Affirmed and Opinion filed October 4, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00633-CR

DONALD RANDON, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 38,190

O P I N I O N

Mr. Donald Randon appeals his conviction for two counts of aggravated robbery. Mr. Randon asserts that his confession was coerced and that his trial counsel was ineffective. We disagree and affirm.

Background

Mr. Randon and several accomplices robbed Cecilio Solis and Margaret Soria at gunpoint in their home. Mr. Randon claims he never entered the home, remaining outside after knocking on the door. According to Mr. Randon, his accomplices were the bad guys

who went into the home and did all the malevolent stuff—he stayed outside and attempted to plunder the victims' car—alone. Mr. Randon's version of events conflicts with that of victim Cecilio Solis. Mr. Solis testified that he saw Mr. Randon as the door opened and before Mr. Randon had a chance to completely pull his mask down over his face. Though the robbery occurred at night, the doorway was illuminated by motion detecting lights.

Mr. Randon and his cohorts stole cash, guns, a gameboy, and a cell phone. The victims called the police immediately after the robbery. Amazingly, Mr. Randon twice used the victims' own cell phone to call and threaten them. Mr. Solis' home phone had caller identification. Listening through the answering machine, Detective Bell of the Brazoria County police department was present during the second call and recognized Mr. Randon's voice.

The following day, Detective Bell prepared two photo spreads for Mr. Solis. Each spread consisted of two pages containing six pictures each. On the first page of each spread in the center top position was a picture of Mr. Randon. Though the pictures of Mr. Randon in each spread were different, he is the only person appearing in both spreads, and he is the only person who is both smiling and appears to have a gold tooth. Prior to viewing the photographs, Mr. Solis told Detective Bell he thought the robber he saw had three or four gold teeth. While Mr. Randon appears to have only one gold tooth in the first photo spread, rather than three or four, Mr. Solis still identified him as the man he saw in his doorway. Ms. Soria was unable to identify Mr. Randon. All the robbers apparently wore masks after entering the home.

Detective Bell arrested Mr. Randon several days later. The victim's cell phone was recovered from the car he was driving. After his arrest, Mr. Randon was held at the Brazoria County police department for questioning for several days. During that time, Mr. Randon was questioned by a number of police officers. Mr. Randon was evidently a suspect in a number of unrelated crimes. According to Detective Bell, Mr. Randon admitted his guilt in two separate written confessions within two hours of being arrested. During trial, Mr.

Randon's counsel moved to suppress these confessions and the court held a *Jackson v. Denno* hearing. At the hearing, Mr. Randon testified that the confessions were not given shortly after arrest, as the State claimed, but instead days later, after extensive food deprivation. Mr. Randon also claimed that an unidentified sergeant in Brazoria County promised him that his confessions would not be used against him. In rebuttal, the State offered the testimony of Detective Bell and the confessions themselves. The confessions include the standard, extensive, initialed recitation of voluntariness. The dates and times on the confessions comport with the State's version of events at the jail, not Mr. Randon's. Mr. Randon does not dispute the authenticity of his signatures, though he does allege the dates and times noted on the documents are fraudulently inaccurate.

Both victims testified at trial. Mr. Solis identified Mr. Randon in court. Mr. Randon's counsel did not object to either the in-court identification of Mr. Randon or to the pretrial photo spreads.

Issues on Appeal

Mr. Randon presents two issues on appeal: First, he claims that the State failed to adequately rebut his claim of coercion by deceptive promise. However, he recognizes that the State did in fact sufficiently controvert his claim of coercion by starvation. Second, Mr. Randon claims his trial counsel was ineffective in failing to object to the in-court identification by Mr. Solis since it resulted from impermissibly suggestive photo spreads. We consider each claim in turn.

Confession Coercion

Mr. Randon claimed during his suppression hearing that a sergeant in Brazoria County promised that his confessions would not be used against him. Mr. Randon claimed Detective Bell lied about when the confessions were given and, in addition, starved him

during the four days he was held at the Brazoria County police department.[1]

When a defendant presents evidence raising a voluntariness question, the prosecution must controvert that evidence and prove voluntariness by a preponderance of the evidence. *State v. Terrazas*, 4 S.W.3d 720, 725 (Tex. Crim. App. 1999). The State need not rebut appellant's assertions, but only controvert them. *Muniz v. State*, 851 S.W.2d 238, 252 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 837, 114 S.Ct. 116 (1993), *citing Dunn v. State*, 721 S.W.2d 325, 333 (Tex. Crim. App. 1986). When the case presents a controverted issue to the trial court, the trial court acts exclusively as the fact finder, assessing the credibility of the witnesses and the weight to be accorded their testimony. *Gentry v. State*, 770 S.W.2d 780, 790 (Tex. Crim. App. 1988). If the trial court's resolution of a controverted issue is supported by the record, a reviewing court should not disturb the trial court's decision. *Dunn*, 721 S.W.2d at 336.

Mr. Randon's claim on appeal is based upon the prosecution's failure to elicit testimony specifically stating that some unidentified sheriff did not make a promise to him. However, Detective Bell's testimony and Mr. Randon's are totally irreconcilable. Detective Bell testified the confessions at issue were given *several days* before Mr. Randon alleges. Detective Bell testified that the confessions were made in the middle of the night, within two hours of arrest, and that during this time period he was alone with Mr. Randon. By contrast, Mr. Randon said the confessions were given after he had been held for 4 days, transferred to a hospital, visited by a host of officers, and returned to the Brazoria County jail, where

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[1] On direct exam, Mr. Randon testified:

Q: Did anyone from Brazoria P.D. discuss the reasons why you might want to give a statement?

A: I don't know the sergeant's name, but the sergeant told me that if I give a statement, he, personally, his self, would call the DA and make sure that–that whatever statement I give, it won't be used against me and that the DA will be lenient on me.

Continuing, Mr. Randon testified:

Q: Did you want to give these two statements that are sitting in front of you right now?

A: No, sir.

Q: Why did you give them?

A: Because I was hungry and I wanted to eat basically.

an unidentified officer offered him a deal that convinced him to confess. The confessions themselves include typed, not printed, times and dates, as well as Mr. Randon's signature and multiple instances of his initials. The confessions are also notarized. The notary's hand-printed time and date notations comport with Detective Bell's version of events, not Mr. Randon's.

Under these facts, we hold that the State met its burden in offering evidence to controvert Mr. Randon's allegation of coercion by deceptive promise. We do not agree that a specific statement from Detective Bell denying Mr. Randon's allegation of a mystery sergeant was required since Detective Bell's testimony was at odds in its entirety with that of Mr. Randon. We defer to the trial court's judgment in weighing this conflicting evidence. *See Dunn v. State*, 721 S.W.2d at 336. We therefore do not address whether the alleged promises were sufficient to render the confession involuntary. We overrule Mr. Randon's first issue.

Ineffective Assistance of Counsel

Mr. Randon next alleges that his trial counsel was ineffective in failing to object to Mr. Solis' in-court identification. Mr. Randon alleges the identification was tainted by impermissibly suggestive pretrial photo spreads. *See Ibarra v. State*, 11 S.W.3d 189, 195 (Tex. Crim. App. 1999). It is axiomatic that counsel's performance was reasonable if the photo spreads were not impermissibly suggestive. On the other hand, even if the spreads were objectionable, counsel may still have been effective.

An in-court identification is inadmissible when the defendant proves, by clear and convincing evidence, that it has been tainted by an impermissibly-suggestive pretrial photographic identification. *Herrara v. State*, 682 S.W.2d 313, 318 (Tex. Crim. App. 1984), *cert. denied*, 105 S.Ct. 2665 (1985). The relevant test is composed of two parts: First, we determine whether, considering the totality of the circumstances, the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial

likelihood of irreparable misidentification. *Ibarra v. State,* 11 S.W.3d at 195. Second, if the procedure is determined to have been impermissibly suggestive, then the following five non-exclusive factors are weighed against the corrupting effect of any suggestive identification procedure in assessing the reliability of the subsequent in-court identification under the totality of the circumstances: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. *Id.* (internal citations omitted). We consider these five factors, all issues of historical fact, deferentially in a light favorable to the trial court's ruling. The factors, viewed in this light, are then weighed *de novo* against the corrupting effect of the suggestive pretrial identification procedure. *Id*., *citing Loserth v. State*, 963 S.W.2d 770, 773-74 (Tex. Crim. App.1998).

