Affirmed and Opinion filed October 19, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00646-CR

CEDRIC BERNARD ANDERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 793,492

O P I N I O N

Appellant, Cedric Bernard Anderson, was convicted of delivery of less than one gram of cocaine. Due to his status as an habitual state jail felony offender, appellant was sentenced to confinement in the state penitentiary for fourteen years. On appeal, he contends (1) his trial counsel was constitutionally ineffective and (2) the evidence was factually insufficient to support his conviction. We affirm.

Two Houston police officers, Eckels and Collinsworth, were working undercover in a neighborhood that had a history of drug dealing. After a few minutes, Billy Ray Wilson approached the passenger side of the officer's truck and asked what they were looking for. Appellant also approached, asked Officer Eckels for a cigarette and again asked what the officers were looking for. Officer

Collinsworth replied that they were looking for a couple of "twenties," a street term for a small amount of cocaine. Appellant said "I can get it for you," took a twenty dollar bill out of officer Collinsworth's hand and left. Wilson followed appellant to a nearby field. They spoke for a moment, and then Wilson returned to the officers as appellant left the scene.

Wilson told the officers that appellant had stolen their money and asked if they had any more. Officer Collinsworth replied that he had only five dollars, whereupon Wilson said "that will work" and spit out a rock of crack cocaine. The officers then notified the raid team, who arrested Wilson. They then began looking for appellant. When they found him they asked "where's our stuff at?" Appellant responded that "The other guy's got it. You need to get it from him. I give it to him." The officer's then notified the raid team to arrest appellant.

Ineffective Assistance of Counsel

In his first point of error, appellant claims he was denied effective assistance of counsel. He contends his counsel erred by failing, on two occasions, to object to hearsay testimony and for failing to allow appellant to testify in his own behalf.

To prevail on a claim of ineffective assistance of counsel, an appellant must first show that counsel's performance was deficient, and then show that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ramirez v. State*, 987 S.W.2d 938, 942-43 (Tex. App.—Austin 1999, no pet. h.). In determining whether an appellant has satisfied the first element of the test, we must decide whether the record establishes that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *See Strickland* at 687.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We must presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* The appellant must demonstrate that counsel's performance

was unreasonable under the prevailing professional norms and that the challenged action was not sound trial strategy. *See Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App.1991). We do not evaluate the effectiveness of counsel in hindsight, but from counsel's perspective at trial. *See Strickland*, 466 U.S. at 689; *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App.1993); *Stafford*, 813 S.W.2d at 506. Further, we assess the totality of counsel's representation, rather than his or her isolated acts or omissions. *See Strickland*, 466 U.S. at 689; *Ramirez*, 987 S.W.2d at 943.

The appellant cannot meet his burden if the record does not affirmatively support the claim. *See Jackson v. State*, 973 S.W.2d 954, 955 (Tex. Crim. App. 1998); *Beck v. State*, 976 S.W.2d 265, 266 (Tex. App.—Amarillo 1998, pet. ref'd); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex. App.—Corpus Christi 1992, pet. ref'd, untimely filed). Generally, a record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

Officer Collinsworth, during the State's case in chief, testified as follows:

> Q: Okay. And what Mr.—what did you tell Mr. Anderson?
>
> A: I told Mr. Anderson—Mr. Anderson asked us what we were looking for and I told him a couple of twenties, which is a street term for a small amount of crack cocaine.
>
> Q: And what did he say?
>
> A: He said he could help us.
>
> Q: How did he say it?
>
> A: He said, "I can get it for you."
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> * * *
>
> Q: And where did you take your car? Did you pull into a parking lot or the street or what?
>
> A: No, we pulled into the seafood parking lot and approached him. He was in the parking lot. I asked him something to the extent, "Hey man, where's our stuff at?" And he made a remark as if—he said, "The other guy's got it. You need to get it from him. I give it to him."

Appellant argues that Officer Collinsworth's testimony as to appellant's statements is inadmissible hearsay, and that his counsel was ineffective in not objecting.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801, 802. However, a party's own statement, offered against him in evidence, is not hearsay. *See id.* at 801(e)(2)(A). Here, appellant's own statement was being used against him; thus, Collinsworth's testimony was not hearsay. Accordingly, counsel was not ineffective for failing to object.

Appellant also contends his trial counsel was ineffective in not allowing him to testify in his own behalf. To support his contention, appellant directs us to letters in the record written between himself and counsel. In those letters, appellant advises his attorney that he intends to go to trial and take the witness stand in his own defense. The letter by appellant's counsel acknowledges appellant's intent to take the stand, advises against it, but concedes the decision is his constitutional right. In the end, appellant did not testify. Appellant now maintains that he was "prevented" from testifying by counsel.

The record demonstrates appellant did not testify, but does not reveal the reasons therefor. It would be pure speculation for us to conclude that appellant did not testify because he was prevented by counsel. Appellant did not file a motion for a new trial; thus, we have no evidence of trial counsel's strategy or motivation. *See Kemp*, 892 S.W.2d at 115. Under the record before us, we are unable to conclude that the performance of appellant's trial counsel was deficient. *Id.* Accordingly, the first element of *Strickland* has not been met. Appellant's first point of error is overruled.

Factual Sufficiency

In his second point of error, appellant contends the evidence is factually insufficient to support his conviction. A factual sufficiency review must be deferential to the trier of fact, to avoid substituting our judgment for that of the jury. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). We maintain this deference by reversing only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997).

Appellant was charged by indictment with delivery of a controlled substance by actual transfer, constructive transfer, or offer to sell. Officer Collinsworth testified that appellant offered to get cocaine for

them. He then took the money from the officer's hand and left. He then spoke to Wilson, who returned and, for an additonal five dollars, sold them a rock of cocaine. When asked later where the promised cocaine was, appellant said he had given it to Wilson. In viewing the evidence, the verdict could be supported on any of the theories advanced in the indictment.

Accordingly, we find the verdict is not against the great weight of the evidence so as to be clearly wrong and unjust. Appellant's second point of error is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 19, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
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