Affirmed and Opinion filed November 22, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00910-CR

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SHERROD D. BUSBY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 803,771

O P I N I O N

Appellant was convicted by a jury of the offense of possession of a cocaine in an amount weighing more than four grams and less than 200 grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(d) (Vernon Supp. 2000). The jury assessed punishment at eleven and one half years. Appellant now presents two issues for review, arguing ineffective assistance of counsel under both the Federal and State Constitutions. We affirm.

Background

On January 26, 1999, police officers Wood and Scoggins were conducting surveillance of a Houston apartment complex on reports that one of its residents regularly engaged in heroin trafficking. Sometime during the course of this surveillance, officer Wood noticed two females approach the window of an apartment unit unrelated to the investigation. One of the women then handed the other a sum of money, with both proceeding to knock on the window. A resident of that unit subsequently came outside and began pointing toward the back of the complex and motioning one of the women to go around to the rear. Wood, who had positioned himself in a business near the front of the complex, radioed Scoggins, positioned at the rear, and advised him of the suspected narcotics activity headed in his direction. Moments later, Scoggins observed the woman, Cynthia Cole, knock on the door of unit number four, enter the unit, and remain for a few minutes. While Cole waited inside, appellant stepped out of the door and across the hallway to a public laundry room where he retrieved a jacket and then reentered the apartment.

After a few minutes, Cole left the apartment and rejoined the other woman in front of the complex while appellant returned the jacket to the laundry room. Wood then saw Cole give something small to the other female while placing something similar in her own bra. As the two females began to leave, Wood questioned them and found cocaine in Cole's possession. Upon his arrival at unit number four, Wood entered and spoke with appellant. From this vantage point, Wood had an unobstructed view of the laundry room and saw the jacket described by Scoggins on top of a pile of clothes. Wood proceeded to search the jacket and found a plastic baggie containing about 5 grams of crack cocaine. After the trial court denied appellant's motion to suppress this evidence, the jury convicted appellant of possession of cocaine. Appellant now raises two issues on appeal.

Ineffective Assistance of Counsel

In his two issues for review, appellant argues that his trial counsel was ineffective under both the Sixth and Fourteenth Amendments to the US Constitution and Article 1 Section 10

of the Texas Constitution. Because Texas courts review the adequacy of representation during the guilt-innocence stage of a trial under the same standard, whether based on state or federal law, we address both issues concurrently. *See Vasquez v. State*, 830 S.W.2d 948, 949 (Tex. Crim. App. 1992) .

In order to establish ineffective assistance of counsel at the guilt-innocence stage of a non-capital trial, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984); *Black v. State*, 816S.W.2d 350, 356 (Tex. Crim. App. 1991). To meet this burden, an appellant must prove by a preponderance of the evidence that his attorney's representations fell below the standard of prevailing professional norms and that there is a reasonable probability that, but for counsel's deficiencies, the result of the trial would have been different. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). During such a review, we indulge a strong presumption that counsel's conduct fell within a wide range of reasonable representation, with the burden on appellant to overcome this presumption *See id*.

In his two issues, appellant complains that his trial counsel rendered ineffective assistance by failing to object to the State's proffer of the cocaine illegally seized in his jacket. For appellant to succeed on this ineffectiveness claim, he must demonstrate that if counsel had objected, the trial court would have erred in overruling the objection. *See Vaughn v. State*, 931 S.W.2d 564, 566 (Tex.Crim.App.1996). We find that appellant cannot meet this burden.

Prior to trial, appellant filed a motion to suppress all evidence obtained on the date of arrest on grounds that the arresting officers seizing such evidence acted without consent, probable cause, or a search warrant. The court carried the motion along with the trial and, outside the presence of the jury, conducted a hearing on the admissibility of the seized cocaine. At this hearing, testimony established that the seizure of cocaine resulted from a search of appellant's jacket. This testimony also established that officer Wood found this

jacket lying in the laundry room located across the hallway from appellant's unit. Based on this evidence, the trial court denied appellant's motion to suppress. For the reasons expressed below, we agree with the court's decision.

Our prior case law holds that when contraband is thrown, dropped, or placed away from the accused in a public place, the recovery thereof does not constitute a search, and the evidence is admissible. *See Washington v. State*, 810 S.W.2d 313, 314 (Tex. App.–Houston [14th Dist.] 1991, appellant's pet. ref'd), *State's pet. dism'd as moot*, 816 S.W.2d 431 (Tex. Crim. App. 1992) (per curiam). Texas statute defines a "public place" as "any place to which the public or a substantial group of the public has access and includes, but is not limited to . . . the common areas of . . . apartment houses . . . ." TEX. PEN. CODE ANN. § 1.07(a)(40) (Vernon 1994). Accordingly, the trial court correctly denied appellant's motion to suppress so that any objection by appellant's counsel would have been properly overruled as the evidence was admissible. Therefore, we conclude that appellant did not satisfy the first prong of the *Strickland* test as an attorney's failure to object to admissible evidence does not constitute ineffective assistance of counsel. *See McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992). We overrule appellant's two points of error and affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment affirmed and Opinion filed November 22, 2000.

Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.

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