Affirmed and Opinion filed December 23, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-00143-CR & 14-98-00144-CR

———————————

LYNDELL JONES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 740, 936 & 740, 937

O P I N I O N

A jury found Lyndell Jones guilty of two counts of intoxication manslaughter and assessed punishment for each offense at 15 years confinement to run concurrently. In three points of error appellant argues the judgment should be reversed because: (1) and (2) the trial court erred in overruling two motions to suppress; and (3) defense counsel did not provide effective assistance of counsel. We affirm the trial court's judgment.

Background Facts

Appellant drove through a red light an hit another vehicle, killing the other car's driver, Ira Goodman, and appellant's passenger, Zadarius Warren, his grandson.

Officr Chadwick, who was investigating the accident, noticed a strong smell of alcohol on appellant's breath. After smelling the odor, he asked appellant if he had been drinking. Appellant responded he had had two beers. During the investigation, Chadwick noticed a license belonging to Adam Grill in appellant's wrecked truck and asked appellant what the license was doing in his car. Appellant responded he had an accident with Grill two to three hours earlier. Chadwick testified that appellant appeared hyperactive and erratically paced back and forth during the questioning. In Chadwick's opinion, appellant was intoxicated above the legal level of the law. He believed he was under the influence of alcohol and another controlled substance. Chadwick gave appellant a field sobriety test. Appellant failed the horizontal gaze nystagmus test and the one-leg stand, but explained his back was hurting.

Chadwick stated that the appellant was not detained or under arrest when he made these statements. It was only after the field test that Chadwick felt that the appellant was detained.

Appellant was not arrested at the scene. Prior to appellant's arrest, Chadwick was told to go to the hospital and get a blood analysis which he did. However, he did not order a blood analysis.

Motion to Suppress

In his first point of error, appellant claims the trial court erred in denying his motion to suppress certain statements he made to police while at the scene of the accident. He argues he was in custody at the time he was questioned by police, and because he was not given his *Miranda* warnings, his statements should not have been entered into evidence. *See Miranda v. Arizona*, 384 U.S. 436 (1966). We disagree.

When reviewing a trial court's ruling on a motion to suppress, appellate courts should afford great deference to a trial court's determination of the facts that the records supports,

especially when there is a question of credibility and demeanor. Only where there are mixed questions of law and fact that do not turn on evaluation of credibility and demeanor may an appellate court review the issue de novo. *See Guzman v State*, 955 S.W.2d 85, 87 (Tex. Crim. App. 1997); *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990). As long as the trial court's evidentiary ruling was at least within the zone of reasonable disagreement, an appellate court may not disturb it. *See Montgomery*, 810 S.W.2d at 391. Where there is a suspicion of driving while intoxicated, a police officer may question the accident participants and even conduct field sobriety tests without violating *Miranda* or Article 38.22 of the *Texas Code of Criminal Procedure*. *See Loar v State*, 627 S.W.2d 399, 400 (Tex. Crim. App. 1981); *Higgins v State*, 473 S.W.2d 493, 494 (Tex. Crim. App. 1971). Police officers are allowed as much freedom as anyone to ask questions of fellow citizens. *Daniels v State*, 718 S.W.2d 702, 704 (Tex. Crim. App. 1986). Such contact is generally described as an encounter and a police officer needs no justification to initiate it.

Officer Chadwick did not need to justify his questioning because appellant was not in custody at the time he made the objectionable statements. Thus, appellant's statements were admissible, and the trial court did not abuse its discretion in denying appellant's motion to suppress.

Admissibility of Adam Gill's Testimony

In his second point of error, appellant asserts that the trial court erred in allowing testimony from Adam Gill, claiming his testimony is the fruit of an illegal search of his truck. Chadwick testified that he smelled a strong odor of alcohol on appellant's breath when he was asking him about the accident. He also stated that appellant's behavior was similar to someone on a controlled substance. Therefore, Chadwick had probable cause to believe that the appellant's truck might contain alcohol or a controlled substance. We find this warrantless search was lawful. *See Hernandez v. State*, 867 S.W.2d 900, 907 (Tex. App.—Texarkana 1993, no pet.). Because the search was lawful, Adam Gill's testimony is not inadmissible.

Appellant's second point of error is overruled.

Ineffective Assistance of Counsel

Appellant contends in his third point of error that he was denied his right to effective assistance of counsel at trial as guaranteed by the U. S. and Texas Constitutions. More specifically he contends that he was denied effective assistance of counsel as follows:

> (1) by counsel's failure to object to the testimony of Officers Bond and Chadwick as to appellants affirmative response as to whether or not he had been drinking.
>
> (2) by counsel's failure to object to testimony as to the driver's license of Adam Grill found in the truck driven by Appellant and admitted without objection.
>
> (3) failure to object to the testimony of the officers as to appellant's response to their questioning regarding the appellants possession of Adam Grill's license. More specifically appellant told the officer that the license belonged to a person who he'd been in an accident with earlier that day.
>
> (4) failure to object to testimony by Adam Grill that appellant had hit him from behind, slurred his words, smelled strongly of alcohol and left the scene and did not return.

The standard of review for evaluating claims of ineffective assistance of counsel is set fourth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2054 (1984). *See Hernandez v. State*, 726 S.W.2d 53 (Tex. Crim. App. 1986). Appellant must show both (1) that counsel's performance was so deficient that he was not functioning as acceptable counsel under the sixth amendment, and (2) that but for counsel's error, the result of the proceedings would have been different. *See Strickland*, 466 U.S. at 687, 104 S.Ct. At 2064. It is the defendants burden to prove ineffective assistance of counsel. *See id*. Defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See id*.

The record is silent as to why appellant's trial counsel acted and or failed to object in the complained of circumstances. Assertions of ineffective assistance of counsel must be firmly founded in the record. *See Thompson v.* State, No. 1532-98, — S.W.3d —, 1999 WL 812394 *5-6 (Tex. Crim. App. Oct. 13, 1999); *Harrison v. State*, 552 S.W.2d 151, 152 (Tex.

Crim. App. 1977). "Failure to make the required showing of . . . deficient performance . . . defeats the ineffectiveness claim." *Thompson*, 1999 WL 812394 at *6. As the Court of Criminal Appeals recently stated: "[a]n appellate court should be especially hesitant to declare counsel ineffective based upon a single alleged miscalculation during what amounts to otherwise satisfactory representation, especially when the record provides no discernible explanation of the motivation behind counsel's actions – whether those actions were of strategic design or the result of negligent conduct." *Id*. Accordingly, with the record provided, appellant has not defeated the strong presumption "that the decisions of his counsel fell within the wide range of reasonable professional assistance." *Id*.

Appellant's third point of error is overruled.

The judgment of the court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed December 23, 1999.

Panel consists of Justices Ross Sears, Bill Cannon and D. Camille Hutson-Dunn.*

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

* Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn.