Affirmed and Opinion filed December 16, 1999.

In The

Fourteenth Court of Appeals

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NOS. 14-98-00562-CR & 14-98-00563-CR

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KENNETH RAY HAYNES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause Nos. 772,882 & 772,883

O P I N I O N

Appellant, Kenneth Ray Haynes, was convicted of two charges of aggravated robbery with a deadly weapon and sentenced to imprisonment for 10 years in each case. On appeal, he contends he was denied effective assistance of counsel because his attorney informed the jury that the sentences in the two cases would run concurrently. He also asserts the trial court erred in informing the jury, in response to its question, that punishment in the two cases would run concurrently. We affirm.

On December 7, 1997, appellant and his nephew entered the "Stop and Gone" convenience store owned and operated by Abdallah Karroum. Around 10:00 p.m., appellant

approached Mr. Karroum and asked him for the time. At approximately 10:05 p.m., appellant again asked Mr. Karroum for the time. At approximately 10:10 p.m., appellant again asked Mr. Karroum for the time. Mr. Karoum became suspicious and asked appellant to leave. At 10:30, appellant reentered the store brandishing a gun. He took money from the register and Mr. Karroum's wallet, then fled on foot. On December 19, 1997, appellant entered the same store, brandished the same gun, and again demanded money. Mr. Karroum again complied, and appellant again fled on foot. On January 10, 1998, Appellant reappeared at the same store. Mr. Karroum called the police, and appellant was arrested.

Ineffective Assistance of Counsel

In his first point of error, appellant contends he was denied effective assistance of counsel because his attorney informed the jury that the sentences in the two cases would run concurrently. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Claims of ineffective assistance of counsel are evaluated under the two-prong analysis articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* applies to ineffective assistance of counsel claims at noncapital punishment proceedings. *See Hernadez v. State*, 988 S.W.2d 770, 773-774 (Tex. Crim. App.1999). The first prong requires appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. To satisfy this prong, appellant must identify the acts or omissions of counsel alleged as ineffective assistance and affirmatively prove that they fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Strickland*, 466 U.S. at 695.

The second prong requires appellant to show prejudice resulting from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d at 770, 772 (Tex. Crim. App. 1999). To establish prejudice, an appellant must prove that but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We must presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* Appellant cannot meet this burden if the record does not affirmatively support the claim. *See Jackson v. State*, 973 S.W.2d 954, 955 (Tex. Crim. App. 1998) (inadequate record on direct appeal to evaluate whether trial counsel provided ineffective assistance); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex. App.–Corpus Christi 1992, pet. ref'd, untimely filed) (inadequate record to evaluate ineffective assistance claim); *see also Beck v. State*, 976 S.W.2d 265, 266 (Tex. App.–Amarillo 1998, pet. ref'd) (inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim). A record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd).

Here, the record reflects that prior to the punishment arguments, the State's attorney initiated the following exchange:

> MR. STELTER: There was one other matter we wanted to put on the record, and that was in regard to the fact that as a matter of law, since the cases we tried together, the defendant's punishment, no matter what it is on each case, has to by law run concurrently. And I don't want to go into that. I won't go into that if the defense has any objection to that, but if they are willing to waive that then I would, but I want to be able to do it on the record.

> MR. GARRET: That's fine, Your Honor.
>
> THE COURT: Is that part of your trial strategy? I don't know if you were planning on arguing something about that as well.
>
> MR. GARRET: Yes, Your Honor.

Later, in his opening, trial counsel argued for a sentence of probation. He repeated Appellant's justifications for why Appellant would be a good candidate for probation. Then, predicting what the state would say, he argued:

> MR. GARRET: Now, Mr. Stelter is going to get up in just a few minutes as I sit down, and he's going to hammer home the point that a gun was pointed at Mr. Karroum's head, money was taken from him. And he may even show you the gun, I don't know. Maybe so, Maybe not. And he's going to argue for an X amount of time.

Counsel then moved on to the issue of concurrent sentences, saying:

> MR. GARRET: I will also tell you that any sentence you offer or come back with will be served concurrently, and what that means is that it will be served at the same time. That's the result of us trying these cases together at the same time.
>
> Okay, what does that mean? What that means is that whatever you come back with as far as punishment they will run on both cases at the same time, okay. So in the event you see it in your hearts to come back with placing Mr. Haynes on probation then he will serve that probationary period at the same time for both cases.

