Affirmed and Opinion filed September 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01354-CR

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KELVIN DEARL DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 749,010

O P I N I O N

Appellant was charged by indictment with the offense of aggravated robbery. *See* TEX. PEN. CODE ANN. § 29.03 (Vernon 1994). The indictment also alleged two prior felony convictions to enhance appellant's punishment. *See* TEX. PEN. CODE ANN. § 12.42(d) (Vernon Supp. 1999). The jury convicted appellant of the charged offense, found the enhancement allegations true, and assessed punishment at 35 years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises three points of error contending his trial counsel was ineffective. We affirm.

I. Factual Summary

On the morning of Easter Sunday, appellant and an accomplice were in a vehicle that "bumped" the vehicle ahead of it. The accomplice got out of the vehicle and, after a struggle, robbed the driver of the "bumped" car of her keys and cell phone. Several witnesses, driving to church, witnessed the robbery and called 9-1-1 on their cell phones. Appellant and his accomplice were also followed by several citizens as they attempted to drive away from the robbery scene. One witness flagged down a police car and gave a description of appellant's vehicle. Appellant and his accomplice abandoned the vehicle and ran in separate directions. A person dressed as the Easter Bunny pointed officers in the direction the robbers were fleeing. Appellant was later found hiding in a flower bed, holding a gun later identified as the one used in the robbery.

II. Voir Dire

A. Appellant's Argument

In his first point of error, appellant alleges he received ineffective assistance of counsel during voir dire. Appellant contends his attorney failed to adequately question prospective juror number 12, who stated that he could not consider the minimum punishment in an aggravated robbery case. Although prospective juror number 12 was brought to the bench for additional questioning, defense counsel never asked questions regarding the range of punishment. Appellant argues that counsel, therefore, was required to use a peremptory strike on prospective juror number 12, and consequently, prospective juror number 28 was allowed to serve on the panel after stating that his close ties with law enforcement might affect his ability to be fair and impartial.

B. Standard of Review

The two-step analysis set out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984), and adopted by the Court of Criminal Appeals in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986), is the standard for appellate review of counsel's effectiveness during all phases of the trial. First, appellant must show that counsel's performance was so deficient as not to function as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland*, 466 U.S. at 687; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). The constitutional right to counsel does not guarantee errorless counsel, therefore, the effectiveness of counsel must be determined by the entire representation. The second *Strickland* prong requires appellant to establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687. It is appellant's burden to prove ineffective assistance of counsel. *See id*. Additionally, appellant must overcome the strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See id.* at 689.

C. Analysis

In *Delrio v. State*, 840 S.W.2d 443 (Tex. Crim. App. 1992), the Court of Criminal Appeals considered a similar case. During voir dire in *Delrio*, a potential juror clearly stated he could not be impartial because of what he knew as an ex-narcotics officer. Defendant's trial counsel did not challenge the potential juror, who eventually served on Delrio's jury. The Court of Criminal Appeals found this conduct alone was insufficient to establish ineffective assistance of counsel. In so holding the court stated:

> ... although we would certainly expect the occasion to be rare, we cannot say, as the court of appeals did, that under no circumstances could defense counsel justifiably fail to exercise a challenge for cause or peremptory strike against a venireman who deemed himself incapable of serving on the jury in a fair and impartial manner.

Delrio, 840 S.W.2d at 446. Relying on *Strickland*, the Court of Criminal Appeals held that, without a supporting record of ineffective assistance of counsel, appellant did not overcome the presumption that counsel made all significant decisions in the exercise of reasonable professional judgment. *See Delrio*, 840 S.W.2d at 447.

In the instant case, there was a motion for new trial; however, it failed to specifically allege ineffective assistance of counsel, and therefore, the record is silent as to why appellant's trial counsel impaneled the jury as he did. In this case, trial counsel peremptorily struck prospective juror number 12 and he did not serve on the panel. Although appellant contends that he was harmed because prospective juror number 28 did serve as a juror, appellant offers no affirmative evidence to support this contention. While prospective juror number 28 stated that his position as a paramedic might affect his ability as a juror, that was the full extent of his statements. To now hold that trial counsel was ineffective would call for rank speculation. Appellant has failed to rebut the presumption that trial counsel made all significant decisions in the exercise of his reasonable professional judgment. Appellant's first point of error is overruled.

