Opinion issued February 24, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00055-CR &

NO. 01-10-00056-CR

STEPHEN LAWRENCE ANDERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Case No. 1189605 & No. 1189606

MEMORANDUM OPINION

Stephen Lawrence Anderson pleaded guilty to the first degree felony offenses of delivery of more than 400 grams of cocaine and aggravated assault of a public servant with a deadly weapon, without an agreed punishment from the State.

See TEX. HEALTH & SAFETY CODE ANN. § 481.112(f) (West 2010); TEX. PENAL CODE ANN. §§ 22.01(a)(2), 22.02(b)(2)(B) (West 2003). Following a pre-sentence investigation ("PSI") hearing, the trial court sentenced him to twenty-eight years' confinement. Anderson filed a motion for new trial, and the trial court denied his motion. On appeal, Anderson contends that the trial court abused its discretion in denying his motion because his plea of guilty was involuntary and he received ineffective assistance of counsel. We conclude that Anderson has not shown a basis for withdrawing his plea, nor that his counsel was ineffective. We therefore affirm.

Background

In October 2008, Anderson delivered one kilogram of cocaine to a confidential informant while in the parking lot of a car wash. Houston police officers and other law enforcement officials observed the delivery. After the delivery, Anderson drove his H2 Hummer to a nearby bank, where the informant intended to withdraw money to pay for the cocaine. After Anderson entered the bank's parking lot, four police cars surrounded the Hummer. With their weapons drawn, the officers commanded Anderson to place his Hummer in park and exit it. Instead, Anderson reversed the Hummer and slammed it into a police car. A DEA agent sat in that car. Anderson slammed his Hummer into this vehicle several more times, and he escaped the parking lot. The police pursed Anderson, who

drove erratically and at a high rate of speed. Anderson eventually crashed his Hummer into a bridge. Shortly thereafter, officers arrested him.

Anderson filed a motion for new trial after he pleaded guilty, alleging that his defense counsel provided him ineffective assistance, which rendered his plea involuntary.[1] Both Anderson and his defense counsel testified at a hearing on the motion. Anderson stated that his defense counsel neither contacted witnesses nor investigated his case. He said defense counsel ordered him to plead guilty and told him that he would receive a more lenient sentence or probation from the trial court. According to Anderson, his counsel also promised his family that he would receive probation. Anderson said that defense counsel did not explain his right to appeal. But he admitted that defense counsel had told him that the trial court could consider the entire range of punishment in sentencing him. He also admitted that defense counsel told him that he had a right to a jury trial, and that defense counsel had set the case for trial before Anderson entered his plea.

In contrast, defense counsel testified that he never promised Anderson that he would receive probation or a lenient sentence if he pleaded guilty to the charges

[1] In his written motion, Anderson argued that his plea was involuntary for the following reasons: (1) defense counsel told him that he had no choice but to plead guilty; (2) defense counsel was personally abusive and would not cooperate with him in preparing a defense to the charges; (3) defense counsel did not inform him of the consequences of entering an open plea of guilty; (4) defense counsel allowed him neither to testify at the PSI hearing nor to call witnesses in his defense, and (5) defense counsel delegated some of the PSI hearing to his associate without Anderson's consent.

against him. He explained the potential consequences of an open plea to Anderson, and he told him that the trial court had the entire range of punishment to consider in sentencing him. According to defense counsel, Anderson chose to plead guilty because he would be ineligible for deferred adjudication if a jury convicted him. Anderson agreed with counsel's strategy of submitting letters from character witnesses in lieu of live testimony at the PSI hearing so that the State did not have the opportunity to cross-examine these witnesses. Also, at the hearing, the State introduced a written statement Anderson signed before he pleaded guilty. In it, Anderson states:

> After a full discussion of all of my options with my two felony cases, I have decided to plead guilty to both of my felony cases, to a presentence investigation and allow the Judge to punish me on both of my felony cases.

