Affirmed and Opinion filed November 4, 1999.

In The

Fourteenth Court of Appeals

NO. 14-99-00292-CR

NORMAN C. GUILLORY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 782,678

O P I N I O N

Norman C. Guillory (Appellant) was indicted for the first degree felony offense of possession of four grams or more but less than 200 grams of cocaine, with intent to deliver. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(d) (Vernon Supp. 1999). Appellant's indictment included an enhancement paragraph because of a previous felony conviction. He pleaded not guilty to the instant offense and "true" to the enhancement paragraph. Following his trial, a jury found Appellant guilty. The trial court sentenced Appellant to twenty years' confinement in the Institutional Division of the Texas

Department of Criminal Justice. On appeal to this Court, Appellant contends that he received ineffective assistance of counsel.[1] We affirm.

Appellant does not challenge the sufficiency of the evidence to support his conviction. Appellant's brief demonstrates that he is familiar with the facts of his case. Thus, we will not discuss or summarize the facts in this opinion.

In his point of error, Appellant contends that he received ineffective assistance of counsel because his trial counsel failed to file a motion to suppress and failed to conduct a pre-trial investigation.

In evaluating a claim of ineffective assistance of counsel, we apply the *Strickland* test, which requires that the defendant demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hernandez v. State*, 726 S.W.2d 53, 56 (Tex.Crim.App. 1986). These two prongs must be established by a preponderance of the evidence. *Moore v. State*, 694 S.W.2d 528, 531 (Tex.Crim.App. 1985). Accordingly, the allegation of ineffective assistance must be firmly founded and affirmatively demonstrated in the record. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex.Crim.App. 1996); *Brown v. State*, 974 S.W.2d 289, 292 (Tex.App.–San Antonio 1998, pet. ref'd). Furthermore, we must indulge a strong presumption that counsel's conduct was reasonable. *Strickland*, 466 U.S. at 689.

As we understand it, Appellant maintains that the arresting police officers lacked probable cause to arrest him because Appellant did not have custody, care and control over the seized cocaine.[2] He argues, therefore, that his trial counsel was ineffective for not discovering these facts and filing a motion to suppress the evidence against him.

To prove his claim, Appellant is obliged to prove that a motion to suppress would have been granted in order to satisfy *Strickland*. *See Jackson v. State*, 973 S.W.2d 954, 957 (Tex.Crim.App.

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[1] Appellant is before this Court *pro se.*

[2] Appellant's brief contains no citations to the record. *See* TEX. R. APP. P. 38.1(f), (h).

1998); *Roberson v. State*, 852 S.W.2d 508, 510-12 (Tex.Crim.App. 1993) (unless there is a showing that a pre-trial motion had merit and that a ruling on the motion would have changed the outcome of the case, counsel will not be ineffective for failing to assert the motion). As the movant, Appellant was required to have produced evidence that defeated the presumption of proper police conduct. *See id*. Appellant did not meet that burden. First, he failed to establish that his arrest was, in fact, not supported by probable cause. Appellant directs this Court to nothing in the record to undermine a finding that the police officers' arrest was supported by probable cause. Second, even if we were to assume that the arrest was not supported by probable cause, Appellant failed to establish by a preponderance of the evidence that the cocaine should have been suppressed. That there may be questions about the validity of a search and seizure is not enough. *See id*.; *Jackson v. State*, 877 S.W.2d 768 (Tex.Crim.App.1994) (trial counsel will not be declared ineffective where the record does not reflect sufficient evidence to support the claim). To prevail on a claim of ineffective assistance of counsel, an appellant has the burden to *develop facts and details* of the seizure sufficient to conclude it was invalid. *See id*. (emphasis added). Appellant did not do so. For these reasons, Appellant's claim of ineffective assistance of counsel cannot be sustained on this record.[3] Appellant's sole point of error is overruled.

[3] We note that Appellant also contends that his trial counsel was ineffective for not making a "timely objection on lesser included offense." No citations to the record are made to support Appellant's claim. Further, the record does not show that Appellant was entitled to a jury charge on a lesser included offense in this case. Jury charges on lesser included offenses must be supported by the evidence contained in the record. *See Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex.Crim.App.), *cert. denied*, 510 U.S. 919, 114 S.Ct. 313, 126 L.Ed.2d 260 (1993). Nothing in the record suggests that Appellant was entitled a jury charge on any lesser included offenses. Thus, counsel was not ineffective for not requesting such an instruction in this case.

The judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed November 4, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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