IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1180-16

ALVIN WESLEY PRINE, JR., Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS LIBERTY COUNTY

KEEL, J., delivered the opinion of the Court in which KELLER, P.J., and KEASLER, HERVEY, RICHARDSON, YEARY, NEWELL, and WALKER, JJ., joined. ALCALA, J., filed a dissenting opinion.

O P I N I O N

A jury found Appellant guilty of sexual assault and sentenced him to 20 years' confinement and a fine of $8,000. He claimed on appeal that his attorney was ineffective during the punishment phase of trial for calling three witnesses who gave damaging testimony on cross-examination. The Fourteenth Court of Appeals agreed and remanded the case for a new punishment hearing. *Prine v. State*, 494 S.W.3d 909, 929 (Tex.

App.—Houston [14th Dist] 2016, pet. granted). We granted the State Prosecuting Attorney's petition for discretionary review on two grounds:

> 1. When the record is silent as to defense counsel's reasons for calling witnesses in support of probation, has the presumption of reasonable strategy been rebutted?
>
> 2. If the reasonableness presumption was rebutted, did defense counsel render ineffective assistance in calling witnesses who presented favorable evidence but also opened the door for damaging evidence?

We reverse the judgment of the court of appeals and affirm that of the trial court.

Background

The evidence in the guilt phase of trial showed that during an alcohol-fueled celebration at the end of a trail ride in Dayton, Texas, the 54-year-old Appellant sexually assaulted the unconscious 19-year-old complainant. He was caught in the act by his friend, the complainant's boyfriend. Appellant tried to flee in his own pick-up while pulling his horse trailer, but a police officer caught him a short distance from the scene of the crime.

In the punishment phase, the State presented the testimony of the complainant and rested on a Friday afternoon. But over the weekend, the prosecutor notified the defense attorney that he had just learned and intended to prove that, some 27 years earlier, Appellant had fathered a child with his children's 15-year-old babysitter.

When the trial resumed on Monday morning, the defense called three witnesses to the stand: a probation officer and Appellant's aunt and sister. The testimony of each was

a mixed bag for Appellant. The probation officer testified to Appellant's eligibility for probation and the strict supervision afforded sex offender probationers, but he opined on cross-examination that Appellant did not deserve probation. Appellant's aunt testified that he had been helpful to her and had always worked and supported his family until suffering multiple strokes and heart attacks. On cross she testified that he had fathered a child some 27 years earlier with his family's under-aged babysitter. Appellant's sister testified about his health problems and resulting physical limitations, his abstention from alcohol since his arrest and his life-saving support for her after her own rape and impregnation by their father. On cross she acknowledged Appellant's sexual relationship with the babysitter.

The majority below held that counsel was deficient in (1) calling the probation officer "without first determining whether [he] would testify in a harmful way" and (2) failing to object to his opinion testimony. *Prine*, 494 S.W.3d at 926. It held that trial counsel compounded this error by calling Appellant's aunt and sister even after the State notified him of its intent to elicit testimony regarding a prior extraneous offense known by the family members. *Id*. It reasoned that these errors caused the near-maximum punishment verdict, and concluded that the defense attorney provided ineffective assistance of counsel in the punishment phase of Appellant's trial. *Id*. at 928.

Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*. 466 U.S. 668, 687 (1984). "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." *Id*. at 686. The defendant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Whether a defendant received effective assistance of counsel is based on the facts of each case. *Id*.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. "It is not sufficient that the appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence. Rather, the record must affirmatively demonstrate trial counsel's alleged ineffectiveness." *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007). The defendant must overcome "the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" and that the conduct constituted sound trial strategy. *Thompson*, 9 S.W.3d at 813; *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

To defeat this presumption, "[a]ny 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). Trial counsel should generally be given an opportunity to explain his actions before being found ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). In the face of an undeveloped record, counsel should be found ineffective only if his conduct was "so outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). The record on direct appeal is generally insufficient to show that counsel's performance was deficient. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

Analysis

In holding that the trial attorney was ineffective, the court of appeals made a number of assumptions.

