Opinion issued December 10, 2009

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00088-CR

CHANDRA DENISE RANDLE, Appellant

V.

THE STATE OF TEXAS, Appellee

*** * ***

NO. 01-07-00089-CR

CHANDRA RANDLE-JACKSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas

Trial Court Cause Nos. 1039811 & 1060609

MEMORANDUM OPINION

Appellant, Chandra Randle,[1] pled guilty, without an agreed recommendation, to two separate charges of fraudulent use or possession of identifying information. After a hearing, the trial court sentenced appellant to two years imprisonment and a fine of $10,000. Appellant raises two points of error: (1) her trial counsel's closing argument during her PSI hearing constituted ineffective assistance of counsel and (2) the trial court erred in finding that she was required to register as a sex offender.[2] We modify the judgments and affirm as modified.

BACKGROUND

Appellant was charged by two separate single-count indictments for fraudulent use or possession of identifying information. One indictment included two enhancement paragraphs for two prior felony convictions for fraudulent use or possession of identifying information, but these enhancements were abandoned by the State. Prior to the commencement of trial, appellant pled guilty to both charges

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[1] Chandra Randle is appealing the judgments of two separate cases she pled together. The judgment in Trial Court Cause No. 1060609 identifies her as "Chandra Randle-Jackson" and the judgment in Trial Court Cause No. 1039811 identifies her as "Chandra Denise Randle." For purposes of this appeal, she will be referred to as either "appellant" or "Randle."

[2] *See* TEX. CODE. CRIM. PROC. art. 62.001(5), 62.002(a) (Vernon Supp. 2008).

and a pre-sentence investigative (PSI) report was ordered. The State's sole witness at the PSI hearing—one of the complainants—asked the court to assess appellant the maximum sentence. Appellant's counsel called no witnesses and asked the State's witness only two questions. Appellant's counsel's closing argument, in its entirety, follows:

> Counsel: Your Honor, I thought about giving—I see some lawyers have these little things with stamps on them. And what they do is—if I use your stamp and give the impression of your name, it will give what you want to give. And I was thinking the lady came here and it is an awful situation, I imagine, to be where she is and she stamped it, too. And then she came, she took the same stamp and stamped it, too. I'm wondering what's the next stamp going to be like.
>
> Your Honor, I don't really like to do presentence. And the reason being, I'm the kind of lawyer I'll fight you to the death. I don't like coming up here being unarmed, sucking my thumb. And that's what this is, you come up here and you bring witnesses and it's—it has to be an awful feeling for somebody to mess up your credit. I mean, there's no question about that.
>
> But if—I notice when we have a trial, for some reason, Judges tell jurors that the reason you can't sit on this jury if something happened to you, you can't be objective. And yet, you'll let that same person knowing their objective is skewed to tell you what to give in a case.
>
> And I'm saying if that be true, then why would

> a Judge ever tell a witness, well, you couldn't sit on this case 'cause you couldn't be objective. You couldn't sit in judgment because you couldn't be objective. And yet, you let a person come in here knowing they can't be objective and ask them what should you give.
>
> And I'm saying if that's the way you do it, then when you voire dire jurors, you should never tell a person you can't be a jury and a witness and tell somebody what to give on a case because your objectivity is not there.
>
> I don't know what you're going to give. And it looks bad here. I'm her friend and I got to say it looks bad.
>
> . . .
>
> I don't know what you are going to do.
>
> . . .
>
> I know it is easy to give her the max.
>
> Court: Okay. Is that what you want?
>
> Counsel: No, I don't want that; but that would be easy.
>
> Court: Okay.
>
> Counsel: But it takes some thought to give her something in between there.

At the conclusion of the hearing, the court assessed appellant the maximum sentence and fine—two years imprisonment and a fine of $10,000. No motion for new trial was filed.

INEFFECTIVE ASSISTANCE OF COUNSEL

In her first point of error, appellant argues that she received ineffective

assistance of counsel based upon the "incoherent" and "rambling" closing argument made by her trial counsel during her punishment hearing.

A. Standard of Review

The United States Constitution, the Texas Constitution, and a Texas statute guarantee an accused the right to assistance of counsel. *See* U.S. CONST. AMEND. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.051 (Vernon Supp. 2008). As a matter of state and federal law, this right includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997).

The United States Supreme Court established a two-prong test to determine whether counsel is ineffective. *See Strickland*, 466 U.S. at 687–95, 104 S. Ct. at 2064–69; *Hernandez v. State*, 726 S.W.2d 53, 55–57 (Tex. Crim. App. 1986) (applying *Strickland* test to Texas statutes and constitutional provisions). Proof of ineffective assistance of counsel requires a showing that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 687–94, 104 S. Ct. at 2064–68; *see*

Thompson v. State, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999).

Based upon the "prevailing professional norms" currently extant in the criminal courts of Harris County, trial counsel's argument was clearly incomprehensible. But the second prong of the *Strickland* test requires that the appellant must also show a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different; absent such a showing, the contention of ineffective assistance fails. *Thompson*, 9 S.W.3d at 812–13.

