Affirmed and Opinion filed December 14, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01212-CR

———————————

MYRON CORTEZ MILLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 361st Judicial District Court
Brazos County, Texas
Trial Court Cause No. 25,936-361

O P I N I O N

Appellant, Myron Cortez Miller, appeals from his conviction for the first degree felony offense of possession with intent to deliver cocaine, a controlled substance, of more than four grams but less than two hundred grams. The trial court assessed punishment at sixteen years confinement and a $5,000 fine. In two points of error, Appellant contends that he was denied effective assistance of counsel. We affirm.

Facts

Officer Kyle Halbert of the Bryan Police Department testified that on January 22, 1998, at approximately 6 a.m., he recorded on radar a car driven by Myron Miller going 90

miles per hour in a 55 miles per hour zone. Officer Halbert followed Miller and pulled in behind him at a gas station. On Officer Halbert's request, Miller presented his driver's license and informed the officer that he did not have auto insurance. As Officer Halbert was writing out a ticket and waiting for dispatch to respond to his request for information, he observed Miller carrying a cigar box and something else to a trash can where he deposited the items. Upon inspecting the trash can, the officer discovered a cigar box, a "Big Gulp" cup, and an orange pharmacy bottle containing thirty-seven rocks of crack cocaine. The trash can was otherwise empty.

Standard of Review

Both the federal and state constitutions guarantee an accused the right to have assistance from counsel. See U.S. CONST. Amend. VI; TEX. CONST. art. I, § 10. The right to counsel includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997).

In reviewing claims of ineffective counsel, Texas courts utilize the two prong analysis first articulated in *Strickland*. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Under this test, an appellant must prove: (1) that his counsel's representation was deficient and (2) that the deficient performance was so serious that it prejudiced his defense. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). To satisfy the first prong, an appellant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms. *Id.* To satisfy the second prong, an appellant must prove that there is a reasonable probability that but for counsel's deficient performance the result of the proceeding would have been different. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceeding." *Id*. The reviewing court must judge the claim based on the totality of the representation; however, it is possible that a single error by counsel could be so egregious as to constitute ineffective assistance. *See Thompson*, 9 S.W.3d at 813.

We begin our review with the strong presumption that counsel was competent. *Id.*; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994)(en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption and proving by a preponderance of the evidence that counsel was ineffective. *See Thompson*, 9 S.W.3d at 813. To meet this burden, the appellant must establish that ineffectiveness is affirmatively demonstrated in the record. *Id*. at 814.

Analysis

In two points of error, Appellant contends that he was denied effective assistance of counsel, specifically in that his counsel: (1) failed to conduct competent voir dire of the jury, and (2) failed to request a jury instruction regarding police harassment. Regarding the conduct of voir dire, appellant's primary contention is that trial counsel was ineffective in failing to ask any questions of juror Robert Wilson, whose answers on the potential juror questionnaire revealed that he was a College Station police officer. Appellant additionally contends that trial counsel's failure to address the elements of the alleged offense during voir dire further demonstrates the ineffectiveness of the representation. And lastly, appellant maintains that trial counsel failed to adequately voir dire the jury concerning the applicable range of punishment. One potential juror specifically stated that he did not think that probation would be sufficient if appellant was convicted of the alleged offense, and, appellant asserts, trial counsel did not ask any followup questions of this juror as foundation for a challenge for cause.

Regarding the jury charge, the appellant contends that although trial counsel established a defensive theory based on a pattern of police harassment of the defendant, counsel failed to request a jury charge on the issue. Appellant argues that trial counsel should have requested a charge informing the jury that they shall disregard any evidence that they believe was obtained in violation of the state or federal constitutions or laws.

Although the record before us generally supports the facts relied on by appellant, it is

silent as to the reasons that may have been behind trial counsel's acts or omissions.[1] It would be improper for us to speculate as to what those reasons, strategic or otherwise, might be. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.--Houston [1st Dist.] 1996, no pet.). Trial counsel's acts and omissions during voir dire or regarding the jury charge certainly do not rise to the level of being *per se* ineffective assistance of counsel. *See Thompson*, 9 S.W.3d at 813 (courts should hesitate to "designate any error as per se ineffective assistance of counsel").

Because the record does not specifically focus on the reasons for the conduct of trial counsel, the appellant cannot meet his burden of rebutting the strong presumption that the decisions of his counsel during trial fell within the wide range of reasonable professional assistance. *See Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.--Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex.App.--Houston [14th Dist.] 1994, pet. ref'd). We therefore overrule both of appellant's points of error.

We affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed December 14, 2000.
Panel consists of Justices Robertson, Sears, and Hutson-Dunn.[*]
Do Not Publish — TEX. R. APP. P. 47.3(b).

---

[1] A defendant wishing to pursue an ineffective assistance of counsel claim based on acts or omissions that may, depending on the reasons therefore, fall within the realm of acceptable conduct, has two options: (1) he or she can file a motion for new trial and request a hearing in order to elicit testimony concerning the reasons for the conduct, or (2) he or she can pursue a writ of habeas corpus to elicit the same type of testimony. *See Thompson*, 9 S.W.3d at 814-15. The latter option is available even after a direct appeal has addressed the issue. *Id.*

[*] Senior Justices Sam Robertson, Ross A. Sears and D. Camille Hutson-Dunn sitting by assignment.