In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-09-00125-CR

TYRELL DARNELL SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 71st Judicial District Court
Harrison County, Texas
Trial Court No. 08-0428X

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

The marihuana found in the possession of Tyrell Darnell Smith, including seeds and possibly stems, weighed 4.13 ounces. Smith was convicted in a jury trial for possession of marihuana in an amount greater than four ounces but less than five pounds and was sentenced to eighteen months' confinement. On appeal, Smith contends his trial counsel was ineffective because he failed to have the marihuana re-weighed after removal of the seeds and stems and because he failed to inform the jury that the seeds and stems were not to be included in the weight of the marihuana. Because ineffective assistance of counsel has not been shown, we affirm.

Any allegation of ineffectiveness of counsel must be firmly founded in the record. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Wallace v. State*, 75 S.W.3d 576, 589 (Tex. App.—Texarkana 2002), *aff'd*, 106 S.W.3d 103 (Tex. Crim. App. 2003). From the record received by this Court, which does not include counsel's reasons for the alleged failures, Smith bears the burden of proving that counsel was ineffective by a preponderance of the evidence. *Goodspeed*, 187 S.W.3d at 392; *Thompson*, 9 S.W.3d at 813; *Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984). We apply the two-pronged *Strickland* test handed down by the United States Supreme Court to determine whether Smith received ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). Failure to satisfy either prong of the *Strickland* test is fatal. *Ex parte Martinez*, 195 S.W.3d 713, 730

n.14 (Tex. Crim. App. 2006). Thus, we need not examine both *Strickland* prongs if one cannot be met. *Strickland*, 466 U.S. at 697.

First, Smith must show that counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms. *Id.* at 687–88. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance and that the challenged action could be considered sound trial strategy. *Id.* at 689; *Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). Therefore, we will not second-guess the strategy of Smith's counsel at trial through hindsight. *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979); *Hall v. State*, 161 S.W.3d 142, 152 (Tex. App.—Texarkana 2005, pet. ref'd). In this case, since the record is silent as to why counsel failed to make an objection or take certain actions with regard to the weight of marihuana containing seeds and stems, we will assume it was due to any strategic motivation that can be imagined. *Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007); *Garcia v. State*, 57 S.W.3d 436, 441 (Tex. Crim. App. 2001); *Fox v. State*, 175 S.W.3d 475, 485–86 (Tex. App.—Texarkana 2005, pet. ref'd).

As defined in the Texas Health and Safety Code, marihuana "means the plant Cannabis sativa L., whether growing or not, the seeds of that plant, and every compound, manufacture, salt, derivative, mixture, or preparation of that plant or its seeds." TEX. HEALTH & SAFETY CODE ANN. § 481.002(26) (Vernon Supp. 2008). It does not include:

> (A) the resin extracted from a part of the plant or a compound, manufacture, salt, derivative, mixture, or preparation of the resin; (B) the mature stalks of the plant or

> fiber produced from the stalks; (C) oil or cake made from the seeds of the plant; (D) a compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake; or (E) the sterilized seeds of the plant that are incapable of beginning germination.

Id. A plain reading of the statute indicates that seeds are included within the definition of marihuana unless they are sterilized and that only mature stalks are excluded.

Smith first contends his counsel was ineffective because he failed to have the marihuana re-weighed without the seeds and stems. Our reading of the record reveals no evidence that the seeds in this case were sterilized.[1] Next, Karen Ream, the forensic scientist that weighed the marihuana, specifically testified stalks were not included in the weight.[2] Since there is no evidence that the weight of marihuana included any mature stalks or sterilized seeds, counsel was not ineffective in failing to ask that the marihuana be re-weighed. We overrule this point of error.

Next, Smith alleges his counsel failed to inform the jury "that the law requires that the weight of the seeds, stems, and contaminants should be included in the total weight" of the marihuana. During closing argument, Smith's counsel claimed "[t]he more serious issue is the weight," and stated "the law in Texas is that it has to be more than 4 ounces of a usable quantity of marijuana as defined by the definition of marijuana in our Penal Code or Health and Safety Code." The trial court's charge

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[1]It is the defendant's burden to establish the seeds were sterilized. *Doggett v. State*, 530 S.W.2d 552, 554–56 (Tex. Crim. App. 1976); *Nowling v. State*, 801 S.W.2d 182, 184 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd); *JohnJock v. State*, 763 S.W.2d 918, 919–20 (Tex. App.—Texarkana 1989, pet. ref'd).

[2]Pictures of the contraband, which was found in three bags, were included as evidence in the record. They do not suggest mature stalks were included in the weight of the marihuana.

specifically included the definition of marihuana per Section 481.002(26) of the Texas Health and Safety Code in its entirety. Also, Smith's counsel pointed out that "it's left up to each of you to determine what is a usable quantity of marijuana, because it's only the usable quantity of marijuana that is supposed to count toward this weight." To solidify his point, although no evidence suggested the small stems in the bags were mature stalks, counsel stated, "It's the leaves; that's what's usable. That's what they smoke. They smoke these leaves. They don't smoke these stems." From these facts, we find that contrary to Smith's assertions, the jury was informed that mature stalks and sterilized seeds were to be excluded in the weight of the marihuana.

Thus, we cannot conclude, based on the record before us, that Smith has met his burden to demonstrate counsel's ineffectiveness.

We affirm the judgment of the trial court.

Josh R. Morriss, III
Chief Justice

Date Submitted: October 5, 2009
Date Decided: October 6, 2009

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