Opinion filed August 6, 2020

In The

Eleventh Court of Appeals

No. 11-18-00211-CR

TROY DON YOUNG, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 238th District Court
Midland County, Texas
Trial Court Cause No. CR50932

M E M O R A N D U M O P I N I O N

The jury found Troy Don Young guilty of first-degree felony possession of methamphetamine in an amount of four grams or more but less than 200 grams with the intent to deliver. TEX. HEALTH & SAFETY CODE ANN. §§ 481.002(8), 481.112(a), (d) (West 2017 & Supp. 2019). Upon Appellant's plea of "true" to prior felony convictions alleged for enhancement purposes, the jury assessed his

punishment at confinement for a period of thirty years in the Institutional Division of the Texas Department of Criminal Justice. In his sole issue on appeal, Appellant complains that his trial counsel provided ineffective assistance during the guilt/innocence phase of trial by introducing evidence of Appellant's gang membership and by failing to object to additional evidence of Appellant's gang membership. We affirm.

Background Facts

Troy Don Young Jr. (Troy), Appellant's son, testified that he had criminal cases pending and that he had agreed to work with the Midland Police Department's narcotics detectives. Troy called Appellant on November 10, 2016, and requested that Appellant deliver drugs to him. After Appellant confirmed that he would bring the drugs to Troy, Troy notified Detective Edward Garcia that Appellant would be traveling to Midland to deliver methamphetamine and would be driving a Silverado pickup. During cross-examination by Appellant's defense counsel, Troy denied that he was a member of a gang. However, Troy testified that his mother and Appellant were involved in the Aryan Brotherhood.

Detective Zac Chesworth of the Midland Police Department's narcotics unit was working with Detective Garcia when Troy informed Detective Garcia that Appellant was traveling from San Angelo to Midland with an ounce of methamphetamine. After surveillance was established, Detective Chesworth observed a pickup matching the description that Troy had provided. After the pickup stopped at a nail salon, a female passenger exited the pickup. Detective Chesworth walked past the pickup and confirmed that Appellant was inside the pickup.

Detective Garcia testified that Troy was "working off a charge" and had informed Detective Garcia that Appellant was dealing methamphetamine. Troy informed Detective Garcia on November 10, 2016, that Appellant was traveling to

Midland with an ounce of methamphetamine and would likely have his girlfriend with him. Troy provided a description of the pickup, and after the pickup was observed, officers confirmed that the license plate showed that the pickup was registered to Appellant.

After he was detained, Appellant informed Detective Garcia that he had "a bunch of salt" in his pocket, a phrase that Detective Garcia believed may have been slang for methamphetamine. Detective Garcia retrieved from Appellant's pocket a bag of what he believed to be methamphetamine. Detective Garcia read Appellant the *Miranda*[1] warnings and recorded his interview of Appellant.

The State published the audio recording of Detective Garcia's interview with Appellant. Defense counsel did not object to the publishing of this evidence. During the audio recording, Appellant stated that he was "trying to leave the family" because he was tired of "this" and explained that, as a condition for "getting out," he had traveled "to hand them twenty-three grams." Appellant stated, "[The family] told me I have to do it for a little bit, man."

After the recording was published, Detective Garcia explained that Appellant's use of the term "the family" was a reference to the Aryan Brotherhood of Texas, a criminal street gang. Defense counsel did not object to Detective Garcia's testimony regarding the Aryan Brotherhood. Detective Garcia explained that Appellant agreed to cooperate and that he informed Detective Garcia that "the family" had organized prepayment for the drugs and that he would not be picking up any payments because his sole task was to deliver the drugs. When the State's prosecutor asked whether "the family" had been threatening Appellant, Detective Garcia replied that Appellant had informed him that "he was doing these smaller -- these kind of trips . . . to try to get out of the family, that he was told that he

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

would have to do stuff like this before they let him go." According to Detective Garcia, Appellant had made other "trips" to deliver drugs. Appellant's traveling companion, Jennifer Key, also told Detective Garcia that she and Appellant had previously traveled to Midland and had traveled to Midland that day to bring something to Appellant's son.

At the police station, Appellant provided information that officers were able to verify, and he was released with the understanding that he was to cooperate with officers. Detective Garcia explained his belief that Appellant "was just giving [him] enough information to keep [him] from filing a case on [Appellant]." Appellant did not stay in contact with Detective Garcia, and because Detective Garcia could not verify that Appellant was providing good intelligence, he eventually filed the case against Appellant.

