Affirmed and Opinion filed November 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00414-CR

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RUDY ALLEN DIVINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 794,520

O P I N I O N

Rudy Allen Divins appeals his conviction by jury for the felony offense of driving while intoxicated, enhanced by two prior DWI offenses and one felony offense of unauthorized use of a motor vehicle. After finding the enhancement paragraphs to be true, the jury assessed punishment at twenty years confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant asserts the following four points of error based on ineffective assistance of counsel: (1) defense counsel failed to raise the defense of involuntary intoxication during the guilt/innocence phase of the trial; (2) defense counsel failed to raise the defense of involuntary intoxication during the punishment phase of the trial; (3) defense counsel failed

to dispute the admissibility of an incriminating statement; and (4) defense counsel's overall representation was deficient. For the reasons stated below, we affirm the judgment of the trial court.

BACKGROUND

On October 2, 1998, Houston Police Officers D. W. Rice and F. J. Lopez were patrolling downtown Houston when a tow truck driver flagged them down. The tow truck driver told the officers that he had been following a white car that was swerving in and out of its lane. The tow truck driver identified the car as a 1996 Oldsmobile that was stopped at a light about 40 feet away. The officers followed the white car and stopped it after it failed to maintain a single lane of travel.

Appellant pulled the car over to the side of the road, and the officers asked appellant to exit the car. When appellant exited the car, the officers noticed that appellant smelled of alcohol, had bloodshot and glassy eyes, and could not maintain his balance. The officers asked appellant if he had been drinking, to which he responded that he had had five 12 oz. beers. The officers helped appellant to the curb and asked him to take a field sobriety test. Appellant refused. The officers then placed appellant in custody.

Officer Lopez conducted an inventory search of the car. He found one unopened beer can and a bag containing medication. The medication was prescribed to appellant. The officers transported appellant to the police station where they videotaped him refusing to perform any sobriety tests. Appellant lost consciousness while he was being processed and was taken to a hospital.

DISCUSSION

Appellant presents four points of error, all based on ineffective assistance of counsel. The U.S. Supreme Court established a two-prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. *See id.* Second, appellant must demonstrate that the deficient performance prejudiced the defense. *See id.* Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that,

but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See id.*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992).

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *See id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *See id.*

Appellant claims that defense counsel should have raised the defense of involuntary intoxication arising from the consumption of prescription drugs and that defense counsel should have objected to the admission of appellant's statement concerning his consumption of beer. Appellant asserts that the cumulative effect of these two incidents of inaction, along with counsel's decision to not voir dire the jury and to not make an opening statement, amounts to ineffective assistance of counsel. While plausible arguments can be made as to trial counsel's strategy, or lack thereof, the record is silent as to why trial counsel engaged in the conduct of which appellant complains. Appellant did not file a motion for new trial raising the issue of ineffective assistance that would have helped to develop the record. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving the allegation of ineffective assistance of counsel.[1] When there is a lack of evidence in the record as to counsel's trial strategy, an appellate court may not speculate about why counsel acted as he did. *See Jackson v. State*, 877 S.W.2d at 771. Without testimony from trial counsel, an appellate court must presume that counsel had a plausible reason for his actions. *See Safari v. State*, 961 S.W.2d 437, 445 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd, untimely filed). In the absence of such testimony, an appellate court cannot meaningfully address claims of ineffectiveness. *See Davis v. State*, 930 S.W.2d 765, 769 (Tex.

[1] "The record in a direct appeal may well contain a less than adequate inquiry into possible tactical reasons for various actions or omissions by counsel and may lack completely trial counsel's own explanations for his actions or inactions." George E. Dix and Robert O. Dawson, 41 Texas Practice: Criminal Practice and Procedure § 24.94 (1995).

App.–Houston [1st Dist.] 1996, pet. ref'd). Accordingly, since there is no evidence in the record concerning trial counsel's explanation for his manner of representation, it is impossible to conclude that counsel's performance was deficient. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.–Houston [1st Dist.] 1996, no pet.).

The record in the case at bar is silent as to why appellant's trial counsel pursued this particular trial strategy. Therefore, appellant has failed to rebut the presumption that his counsel's actions were based on reasonable decisions. "Failure to make the required showing of ... deficient performance ... defeats the ineffectiveness claim." *See Strickland v. Washington*, 466 U.S. at 699. However, recourse for appellant's claim is still available. The Court of Criminal Appeals has held that the general doctrine that forbids an application for writ of habeas corpus after direct appeal has addressed the issue does not apply in these situations, and appellant can resubmit his claim via an application for writ of habeas corpus. *See Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998); *Ex Parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997). This would provide an opportunity to conduct a dedicated hearing to consider the facts, circumstances, and rationale behind counsel's actions. Specifically, a hearing would allow trial counsel himself to explain what motivated his actions during the proceedings.

Appellant has not rebutted the strong presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment. We overrule appellant's sole point of error and affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed November 9, 2000.

Panel consists of Justices Anderson, Frost, and Lee.[2]

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

[2] Senior Justice Norman Lee sitting by assignment.