Opinion issued October 14, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00071-CR

ADRION VALERIO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Case No. 1156659

MEMORANDUM OPINION

A jury found appellant, Adrion Valerio, guilty of aggravated robbery, *see* TEX. PENAL CODE ANN. §§ 29.02(a)(2), 29.03(a)(2) (Vernon 2003), and assessed punishment at 15 years in prison. Based on the language of the indictment and the jury's guilty finding, the trial court included a deadly-weapon finding in the

judgment. In one issue, appellant asserts that he was denied effective assistance of counsel at trial.

We affirm.

Background

The complainant, Robert Garcia, was working on his car in the parking lot of his apartment complex. A white Ford Explorer pulled into the lot and parked three spaces away from Garcia. Two men got out of the Explorer and approached appellant. One of the men, later identified as appellant, had a shotgun. The men took Garcia's wallet and demanded his car keys. Although the keys were in his car, Garcia lied and said the keys were in his apartment.

Garcia got to his apartment first and tried to shut the door, but the two assailants stuck the shotgun in the doorway, preventing the door from closing. Garcia managed to close the door, and the assailants headed back to the parking lot. Garcia looked out the window and saw one of the assailants point a handgun at him.

The assailants then realized that the keys were in Garcia's car. Appellant started the car, but after it stalled a couple of times, he abandoned it and ran off on foot.

During the incident, appellant's wife had called the police. When the officers arrived, Garcia gave them a description of the assailants and their vehicle.

The responding officers began patrolling the area near Garcia's apartment complex looking for the two assailants.

A short time later, one of the officers spotted a white Explorer approximately one mile from the apartment complex. The officer initiated a traffic stop of the vehicle. Another officer, Harris County Sherriff's Deputy J. Laird, responded to assist in the traffic stop and investigation.

The officers discovered four people in the Explorer: appellant, Brian Ayala, a woman, and a seven-month-old baby. Because Garcia had reported that the assailants were armed, the officers did a pat-down search of appellant and Ayala. The officers found shotgun shells in appellant's and Ayala's pockets. The two men were handcuffed and separated.

The officers then conducted a "protective sweep" of the Explorer. In plain view, the officers found a handgun and a large combat knife in the center console. The officers also recovered clothing from the vehicle that matched Garcia's description of the clothing worn by the assailants. The officers did not find a shotgun in the Explorer.

Garcia came to the scene and viewed appellant and Ayala. Garcia identified the two men as the assailants who had robbed him earlier in the evening. Garcia also specified which assailant had carried which weapon during the robbery. Deputy Laird then asked appellant and Ayala where the shotgun was that had been

used in the robbery. Neither man responded to the question. The police searched the area and recovered a shotgun near the entrance of the apartment complex.

Appellant and Ayala were each charged with aggravated robbery. The two were tried together, each represented by his own counsel. Both men were found guilty of the offense of aggravated robbery. Ayala was sentenced to five years in prison. Appellant was sentenced to 15 years in prison. Appellant did not file a motion for new trial.

Appellant now appeals his conviction. In one issue, appellant contends that he received ineffective assistance of counsel at trial.

Ineffective Assistance of Counsel

A. Applicable Legal Principles

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. *See* U.S. CONST. amend. VI. To show ineffective assistance of counsel, a defendant must demonstrate both (1) that his counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *Andrews v. State*, 159 S.W.3d 98, 101–02 (Tex. Crim. App. 2005).

An appellant bears the burden of proving by a preponderance of the evidence that his counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*. at 813. We presume that a counsel's conduct falls within the wide range of reasonable professional assistance, and we will find a counsel's performance deficient only if the conduct is so outrageous that no competent attorney would have engaged in it. *Andrews*, 159 S.W.3d at 101.

In most ineffective-assistance-of-counsel cases, the record on direct appeal is not developed and does not adequately reflect the alleged failings of trial counsel. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). This is particularly true when the alleged deficiencies are matters of omission and not of commission that are shown in the record. *Id*. In such cases, the record is best developed in a hearing on a motion for new trial or on application for a writ of habeas corpus. *See id*.

