Opinion issued May 12, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00610-CR

COREY DOUGLAS-MYERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1431643

MEMORANDUM OPINION

Appellant Corey Douglas-Myers pleaded guilty to the offense of aggravated robbery, without an agreement on punishment. After a pre-sentence investigation ("PSI") and punishment hearing, the trial court sentenced appellant to eight years' confinement in the Texas Department of Criminal Justice, Institutional Division.

By two issues, appellant argues on appeal that trial counsel provided ineffective assistance by failing to (1) object to juvenile offenses included in the PSI report and (2) provide further mitigation evidence during the punishment hearing. We affirm.

Background

On Tuesday, June 10, 2014, Deputy L. Fernandez was dispatched to a Burglary of a Habitation. The Deputy spoke to Tanni Wortham and McKenna Hall who reported that appellant was one of three men who had robbed them at gunpoint. They knew appellant through their roommate and provided the Deputy with appellant's telephone number. After Wortham and Hall positively identified appellant as one of the perpetrators, appellant was charged with aggravated robbery with a deadly weapon.

Appellant pleaded guilty without a plea bargain. Before resetting the case for a sentencing hearing, the trial court asked the appellant whether he acted on his own. Appellant responded "Yes, Sir."

The trial court requested a PSI. The PSI report detailed the charged offense, including statements from Wortham and Hall as well as a statement from appellant, appellant's criminal and social history, and a Texas Risk Assessment System ("TRAS") assessment. The PSI report relayed that appellant said he "did not do it" and pleaded guilty for reasons related to witness availability. The PSI report goes

on to set out appellant's ascertainable prior court record, which apart from the charged offense, noted that appellant reported that he once "received a $100 ticket for cursing in school" and that he had been charged with two juvenile offenses.

In the first of these two juvenile offenses, according to the PSI report, appellant was charged in May 2009, with the offense of Terroristic Threat and sentenced to six-month's deferred prosecution. Appellant told the PSI investigator that he was so charged after threatening to stick his teacher with scissors and pointing scissors at the teacher. The second juvenile offense described in the PSI report occurred in December 2011, when appellant was charged for the offense of Assault of a Public Servant and sentenced to six month's deferred prosecution. Appellant told the PSI investigator that he was so charged after he accidentally hit an Assistant Principal while involved in a fight with another student at school. Appellant further stated that he was not under the influence of alcohol or drugs at the time of either offense. Ultimately, both cases were nonsuited, suggesting appellant successfully completed both terms of deferred prosecution.

During the sentencing hearing, appellant presented no witnesses but provided letters from himself, Tevia Douglas, Gwendyln Roy, and L. Williams. The State introduced testimony from Wortham and Hall, who both asked that appellant be sentenced to a term of confinement. The trial court stated that that it reviewed the PSI report, the TRAS assessment, and the letters submitted by

appellant. The trial court found appellant guilty of aggravated robbery and assessed punishment at eight years' confinement.

Discussion

By two issues, appellant contends that he received ineffective assistance of counsel because his trial counsel did not (1) object in a timely fashion to descriptions of prior juvenile offenses in the PSI report and (2) present mitigation evidence during the punishment hearing.

A. Standard of Review

We consider claims of ineffective assistance of counsel under the two-prong test adopted in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Hernandez v. State*, 988 S.W.2d 770, 770 (Tex. Crim. App. 1999). To prevail on an ineffective assistance of counsel claim, appellant must show that (1) counsel's performance was deficient—meaning it fell below an objective standard of reasonableness—and (2) the deficiency prejudiced the defendant—meaning there was a reasonable probability that, but for the counsel's deficient performance, the results of the trial would have been different. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Ex parte Napper*, 322 S.W.3d 202, 246, 248 (Tex. Crim. App. 2010). A reasonable probability is a probability sufficient to undermine confidence in the outcome, meaning that counsel's errors must be so

serious that they deprive appellant of a fair trial. *Smith v. State*, 286 S.W.3d 333, 340–41 (Tex. Crim. App. 2009).