It seems clear that the trial counsel was engaging in a deliberate strategy. Appellant may consider this an unsound tactic,[1] but from the record before us, we cannot say appellant has overcome the strong presumption that counsel's strategy was reasonably professional and that his action were motivated by sound trial strategy. Appellant did not file a motion for a new trial or obtain a hearing thereon; thus, he has failed to develop evidence of a defective trial strategy. Because we are unable to conclude from the record presented here that counsel's

[1] In hindsight, the tactic seems to have worked well. Aggravated robbery carries a penalty ranging from not less than 5 years, up to 99 years or life. TEX. PEN. CODE ANN. §§ 12.32, 29.03 (Vernon 1994). A sentence of 10 years is in the low range of potential punishment.

performance was deficient, the first prong of *Strickland* has not been met. Appellant's first point of error is overruled.

Trial Judge's Response

In his second point of error, appellant argues that the trial court erred in informing the jury, in response to its question at sentencing, that any punishments would run concurrently. The jury asked:

> Can the jury find probation in one case and jail time in the second? Ex. cause 772883 - (5 yrs) probation Cause 773882 - 10 yrs How would this be handled?

The Judge responded: "Yes, each case is a separate case; however punishments still run concurrently." Appellant argues that reemphasizing the concurrent sentences was harmful, because it influenced the jury to reject probation as a punishment.

When the trial judge responds substantively to a jury question during deliberations, that communication essentially amounts to an additional or supplemental jury instruction. *See Daniell v. State*, 848 S.W.2d 145, 147 (Tex. Crim. App. 1993). Thus, in determining whether the subject matter of the communication was proper, we must look to the rules governing instructions. *See id*. If an instruction may properly be given in the original charge, it may be given as an additional instruction. *See Allaben v. State*, 418 S.W.2d 517, 521 (Tex. Crim. App. 1967). We find the instruction given here to have been a proper and accurate statement of the law.

The trial court judge is required to distinctly set forth in his charge to the jury "the law applicable to the case." *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1999). The law provides that a defendant may be prosecuted in a single trial for all offenses arising out of the same criminal episode.[2] *See* TEX. PEN. CODE ANN. § 3.02 (Vernon 1994). Except for certain offenses which are not pertinent here, when a defendant is found guilty of more than

[2] "Criminal episode" means the repeated commission of the same or similar offenses regardless of whether the harm is directed toward or inflicted upon more than one person or item of property. *See* TEX. PEN. CODE ANN. § 3.01 (Vernon 1994).

one offense arising out of the same criminal episode in a single trial, the sentences for the two offenses shall run concurrently. *See* TEX. PEN. CODE ANN. § 3.03(a) (Vernon Supp. 1999). Thus, unlike a defendant's eligibility for parole, which is speculative, the concurrent nature of appellant's sentences is a readily ascertainable matter of law which directly affects the length of his confinement. *See Ex parte Moody*, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999). Accordingly, we find the trial court correctly instructed the jury.

However, even if the additional instruction had not been appropriate, appellant waived any possible error. No objection to the instruction is apparent in the record.[3] Thus, unless the instruction resulted in egregious harm, the alleged error is waived. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *Brooks v. State*, 921 S.W.2d 875, 879 (Tex. App.–Houston [14th Dist.] 1996), *aff'd*, 957 S.W.2d 30 (Tex. Crim. App. 1997). As we have previously observed in our resolution of appellant's first point of error, appellant's counsel advised the jury that the sentences would be served concurrently. In light of counsel's decision, we cannot conclude appellant was harmed by the trial court's instruction.

Accordingly, appellants' second point of error is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed December 16, 1999.
Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.
Do Not Publish — TEX. R. APP. P. 47.3(b).

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[3] We also note that appellant fails to cite any authority in support of this issue. Appellant cites a case on harmless error which is not germane to the issue before us. Appellant also cites authority stating that the concurrent sentence rule applies – which is exactly what the judge told the jury. Failure to cite authority in support of a point of error on appeal can waive the complaint. *See* TEX. R. APP. P. 38.1(h).