On cross-examination, defense counsel elicited testimony that Detective Garcia had first interviewed Troy a week or two before November 10, 2016, after Troy had been "busted with a quantity of meth." Troy had informed Detective Garcia that he was a part of the Aryan Brotherhood and could do several things to help police. Although Detective Garcia initially found it strange, Troy insisted that he wanted to provide information regarding Appellant.

Troy explained to Detective Garcia that, on the day Troy had been released from prison, Appellant had "handed [him] so much meth" and declared it "a gift to get you back on your feet." Troy blamed Appellant for Troy's drug problem. This angered Troy, who informed Detective Garcia, "[I]f it wasn't for my dad[,] I would have never got back into drugs." Detective Garcia advised Troy that whatever productive help he could provide quickly to police would help Troy in the long run, but he clarified at trial that no "deal" had been made with Troy. Rather, if Troy had been cooperative, Detective Garcia would have informed prosecutors of any

assistance Troy may have provided, which possibly could have lessened the severity of his punishment or could have raised the possibility that he would not be charged for possessing methamphetamine. Although Troy's information about Appellant's pickup and the drugs Appellant brought to Midland was accurate, Detective Garcia acknowledged that Troy did not successfully "work off the charge" and that he later went to prison.

Appellant testified on his own behalf during the guilt/innocence phase. Appellant stated that he first became involved with a gang when he went to prison in 1998. Appellant explained that he had tried to keep his son away from involvement in gangs and drug activity and that he had been attempting to "get out of the gang" since 2013, when he began a gang renouncement program while in prison. Appellant asserted that Troy had notified him that Troy was in trouble and needed help because he did not want "to do this life" anymore or to go back to prison and wanted to stay out of prison for his children. Troy explained his recent arrest to Appellant, and he advised Appellant that he needed the drugs "brought" to him to help out with Troy's situation with the police.

Appellant acknowledged that he was still on parole and that he would experience negative consequences for bringing the drugs to Troy. Appellant testified that he told Troy, "I can deal with it." Appellant also testified that his willingness to perform this act for his son arose from the fact that he had "never been there" for Troy. Appellant knew that he would be returning to prison by helping Troy but that he wanted to possibly gain the respect of his son by willingly transporting the methamphetamine "straight to the cops." Appellant stated that he did this for his son and said, "I gave him what I had to give."

On cross-examination, Appellant agreed that he knowingly drove almost twenty grams of methamphetamine to Midland to deliver to "somebody" and that he

did so without being under threat or otherwise promised that his son would not be charged. He acknowledged that Troy was subsequently sent to prison. The prosecutor asked Appellant to identify the gang with which he was associated, and without objection by defense counsel, Appellant answered, "Aryan Brotherhood." Without objection, Appellant asserted that his 2012 convictions for possession of methamphetamine and a pistol were not committed in the service of the Aryan Brotherhood and explained that he tried "not to mess with them too much in the world. It's a prison gang."

After the defense rested its case, the State recalled Troy as a rebuttal witness. He testified that he did not recall telling Appellant either that he was in legal trouble and was working with narcotics detectives or that he needed Appellant to deliver the drugs to help him get out of trouble. Troy recalled asking Appellant whether he had anything to bring, Appellant confirming that he did, and Appellant stating that he could bring it that same afternoon. Troy testified that he never told Appellant that he had previously been caught with drugs, and Troy did not know whether anyone else had informed Appellant of this fact. While under cross-examination, Troy reiterated that Appellant had no idea about the arrangement that Troy had made with police.

During closing arguments, the State did not mention Appellant's gang activity. Defense counsel, however, suggested that Troy had joined the gang for protection in prison and that his primary motive in arranging Appellant's transport and delivery of the methamphetamine was to avoid prison. Defense counsel further argued that Troy had lied about not being a gang member, asked the jury to consider whether Troy's testimony that he had not told his father that he needed help with his recent drug charge had been a lie, and recalled that Troy had been angry with Appellant.

Defense counsel made no direct reference to Appellant's gang activity during closing argument. However, defense counsel made the following argument:

> [Appellant] was on the stand and he told y'all what was going through his mind, why these things were being done. What would you do for your son? How would you handle it if your kid was in such a dire situation and you knew what it was all about? What would you do? How would you handle it? Would you lay down your life for one of your children? Would you give up your freedom for one of your children?

Defense counsel also argued that Appellant had transported the methamphetamine to Midland while knowing that no delivery would occur, thereby negating the required intent for delivery. The State rebutted these arguments by suggesting that Appellant had a motive to spin a story and argued that, even if the jury could believe that Appellant did not intend to deliver the methamphetamine, Appellant had admitted that he had knowingly possessed and transported the drugs. The State did not mention Appellant's gang membership during rebuttal.

