

**Affirmed and Memorandum Opinion filed February 9, 2010.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-08-00732-CR**

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**THOMAS RAY POOLE, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 173rd District Court  
Henderson County, Texas  
Trial Court Cause No. A-14,947**

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**MEMORANDUM OPINION**

Appellant, Thomas Ray Poole, appeals his conviction for felony Driving While Intoxicated (“DWI”). Tex. Penal Code Ann. §§ 49.04, 49.09(b)(2) (Vernon 2003). Pursuant to the habitual felony offenders statute, appellant was sentenced to forty years’ confinement in the Institutional Division of the Texas Department of Criminal Justice. Tex. Penal Code Ann. § 12.42(d) (Vernon Supp. 2009). We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On April 28, 2006, Texas Department of Public Safety Trooper Johnny Massey first observed appellant’s vehicle on State Highway 198 in Henderson County, Texas as he was

completing a traffic stop on another vehicle. When Trooper Massey checked appellant's speed, he was traveling 62 miles per hour in a 55 mile per hour zone. While following appellant, Trooper Massey observed what he believed was a malfunctioning brake light on appellant's vehicle. After confirming the malfunctioning brake light, Trooper Massey activated his emergency lights and pulled appellant over.

After making contact with appellant, Trooper Massey smelled the odor of alcohol. In addition, Trooper Massey noticed appellant's speech was slurred, his eyes were red, and his balance appeared off. Trooper Massey then performed field sobriety tests on appellant. During trial, Trooper Massey testified appellant failed all three field sobriety tests. Trooper Massey then had appellant give a breath sample into a portable breath tester device, the result of which was a .152 blood alcohol content. Trooper Massey then placed appellant under arrest for DWI. Trooper Massey took appellant to the Henderson County jail where he administered two breath tests on appellant using the Intoxilizer 5000. The two breath tests revealed a blood alcohol content of .12 and .114 respectively. On July 16, 2008, the jury found appellant guilty. That same day, the jury assessed his punishment at 40 years' confinement. The trial court sentenced him accordingly and this appeal followed.

## **DISCUSSION**

In a single issue, appellant contends he received ineffective assistance of counsel during the guilt-innocence phase of his trial when, during his cross-examination, appellant's trial counsel questioned Trooper Massey concerning the specific result of the portable breath test administered to appellant. We disagree that, on this record, appellant has established that his trial counsel was ineffective.

### **I. The Standard of Review**

In reviewing claims of ineffective assistance of counsel, we apply a two prong test. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland v.*

*Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). To establish ineffective assistance of counsel, appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation was deficient in that it fell below the standard of prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Id.*

An accused is entitled to reasonably effective assistance of counsel. *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). However, reasonably effective assistance of counsel does not mean error-free representation. *Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991). When evaluating a claim of ineffective assistance, the appellate court looks to the totality of the representation and the particular circumstances of the case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). There is a strong presumption that counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *Salinas*, 163 S.W.3d at 740; *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). To overcome the presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 814. When determining the validity of an ineffective assistance of counsel claim, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ingham, v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). When the record is silent as to the reasons for trial counsel's conduct, a finding that trial counsel was ineffective would require impermissible speculation by the appellate court. *Stults*, 23 S.W.3d at 208. Absent specific explanations for counsel's decisions, a record on direct appeal will rarely contain sufficient information to evaluate an ineffective assistance claim. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

If a criminal defendant can prove trial counsel's performance was deficient, he still must prove he was prejudiced by counsel's actions. *Thompson*, 9 S.W.3d at 812. This

requires the defendant to demonstrate a reasonable probability that the result of the proceeding would have been different if the trial counsel had acted professionally. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Malett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

**II. Appellant did not establish that his trial counsel’s performance was deficient.**

To overcome the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813. Appellant did not file a motion for new trial. In addition, appellant’s trial counsel was not afforded the opportunity to explain his decisions or trial strategy. While we may be able to speculate as to why appellant’s trial counsel asked Trooper Massey about the results of appellant’s portable breath test, there is no direct evidence in the appellate record of his reasons for doing so. Therefore, without speculation, we cannot determine whether counsel’s representation of appellant fell below the objective standard of professional representation. In the absence of a record identifying the reasons for trial counsel’s actions, we must presume they were made deliberately and as a part of a reasonable trial strategy. *Stults*, 23 S.W.3d at 209. We overrule appellant’s only issue on appeal.

**CONCLUSION**

Having overruled appellant’s single issue on appeal, we affirm the trial court’s judgment.

/s/ John S. Anderson  
Justice

Panel consists of Chief Justice Hedges and Justices Anderson, and Boyce.

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