In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00034-CR

EMANUEL ESCOBEDO, APPELLANT

V.

STATE OF TEXAS, APPELLEE

On Appeal from the 108th District Court
Potter County, Texas
Trial Court No. 67,998-E; Honorable Douglas Woodburn, Presiding

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October 13, 2016

MEMORANDUM OPINION

Before QUINN, CJ., and HANCOCK and PIRTLE, JJ.

Appellant, Emanuel Escobedo, was convicted by a jury of delivery of a controlled substance, to-wit: methamphetamine, in an amount of four grams or more but less than two hundred grams,[1] enhanced by an allegation that, prior to the commission of the primary offense, he engaged in delinquent conduct constituting a felony offense for

[1] *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(a), (d) (West 2010) (an offense under this subsection is a first degree felony).

which he was committed to the Texas Juvenile Justice Department.[2] The jury sentenced him to confinement for fifty years and assessed a fine of $10,000. In two issues, which we will combine for convenience, Appellant asserts his counsel was ineffective to the point there is a reasonable probability that if it had not been for his counsel's unprofessional errors, the outcome of the proceedings would have been different. We affirm the trial court's judgment.

BACKGROUND

In June 2014, an indictment was filed alleging that Appellant knowingly delivered a controlled substance, namely methamphetamine, in an amount of four grams or more but less than two hundred grams, to an undercover officer. The indictment also contained an enhancement paragraph referencing a felony conviction for Burglary of a Habitation in juvenile court in October 2006.

The evidence at trial showed Appellant sold approximately seven grams of methamphetamine to the undercover officer in exchange for four hundred dollars. The officer testified that seven grams was more than a user would normally purchase or be holding. The transaction was videotaped from two different locations and Appellant was seen approaching the officer's unmarked car, entering the car, and then leaving after about a minute. Appellant was not immediately arrested due to the continuing nature of the undercover operation.

[2] *See* TEX. PENAL CODE ANN. § 12.42(c)(1) (West Supp. 2016). An adjudication by a juvenile court that a child engaged in delinquent conduct on or after January 1, 1996, constituting a felony for which the child was committed to the Texas Juvenile Justice Department is a final felony conviction for purposes of section 12.42(c)(1). *See* TEX. PENAL CODE ANN. § 12.42(f) (West Supp. 2016). *See also Vaughns v. State*, No. 04-10-00364-CR, 2011 Tex. App. LEXIS 1901, *10-11 (Tex. App.—San Antonio Mar. 16, 2011, no pet.). As enhanced, the offense in this case was punishable by confinement for life, or any term of not more than 99 years or less than 15 years, and a fine not to exceed $10,000.

Following the trial, the jury convicted Appellant of the knowing delivery of methamphetamine in an amount greater than four grams but less than two hundred grams, enhanced, assessed a fine of $10,000, and sentenced him to confinement for fifty years. This appeal followed.

INEFFECTIVE ASSISTANCE BY COUNSEL

Appellant asserts his counsel was ineffective because (1) he did not file a written objection to the indictment until the first day of trial, (2) did not file a motion to prevent the State from reading or alluding to a non-jurisdictional enhancement count at guilt-innocence until the first day of trial, (3) did not file any pre-discovery motions, specifically a motion to discover exculpatory evidence necessary to mitigate the State's evidence supporting the indictment's enhancement paragraph, (4) did not object during the punishment phase to the inclusion of evidence of his offenses which had been considered together with his offense of burglary of a habitation in his juvenile adjudication and commitment, (5) did not object during the punishment phase to three unadjudicated shooting offenses referenced in a State exhibit, and (6) did not object to the prosecutor's punishment argument that his three unadjudicated juvenile shooting offenses militated for a harsher punishment. The State asserts Appellant has not met either prong of the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We agree with the State.

We examine ineffective assistance of counsel claims by the standard enunciated in *Strickland* and adopted by Texas in *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986). Under that standard, Appellant has the burden to show by a preponderance of evidence (1) trial counsel's performance was deficient in that it fell

below the prevailing professional norms and (2) the deficiency prejudiced the defendant; that is, but for the deficiency, there is a reasonable probability that the result of the proceeding would have been different. *See Thompson v. State,* 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). In face of such claims, counsel's conduct is viewed with great deference, *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005), and 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.

In the usual case in which an ineffective assistance claim is made, "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 decision-making as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). This is generally the case because a silent record provides no explanation for counsel's actions and therefore will not overcome the strong presumption of reasonable assistance. *Freeman v. State*, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003). The proper procedure for raising a claim of ineffective assistance is almost always *habeas corpus*. *Aldrich v. State*, 104 S.W.3d 890, 896 (Tex. Crim. App. 2003).

This case demonstrates the inadequacies inherent in evaluating such claims on direct appeal. *See Patterson v. State*, 46 S.W.3d 294, 306 (Tex. App.—Fort Worth 2001, pet. ref'd). Like *Patterson*, Appellant's motion for new trial did not claim ineffective assistance of counsel and the trial court did not hold a hearing to determine whether Appellant's complaints on appeal involved actions that may or may not have been grounded in sound trial strategy. He fails to establish how the earlier filing of any

motion or objection to the indictment would have resulted in a different outcome. Furthermore, Appellant does not point to any evidence that was available or describe how the presence or absence of certain evidence would have created a reasonable probability that the result of the proceeding would have been different.

On this record, to find Appellant's counsel ineffective, we would have to engage in prohibited speculation. *See Stafford v. State*, 101 S.W.3d 611, 613-14 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). Absent evidence of counsel's strategy, we cannot denounce counsel's actions as ineffective nor can we determine whether there is a reasonable probability that the outcome would have been different. For this reason, Appellant has not met either prong of the *Strickland* test. Appellant's issues one and two are overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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