AFFIRMED; Opinion Filed June 23, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00174-CR

No. 05-15-00175-CR

MOHSIN ZIA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause Nos. F13-33179-M and F13-33180-M

MEMORANDUM OPINION

Before Justices Bridges, Evans, and O'Neill[1]
Opinion by Justice Evans

Mohsin Zia appeals his convictions for two third-degree felony offenses. Appellant contends that he was denied the effective assistance of counsel because counsel: (1) erroneously advised him to plead guilty when the evidence was legally insufficient to support a conviction; and (2) failed to present available mitigating character evidence at his sentencing hearing. Appellant seeks a reversal and remand for further proceedings. We affirm.

BACKGROUND

On December 3, 2012, a fire destroyed a 22-unit apartment complex in Irving, Texas. Lorenzo Chavez, a lieutenant in the fire investigation unit of the Irving Police Department,

[1] The Hon. Michael J. O'Neill, Justice, Assigned

responded to the scene to investigate the fire.[2] Chavez spoke with several residents who believed that the fire started on the second floor. Chavez also spoke with Officer Rider, an Irving police officer who arrived first at the scene. According to Officer Rider appellant told him that the fire started in his unit and that acetone was involved. Chavez also spoke with the paramedics that transferred appellant to the hospital, and appellant told the paramedics that he had acetone under his sink.

Chavez interviewed appellant the day after the fire at Parkland Hospital. Appellant told Chavez that the fire began while he was making a home blend of hookah in his kitchen. Appellant stated that the leaves and the alcohol-based flavoring caught fire but Chavez testified that appellant's statement was not consistent with the intensity of the fire and mass loss of material in the middle of the apartment building.

Due to appellant's mention of acetone–which is a precursor to bomb-making material–Chavez spoke with the FBI and other agencies about the potential manufacturing of explosives. After the FBI spoke with appellant, Chavez interviewed appellant a second time. In this interview, appellant told Chavez that he met with a man named Solomon who provided him with a white powdery chemical for the manufacturing of a controlled substance, namely K2. Solomon later told appellant to dump the product because one of their associates had been arrested, and appellant told Chavez that he did dump the compound. Appellant admitted to Chavez that on the night of the fire, appellant was testing different methods of flavoring to remove the taste of acetone which was in his blend for the manufacturing of K2.

On February 18, 2013, appellant was indicted on two counts of arson while manufacturing and attempting to manufacture a controlled substance causing bodily injury. On January 9, 2015, appellant entered an open plea of guilty to the two offenses. Appellant's

[2] Chavez testified at the sentencing hearing.

signed, written, voluntary confession and stipulation of evidence was admitted in each case. The trial court accepted the pleas, found that appellant was competent to enter the pleas, and that the pleas were entered freely and voluntarily.

On January 21, 2015, the trial court held a sentencing hearing. The State presented testimony from Kymber Wingard, a resident of the apartment complex who suffered injuries from the fire, and Chavez. Chavez testified that he believed appellant was manufacturing K2 on the night of the fire. Appellant also testified at the hearing. The State recommended a five-year sentence and the trial court followed the recommended prison sentence.

On February 5, 2015, appellant filed a motion for new trial and a notice of appeal. A hearing on the motion for new trial occurred on March 27, 2015. Both of appellant's trial attorneys testified at the hearing. On April 3, 2015, the trial court denied appellant's motion for new trial.

ANALYSIS

In two issues, appellant contends that he was not afforded effective assistance of counsel because counsel: (1) erroneously advised him to plead guilty when the evidence was legally insufficient to support a conviction; and (2) failed to present available mitigating character evidence at his sentencing hearing.

A. Standard of Review

Texas courts apply the two-pronged *Strickland* test to determine whether counsel's representation was so inadequate as to violate a defendant's Sixth Amendment right to counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (U.S. 1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting the *Strickland* two-prong test for criminal cases in Texas). Under this two-part test, appellant must establish that: (1) counsel's performance was deficient and that his assistance fell below an objective standard of reasonableness; and (2) but for

counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 687. Unless appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). In order to satisfy the first prong, appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Further, there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 689. To prove the second prong, appellant must show that there is a reasonable probability, or a probability sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different. *Lopez*, 343 S.W.3d at 142.