III. Impeachment

A. Appellant's Argument

In his second point of error, appellant contends trial counsel did nothing to limit the jury's consideration of impeachment evidence. Appellant contends the testimony of Officer Starks was in conflict with the testimony of the complainant. During the cross- examination of the complainant, the following colloquy occurred:

> Q: Now, the individual who approached your car, is not the individual sitting next to me. In fact, would it be fair to say that you did not see the gentlemen sitting to my left, Mr. Davis, at any time during this entire episode, other than when the police brought him to the scene?
>
> A: Right

Q: You did not see Mr. Davis driving this black vehicle?

A: No, I did not.

Q: You didn't see him at the scene at all?

A: No.

Q: He was not the person who had the gun?

A: No.

* * * *

Q: And as a matter of fact, you didn't see Mr. Davis so anything in connection with this incident; is that correct?

A: Only when the police brought him back.

Officer Starks testified on direct examination that the complainant was able to identify the defendant. During cross-examination by the defense, the officer clarified his position:

Q: Officer, with regard to the identification of Mr. Davis that you say was made at the scene by [the complainant] isn't it the fact that she made a positive identification of Mr. Tabb [the accomplice] and only what was described as a tentative identification of Mr. Davis:

A: Yes, sir.

Q: And what's the difference between positive and tentative, officer?

A: She was absolutely positive that Mr. Tabb was involved in the robbery, and that she was pretty sure but not positive about this Defendant.

Q: So positive means she was certain; tentative means she's not certain, correct?

A: Correct.

Appellant argues that the jury was allowed to consider the statement of Officer Starks that the complainant had made a tentative identification of appellant at the scene as one of the perpetrators of this crime as substantive evidence of appellant's guilt. However, defense counsel clearly established during the cross-examination of Officer Starks that the tentative identification meant the complainant was not positive. There is not a clear inconsistency between the testimony of the complainant and the officer.

B. Analysis

Under the *Strickland* construct, discussed above, appellant has failed to establish the first prong, that counsel's performance was so deficient as not to function as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution. Counsel zealously questioned the two witnesses, and while, arguably, there may be an inconsistency, both witnesses were thoroughly examined regarding the identification of appellant. Trial strategy will be reviewed only if the record demonstrates the action taken by trial counsel is without any plausible basis. *See Ex parte Ewing*, 570 S.W.2d 941, 945 (Tex. Crim. App. [Panel Op.] 1978). An appellate court does not use hindsight to second guess a tactical decision made by trial counsel, that does not fall below the objective standard of reasonableness. *Solis v. State*, 792 S.W.2d 95, 100 (Tex. Crim. App. 1990). Appellant's second point of error is overruled.

IV. Punishment

A. Appellant's Argument

In his third point of error, appellant contends trial counsel was ineffective at the punishment phase of the trial in failing to attack a void judgment from a prior conviction. Appellant claims the case should be remanded for a new punishment hearing. Assuming without deciding that the judgment is indeed void, appellant has failed to establish prejudice.[1] The State used four other judgments to establish appellant's prior criminal record, including the enhancement allegations. Appellant does not challenge those judgments. There is no affirmative showing that this one conviction, apart from the other four, led the jury to punish appellant unfairly or more harshly. Appellant's third point of error is overruled.

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[1] Although appellant alleges that the "void" judgment contained the harshest sentence of 18 years, the other four judgments contain punishments of between one and twelve years. Additionally, appellant admitted during the punishment phase, that he had, indeed, sold drugs before, which is the basis for the "void" judgment.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed September 23, 1999.

Panel consists of Justices Wittig, Frost, and Baird.[2]

Do Not Publish — TEX. R. APP. P. 47.3(b).

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