After he was convicted and sentenced, Appellant filed a motion for new trial and motion in arrest of judgment in which he generally asserted that the verdict was contrary to law and urged that a new trial should be granted in the interests of justice. The motion for new trial was overruled by operation of law without being heard by the trial court. *See* TEX. R. APP. P. 21.8(c).

Analysis

In his sole issue on appeal, Appellant asserts that he received ineffective assistance of counsel during the guilt/innocence phase of trial because defense counsel introduced evidence of Appellant's gang membership and failed to object to Appellant's testimony regarding his gang membership. Appellant contends that this evidence would have been inadmissible. He bases his complaint on Rule 404(b) of the Texas Rules of Evidence, which prohibits the use of evidence of a crime, wrong,

or other act to prove a person's character in order to show that on a particular occasion that the person acted in accordance with the character. TEX. R. EVID. 404(b)(1).

To prevail on a claim of ineffective assistance of counsel, the defendant must satisfy a two-pronged test and 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. If the defendant fails to satisfy either prong of the *Strickland* test, a reviewing court need not address the other. *Id.* at 697.

The defendant bears the burden of proving by a preponderance of the evidence that defense 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 [defendant] 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).

We must first determine whether the defendant has shown that his counsel's representation fell below an objective standard of reasonableness and, if so, we next determine whether there is a reasonable probability that the result would have been different but for his counsel's errors. *Strickland*, 466 U.S. at 687; *Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986). A reasonable probability is a

probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694; *Hernandez*, 726 S.W.2d at 55.

The defendant must overcome the "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance" and that it 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 claim of ineffective assistance of counsel "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). The record must show that no reasonable trial strategy could justify counsel's acts or omissions. *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011). Trial counsel should generally be provided an opportunity to explain his or her actions before being found ineffective. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003).

When counsel's trial strategy is not developed in the trial record, counsel should be found ineffective only if the conduct at issue 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) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). The record on direct appeal is typically insufficient to show that counsel's performance was deficient. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). "Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation." *Thompson*, 9 S.W.3d at 813.

"[G]ang membership is highly inflammatory character evidence likely to cause an individual to be convicted for being a bad person apart from sufficient indicia of guilt regarding this particular crime." *Galvez v. State*, 962 S.W.2d 203,

206 (Tex. App.—Austin 1998, pet. ref'd). However, evidence of gang membership is admissible during the guilt/innocence phase if it is relevant for a noncharacter purpose that in turn tends to show commission of a crime. *Rawlins v. State*, 521 S.W.3d 863, 868 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd) (citing *Tibbs v. State*, 125 S.W.3d 84, 89 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd)). For example, evidence of gang membership may be admissible during the guilt/innocence phase to show bias, motive, or intent or to refute a defensive theory. *See id.* (citing *Smith v. State*, 355 S.W.3d 138, 154 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd)).

As noted previously, Appellant filed a motion for new trial. However, the motion for new trial did not allege ineffective assistance of counsel, and no hearing on the motion occurred. Accordingly, trial counsel has not had an opportunity to explain his trial strategy in response to the matters that Appellant now contends were deficient.

It is possible that defense counsel's treatment of the gang-related matters during trial involved deliberate trial strategy. We note in this regard that defense counsel faced a daunting task in defending Appellant at trial. Appellant's son cooperated with the police to set up a drug delivery from Appellant. Police officers arrested Appellant with a large amount of methamphetamine in his pocket. Additionally, Appellant provided the police with a statement that detailed his connection with "the family." Defense counsel may have made a strategic choice to not resist the evidence of Appellant's gang membership so that he could make the argument that Appellant "knew what it was all about" in order to provide the jury with a rationale for Appellant's actions and his stated goal of assisting his son. This evidence may have also helped to rebut the allegation that Appellant possessed the methamphetamine with an intent to deliver.

Appellant has not shown that trial counsel's acts or omissions regarding the gang-related testimony did not constitute reasonable trial strategy. *See Lopez*, 343 S.W.3d at 143. Given the state of the evidence and the undeveloped record regarding defense counsel's trial strategy, we are unable to conclude that defense counsel's performance was deficient and was "so outrageous that no competent attorney would have engaged in it." *Goodspeed*, 187 S.W.3d at 392 (quoting *Garcia*, 57 S.W.3d at 440). We overrule Appellant's sole issue on appeal.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

August 6, 2020

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[2]

Willson, J., not participating.

[2]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.