Affirmed and Opinion filed September 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00462-CR

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OLESTER EARL COLEMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 786,763

O P I N I O N

Appellant, Olester Earl Coleman, was convicted in the 338th Judicial District Court of Harris County for the offense of theft as a third time offender. The indictment contained four enhancement paragraphs for the purposes of punishment and appellant answered true to the allegations in the enhancement paragraphs. Appellant pled not guilty to the primary offense, but the jury rejected appellant's not guilty plea and found appellant guilty as charged in the indictment. The jury assessed punishment at confinement for fifteen years at the Texas Department of Criminal Justice, Institutional Division.

In his first point of error, appellant argues that the trial court violated his due process rights because his appointed trial counsel failed to render him effective legal assistance. In his second and third points of error, appellant contends that the State's jury argument during the punishment phase of trial was improper and violated his due process rights. Overruling these points, we affirm the judgment of the trial court.

I.

Factual and Procedural Background

On June 29, 1998, appellant entered a Home Depot store through the exit door and proceeded directly to the area of the store containing tools. Home Depot's loss prevention manager observed appellant remove a drill valued at $139.00 from its box and place it in his pants. Appellant then exited the store where Home Depot personnel apprehended him.

The State charged appellant by indictment with the offense of theft as a third time offender. The indictment contained four enhancement paragraphs regarding appellant's prior convictions for arson, possession of a controlled substance, and two prior misdemeanor theft convictions. Appellant pled true to the enhancement offenses.

The trial court conducted voir dire of the jury on March 11, 1999. During voir dire, appellant's counsel asked if any members of the panel worked in retail and extended the question to include the members' spouses and family. When numerous members responded to that question, he then limited the question to the jurors or their spouses.

In the State's opening statement, the prosecutor informed the jury that the State would prove that appellant stole the drill from Home Depot. Prior to the State's first witness testifying, juror Athena Antonidis informed the court and attorneys, outside the presence of the jury, that her sister-in-law worked for Home Depot's corporate office and that she had forgotten about it in voir dire. She also stated, though, that it would not have any bearing on her ability to be impartial. Appellant started to object to this juror but the trial court ruled that it would have a hearing on the matter at a later time.

At the hearing, appellant's counsel stated that he would not have selected Ms. Antonidis if he had known that she had a relative who worked for Home Depot, but he agreed that she did not intend to mislead the court or counsel. The trial court noted that appellant's counsel had limited the question regarding relatives who worked in retail because he stated that he was only asking about close relatives. Additionally, Ms. Antonidis stated that her sister-in-law's employment with Home Depot would not affect her judgment and the trial judge said "the bottom line is that after she was selected she said it wouldn't affect her". Therefore, the trial court refused to grant a mistrial. At the conclusion of the trial, the jury found appellant guilty as charged in the indictment.

II.

Ineffective Assistance of Counsel

In his first point of error, appellant contends that his appointed counsel's ineffective assistance violated his due process rights. Specifically, appellant argues that his attorney ineffectively represented him because trial counsel did not question Ms. Antonidis and did not take the steps necessary to preserve error as one would do when the trial court denies a challenge for cause during voir dire. Because appellant did not file a motion for new trial, there is no evidence in the record as to why appellant's counsel did not question Ms. Antonidis or take the steps necessary to preserve error. The record that appellant brought to this Court fails to rebut the strong presumption that trial counsel acted within the wide realm of reasonable professional assistance, and therefore we overrule appellant's first point of error.

We measure claims of ineffective assistance of counsel against the standard set forth by the United States Supreme Court in *Strickland v. Washington*. *See* 466 U.S. 668 (1984). The Texas Court of Criminal Appeals adopted this standard in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986), and recently applied it in *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). *Strickland* sets forth a two-pronged test that requires the defendant to show that his counsel's performance was deficient and that this deficiency caused him serious harm. *See Strickland*, 466 U.S. at 687; *see also Thompson*, 9 S.W.3d at 812.

When evaluating an ineffective assistance claim, we look at the totality of the representation and the particular circumstances of the case. *See Thompson*, 9 S.W.3d at 812. An allegation of ineffectiveness must be firmly founded in the record, and the record must also affirmatively show the alleged deficient performance. *See id*. at 813. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *See id*.

When determining if counsel's trial performance was deficient, we do not speculate about counsel's strategy. *See McCoy v. State*, 996 S.W.2d 896, 900 (Tex. App. — Houston [14th Dist.] 1999, pet. ref'd). There is a strong presumption that trial counsel acted within the wide range of reasonable professional assistance. *See Thompson*, 9 S.W.3d at 814. The defendant bears the burden of overcoming this presumption and must prove by a preponderance of the evidence that counsel was ineffective. *See id*. This burden requires the defendant to bring forth a record from which we may discern that trial counsel's performance was not based on sound strategy. *See Jackson v. State*, 877 S.W.2d 768, 771-72 (Tex. Crim. App. 1994).

Without an evidentiary hearing on the issue, the burden is difficult to meet. *See Thompson*, 9 S.W.3d at 813. "Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation." *Id*. As the *Thompson* court recognized, in the majority of cases, the record on a direct appeal is simply underdeveloped and cannot adequately reflect the failing of trial counsel. *See id*. This case is among the majority and is not one of the rare exceptions where the record is sufficiently developed on direct appeal to prove ineffective assistance of counsel.

In the absence of such a record, appellant has failed to overcome the strong presumption that his trial counsel's strategy was reasonable. Therefore, we overrule appellant's first point of error.

III.

Jury Argument

In appellant's second and third points of error, he claims that the State's jury argument during the punishment phase of his trial violated his constitutional rights under both the United States and Texas Constitutions. We find, however, that the statements about which appellant complains do not appear in the record, so the issues present nothing for review. Accordingly, we overrule points of error two and three.

In his brief, appellant asserts that the offending jury argument occurred during the punishment phase of the trial when the prosecutor stated on page 52 of volume VI of the record that "[i]t is important to note that the prosecutor by their argument invited the jury to violate the charge of the court." Neither this statement nor a variation of similar content appears at or near the cited page in the record. Later in his brief, when referring to how the prosecutor argued outside the record, the appellant states, "The record does not contain any evidence from which the prosecutor could have reasonably deduced or inferred that the appellant was trying to buy off the State or the bank." No statement made by the prosecutor appears in the record implying that appellant was trying to buy off the State or the bank. The Prosecutor simply argued on pages 52 and 53 of volume VI of the record that shoplifting is not a victimless crime in that the citizens of Harris County and people who shop at Home Depot pay inflated prices to cover the price of stolen items.

Appellant's assertions are not supported in the record and Texas jurisprudence is clear that assertions in the appellant's brief which are not supported by the record will not be accepted as fact and cannot be considered on appeal. *See Vanderbilt v. State*, 629 S.W.2d 709, 717 (Tex. Crim. App. 1981); *Franklin v. State*, 693 S.W.2d 420, 431 (Tex. Crim. App. 1985); *Tooke v. State*, 642 S.W.2d 514, 518 (Tex. App. — Houston [14th Dist.] 1982, no pet.). Since the argument about which appellant complains does not appear in the record, points of error two and three present nothing for review and are overruled.

Accordingly, we affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed September 7, 2000.

Panel consists of Justices Amidei, Fowler and Frost.

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