B. First Prong of *Strickland* – Deficiency

Although decisions relating to closing argument are often purely strategic and thus deserving of deference, *Taylor v. State*, 947 S.W.2d 698, 704 (Tex. App.—Fort Worth 1997, pet. ref'd), we can discern no possible plausible, legitimate, trial strategy that would justify trial counsel's giving such a rambling, inarticulate, and at times, wholly irrelevant, closing argument. *See Ortiz v. State*, 93 S.W.3d 79, 88–89 (Tex. Crim. App. 2002) (requiring reviewing courts to defer to trial counsel's decisions if "there is at least the possibility that the conduct could have been legitimate trial strategy"); *see also Naranjo v. State*, No. 14-99-01227-CR, 2001 WL 931380, at *1, *10 (Tex. App.—Houston [14th Dist.] Aug. 16, 2001, pet. ref'd) (mem. op.) (not designated for publication) (finding ineffective

assistance of counsel; stating "there could be no plausible strategic reason for giving an argument that is 'aimless, incoherent, devoid of substance, and without any apparent purpose.'"). Although there is nothing in the record to explain counsel's actions, we find counsel's closing argument so unwieldy and incoherent that the argument itself undermines the presumption that counsel exercised reasonable professional judgment in making it. Therefore, based upon the record before us, we conclude that trial counsel's representation fell below objective standards of professional conduct and find that appellant has satisfied the first prong of *Strickland*. *See Strickland*, 466 U.S. at 687–91, 104 S. Ct. at 2064–66.

C. Second Prong of *Strickland*—Harm

Having established that her trial counsel's conduct was deficient, appellant need now, by a preponderance of the evidence, show a reasonable probability that she would have received a different sentence but for counsel's confusing yammering. *See Thompson*, 9 S.W.3d at 812–13.

The transcript of the PSI hearing makes it abundantly clear that the trial judge's decision to assess appellant the maximum sentence and fine was attributable to appellant's criminal history in the PSI report. Specifically, at the conclusion of the PSI hearing, the trial judge stated:

> Well, I have given it a lot of thought. In fact, I read this report and I was, frankly, a little astonished that this

> wasn't a higher grade felony because this lady has two prior felony convictions for fraudulent use and possession of documents. And [both enhancements] were dismissed as part of the plea bargain, which brought it down from 2 to 10 years and only give[s] the Court range only up to two years state jail.
>
> And I read the presentence investigative report. This is not any aberration of something that just happened in her life.

The trial judge then read a litany of convictions dating back to 1987 including, *inter alia*, two convictions for theft by check (1994 and 1996), two convictions in 2003 for fraudulent use or possession of identifying information, and several charges for credit card abuse and fraudulent use or possession of identifying information that were eventually dismissed. After appellant's trial counsel challenged the inclusion of the dismissed charges, the judge stated that he was "not punishing her for the ones dismissed. You know, I'm not going to consider those, period. You know, that's a good point." The trial judge then went on to state:

> But Ms. Randle, you are very fortunate to be here with a state jail felony. This is more like a ten year case in the penitentiary, frankly. And I mean, without even—I mean, after considering all this, reading this, I'm just amazed that you don't have a third degree felony, because you deserve the maximum. And I am finding you guilty on both cases of the fraudulent use [or] possession of identifying information [in] both cases. I'm assessing your punishment [in] both cases at two years in the state jail facility. And I'm assessing a 10,000-dollar fine on both cases also.
>
> And by law, since you pled [both cases] together, they

> will run concurrently. So you'll be taken into custody at this time.

Because the trial judge assessed the maximum sentence, appellant argues that "it would seem likely there was [a] connection between the heightened punishment and defense counsel's failures," yet offers no evidence to either support her position or to undermine the clear inference from the record that the trial judge's maximum sentence was based exclusively upon appellant's prior record. Here, the record is void of any evidence of a reasonable probability that, had her trial counsel's assistance met the prevailing professional norms, appellant would have received a lesser sentence. Therefore, in accordance with *Strickland* and its progeny, we have no choice but to overrule appellant's first point of error.

REFORMING THE JUDGMENTS

In her second point of error, appellant asserts, and the State concedes, that the trial court erred in finding that the sex offender registration requirements of Chapter 62 of the Texas Code of Criminal Procedure applied to her and asks this Court to reform the judgments entered against her.[3] The cases before us are for fraudulent use or possession of identifying information and as Chapter 62 is inapplicable, we modify the trial court's judgments to so reflect.

[3] *See* TEX. CODE. CRIM. PROC. art. 62.001(5), 62.002(a).

CONCLUSION

We modify the judgments of the trial court to show that appellant is not required to register as a sex offender, and as modified, we affirm.

Jim Sharp
Justice

Panel consists of Justices Jennings, Higley, and Sharp.

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