Opinion of March 9, 2000, Withdrawn; Affirmed and Substitute Opinion filed May 4, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00118-CR

ISAAC ESCAMILLA, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 773,610

O P I N I O N

Appellant was charged by indictment with the offense of possession of marihuana. The indictment alleged a prior felony conviction for the purpose of enhancing the range of punishment. Without the benefit of a plea bargain agreement, appellant pled guilty to the charged offense and true to the enhancement allegation. The trial court assessed punishment at twenty years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises a single point of error alleging ineffective assistance of counsel. We affirm.

I. Factual Summary

Appellant and his father were charged in separate indictments with commission of the same offense, namely, possession of marihuana. Both were represented by the same counsel in the trial court. When counsel was unable to reach an acceptable plea bargain with the State, appellant and his father pled guilty to the charged offenses and the trial court assessed punishment at twenty years and five years confinement in the Texas Department of Criminal Justice--Institutional Division, respectively.

II. Appellant's Argument

Appellant contends the joint representation by trial counsel resulted in appellant receiving ineffective assistance of counsel. Specifically, appellant argues the State placed trial counsel "in a box by refusing to work separate deals for the appellant and his father. The prosecutor's position was that either both the appellant and his father plead [guilty] or they both would have to go to trial."[1] In exchange for pleas of guilty, the State offered appellant twelve years and his father eight years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant contends he refused the State's recommendation because it required his father to go to prison.

III. Standard of Review

Generally, our standard of review for ineffective assistance of counsel claims is the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This test requires an appellant to demonstrate first that counsel's representation fell below an objective standard for reasonableness, and secondly, that but for counsel's deficient representation, the result of the proceeding would have been different. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. An exception to this general rule applies when we review claims stemming from joint representation by trial counsel. Under this exception, the second prong of *Strickland* does not apply. *Id.*, 466 U.S. at 692, 104 S.Ct. at 2067. If counsel's performance was adversely affected by his active representation of conflicting interests, prejudice is presumed. *See Cuyler v. Sullivan*, 446 U.S. 335, 345-350, 100 S.Ct. 1708, 1716-19, 64 L.Ed.2d

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[1] This argument is supported by the affidavit of trial counsel, which was filed in support of appellant's motion for new trial. Said motion was overruled by operation of law.

333 (1980). This is so because a single lawyer cannot simultaneously represent the conflicting interests of two clients. *See Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 465, 86 L.Ed. 680 (1942). However, not all codefendants have conflicting interests, and there may be a tactical advantage from presenting a common defense. *See Raspberry v. State*, 741 S.W.2d 191, 197 (Tex.App.--Fort Worth 1987, pet. ref'd). Consequently, permitting a single attorney to represent codefendants does not always violate the constitutional guarantees to effective assistance of counsel and the mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. *See Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1719.

A defendant who does not complain of a conflict of interest at trial can demonstrate a violation of the right to reasonably effective assistance of counsel if he can show that defense counsel was burdened by an actual conflict of interest that had an adverse effect on specific instances of the attorney's performance. *See Howard v. State*, 966 S.W.2d 821, 826 (Tex.App.--Austin 1998, pet. ref'd). An actual conflict of interest arises when one defendant stands to gain significantly by counsel adducing evidence or arguments that are damaging to the cause of a codefendant whom counsel is also representing. *See Ex parte Alaniz*, 583 S.W.2d 380, 381 n. 3 (Tex.Crim.App.1979). Where there is evidence of counsel's "struggle to serve two masters" that cannot be seriously doubted, a finding of ineffective assistance based on counsel's conflict of interest necessarily follows. *See Ex parte Acosta*, 672 S.W.2d 470, 474 (Tex.Crim.App.1984); *Ex parte McCormick*, 645 S.W.2d 801, 806 (Tex.Crim.App.1983).

Actual conflicts of interest have been found on several occasions. For example, in *Amaya v. State*, 677 S.W.2d 159 (Tex.App.--Houston [1st Dist.] 1984, pet. ref'd), a conflict between the various alibi witnesses could have been exploited to one codefendant's benefit, but this would have harmed the defenses of the other codefendants. Thus, the record showed that one codefendant stood to gain significantly at the guilt stage by counsel adducing evidence or arguments that would have damaged the cause of his codefendants whom counsel was also representing. In *Maya v. State*, 932 S.W.2d 633 (Tex.App.--Houston [14th Dist.] 1996, no pet.), this court found an actual conflict of interest when an attorney represented a husband and wife in a joint prosecution for attempted murder. There, the husband's theory of self-defense was undermined by the wife's written confession and her testimony before the jury. The joint representation prevented counsel from cross-examining or impeaching the wife to further advance

the defense of the husband. Similarly, counsel could not seek to minimize the wife's involvement in the incident without shifting the attention and guilt to the husband. These dilemmas represent actual conflicts of interest. 932 S.W.2d 633, 635-636.

IV. Analysis

As there was no complaint of a conflict of interest in the trial court, the question presented is whether defense counsel was burdened by an actual conflict of interest in his representation of appellant and his father. *See Howard*, 966 S.W.2d at 826. In other words, did either appellant or his father stand to gain significantly and the other stand to be damaged by accepting trial counsel's advice to waive jury trials and plead guilty to the charged offense without the benefit of a plea bargain agreement. *See Alaniz*, 583 S.W.2d at 381.

Here, appellant and his father were confronted by a prosecutor who wished to resolve each of these prosecutions in the same manner, either by plea or by trial. Certainly, it was within the prosecutor's discretion to proceed in this fashion. We have no reason to believe the prosecutor would not have followed this course had appellant and his father been represented by separate trial counsel.

Appellant contends trial counsel's "ability to obtain a plea bargain for [appellant] certainly was limited because it meant [appellant] would have to deny his father a shot a probation."

By advising both appellant and his father to plead guilty without an agreed recommendation as to punishment from the State, trial counsel pursued the only course of action which provided the opportunity for community supervision not just for the father but for appellant as well. Neither were eligible to receive community supervision from a jury as both had prior felony convictions. *See* TEX. CODE CRIM. PROC. art. 42.12 § 4(e). Indeed, the presentence report reflects appellant hoped to receive community supervision.[2] Under this strategy, neither appellant, nor his father, stood to gain at the damage to the other. Indeed, both shared the opportunity to have the trial court assess probated sentences. The fact that appellant was not accorded community supervision and ultimately received a greater punishment than

[2] Specifically, the presentence report states: "[Appellant] stated he is in hopes of a probated sentence so that he can continue to support his mother, wife and children."

originally offered by the State does not establish an actual conflict of interest stemming from the joint representation of trial counsel.

Accordingly, we hold appellant did not receive ineffective assistance of counsel in the trial court. The point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed May 4, 2000.

Panel consists of Justices Hudson, Wittig and Baird.[3]

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[3] Former Judge Charles F. Baird sitting by assignment.