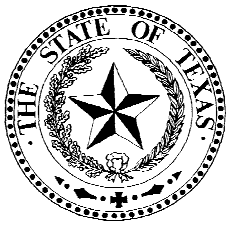
Affirmed and Opinion filed October 18, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00948-CR

FEDERICO MARIN VILLARREAL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 176th District Court
Harris County, Texas
Trial Court Cause No. 828,160

O P I N I O N

Frederico Marin Villarreal appeals a conviction for aggravated robbery[1] on the grounds that: (1) he was denied effective assistance of counsel; and (2) his Sixth Amendment right to counsel was denied when his appointed counsel was removed, upon transferring the case to another district court, and new counsel was substituted. We affirm.

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[1] A jury found appellant guilty and imposed punishment of 55 years confinement.

Ineffective Assistance of Counsel

Standard of Review

To prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and, second, that the appellant was prejudiced in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). To be sustained, an allegation of ineffective assistance of counsel must be affirmatively demonstrated in the record. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119 (1997). In reviewing an ineffectiveness claim, a court need not determine whether counsel's performance was deficient if it is easier to dispose of the challenge based on lack of prejudice. *Strickland*, 466 U.S. at 697.

In reviewing ineffectiveness claims, scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. A court must indulge, and a defendant must overcome, a strong presumption that the challenged action might be considered sound trial strategy under the circumstances. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Thus, the presumption that an attorney's actions were sound trial strategy ordinarily cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 268–69 (Tex. Crim. App. 1999).

Insufficient Record

Appellant's first three issues assert that his trial counsel was deficient in various respects which are discussed below. However, because appellant has failed to present this court a record showing counsel's reasons for his actions, appellant has failed to rebut the

presumption of sound trial strategy. Additional reasons that appellant has failed to demonstrate ineffective assistance are noted below with regard to the specific contentions.

Punishment Phase

Appellant's first issue contends that he did not receive effective assistance of counsel during the punishment phase of trial because his counsel failed to object to the introduction of evidence of an adjudication of guilt for a violation occurring after the period that the underlying deferred adjudication had expired.[2] Specifically, he claims that his counsel failed to point out that the trial court in that case lacked jurisdiction to adjudicate his guilt in 1996 because the one year probation which had been imposed in 1994, would have expired.[3]

A defendant has the right to appeal from deferred adjudication community supervision to the same extent that he is permitted to appeal from post-conviction community supervision. *See* TEX. CRIM. PROC. CODE ANN. art. 44.01(j) (Vernon Supp. 2000); *Dillehey v. State*, 815 S.W.2d 623, 625 (Tex. Crim. App. 1991). However, where either is appealed, the terms of community supervision go into effect only after final disposition of the appeal.[4] Therefore, if appellant appealed his deferred adjudication in 1994, the time at which his probationary period began would have awaited the final disposition of that appeal. Because appellant has not affirmatively shown that he either did not appeal or concluded any appeal

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[2] This evidence was not admitted for enhancement purposes but only for the jury's consideration of punishment generally. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a) (Vernon 1981 & Supp. 2001).

[3] Appellant does not complain of his counsel's failure to object to evidence of other prior offenses: (1) 60 days confinement for burglary of a motor vehicle in 1995, (2) 150 days confinement for burglary of a motor vehicle in 1996, (3) 8 months confinement for felony theft in 1996, and (4) 60 days confinement for possession of marijuana in 1999. Nor has appellant demonstrated how, in light of these offenses, exclusion of the adjudication would probably have produced a different result.

[4] *Cf. Ex parte King*, 550 S.W.2d 689, 690 (Tex. Crim. App. 1977); *McConnell v. State*, 34 S.W.3d 27, 30 (Tex. App.—Tyler 2000, no pet.). *King* and *McConnell* each hold that, in an appeal from a post-conviction community supervision, the terms of probation do not commence until the mandate of the appellate court is received. *King*, 550 S.W.2d at 690; *McConnell*, 34 S.W.3d at 30. It follows that the same rationale would apply to deferred adjudication community supervision.

more than a year before the trial court adjudicated his guilt, he has not shown that the trial court lacked jurisdiction, or that his counsel's failure to object to the introduction of the adjudication of guilt was deficient.