The trial court denied Anderson's motion for new trial.

Discussion

Standard of Review

An appellate court reviews a trial court's ruling on a motion for new trial an abuse of discretion. *Webb v. State*, 232 S.W.3d 109, 112 (Tex. Crim. App. 2007). We view the evidence in the light most favorable to the trial court's ruling and uphold the ruling if it was within the zone of reasonable disagreement. *Wead v. State*, 129 S.W.3d 126, 129 (Tex. Crim. App. 2004). We do not substitute our judgment for that of the trial court, but rather we decide whether the trial court's

decision was arbitrary or unreasonable. *Webb*, 232 S.W.3d at 112. Thus, a trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004). An appellate court "must view the evidence in the light most favorable to the trial court's ruling and presume that all reasonable factual findings that could have been made against the losing party were made against that losing party." *Id.*

Voluntariness of Guilty Plea

Anderson asserts his plea was involuntary because he entered it based on false and misleading statements by his defense counsel. According to Anderson, his defense counsel improperly advised him about the consequences of an open plea of guilty. Counsel allegedly promised Anderson that he would receive probation or a more lenient sentence if he pleaded guilty without an agreed recommendation from the State. Also, Anderson claims that his defense counsel coerced his plea by telling him that a trial was not an option for him.

In assessing the voluntariness of a plea, we review the record as a whole and consider the totality of the circumstances. *Griffin v. State*, 703 S.W.2d 193, 195 (Tex. Crim. App. 1986) (en banc); *Lee v. State*, 39 S.W.3d 373, 375 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Edwards v. State*, 921 S.W.2d 477, 479 (Tex. App.—Houston [1st Dist.] 1996, no pet.). A trial court may accept a guilty plea

only if the defendant enters it freely and voluntarily. TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (West Supp. 2010).

A record indicating that the trial court properly admonished the defendant presents a prima facie showing that the guilty plea was made voluntarily and knowingly. *Starz v. State*, 309 S.W.3d 110, 117 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (citing *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (en banc)). If the record presents such a showing, then the burden shifts to the defendant to show that he entered the plea without understanding the consequences. *Id.* An accused who attests that he understands the nature of his guilty plea and that it is voluntary has a heavy burden on appeal to show that his plea was involuntary. *Id.*; *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). A guilty plea based on erroneous information conveyed by trial counsel to the defendant is involuntary. *Labib v. State*, 239 S.W.3d 322, 333 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Fimberg v. State*, 922 S.W.2d 205, 207 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). However, a trial court may reject the defendant's uncorroborated testimony that he was misinformed by counsel. *Starz*, 309 S.W.3d at 117; *Fimberg*, 922 S.W.2d at 208.

Here, defense counsel told Anderson that he had a right to a jury trial. He, in fact, had requested that the court set the case for trial before Anderson entered his plea. Defense counsel maintained that he did not promise Anderson he would

receive probation or a lenient sentence if he pleaded guilty to the charges. He testified instead that he explained an open plea to Anderson and told him that the trial court had the entire range of punishment to consider in sentencing him. In his view, Anderson chose to plead guilty because he wished to receive deferred adjudication. Anderson's own testimony and written statement establish that defense counsel did not coerce him into pleading guilty, and that he understood the consequences of his plea. We hold that the trial court did not abuse its discretion in finding that his plea was voluntary.

Ineffective Assistance of Counsel

Anderson further contends that defense counsel was ineffective because he failed to present mitigating evidence at the PSI hearing that after the commission of the offense, Anderson crashed his vehicle into a bridge and may have suffered cognitive injuries as a result. Specifically, Anderson claims that defense counsel failed to obtain the assistance of a physician, psychiatrist, or other mental health expert and offer evidence of his injuries at the PSI hearing. According to Anderson, had defense counsel presented this evidence, the trial court would have given him a more lenient punishment.

