

Opinion issued March 10, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00663-CR

JEREMY DAVID SHIVERS, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Case No. 1165765**

MEMORANDUM OPINION

Appellant Jeremy Shivers pleaded guilty to the offense of unauthorized use of a motor vehicle, and the trial court deferred adjudication. *See* TEX. PENAL CODE ANN. § 31.07 (West 2003). The State later moved to adjudicate, alleging that

Shivers violated the terms and conditions of his probation by committing assault. The State and Shivers agreed to the sentence that the trial court should impose, and Shivers pleaded true to the motion to adjudicate. The trial court adjudicated Shivers's guilt, and in accordance with his agreement with the State, the court sentenced him to 16 months' confinement in state jail and assessed a fine of \$500.

On appeal, Shivers contends that he received ineffective assistance of counsel. Specifically, he contends that his trial counsel was ineffective for failing to request a hearing on the motion to adjudicate, failing to request a hearing on punishment, and failing to request a court reporter to record the proceedings for appeal. Shivers has not shown that his counsel's performance was deficient or that, but for his counsel's alleged unprofessional errors, the result of the proceeding would have been different. Accordingly, we affirm.

I. Background

Shivers did not contest the State's motion to adjudicate guilt. The record in this case consists of the clerk's record. No reporter's record was made during the proceedings on the motion to adjudicate. Shivers waived "the appearance, confrontation, and cross-examination of witnesses"; consented to the introduction of affidavits, written witness statements, and other documentary evidence; and stipulated that certain facts were true, including that he committed the offense of assault, violating the terms and conditions of his probation. His initials appear

beside each of 16 admonishments, which included a statement that he had the right to have a court reporter record his plea. In his signed statement he acknowledged that he understood the admonishments he was given and was fully satisfied with his counsel's representation. The trial court adjudicated Shivers's guilt and sentenced him in accordance with his agreement with the State.

II. Standard of review

The standard of review for claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 687–96, 104 S. Ct. 2052, 2064–69 (1984), and *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). To prevail, Shivers must first show that his counsel's performance was deficient. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Bone*, 77 S.W.3d at 833. “Specifically, appellant must prove, by a preponderance of the evidence, that his counsel's representation fell below the objective standard of professional norms.” *Bone*, 77 S.W.3d at 833. “Second, appellant must show that this deficient performance prejudiced his defense,” meaning that Shivers “must show a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* (quoting *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002)). A “reasonable probability” is one “sufficient to undermine confidence in the outcome.” *Id.* Thus, 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.” *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064.

There is a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.*, 466 U.S. at 689, 104 S. Ct. at 2065. To overcome the presumption of reasonable professional assistance, “any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness.” *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). When determining the validity of an ineffective-assistance-of-counsel claim, judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). The record on direct appeal will rarely contain sufficient information to evaluate an ineffective-assistance-of-counsel claim. *See Bone*, 77 S.W.3d at 833. Based on such a record, a finding that counsel was ineffective would normally require impermissible speculation by the appellate court. *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d). When the record is silent as to trial counsel’s strategy, we will not conclude that defense counsel’s assistance was ineffective unless the challenged conduct 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)).

III. Analysis

Shivers argues that his trial counsel should have requested a hearing on the motion to adjudicate and as to punishment and, further, should have requested that a court reporter record the proceedings.

A defendant may waive any legal right except the right to trial by jury in a capital case in which the State seeks the death penalty. TEX. CODE CRIM. PROC. ANN. art. 1.14 (West 2005). For example, an appellant may waive his right to have a court reporter record the proceedings in the trial court, and doing so does not deprive him of a fair trial. *Palka v. State*, 435 S.W.2d 525, 526 (Tex. Crim. App. 1969); accord *Green v. State*, 841 S.W.2d 926, 927 (Tex. App.—Corpus Christi 1992, no pet.). “Even if a request is made and refused by the trial court, no reversible error is shown when appellant does not allege any error which the statement of facts would reveal.” *Green*, 841 S.W.2d at 927.

Shivers argues that if his trial counsel had requested hearings and had them recorded, the result “might have been different.” He does not explain why the result might have been different or identify any specific evidence he would have introduced or any error that would have been apparent in a reporter’s record but is

not apparent in the appellate record in this case. He waived his right to appearance, confrontation, and cross-examination of witnesses; to having compulsory process to obtain attendance of witnesses in his favor; and to having his plea recorded by a court reporter. He pleaded true to the motion to adjudicate and stipulated that he violated the terms and conditions of his probation by committing assault.

His allegation of ineffective assistance of counsel is not firmly founded in the record, and Shivers makes no argument explaining why a hearing was necessary on the motion to adjudicate or on punishment in light of his waivers and stipulations. His waiver of a court reporter did not deprive him of a fair trial. *See id.* In this case, nothing in the appellate record shows that Shivers's "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." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064. Shivers acknowledged that he was satisfied with his trial counsel's representation. Shivers has not shown that his counsel's performance was deficient or that, but for his counsel's alleged unprofessional errors, the result of the proceeding would have been different. *See Bone*, 77 S.W.3d at 833. Accordingly, we overrule his sole issue.

The trial court certified Shivers's right to appeal, however the certification does not include his signature as required by the Texas Rules of Appellate

procedure, indicating that he has been informed of his rights to appeal or to file a pro se petition for discretionary review. This defect has not been remedied by the trial court or Shivers's attorney. We therefore order Shivers's attorney, pursuant to Texas Rule of Appellate Procedure 48.4, to send Shivers a copy of this opinion and our judgment, to notify him of his right to file a pro se petition for discretionary review, and to inform him of the pertinent deadlines. *See* TEX. R. APP. P. 48.4, 68. Shivers's attorney is further ordered to comply with any additional requirements of Rule 48.4.

CONCLUSION

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

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