Affirmed and Opinion filed September 28, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00710-CR

———————————

TERRY DEAN RIPPETOE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 97CR0914

O P I N I O N

A jury convicted appellant, Terry Dean Rippetoe, of driving while intoxicated and the trial judge assessed punishment at five years' confinement, which was suspended for ten years while appellant is on community supervision. In two points of error, appellant argues the trial court erred by: refusing to suppress the audio portion of a videotape; denying appellant's motion to strike a prior conviction and the motion in limine. In his third point of error, he contends he was denied effective assistance of counsel. We affirm.

After he failed the field sobriety tests, appellant was arrested for suspicion of driving while intoxicated and taken to the League City Jail. Appellant appeared on a video tape, where

an officer requesting appellant to take a breath sobriety test. In his first point of error, appellant argues the audio portion of the videotape, where he refused to perform any sobriety tests, should have been suppressed. We disagree.

The constitutional privilege against self-incrimination applies only to compelled testimony resulting from a custodial interrogation. *See Pennsylvania v. Muniz*, 496 U.S. 582, 589, 110 S. Ct. 2683, 110 L. Ed.2d 528 (1990). Interrogation is defined as any word or action on a police officer's part that he knew or should know is reasonably likely to elicit an incriminating response from an accused. *See Rhode Island v. Innis*, 446 U.S. 291, 300-02, 100 S. Ct. 1682, 1689-90, 64 L. Ed.2d 297 (1980); *Jones v. State*, 795 S.W.2d 171, 176 (Tex. Crim. App. 1990). Therefore, questioning "normally attendant to arrest and custody" is not an interrogation. *See McCambridge v. State*, 712 S.W.2d 499, 505 (Tex. Crim. App. 1986).

The police officer only attempted to conduct sobriety tests; he did not interrogate appellant. "Police requests that suspects perform the sobriety tests and directions on how suspects are to do the tests do not constitute [an] 'interrogation.'" *Jones*, 795 S.W.2d at 176; *State v. Davis*, 792 S.W.2d 751, 754 (Tex. App.—Houston [14th Dist.] 1990, no pet.). Accordingly, because appellant was not interrogated when he was requested to take the sobriety test, we overrule appellant's point of error one.

In his second point of error, appellant argues the trial court erred by denying his motion to strike his prior conviction and the motion in limine on the prior conviction. At a pre-trial suppression hearing, appellant challenged the validity of one of the prior convictions alleged in the indictment. He testified that when he entered a guilty plea in 1990 to a misdemeanor DWI charge but was not told the range of punishment by his attorney. The trial court denied his motion to strike that prior conviction, which was one of those listed in the indictment. The judgment and sentence of that particular conviction was later admitted by the State during its case in chief.

We have previously decided that due process does not require trial courts to admonish misdemeanor defendants on the range of punishment before accepting a guilty plea. *See Tatum*

v. State, 861 S.W.2d 27, 29 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (citing cases). Thus, because appellant's prior conviction was a misdemeanor, appellant's second point of error is overruled.

In his third point of error, appellant argues he was denied the effective assistance of counsel. We disagree.

Both the federal and state constitutions guarantee an accused the right to have assistance from counsel. *See* U.S. CONST. AMEND. VI; TEX. CONST. Art. I, § 10; TEX. CODE CRIM. PROC. ANN. Art. 1.05 (Vernon 1994). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). Both state and federal claims of ineffective assistance of counsel are evaluated under the two prong analysis articulated in *Strickland*. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The first prong requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To satisfy this prong, the appellant must (1) rebut the presumption that counsel is competent by identifying the acts or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts or omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). We will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Thompson*, 9 S.W.3d at 813.

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of

the proceedings." Id. The appellant must prove his claims by a preponderance of the evidence. See id. In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption. *See id.* The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *See Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.-Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.-Houston [14th Dist.] 1994, pet. ref'd). When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.-Houston [1st Dist.] 1996, no pet.) (citing *Jackson*, 877 S.W.2d at 771). We will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused relying on an ineffective assistance of counsel claim to make the necessary record in the trial court.

Appellant argues his counsel was ineffective because he failed to file certain pre-trial motions; did not obtain rulings from the court on the motions he did file; and failed to obtain rulings from the trial court on certain objections. However, appellant did not file a motion for new trial alleging ineffective assistance of counsel. When there is no motion for new trial and the record is silent as to counsel's reasons for his actions, the appellate court will not speculate as to counsel's trial strategy. *See Gamble*, 916 S.W.2d at 93. This is particularly true when that strategy concerns the defendant's decision to testify. *See Hubbard v. State*, 770 S.W.2d 31, 43 (Tex. App.—Dallas 1989, pet. ref'd). The record in this case is silent as to trial counsel's strategy and the appellate court will not speculate as to such. Accordingly, appellant has not overcome the presumption that his counsel's actions were sound trial strategy.

Because there is no showing of the reasons for the conduct of appellant's trial counsel and any finding of ineffectiveness would require us to speculate for reasons for his counsel's actions, we overrule his third point of error.

Having overruled all of appellant's points of error, we affirm the trial court's judgment.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed September 28, 2000.

Panel consists of Justices Roberston, Sears, and Lee.*

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

* Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.