To prevail on a claim of ineffective assistance of counsel, the appellant must show: (1) counsel's performance was deficient and (2) this deficiency was so prejudicial that it rendered the trial unfair. *Strickland v. Washington,* 466 U.S.

668, 687, 104 S. Ct. 2052, 2064 (1984). The first prong of the *Strickland* standard requires the appellant to show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 687–88, 104 S. Ct. at 2064. Under the second prong, the appellant must demonstrate prejudice by "show [ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. It is not enough for the appellant to show that the errors had some conceivable effect on the outcome. *Id.* at 693, 104 S. Ct. at 2067.

Failure to make the required showing of either prong defeats the ineffective assistance claim. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). Appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). "There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Andrews v. State*, 159 S.W.3d 98, 101 (Tex. Crim. App. 2005); *see also Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Appellant must overcome the presumption that counsel's action or inaction might be considered "sound trial strategy" under the circumstances. *Weaver v. State*, 265 S.W.3d 523, 538 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (citing *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065)). Any allegation of ineffectiveness must be firmly founded in the record, which must affirmatively

demonstrate the alleged ineffectiveness. *Id.* (citing *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999)).

Generally, the record on direct appeal is undeveloped, and a silent record that provides no explanation for counsel's actions will not overcome the strong presumption of reasonable assistance. *Id.* (citing *Rylander*, 101 S.W.3d at 110–11). We may not speculate to find trial counsel ineffective if the record is silent regarding counsel's reasoning or strategy. *Id.* (citing *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.)). Nevertheless, it is not speculation to hold counsel ineffective if a silent record clearly indicates that no reasonable attorney could have made such trial decisions. *Id.* (citing *Weeks v. State*, 894 S.W.2d 390, 392 (Tex. App.—Dallas 1994, no pet.)). Therefore, in rare cases, the record can be sufficient to prove that counsel's performance was deficient, despite the absence of affirmative evidence of counsel's reasoning or strategy. *Id.* (citing *Robinson v. State*, 16 S.W.3d 808, 813 n. 7 (Tex. Crim. App. 2000)).

When the claim of ineffective assistance is based on counsel's failure to call witnesses, the appellant must show that such witnesses were available to testify and that appellant would have benefitted from their testimony. *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004) (citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983).

Here, although Anderson moved for new trial, he did not allege in his written motion or at the hearing that defense counsel was ineffective for failing to seek the assistance of a medical expert and offering evidence of his alleged cognitive injuries. The record here thus is silent as to defense counsel's assessment of the need for such assistance and, if he assessed it was needed, why he did not offer the evidence of any cognitive injuries at the PSI hearing. On the silent record, it is just as likely that defense counsel evaluated these matters and concluded that they would not support a reduction in Anderson's sentence. There is no "specific, objective evidence in the record" of Anderson's injuries. *See Stafford v. State*, 101 S.W.3d 611, 613 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (distinguishing defendant's unsupported claims of mental illness from cases involving objective documentation). Anderson represented in his written guilty plea that he was mentally competent, and according to the PSI, he stated he was in good physical health. We cannot conclude that the record before us indicates that Anderson's defense counsel made unreasonable decisions on this issue. *See Weaver*, 265 S.W.3d at 538 (citing *Weeks*, 894 S.W.2d at 392).

Finally, Anderson claims that defense counsel was ineffective because he did not explain to him his right to appeal his sentence. As noted above, defense counsel explained an open plea to Anderson, and Anderson stated in a written statement that he decided to plead guilty after a full discussion of his options with

defense counsel. On the day he entered his plea, Anderson signed a document certifying his right to appeal, in which he stated that he had been informed of his rights concerning any appeal of his case. Indeed, Anderson has exercised that right. Thus, Anderson understood the consequences of his plea, including his right of appeal. We hold that Anderson has not demonstrated that he was denied effective assistance of counsel.

Conclusion

We conclude that Anderson has not shown either a basis for a withdrawal of his guilty plea or that his counsel was ineffective. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

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