Affirmed and Opinion filed December 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-01382-CR

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ARTHUR DEAN EVELINE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337TH District Court
Harris County, Texas
Trial Court Cause No. 788,606

O P I N I O N

A jury found appellant guilty of aggravated robbery. The court thereafter found both enhancement paragraphs true and assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for thirty years.

Appellant's court-appointed counsel filed a motion to withdraw from representation of appellant along with a supporting brief in which he concludes that the appeal is wholly frivolous and without merit. *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The brief meets the requirements of *Anders* by presenting a professional evaluation

of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d 807, 811 (Tex. Crim. App. 1978).

A copy of counsel's brief was delivered to appellant. Appellant was advised of the right to examine the appellate record and to file a *pro se* response. Appellant has filed a *pro se* response to the *Anders* brief presenting three points of error. Appellant asserts that (1) there is no evidence to support his conviction, (2) the arresting officer had no probable cause to arrest appellant, and (3) appellant's trial and appellate counsel provided ineffective assistance. The State informed us by letter that it will not file a responsive brief.

The testimony presented at trial showed that complainant was employed as a cashier for a Chevron gas station and convenience store on the night of the offense. In the early morning hours, appellant pulled a gun on the store clerk (the complainant), demanded money and demanded that he fill a trash bag with cartons of cigarettes. While appellant held a gun on complainant, complainant gave appellant some cash and inserted approximately fifty cigarette cartons into the bag.

Complainant enlisted the help of Robert Green, a customer who had just finished pumping gas into his car, to drive him to a restaurant where police officers congregated. Complainant gave police a description of the robber, described his clothing and where he was heading, and the police broadcasted the description over the police radio. Approximately twenty minutes later, a police officer returned to the scene of the crime with appellant in the back of the police car. Complainant positively identified appellant as the robber.

LEGAL SUFFICIENCY OF THE EVIDENCE

In his second point of error, appellant claims there is no evidence to support his conviction. When reviewing the legal sufficiency of the evidence, we will review all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560

(1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). In conducting this review, we will not re-evaluate the weight and credibility of the evidence; instead, we act only to ensure the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). The jury is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

The elements of aggravated robbery are (1) a person; (2) in the course of committing theft; (3) with intent to obtain or maintain control of property; (4) intentionally or knowingly; (5) threatens another with, or places another in fear of; (6) imminent bodily injury or death; and (7) uses or exhibits (8) a deadly weapon. *See* TEX. PENAL CODE ANN. § 29.02-29.03 (Vernon 1994); *Hoyos v. State*, 951 S.W.2d 503, 511-512 (Tex. App.–Houston [14th Dist.] 1997, pet. granted), *affirmed* in *Hoyos v. State*, 982 S.W.2d 419 (Tex. Crim. App. 1998). A rational jury could have found that appellant was the robber and that each element of the offense was proven beyond a reasonable doubt. *See Joseph v. State*, 681 S.W.2d 738, 739 (Tex. App.–Houston [14th Dist.] 1984, no pet.); *Normand v. State*, 686 S.W.2d 275 (Tex. App.–Houston [14th Dist.] 1985, pet. ref'd). The evidence was legally sufficient to support appellant's aggravated robbery conviction.

PROBABLE CAUSE TO ARREST

In his first point of error, appellant argues that the police did not have probable cause for arrest. Generally, police officers must obtain a warrant prior to taking someone into custody. *See Crane v. State*, 786 S.W.2d 338, 346 (Tex. Crim. App. 1990). The Texas Code of Criminal Procedure provides one of the exceptions to the warrant requirement:

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.

TEX. CODE CRIM. P. ANN. article 14.04 (Vernon Supp. 1999). A police broadcast, standing alone, is not sufficient to establish probable cause for an arrest. *See Amores v. State*, 816 S.W.2d 407, 416 (Tex. Crim. App. 1991). There must exist additional facts, available to the officer, which would warrant a person of reasonable caution to conclude that a crime has been committed. *Id.*

Complainant reported in person to the police that he had been robbed just minutes earlier and provided a description of his assailant, whom he had ample time to observe both before and during the commission of the crime. He described the robber as being approximately six feet tall, approximately thirty years of age, weighing about 250 pounds, and wearing a white shirt and white pants. The police immediately broadcasted the description over the radio. Another officer heard the broadcast and saw a person who matched the description walking about one-half to three-quarters of a mile away from the Chevron station where the offense occurred. The officer took appellant into custody and returned him to the scene of the crime within approximately forty minutes of the incident, at which time he was positively identified by the complainant. Because the complainant talked to the broadcasting officer in person, provided a detailed description of his assailant's appearance, and because of the temporal and physical proximity of the robbery site and the arrest cite, the officer had sufficient probable cause to arrest appellant. *See Rodriguez v. State*, 975 S.W.2d 667, 679 (Tex. App.–Texarkana 1998, pet. ref'd).

