In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00340-CR

SAMUEL CHARLES VAN NESS, IV, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law
Polk County, Texas
Trial Cause No. 2009-0039

MEMORANDUM OPINION

A jury found Samuel Charles Van Ness, IV, guilty of driving while intoxicated. *See* TEX. PEN. CODE ANN. § 49.04 (Vernon 2003). The trial court assessed punishment at 180 days of confinement in the county jail and a fine of $750 plus court costs. The court probated the sentence for two years with standard terms and conditions of probation. Van Ness filed this appeal, in which argues he was denied effective assistance of counsel.

Van Ness argues he was denied effective assistance of counsel because (1) trial counsel erred when he opened the door to an oral statement made by Van Ness at the time of his arrest, (2) trial counsel's conduct in his opening statement "undermined the duty to avoid conflicts of interest," and (3) trial counsel was ineffective because he failed to set a formal hearing on Van Ness's motion to suppress evidence.

We apply a two-pronged test to ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Garza v. State*, 213 S.W.3d 338, 347-48 (Tex. Crim. App. 2007); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). To establish ineffective assistance of counsel, the appellant must show by a preponderance of the evidence that his counsel's representation fell below the standard of prevailing professional norms and that there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Strickland*, 466 U.S. at 694; *Garza*, 213 S.W.3d at 347-48; *Thompson*, 9 S.W.3d at 812. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thompson*, 9 S.W.3d at 812. "Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

"Under *Strickland*, the defendant must prove, by a preponderance of the evidence, that there is, in fact, no plausible professional reason for [counsel's] specific act or

omission." *Id.* at 836. "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. The Court in *Bone* explained as follows:

> Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decisionmaking as to overcome the presumption that counsel's conduct was reasonable and professional. As this Court recently explained, rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation: '[i]n the majority of cases, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel.'

Bone, 77 S.W.3d at 833 (footnotes omitted); *see also Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) ("Direct appeal is usually an inadequate vehicle for raising [an ineffective assistance] claim because the record is generally undeveloped.").

Van Ness's complaints on appeal appears to be based on defense counsel's reference in his opening statement to an admission made by Van Ness after he was arrested. Specifically, in his opening statement, defense counsel stated:

> After it was determined, and only after it was determined that he was under .08, and he was being booked into the jail for an overnight stay, was he asked the question, "Are you on any medications?" And he told them yes, that he had taken a Xanax earlier that day. And that was also made a part of his being intoxicated, and it's part of the definition, if you remember correctly. It's not just alcohol, it is also drugs, ...
>
> But I would point out to you . . . at the time of the arrest, he was arrested for being intoxicated on alcohol. . . . If the evidence shows you that he was arrested for driving while intoxicated on alcohol, then we would ask you to find him not guilty.

The arresting officer also testified, without objection, regarding Van Ness's statement that he had "taken Xanax."

In the instant case, there was no post-trial evidentiary proceeding during which trial counsel was afforded an opportunity to present evidence of the strategic basis, if any, for his tactical decisions. Under these circumstances it is extremely difficult for a defendant to meet the burden of showing that trial counsel performed deficiently. *See Bone*, 77 S.W.3d at 833; *Goodspeed*, 187 S.W.3d at 392. Trial counsel should ordinarily be provided an opportunity to explain his actions or omissions at trial before being found to have provided ineffective assistance. *Goodspeed*, 187 S.W.3d at 392. Absent such evidence, appellate courts are not at liberty to find trial counsel's conduct ineffective unless the challenged conduct was "'so outrageous that no competent attorney would have engaged in it.'" *Id.* (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

We note that Van Ness's statement was admissible as an admission by a party-opponent. *See* TEX. R. EVID. 801(e)(2)(A). Contrary to Van Ness's assertion on appeal, the record does not contain a concession by trial counsel that he violated any professional standard. Trial counsel's reference to Van Ness's admission in his opening statement appears to have been part of a strategy to undermine the officer's arrest of Van Ness for the charged offense. However, because trial counsel was not afforded the opportunity to explain the basis of his defense, we can only speculate as to counsel's

strategy. *See Goodspeed*, 187 S.W.3d at 394. In the absence of a record that affirmatively demonstrates trial counsel's alleged ineffectiveness, we cannot find that trial counsel provided ineffective assistance, nor do we find that the challenged conduct was so outrageous that no competent attorney would have engaged in it. *See id.* at 392; *Thompson*, 9 S.W.3d at 813. We conclude that Van Ness's ineffective assistance claim lacks merit. We overrule Van Ness's sole issue on appeal and affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on May 25, 2010
Opinion Delivered July 21, 2010
Do not publish

Before McKeithen, C.J., Gaultney and Kreger, JJ.