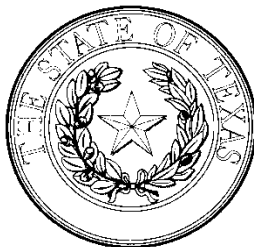


Opinion issued October 20, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00731-CR

THOMAS BRIAN OREZINE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Case No. 1260947

MEMORANDUM OPINION

Convicted by a jury of the felony offense of possession of a controlled substance¹ and assessed punishment at four years' confinement, appellant, Thomas

¹ Specifically, Orezine was convicted of possessing less than one gram of cocaine, a Penalty 1 Group controlled substance. See TEX. HEALTH & SAFETY CODE ANN § 481.102(3)(D) (West 2010) (identifying cocaine as Penalty 1 Group controlled

Brian Orezine asserts in his sole point of error that his counsel's failure to ask more questions during voir dire was ineffective assistance of counsel. We affirm.

Background

While on patrol, Officers Turrentine and Duran of the Houston Police Department were preparing to stop a truck being driven by Walter Pettis for expired registration when the truck stopped in front of a known crack house. Pulling up behind the truck, the officers exited their patrol car just as Orezine was getting out of the passenger side of the truck. Seeing the officers, Orezine rapidly got back into the parked truck. Officer Duron testified that as walked up to the truck, he saw Orezine attempting to put a crack pipe in his pocket.

Officer Turrentine removed Pettis from the truck, and Duron removed Orezine from the truck and searched him. Officer Duron found a small rock-like substance in Orezine's pocket that field-tested positive as cocaine. After issuing him a traffic citation, the officers released Pettis and drove Orezine across the street to complete their paperwork and finish searching him. Office Duron then found the crack pipe that he believed he had seen earlier.

At trial, Orezine's counsel began voir dire by re-emphasizing the standard to be used by jurors: that the defendant's guilt must be established beyond a

substance); TEX. HEALTH & SAFETY CODE ANN. § 481.115(a), (b) (West 2010) (identifying possession of less than one gram of Penalty Group I substance as state-jail felony).

reasonable doubt and asking the venire members if any found that standard personally problematic. Second, she asked the prospective jurors about their ability to judge the credibility of witnesses and ability to determine guilt based on police officer testimony. Finally, she asked about their ability to assess a maximum penalty of twenty years.

Following voir dire and the exercise of the litigants' respective strikes, the court inquired whether there were any objections to the seating of the jury. The reply from both counsels was "none," and the jury was then sworn and seated.

Officers Turrentine and Duran testified for the State. State's Exhibits 1 and 2, the 'rock' and the crack pipe obtained from Orezine, were admitted without objection. Brittany Smith, a criminalist with the Houston Police Department, testified that the State's Exhibit 2, contained 0.2 grams of crack cocaine. Testifying on his own behalf, Orezine said that he had never had a problem with drugs and the drugs and pipe were not his and that the police were using him in their attempts to detain Pettis, with whom the police had several prior encounters.

The jury found Orezine guilty of felony possession of a controlled substance. While the State asked for the maximum penalty of twenty years, the jury assessed his punishment at four years' confinement. Orezine timely filed his notice of appeal.

In his sole point of error, Orezine contends that his trial counsel's failure to ask questions of consequence to venire members violated his right to effective assistance of counsel.

Standard of Review

A defendant's right to reasonably effective assistance of counsel does not mean errorless counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006); *cf.* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. Finding that there was ineffective assistance of counsel requires that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the result. *Strickland v. Wash.*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). There also need be "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. "Reasonable probability" means that it is sufficient to undermine confidence in the outcome. *Id.*; *see also Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Failure to make a showing of either prong of the *Strickland* standard defeats a defendant's ineffectiveness claim. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

The *Strickland* standard is also highly deferential. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2053. There is a strong presumption that counsel's conduct falls within a wide range of reasonable assistance or that counsel's behavior was sound

trial strategy. *Robertson*, 187 S.W.3d at 482 (citing *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). To prevail, an appellant must show his counsel was ineffective by a preponderance of the evidence. *Robertson*, 187 S.W.3d at 483.

Our examination of trial counsel’s performance is based on “the totality of the representation.” *Id.* To do so, we examine the trial record from counsel’s perspective at the time of trial, and every effort must be made to eliminate the distorting effects of hindsight. *Id.* (citing *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). We cannot speculate as to reasons supporting counsel’s behavior, and allegations of ineffectiveness must be firmly founded in the record. *Harrison v. State*, 333 S.W.3d 810, 813 (Tex. App.—Houston [1st Dist.] 2010, pet. ref’d) (citing *Bone*, 77 S.W.3d at 835). Absent such reasons in the record for counsel’s challenged conduct, an appellate court should not find deficient performance unless the 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). While appellate courts should be hesitant to conclude that counsel provided ineffective assistance based on one error, “it is possible that a single egregious error of omission or commission by appellant’s counsel constitutes ineffective assistance.” *Thompson*, 9 S.W.3d at 813.

Counsel's Performance

The record below yields no insight as to counsel's voir dire strategy. Failure to pose certain questions during voir dire does not necessarily mark counsel as ineffective. *See Harrison*, 333 S.W.3d at 814 ("The failure to ask questions appellant's counsel believed to be important does not mean that counsel's conduct was deficient; nor does the lack of such questioning amount to behavior that is so outrageous, no competent attorney would have engaged in it.") (internal citations omitted); *see also Jackson v. State*, 491 S.W.2d 155, 156 (Tex. Crim. App. 1973) ("The length of the voir dire examination could have very well been dictated by trial strategy. . . . We find no merit in the complaint that counsel was ineffective"); *Goodspeed*, 187 S.W.3d at 392 ("We cannot conclude that the failure to ask any questions in voir dire constitutes conduct so outrageous that no competent attorney would have engaged in it.").

Our review of the record with an eye towards the totality of the representation does not suggest that Orezine's counsel was ineffective. Counsel's voir dire included a question about the reasonable doubt standard, police officer testimony and credibility, and assessment of a maximum punishment. The legal concepts about which Orezine's brief now sets out as those from which voir dire questions should have been formulated and asked (i.e., presumption of innocence, proof of guilt beyond a reasonable doubt, the indictment as evidence of guilt, and

credibility of a criminal defendant) had been addressed generally by the trial judge. Trial counsel successfully struck venire members for cause, cross-examined State's witnesses and, in closing arguments, challenged the credibility of the State's witnesses. Finally, trial counsel's presentation of the case was at least sufficiently successful to have engendered in the jury a modicum of mercy when it rejected the State's request for the full twenty-year prison term and sentenced Orezine to four.

Applying the strong presumptions and other measurements of the *Strickland* standard, we can only conclude that Orezine has failed to show by a preponderance of the evidence that his counsel's conduct fell below an objective standard of reasonableness.

Conclusion

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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