B. Analysis

Appellant contends that he received ineffective assistance of counsel at trial because his defense attorney did not object when the State elicited testimony from Deputy Laird, during the State's case-in-chief, regarding appellant's post-arrest silence. Deputy Laird testified that, after Garcia had positively identified the men

as his assailants, he asked appellant and Ayala where the shotgun was located. The prosecutor followed-up by asking Deputy Laird whether the two men had indicated where the shotgun was located. At that point, Ayala's attorney objected arguing that such testimony would contain hearsay and would violate his client's *Miranda* rights. The trial court overruled the objection. Deputy Laird testified that appellant and Ayala did not give him any indication where the shotgun was located. Appellant's defense counsel did not object to this testimony.

On appeal, appellant argues that his counsel's failure to object to Deputy Laird's testimony amounted to ineffective assistance of counsel. Appellant contends, "Appellant received ineffective assistance of counsel when his attorney failed to object to evidence that violated appellant's state constitutional right to remain silent."

The United States Supreme Court held in *Doyle v. Ohio* that the federal Due Process Clause prohibits the cross-examination of a defendant concerning his silence after he has been arrested and given *Miranda* warnings. 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976). This prohibition serves to prevent a jury from drawing inferences of guilt from a defendant's decision to remain silent after being told he has a right to remain silent. *See id*. The same consideration bars the prosecution from using evidence of such silence as part of its case-in-chief against

the defendant. *Stroman v. State*, 69 S.W.3d 325, 331 (Tex. App.—Texarkana 2002, pet. ref'd).

A defendant's rights with regard to post-arrest silence are broader under our state constitution. Article I, section 10 protects a defendant from compelled self-incrimination from the moment an arrest is effectuated. *Sanchez v. State*, 707 S.W.2d 575, 579–80 (Tex. Crim. App. 1986); *see* TEX. CONST. art. I, § 10. That provision protects a defendant's post-arrest silence regardless of whether he has been informed of his right to remain silent. *See Sanchez*, 707 S.W.2d at 582. As a result, the State may not refer to or admit in evidence the fact of a defendant's silence if such silence occurs after the defendant has been arrested, notwithstanding the fact that he had not been advised of his rights at that time. *See id.* at 579.

Here, the parties dispute whether appellant was under arrest at the time he failed to indicate to Deputy Laird where the shotgun was located. We need not resolve that issue, however, to resolve the issue of whether appellant received effective assistance of counsel at trial.

This case demonstrates the inadequacies that are inherent in evaluating ineffective assistance claims on direct appeal when the appellant did not file a motion for new trial. Here, the record does not show why appellant's trial counsel

did not object to Deputy Laird's testimony regarding appellant's silence with respect to the location of the shotgun. Any possible trial strategy is not revealed.

Because the record is silent, we cannot determine whether trial counsel's inaction was grounded in sound trial strategy. *See Jackson*, 877 S.W.2d at 771. In the absence of direct evidence of counsel's reasons for the challenged conduct, an appellate court will assume a strategic motivation if any can be imagined. *See Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001); *see also Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (presuming reasonable trial strategy supported failure to object in face of silent record).

Appellant takes the position that no possible plausible trial strategy can be imagined for counsel's failure to object. We disagree.

We note that courts have posited that counsel may choose not to object to testimony revealing a defendant's post-arrest silence to create the appearance that the defense is being open and completely honest with the jury. *See, e.g., Stroman v. State*, 69 S.W.3d 325, 332 (Tex. App.—Texarkana 2002, pet. ref'd) (noting that counsel's failure to object to police officer's testimony regarding defendant's post-arrest silence may have constituted trial strategy to appear open and honest with jury); *Ahmadi v. State*, 864 S.W.2d 776, 783 (Tex. App.—Fort Worth 1993, pet. ref'd) (indicating that failure to object to prosecutor's use of post-arrest silence was

sound trial strategy). A plan to appear open and honest with the jury constitutes reasonable strategy. *See Thomas v. State*, 886 S.W.2d 388, 392 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) ("[T]rial counsel's decision not to object to improper testimony can be a plausible trial strategy when counsel desires to create the appearance of being open and completely honest with regard to all questions.").

Because the record is silent regarding why counsel did not object, and a plausible trial strategy can be imagined, appellant fails to overcome the presumption that counsel exercised reasonable professional judgment when he did not object to Deputy Laird's testimony. *See Thompson*, 9 S.W.3d at 814. On this record, appellant has not met his burden to show that counsel's assistance fell below an objective standard of reasonableness. *See id.* Appellant has failed to satisfy *Strickland*'s first prong; thus, we need not consider the second prong. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Bland

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