B. Insufficient Evidence

In his first issue, appellant argues that, but for his counsel's erroneous advice, he would not have pleaded guilty because the evidence was legally and factually insufficient to support a conviction. Appellant makes two arguments that are essentially based on the same premise—whether or not he had the required ingredients to attempt to manufacture K2. He first argues that the evidence did not satisfy the corpus delecti rule because the "State was not in possession of corroborating evidence to establish that [appellant] was manufacturing a controlled substance" and that "the evidence the State did possess, i.e. [appellant's] extra-judicial statements, did not establish that [appellant] was manufacturing a controlled substance because he did not possess the requisite chemical component." Appellant also argues that the State cannot prove attempt in this case because in "cases where courts have found an attempt to manufacture a controlled substance, *all* of the necessary ingredients were present." Appellant argues that since the State cannot prove that he attempted to manufacture K2, appellant's trial attorneys rendered ineffective assistance of counsel by advising him to plead guilty. We disagree.

In order to argue successfully that his trial counsel rendered ineffective assistance of counsel, appellant must show that he could not have been convicted of attempt to manufacture K2 because he did not possess all of the ingredients to manufacture a controlled substance. Appellant, however, cannot meet this burden. Appellant fails to cite to any case law—nor can we locate any such case law—which supports appellant's allegation that he must have possessed all necessary ingredients to manufacture a controlled substance in order to be convicted of attempt to manufacture. Although appellant correctly states that various courts have upheld convictions for attempt to manufacture a controlled substance when all ingredients of the controlled substance were present, these courts did not hold that all ingredients were required to be present in order to uphold the conviction. *See Martin v. Texas*, 727 S.W.2d 820 (Tex. App.—Fort Worth 1987, no pet.); *Lindley v. State,* 736 S.W.2d 267 (Tex. App.—Fort Worth 1987, pet. ref'd, untimely filed); *Fronatt v. State,* 630 S.W.2d 703 (Tex. App.—Houston [1st Dist.] 1981, pet. ref'd). In contrast to appellant's cases, the State refers us to cases which uphold convictions for attempt to manufacture a controlled substance although the defendant lacked all of the necessary ingredients to actually manufacture the substance. *See Cochran v. State*, 107 S.W.3d 96 (Tex. App.—Texarkana 2003, no pet.); *Baxter v. State*, 718 S.W.2d 28 (Tex. App.—Eastland 1986, pet. ref'd). These cases, however, do not directly decide that all ingredients need not be present for a person to be guilty of attempt to manufacture a controlled substance. Instead, it appears that no Texas court has decided the issue of whether or not all ingredients to manufacture the substance must be in the defendant's possession for an appellate court to conclude there was sufficient evidence to affirm a conviction for attempt to manufacture a controlled substance.

An ineffective assistance of counsel claim cannot be based on an alleged error of counsel when the case law evaluating counsel's actions and decisions in that instance was nonexistent or

not definitive. *See Vaughn v. State*, 931 S.W.2d 564, 567 (Tex. Crim. App. 1996) ("We have said that basing an ineffective assistance claim on caselaw [sic] that is unsettled at the time of counsel's actions 'would be to engage in the kind of hindsight examination of effectiveness of counsel the Supreme Court expressly disavowed in *Strickland* . . . .'" (citing *Ex Parte Davis*, 866 S.W.2d 234, 241 (Tex. Crim. App. 1993))). As the case law is unclear in this instance, we cannot conclude that counsel's representation fell below an objective standard of reasonableness.[3] As such, we overrule appellant's first issue.

C. Mitigation Evidence

In his second issue, appellant contends that he failed to receive effective assistance of counsel because his attorney failed to present available mitigating character evidence at his sentencing hearing. Again, we disagree.

