Affirmed and Opinion filed April 13, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00585-CR

GERALD WAMOND TILLISON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 98-12419

O P I N I O N

Appellant, Gerald Wamond Tillison, was charged by information with driving while intoxicated. TEX. PEN. CODE ANN. § 49.04 (Vernon 1994). A jury found appellant guilty. Appellant pleaded true to an enhancement paragraph and the trial court assessed punishment at confinement for one year in the Harris County Jail, probated for two years, and a $750 fine. In one point of error, appellant claims that he received ineffective assistance from his trial counsel. We affirm.

Background Facts

Houston County Sheriff's Deputies Donald Gray and Frank Miller were dispatched to the scene of an accident. Appellant had driven his car into a ditch on the side of the road. When the two deputies arrived, they saw appellant drive out of the ditch, onto the road, and then into a gasoline station. Appellant got out of the truck and walked to the window of the station. The deputies noticed that appellant stumbled as he walked. They approached appellant to investigate the accident. After talking to the appellant, both deputies observed appellant's bloodshot eyes, slurred speech, and a strong odor of alcohol on his breath.

Deputy Gray asked appellant to perform several field sobriety test. Appellant exhibited signs of intoxication during the test. He was placed under arrest and taken to the Wallisville Substation. Appellant refused to take a breath test. However, he asked the deputies if he could take a blood test and he wanted to speak to his attorney. Deputy Gray felt it would be inappropriate to conduct an interview after appellant's request, so he did not conduct a video interview. Appellant was not allowed to take a blood test.

Ineffective Assistance from Counsel

In his sole point of error, appellant claims that his trial counsel was ineffective for failing to object to inadmissible testimony. The testimony concerned appellant's invocation of his right to counsel. We hold that appellant did not overcome the strong presumption that the decisions of his attorney during trial fell within the wide range of reasonable professional assistance.

For counsel to be ineffective at either the guilt/innocence or punishment phase of trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires a defendant to show: (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) the probability that, but for counsel's errors, the result of the proceeding would have been

different. *See Strickland*, 466 U.S. at 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App.1999) In looking at these requirements, a court is to keep in mind that the right to counsel does not guarantee an error-free counsel or counsel whose competency is judged by hindsight. *See Hernandez v. State*, 726 S.W.2d 53, 58 (Tex. Crim. App.1986). There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994).

The assessment of whether a defendant received effective assistance of counsel must be made according to the facts of each case. *See Ex parte Scott*, 581 S.W.2d 181, 182 (Tex. Crim. App.1979). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119, 117 S.Ct. 966, 136 L.Ed.2d 851 (1997). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id.*

The record shows that both deputies testified that appellant invoked his right to counsel. Generally, a defendant's request for counsel may not be used as evidence of guilt. *See Hardie v. State*, 807 S.W.2d 319, 322 (Tex. Crim. App.1991). "[A]dverse use of evidence that a defendant invoked a right or privilege which has been granted him, is constitutionally impermissible." *Id.* (*citing Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)). However, the record does not show why counsel failed to object to this evidence.

Appellant relies on *Thompson v. State*, 981 S.W.2d 319, 324 (Tex. App.–Houston [14th Dist.] 1999) *rev'd*, 9 S.W.3d 808 (Tex. Crim. App. 1999), for the proposition that counsel's failure to object cannot be justified; therefore, further development of the record would be unnecessary. However, the Court of Criminal Appeals reversed our decision in *Thompson* and found that the defendant in that case failed to rebut the presumption that counsel's failure to object to inadmissible evidence was a reasonable decision. *See*

Thompson v. State, 9 S.W.3d 808, 814-15 (Tex. Crim. App. 1999). Like in our case, the record was silent as to why Thompson's trial counsel failed to object to inadmissible hearsay testimony.

Appellant did not overcome the strong presumption that the decisions of his attorney during trial fell within the wide range of reasonable professional assistance. Because the record does not show why appellant's trial counsel failed to object to the invocations of appellant's right to an attorney, we find that appellant has failed to show that his trial counsel's representation fell below an objective standard of reasonableness. We overrule appellant's sole point of error.

We affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed April 13, 2000.
Panel consists of Justices Sears, Draughn, and Hutson-Dunn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Joe L. Draughn, and D. Camille Hutson-Dunn sitting by assignment.