Appellant also asserts that his counsel's performance was deficient in that he mentioned in his closing argument that appellant is from Mexico and will most likely be deported after he is released from the penitentiary. However, counsel's argument that appellant is an illegal alien and thus likely to be deported after serving his punishment was a plausible trial strategy in trying to induce the jury to impose a shorter sentence because appellant would not thereafter pose a threat to the community. Consequently, appellant has failed to meet the first prong of *Strickland,* and his first issue is overruled.

Guilt Stage

Appellant's second issue argues that he was denied effective assistance at the guilt stage because his counsel failed to request pretrial notice of the State's intent to introduce evidence of extraneous misconduct and failed to object to the admission of that evidence.[5] Appellant also complains that counsel failed to cross-examine the State's witnesses meaningfully.

Appellant has wholly failed to demonstrate how, but for his counsel's actions, the result of the proceeding would have been different. He does not indicate what beneficial testimony or impeachment would have resulted from any cross-examination of the State's witnesses. Nor does he show how obtaining notice of the extraneous offenses could have overcome any inability to prevent their admission or to develop rebuttal evidence. Similarly, counsel's decision to not object to objectionable extraneous offense testimony can be a

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[5] This evidence includes: (1) the complainant's testimony, speculating that appellant's picture was probably not in his middle school yearbook because appellant was always a trouble maker and probably skipped school that day; (2) officer Martinez's testimony that he found a photograph of appellant by searching the "Lennox Gang" police file; (3) officer Hernandez's testimony that weapons found during the search of appellant's truck included an automatic weapon belonging to appellant; and (4) officer Garza's testimony that he was called to search appellant's home for possible narcotics.

plausible trial strategy as an attempt to appear open and honest with regard to all questions. *See Heiman v. State*, 923 S.W.2d 622, 626 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd). Moreover, counsel may reasonably choose to not object to objectionable testimony generally in order to avoid drawing additional attention to it. *See Valencia v. State*, 891 S.W.2d 652, 659 (Tex. App.—Houston [1st Dist.] 1993), *vacated on other grounds*, 946 S.W.2d 81 (Tex. Crim. App. 1997).[6] Lastly, although appellant speculates that the filing of a pre-trial motion could have opened new avenues of investigation, he does not indicate what those avenues might have been. Because he has thus not met his burden under *Strickland*, his second issue is overruled.

Appellant's third issue similarly contends that he was denied effective assistance because his counsel failed to file pretrial motions, neglected to make a pretrial election concerning who would assess punishment, and failed to request the court reporter's presence during voir dire in order to ensure a full record of the proceedings. Likewise, appellant argues that the court had to point out to counsel which jurors to challenge for cause because his counsel could not recall which jurors stated potential bias.

Again, appellant fails to point to any portion of the record showing that, but for counsel's alleged failure to file pretrial motions or make a pretrial election on who would assess punishment, the result of any aspect of the trial would have been different. Appellant also does not explain how the outcome of voir dire would have been more beneficial had counsel challenged the biased jurors without the trial court's help. Nor does appellant allege that any particular error occurred during the unrecorded portion of voir dire. Without a showing of some injury, the failure to request transcription of voir dire is not ineffective assistance *per se*. *Wills v. State*, 867 S.W.2d 852, 857 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Therefore, appellant's third issue is overruled.

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[6] Appellant has not asserted that the evidence of his guilt in this case was so tenuous that evidence of the extraneous offenses could have produced an erroneous guilty verdict, but rather admits that the evidence of his guilt was strong.

Substitution of Counsel

Appellant's fourth issue asserts that his Sixth Amendment right to counsel was denied when his first appointed counsel was removed from the case and another lawyer was substituted. He claims that, because a trial court has no discretion to remove counsel *sua sponte*, this case should be remanded to the trial court to make a record as to whether his first counsel was properly removed.

A trial judge lacks discretion to replace appointed counsel over the counsel's and defendant's objection when the only justification for such replacement is the judge's personal preference. *See Stotts v. Wisser*, 894 S.W.2d 366, 367 (Tex. Crim. App. 1995). Thus, the record must show a principled reason to justify a trial judge's *sua sponte* replacement of appointed counsel. *Id*. However, in this case, appellant admits that the "record is unclear as to what happened and whether his first appointed counsel was removed sua sponte" at all. Thus, without developing a record showing the circumstances leading to the change of counsel and an objection thereto, appellant failed to preserve or establish any challenge to the propriety of his counsel's replacement. Accordingly, appellant's fourth issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 18, 2001.
Panel consists of Justices Yates, Edelman, and Wittig.[7]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[7] Senior Justice Don Wittig is sitting by assignment.