As we review appellant's claim of ineffective assistance, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather than judging trial counsel's decisions with the benefit of hindsight, "[t]he 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." *Id.* at 686, 104 S. Ct. at 2064.

B. Analysis

1. Failure to object to portions of PSI report

In his first issue, appellant argues that his trial counsel provided ineffective assistance in failing to object to the description of appellant's juvenile offenses in the PSI report. In particular, appellant complains that the PSI report's inclusion of appellant's juvenile charge for assault of a public servant and of appellant being fined $100 for cursing in school were unfairly prejudicial and thus objectionable under Texas Rule of Evidence 403.

In order to show ineffective assistance based on a failure to object, appellant must show that the trial judge would have committed error in overruling the objection had it been made. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004). A defendant's criminal history is probative to a trial court's assessment of punishment. *See* TEX. CODE CRIM. PROC. art. 37.07 § 3(a) (providing that "evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant . . ."); TEX. CODE CRIM. PROC. art. 42.12 § 9(a) (providing that PSI report may include "criminal and social history" as well as "any other information relating to the defendant or the offense requested by the judge").

Here, had defense counsel objected to the PSI report's inclusion of appellant's criminal history and an instance of cursing in school under Rule 403, the trial court would not have erred in overruling such an objection. Appellant has not alleged that the PSI report inaccurately represents appellant's ascertainable criminal or social history. An accurate statement of appellant's juvenile criminal and social history is relevant to the trial court's assessment of punishment. *See* TEX. CODE CRIM. PROC. art. 37.07 § 3(a); TEX. CODE CRIM. PROC. art. 42.12 § 9(a); *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990) ("Rule 403 favors admissibility of relevant evidence, and the presumption is that relevant evidence will be more probative than prejudicial."). Though the inclusion of such

information in the PSI report was prejudicial, it cannot be said to be unfairly prejudicial in the context of a sentencing hearing. Thus, we conclude that trial counsel's representation did not fall below an objective standard of reasonableness by failing to object to descriptions of appellant's criminal and social history in the PSI report.

We overrule appellant's first issue.

2. Failure to present further mitigating evidence

In his second issue, appellant argues that trial counsel provided ineffective assistance in failing to present further mitigating evidence at the sentencing hearing, particularly stressing the failure to offer live testimony from an expert witness able to discuss the adverse effects of appellant's traumatic childhood.

"A defendant who complains about trial counsel's failure to call witnesses must show the witnesses were available and that he would have benefitted from their testimony." *Cantu v. State*, 993 S.W.2d 712, 719 (Tex. App.—San Antonio 1999, pet. ref'd) (first citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983), then citing *Kizzee v. State*, 788 S.W.2d 413, 416–17 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd)). Here, appellant has not identified any available witnesses whose testimony trial counsel should have offered at the sentencing hearing.

Similarly, appellant has not shown that, had such witnesses been available, he would have benefitted from their testimony. Appellant's claim of ineffective assistance is before us on direct appeal, and the record, which contains no motion for a new trial, is silent as to why appellant's trial counsel elected to present only the mitigation evidence offered. *See, e.g.*, *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999) ("In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel.") (citing *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998)). In the absence of a robust record, we cannot adequately assess the motives behind the strategy pursued or determine whether appellant would have benefitted by the introduction of further evidence. Without some concrete showing that a witness was available and that appellant would have benefitted from the testimony that he or she would have offered, appellant has not overcome the presumption of effective assistance. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006) (explaining that right to effective assistance of counsel merely ensures right to reasonable effective assistance and "does not mean errorless or perfect counsel"); *Jagaroo v. State*, 180 S.W.3d 793, 799 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (concluding trial counsel not ineffective where counsel obtained positive letters on his behalf from employers, friends, and family

members and appellant failed to support assertion that other mitigating evidence was available).

We overrule appellant's second issue.

Conclusion

We affirm the trial court's judgment.

Rebeca Huddle
Justice

Panel consists of Justices Keyes, Brown, and Huddle.

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