Affirmed and Opinion filed July 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00213-CR

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DONALD RAY NEWSOME, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 788,220

O P I N I O N

Donald Newsome appeals his conviction by jury for the felony offense of possession of marijuana, enhanced by two prior felony convictions. After finding the enhancement paragraphs to be true, the trial court assessed punishment at eighteen years confinement in the Texas Department of Criminal Justice, Institutional Division. In his sole point of error, appellant contends that he received ineffective assistance of counsel.

BACKGROUND

Officer John Vaughan received a complaint regarding two black males selling narcotics from a blue Cadillac. When Officer Vaughan arrived at the scene, he saw two black males standing next to a blue Cadillac. One of the black males, later identified as appellant, fled when the police car arrived. A second officer pursued and captured appellant. During the pursuit, appellant threw down a bag of marijuana.

Officer Vaughan looked in the Cadillac and saw marijuana in plain view in various places in the car. Vaughan also noticed the smell of marijuana emanating from the car. A search of the car revealed marijuana in the glove compartment, scales, cigars with the tobacco removed and marijuana stuffed within, and a backpack. A narcotics-detection dog alerted the officers to the presence of drugs in the trunk. The officers opened the trunk and found a pillowcase half full of marijuana. The police recovered a total of 2.3 pounds of marijuana from the car.

DISCUSSION

In his sole point of error, appellant asserts that he was denied the effective assistance of counsel. Specifically, appellant contends that his counsel was ineffective because during direct examination he allowed appellant to admit to putting some of the drugs in the car.

The U.S. Supreme Court established a two-prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must demonstrate that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See id.*; *Hathorn v. State,* 848 S.W.2d 101, 118 (Tex. Crim. App. 1992).

In any case analyzing the effective assistance of counsel, we begin with the presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *See id.* Moreover, it is the appellant's burden to rebut this presumption via evidence illustrating why trial counsel did what he did. *See id.*

The record reflects that appellant announced in open court "I want to take the stand," as soon as the State rested its case-in-chief. In response, the trial judge removed the jury from the courtroom, and the following dialog took place:

> DEFENSE COUNSEL: Your Honor, at this time I wanted to do two things, one, I wanted to put on the record that I advised my client not to take the stand because of his priors and his, I believe, inability to –
>
> THE COURT: I can't hear you.
>
> DEFENSE COUNSEL: – because of his priors and because of his possible inability –...to effectively withstand a cross-examination. I have vigorously advised my client not to take the stand at this time.

The trial court then admonished appellant that there would be certain risks involved in taking the stand in his own defense, that he would be subject to cross-examination by the State and that his prior criminal record could be disclosed. Appellant replied that he understood the admonishment and took the stand. During direct examination, appellant confessed that he did indeed put the drugs in the car.

Appellant now complains that his admission was a result of his counsel's ineffective assistance. The record shows that both appellant's trial counsel and the trial judge warned appellant as to the possible consequences of testifying. Although defense counsel is responsible for the progress of the case, the defendant is responsible for making three decisions: (1) his plea to the charge; (2) whether to be tried by a jury; and (3) whether to testify. *See Jackson v. State*, 766 S.W.2d 504, 508 (Tex. Crim. App. 1985). Appellant voluntarily took the stand, which led to the following incriminating testimony:

DEFENSE COUNSEL: Is it possible that somebody else got ahold of your keys and put the drugs in your car?

PROSECUTOR: Calls for speculation.

THE COURT: Overruled.

DEFENSE COUNSEL: Is that possible?

DEFENDANT: It's possible, but I don't, I didn't see anybody put any drugs in there.

DEFENSE COUNSEL: How did the drugs get in there, Mr. Newsome?

DEFENDANT: I had put some in there.

DEFENSE COUNSEL: Okay. Did you put all of those drugs in there?

DEFENDANT: I couldn't be sure. I don't even know how much it was. I couldn't be sure.

There is nothing in the record to show that defense counsel was responsible for appellant's confession. To the contrary, defense counsel "vigorously" advised appellant not to testify out of fear that such action would damage appellant's case. Therefore, appellant has not shown that his counsel's representation fell below an objective standard of reasonableness merely because appellant's testimony proved to be incriminating.

Moreover, since there was no hearing on appellant's motion for new trial, the record is silent as to why trial counsel engaged in the conduct of which appellant complains. When there is a lack of evidence in the record as to counsel's trial strategy, an appellate court may not speculate about why counsel acted as he did. *See Jackson v. State*, 877 S.W.2d at 771. Without testimony from trial counsel, an appellate court must presume that counsel had a plausible reason for his actions. *See Safari v. State*, 961 S.W.2d 437, 445 (Tex. App.–Houston [1st Dist.] 1997, pet. ref'd, untimely filed). In the absence of such testimony, an appellate court cannot meaningfully address claims of ineffectiveness. *See Davis v. State*, 930 S.W.2d 765, 769 (Tex. App.–Houston [1st Dist.] 1996, pet. ref'd). Accordingly, since there is no evidence in the record concerning trial counsel's explanation for his manner of

representation, it is impossible to conclude that counsel's performance was deficient. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.–Houston [1st Dist.] 1996, no pet.).

Appellant has not rebutted the presumption that trial counsel made all significant decisions in the exercise of reasonable professional judgment. We overrule appellant's sole point of error and affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed July 13, 2000.
Panel consists of Justices Anderson, Frost, and Lee[1].
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Norman R. Lee sitting by assignment.