We do not find the photo spreads in this case to be impermissibly suggestive. Mr. Randon correctly notes that he is the only individual to appear in both sets of pictures and that he appears in the same location in each. Neither of these two conditions has been held to be suggestive. *See Benitez v. State*, 5 S.W.3d 915 (Tex. App.—Amarillo 1999, pet. ref'd), *distinguishing Cantu v. State*, 738 S.W.2d 249 (Tex. Crim. App. 1987). Mr. Randon's suggestiveness argument also rests upon his claim that he alone among the 23 distinct individuals in the two spreads can be seen to possibly have a gold tooth. While accurate, this fact is not enough to render the line-up suggestive. In *Hicks v. State*, the defendant was the only person among five to show his teeth. 901 S.W.2d 614, (Tex. App.—San Antonio 1995, writ ref'd). The victim in *Hicks* had stated that her attacker had a gap between his front teeth, as did the defendant. The *Hicks* court refused to find the lineup suggestive on the ground that the photos of the other individuals in the spread did not affirmatively show the absence of a gap in their teeth. Here, as in *Hicks*, the photos of the other 22 individuals did not affirmatively show an absence of gold teeth. On the other hand, in *Hicks* the victim

testified that she did not rely on the gap in the teeth in making her identification. In this case it is relatively clear that Mr. Solis did rely on the three or four gold teeth he thought he saw on the man who robbed him.

Nevertheless, even if the lineup were suggestive, and even if application of the five factors enumerated above to the current facts did render Mr. Solis' identification unreliable, we cannot agree that Mr. Randon's counsel was ineffective.

We apply a two-pronged *Strickland* test to determine whether counsel's representation was so inadequate as to violate a defendant's Sixth Amendment right to counsel. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). *See generally Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must first show by a preponderance of the evidence that counsel's performance was deficient, *i.e.*, that his assistance fell below an objective standard of reasonableness. *Id.* Next the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App.1996), *cert. denied*, 519 U.S. 1119, 117 S.Ct. 966, 136 L.Ed.2d 851 (1997). There is a strong presumption that counsel's conduct constitutes sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052.

Mr. Randon has not cited a single case in which counsel was found to be ineffective for failing to object to an in-trial identification as being the result of impermissible pretrail procedures. *Cooke v. State*, cited by Mr. Randon, is inapposite. 735 S.W.2d 928 (Tex. App.—Houston [14th Dist.] 1987). Both in *Cooke* and in the cases cited therein, the defendants were arrested without warrants and placed in lineups. The arrests were blatantly illegal and the identifications were clearly fruits of those illegal searches/seizures. In *Rodriguez v. State*, also cited by Mr. Randon, the appellate court declined to find trial counsel

ineffective because the defendant's arrest and subsequent lineup identification was in fact lawful. 975 S.W.2d 667 (Tex. App.—Texarkana 1998. pet ref'd). Again we note that *Rodriguez* did not involve an issue of a suggestive lineup, but rather the fruits of an arrest.

On cross-examination, counsel for Mr. Randon vigorously attacked Mr. Solis regarding the inconsistencies between the description of his attacker that he gave to police and the physical characteristics of Mr. Randon. Moreover, the most damaging evidence trial counsel faced were the two confessions Mr. Randon had given. The admission of these confessions was fought admirably, but without hope because they were patently admissible. Under these facts, we find trial counsel's failure to move to suppress Mr. Solis' trial identification and rely solely upon cross-examination to be competent trial strategy and objectively reasonable. Additionally, we hold that, because the confessions were admissible, there is no chance the result of the proceeding would have been different had Mr. Solis' identification been excluded. Mr. Randon has therefore failed to show ineffectiveness under either of the two prongs of *Strickland*, as required. The second issue on appeal is overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ Don Wittig
Senior Justice

Judgment rendered and Opinion filed October 4, 2001.
Panel consists of Justices Yates, Edelman, and Senior Justice Wittig.[2]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Don Wittig sitting by assignment.