon their verdict. Further, we trust the trial judge ignored the suggestion, if any, that counsel believed appellant should have accepted the State's offer. Finally, the exchange in no way relived the State of its burden of proving up the enhancement paragraphs. Appellant testified only that he was currently on parole. The State established through the testimony of a fingerprint expert that appellant was the same individual convicted of both offenses alleged in the enhancement paragraphs. Thus, we find appellant's contention is without merit.

The Range of Punishment

Appellant alleges his trial counsel was ineffective because, in the above exchange, counsel failed to explain the correct range of punishment. Counsel told appellant he faced a possible range of punishment from 20 years to 99 years and a fine. The actual range of punishment was 25 years to life and a fine. *See* TEX. PEN. CODE ANN. § 12.42(d) (Vernon 1999).

Trial counsel obviously erred. However, as a practical matter, 99 years and life are equivalent sentences. *See Tollett v. State*, 799 S.W.2d 256,259 (Tex. Crim. App. 1990). Moreover, appellant does not contend that he was confused by counsel's misstatement or that his plea was rendered involuntary by erroneous advice. Thus, while appellant is correct in observing that counsel misstated the range of punishment, we cannot say the error prejudiced appellant.

Comment on the Weight of the Evidence

Appellant alleges his trial counsel was ineffective because he failed to object to the court's comment on the weight of the evidence. During the State's case-in-chief, the following exchange took place:

> Q. [By the State's attorney]: But on September 18, 1998, did Michael Penrice still live on the property?
>
> A. No, ma'am.
>
> Q. Did Felicia Martin still live on the property?
>
> A. No, ma'am.
>
> Q. Okay. So, after you tell – after you make that statement to her, what happens next?
>
> A. Well, like I said, I noticed the front door open to and I started that way, and she started hollering, Michael, Michael. And he came out the front door.
>
> Q. Okay.
>
> A. And I stopped.
>
> Q. Now, you saw the defendant come out the front door?
>
> A. Yes, ma'am.

THE COURT: For the record, what do you mean by "he," please.

[The State's attorney:] I'm getting there, Judge.

THE COURT: Let the record show whom you mean by he for the benefit of the jury.

Q. [By the State's attorney] Michael Penrice?

A. Michael, right.

Appellant contends "the Court felt that the jury was not getting the full import of the damning evidence being produced by the State, so it sought to make it clear to the jury that the witness was positively identifying appellant."

A judge should not "at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case." TEX. CODE CRIM. PROC. ANN. Art. 38.05 (Vernon 1979). To constitute reversible error, the judge's comment must be such that it is reasonably calculated to prejudice the defendant's rights or benefit the State. *See Marks v. State*, 617 S.W.2d 250, 252 (Tex. Crim. App. [Panel Op.] 1981).

Here, the trial judge's interjection appears to have been intended to prevent any confusion that might have resulted from the witness' use of an indefinite pronoun. The remarks in no way convey the court's opinion of the case, and could neither prejudice the defendant's rights nor benefit the State. Because the court's remarks were not an impermissible comment on the weight of the evidence, counsel was not ineffective for failing to object.

Counsel's Cumulative Errors

Appellant's final contention is that his counsel was ineffective due to the cumulative effect of his many errors. We presume appellant is referring to the errors discussed above. However, we have already determined, based on the totality of counsel's representation, that appellant has not shown his trial counsel's performance to have been deficient.

Appellant's points of error are overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed August 17, 2000.

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

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