In this case, appellant was the only defense witness to testify at his sentencing hearing. Appellant testified that he did not tell his parents about his alleged crime because of their age and health conditions, or his younger brother because he was still in high school. Appellant stated that "I didn't want to burden them with any of this stress that was caused December of 2012." At the motion for new trial hearing, appellant's trial counsel, Brian Bolton, testified that no one except appellant's other brother, Hasson, knew about his offense. Bolton testified as follows: "No one else new [sic] about this. It would be too detrimental to what he had done, where he was in his career and getting things started, there weren't witnesses to be called." Bolton also testified that he was sure that he spoke with appellant about character witnesses for the sentencing hearing but that appellant did not want to get anyone involved. April Tran, Hasson's

[3] The record contains testimony from appellant's trial counsel and appellant himself that appellant wanted to plead guilty and admit to his mistake in an attempt to obtain deferred adjudication and avoid a prison sentence. The record also provides that the trial court advised appellant during his plea hearing that the range of punishment was not less than two years and up to ten years in the penitentiary. Appellant does not complain on appeal that his guilty plea was involuntary, only that he was rendered ineffective assistance.

girlfriend, also testified at the motion for new trial hearing that she was never asked to come to court and testify as a character witness but that she would have testified. Tran testified that she was not present for the fire and could only have testified that she believed appellant was a "good guy." The following exchange then took place:

[State's attorney]:	Even good guys can make mistakes, though, right?
[Tran]:	Yes.
[State's Attorney]:	And when they make mistakes that hurt 50-some-odd people, there have to be consequences, right?
[Tran]:	Yes, sir.
[State's Attorney]:	Punishment have [sic] to be doled out, right?
[Tran]:	Yes.
[State's Attorney]:	So even though he is a good guy, that shouldn't necessarily change the punishment that he received for what he did?
[Tran]:	I don't believe the punishment he received --
[Appellant's Attorney]:	Your Honor, I guess I am going to object. This really isn't relevant and it wouldn't be proper in front of the court what she think the punishment should be.
[Court]:	Sustained.
[State's Attorney]:	May I respond, Judge?
[Court]:	You may. I sustained.
[State's Attorney]:	As far as any further questions on this line, what I am trying to establish is two factors, when it comes to ineffective assistance of counsel; the second is that but for the ineffective assistance, the result would have been different. What I am trying to establish through this witness is that she could not testify to anything that would change the result of that hearing.

[Court]: I think you have already, in my eyes, established that.

In support of his motion for new trial, appellant submitted fourteen affidavits from people who stated that they were not asked to testify on appellant's behalf at his sentencing hearing but would have testified as to his good character.

To prevail on an ineffective assistance claim, however, appellant needed to present an appellate record that affirmatively demonstrates that his counsel's actions were not based on sound trial strategy. *Martinez v. State*, 449 S.W.3d 193, 209 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). Here, appellant's trial counsel testified that appellant did not want to get anyone involved in testifying and that he was worried that it would impact his career. There is no testimony by appellant or anyone else which contradicts these statements. Accordingly, appellant had not demonstrated that his counsel's actions were not based on sound trial strategy.

Further, counsel's failure to call witnesses at the punishment stage is irrelevant absent a showing that the witnesses' testimony would have benefitted appellant. *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). Here, although the thirteen potential witnesses named in the affidavits did state that they were available to testify at the punishment phase, there is no evidence that appellant would have benefited from their testimony. All of the affidavits contained testimony similar to April Tran's testimony at the motion for new trial hearing; that appellant was a good guy and deserved a second chance. As stated above, the trial court stated on the record that the State had effectively demonstrated that Tran's testimony about appellant's character would not have changed the result of the sentencing hearing. Thus, there is no reason to believe that the similar testimony of additional witnesses at the sentencing hearing would have had any additional impact on the court or lead to a lesser sentence. Accordingly, we cannot conclude that appellant suffered ineffective assistance of counsel for failure to present mitigating character evidence and we overrule appellant's second issue.

CONCLUSION

We resolve appellant's issues against him and affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
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JUDGMENT

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Opinion delivered by Justice Evans.
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Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 23rd day of June, 2016.

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