EFFECTIVE ASSISTANCE OF COUNSEL

In his third point of error, appellant asserts that both his trial and appellate counsel rendered ineffective assistance of counsel. In order to establish a claim for ineffective assistance of counsel, the defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Perrett v. State*, 871 S.W.2d 838, 840 (Tex.

App.–Houston [14th Dist.] 1994, no pet.) (*citing Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex. Crim. App.1986). A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. *See Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App.1992).

Judicial scrutiny of counsel's performance must be highly deferential. *See Strickland* at 466 U.S. 689, 104 S.Ct. 2052. A reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See id.* Counsel's performance must be judged by the totality of the representation. *See Chatham v. State*, 889 S.W.2d 345, 349 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd). An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *See id.* at 351. Under the *Strickland* test, the defendant bears the burden of proving ineffective assistance of counsel. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994). Contentions of ineffectiveness must be proved by the accused by a preponderance of the evidence. *See Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App.1993). Following *Strickland*, we must determine, for each instance of ineffective assistance cited by appellant, whether defense counsel's performance was deficient before we reach the prejudice prong of the *Strickland* test. *See Jackson,* 877 S.W.2d at 771. Appellant asserts defense counsel's performance was deficient on several grounds.

First, appellant contends that defense counsel's failure to file any pretrial motions constituted ineffective assistance of counsel. The evidence of appellant's guilt was very strong and to make unnecessary motions would have been useless. *See Hammond v. State*, 942 S.W.2d 703, 710 (Tex. App.–Houston [14th Dist.] 1997, no pet.). The mere filing of pre-trial motions, for the sake of appearance, does not in and of itself aid in the defense of an accused. *See id; Yuhl v. State,* 784 S.W.2d 714, 717 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd). In addition, appellant fails to identify a basis in the record for such motions and fails to state

how such motions would have been beneficial or how the results would have been different but for lack of these motions. *See Passmore v. State,* 617 S.W.2d 682, 685 (Tex. Crim. App.1981), *overruled on other grounds* by *Reed v. State,* 744 S.W.2d 112 (Tex. Crim. App.1988). When the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude counsel's performance was deficient. *See Jackson,* 877 S.W.2d at 771. Indeed, under *Strickland,* we must presume that counsel's actions might be considered sound trial strategy, and a silent record fails to rebut that presumption. *See id.* We do not conclude trial counsel was ineffective in regard to the filing and pursuit of pre-trial motions.

Appellant also points to the fact that trial counsel failed to make an independent investigation of the facts of the case. Specifically, appellant asserts that further investigation of the facts by trial counsel would have resulted in counsel calling a witness, Robert Green, to testify at trial. Appellant asserts that Green was the only person who could have proven that appellant did not commit the offense of aggravated robbery.

During a discussion at the bench during trial, the prosecutor informed the trial judge that the State had issued a subpoena for Green that could not be served due to an inability to locate Green. Further, complainant testified at trial that during the commission of the offense, which occurred inside the Chevron station, Robert Green was outside pumping gas and did not witness the crime. An attorney's failure to investigate or present witnesses will not be a basis for establishing ineffective assistance of counsel unless it is affirmatively shown that the presentation of that evidence would have benefitted appellant. *See Johnson v. State,* 915 S.W.2d 653, 662 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd). Counsel's inability to present the testimony of Green does not deem his representation ineffective.

Finally, appellant's vague allegation that trial counsel failed to adequately prepare for trial is without merit. Based upon the record before us, we find that appellant has not met his burden that, based upon the totality of the representation, trial counsel performed deficiently. A silent record as to trial counsel's intentions or strategies concerning decisions made during

trial does not require us to speculate on those intentions or strategies. *See Jackson*, 877 S.W.2d at 771. When the record contains no evidence of the reasoning behind trial counsel's actions, we cannot conclude counsel's performance was deficient. *See id.*

From the totality of the representation, it appears that appellant received effective assistance of counsel at trial. Counsel adequately cross-examined each of the State's witnesses, objected at various points in the proceedings where appropriate, and presented a competent closing argument at trial. We hold defense counsel was, during the guilt/innocence phase of trial, performing within the range of reasonable professional assistance. Therefore, because appellant was not denied his Sixth Amendment right to effective assistance of counsel for his defense, we need not address the prejudice prong of *Strickland.*

Appellant also argues in his *pro se* brief that his appellate counsel rendered ineffective assistance of counsel because counsel filed an *Anders* brief and failed to raise any meritorious points of error on appeal. A defendant's right to assistance of counsel does not include the right to have an attorney urge frivolous or unmeritorious claims. *See Johnson v. State*, 885 S.W.2d 641, 645 (Tex. App–Waco 1994, pet.ref'd). In cases in which counsel cannot, in good faith, advance any arguable grounds of error, counsel must file a brief containing a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d at 811.

We have carefully reviewed the record, counsel's brief and appellant's *pro se* brief, and find no reversible error in the record. Appellant's *pro se* response does not raise any arguable points of error. We agree with appellate counsel that the appeal is wholly frivolous and without merit.

Accordingly, the judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed December 16, 1999.

Panel consists of Justices Yates, Fowler, and Frost.

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