It first assumed that the defense attorney called the probation officer to the stand without determining whether his testimony might harm the defense. *Prine*, 494 S.W.3d at 926. Nothing in the record demonstrates what the attorney knew about the probation officer's potential testimony. The lower court cited the probation officer's testimony that he met briefly with Appellant to determine his probation eligibility and that they did not discuss the facts of the case. *Id*. at n. 10. But the probation officer did not testify about any conversations he may have had with the defense attorney. As the dissent below pointed out, the record is silent about the defense attorney's impression of the probation officer's potential testimony. *Prine*, 494 S.W.3d at 932-33 (Frost, C.J., dissenting).

The court of appeals criticized the defense attorney for failing to object to the probation officer's opinion that Appellant did not deserve probation, but he did object, at least initially. Instead of ruling on the objection, however, the trial court prompted the prosecutor to rephrase the question in a particular way.[1] When the prosecutor rephrased, the defense attorney did not renew his objection. Without a more fully developed record, it is impossible to conclude that his failure to repeat his objection lacked any reasonable strategic basis.

Moreover, the court of appeals did not determine that the probation officer's opinion was inadmissible. The failure to object will not support a claim of ineffective assistance unless the trial judge would have erred in overruling the objection. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011); *Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002). A trial court does not necessarily err in overruling a defense objection to a question about the defendant's suitability for probation. *See Ellison v. State*, 201 S.W.3d 714, 723-24 (Tex. Crim. App. 2006). Since the court of appeals did not determine that the probation officer's opinion was inadmissible, it should not have held that the trial attorney was deficient for failing to renew his objection to it.

Even assuming that the probation officer's opinion was inadmissible, the decision to call him as a witness was a strategic choice that involved weighing the risks and benefits of his testimony. Evaluating such risks and benefits "is exactly the type of

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[1] The judge instructed the prosecutor, "Rephrase your question. 'In your opinion based on the limited amount of interview time you have had with the defendant.'"

strategic decision that ordinarily requires courts to evaluate an attorney's explanations before concluding counsel was ineffective." *Prine*, 494 S.W.3d at 930 (Frost, C.J., dissenting). On one hand, the probation officer established Appellant's eligibility for probation, detailed the conditions of probation, explained the methods of enforcing those conditions and described the possible sanctions for violations. But on the other hand, he expressed a negative opinion about Appellant's suitability for probation. Without more, this record does not support a conclusion that the attorney's choice to put him on the stand was so outrageous that no other attorney would have done the same.

With respect to the extraneous offense evidence testified to on cross-examination by the aunt and sister, the court of appeals suggested that the defense attorney could have prevented its admission if he had refrained from calling them to the stand. *Prine*, 494 S.W.3d at 926-27. The record does not support the suggestion. When the prosecutor was thwarted in his effort to prove the extraneous offense through the probation officer, he asserted that he had "another witness" through whom he would prove it. If the witness was the aunt or sister, as the lower court seems to assume, the State might have called one or both of them to the stand if the defense had not done so first. On the other hand, if the State had yet another witness who would prove the extraneous offense without offering any mitigating evidence as the aunt and sister did, failing to call the aunt and sister might have been worse for Appellant.

Appellant argues that the defense attorney should have abandoned the effort to prove probation, called no witnesses in the punishment phase and advised the aunt and sister "to stay away from the courthouse" so that the prosecution could not call them to the stand. But if trial counsel had acted accordingly, then Appellant could have claimed ineffective assistance for failing to prove his probation eligibility and guaranteeing him a prison sentence. *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002).

The defense attorney faced a dilemma in the punishment phase of this case. The facets of that dilemma are not fully revealed by the record before us. Thus it is impossible to say that his decision to call these witnesses and suffer their cross-examination was so unreasonable that no other attorney would have made the same decision. Without a more fully developed record, the court of appeals erred to hold that the trial attorney was ineffective as a matter of law. Accordingly, we reverse the judgment of the court of appeals and affirm the trial court's judgment and sentence.

Delivered: September 20, 2017

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