Opinion issued July 28, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00273-CR

HENRY RANGEL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 355th District Court
Hood County, Texas
Trial Court Case No. CR13465

MEMORANDUM OPINION

A jury convicted appellant, Henry Rangel, of the second-degree felony offense of possession of between four and 200 grams of a controlled substance, methamphetamine. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(6), 481.115(a), (d). After appellant pleaded true to two enhancement paragraphs, the

jury assessed punishment at forty years' confinement, which is within the applicable sentencing range. *See* TEX. PENAL CODE ANN. §§ 12.32(a), 12.42(b), (d). In one issue, appellant contends that his first appellate counsel rendered ineffective assistance of counsel by failing to raise the issue of ineffectiveness of his trial counsel.

We affirm.

Background

On March 5, 2016, law enforcement stopped appellant's vehicle for speeding on U.S. Highway 377 in Hood County, Texas.[1] Appellant had active warrants, so he was arrested and searched, and officers found a glass pipe with white residue in his jacket and a digital scale in a backpack in his car, but found no drugs. Appellant was taken to the Hood County Jail. While changing into jail clothing, appellant removed two pairs of underwear he had on and jail officials found a bag with just under 13 grams of methamphetamine in the underwear. Appellant was indicted for the second-degree felony offense of possession of a controlled substance, and the indictment included one enhancement paragraph for a prior conviction of aggravated possession

[1] The Texas Supreme Court transferred this appeal from the Court of Appeals for the Second District of Texas to this Court pursuant to its docket equalization powers. *See* TEX. GOV'T CODE ANN. § 73.001; Misc. Docket No. 18-9049 (Tex. Mar. 27, 2018). We are unaware of any conflict between the precedent of the Second Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

with intent to deliver a controlled substance and two habitual felony-offender counts for unauthorized use of a motor vehicle and theft. At the punishment phase of his trial, appellant pleaded true to the enhancement paragraph and the habitual count of unauthorized use of a motor vehicle, which enhanced the punishment range to that of a first-degree felony with a minimum 25-year sentence.[2]

Appellant's trial counsel, Angie Hadley, filed a two-page motion for new trial generally contending that a new trial "will allow [appellant] to have equal protection under the law." Hadley did not request a hearing on appellant's motion for new trial. She also filed a notice of appeal and a motion to appoint appellate counsel for appellant, and she moved to withdraw as appellant's counsel. Hadley averred in appellant's motion that "she [did] not feel qualified to represent [appellant] on appeal for a trial where she was the trial attorney for [appellant]."

The trial court granted Hadley's motion to withdraw and appointed Lukas Lawrence as appellant's appellate counsel. Lawrence took no further action on appellant's motion for new trial, which was overruled by operation of law. Lawrence then filed a brief in this Court under *Anders v. California*, contending that there were no arguable grounds for appeal and requesting to withdraw as counsel. *See* 386 U.S. 738, 744–45 (1967). The *Anders* brief included a discussion of the effectiveness of

[2] Appellant did not enter a plea on the second habitual count for theft.

appellant's trial counsel, concluding that Hadley had rendered effective assistance. Appellant filed a pro se response to his counsel's *Anders* brief, generally complaining that both Hadley and Lawrence were ineffective.

After briefing in this case, we independently reviewed the record and concluded that an arguable issue existed: namely, whether appellant's prior conviction for unauthorized use of a motor vehicle could be used to enhance the sentencing range of appellant's current offense because unauthorized use of a motor vehicle is currently classified as a state-jail felony, which may not be used to enhance a subsequent felony; but, at the time of appellant's conviction in 1991, it was classified as a third-degree felony, which may be used to enhance a subsequent felony. *See* TEX. PENAL CODE ANN. § 12.42(b) (providing, on trial of second-degree felony, that defendant "shall be punished for a felony of the first-degree" when defendant previously has been finally convicted of a felony other than a state jail felony), (d) ("A previous conviction for a state jail felony . . . may not be used for enhancement purposes under this subsection."). Because we found an arguable issue, we struck counsel's *Anders* brief, granted counsel's motion to withdraw, and abated and remanded the case to the trial court to appoint new appellate counsel to file a brief in this Court. The trial court appointed new appellate counsel, who has filed a brief on the merits for appellant. We now proceed to the merits of appellant's issue.

Effectiveness of Counsel

In his sole issue on appeal, appellant contends that his initial appointed appellate counsel was ineffective.[3]

A. Standard of Review and Governing Law

To establish that counsel rendered constitutionally ineffective assistance, an appellant must demonstrate, by a preponderance of the evidence, that (1) his trial counsel's performance was deficient and (2) there is a reasonable probability that the result of the proceeding would have been different but for his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010); *Cannon v. State*, 252 S.W.3d 342, 348–49 (Tex. Crim. App. 2008); *see Smith v. Robbins*, 528 U.S. 259, 285 (2000) ("[T]he proper standard for evaluating Robbins' claim that appellate counsel was ineffective in neglecting to file a merits brief is that enunciated in *Strickland v. Washington*.") (citation omitted); *Ex parte Miller*, 330 S.W.3d 610, 623 (Tex. Crim. App. 2009) (stating same standard for claim that appellate counsel failed to assert particular point of error on appeal) (citations omitted). The appellant's failure to make either of the required showings of deficient performance or sufficient

[3] Both parties agree that appellant's 1991 conviction for unauthorized use of a motor vehicle—which was a third-degree felony when appellant was convicted, but which the Legislature later re-classified as a state-jail felony—was properly used to enhance appellant's punishment. We therefore do not consider this issue on appeal.

prejudice defeats the claim of ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003); *see Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").

To establish the first prong of *Strickland*, the appellant must show that his counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The second prong of *Strickland* then requires the appellant to demonstrate prejudice—"a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Thompson*, 9 S.W.3d at 812. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and, therefore, the appellant must overcome the presumption that the challenged action constituted "sound trial strategy." *Id.* at 689; *Williams*, 301 S.W.3d at 687. Our review is highly deferential to counsel, and we do not speculate regarding counsel's trial strategy. *See Bone v. State*, 77 S.W.3d 828, 833, 835 (Tex. Crim. App. 2002) ("If a reviewing court can speculate about the existence of further mitigating evidence, then it just as logically

might speculate about the existence of further aggravating evidence."). To prevail on an ineffective assistance claim, the appellant must provide an appellate record that affirmatively demonstrates that counsel's performance was not based on sound strategy. *Id.* at 835 ("Ineffective assistance of counsel claims are not built on retrospective speculation; they must 'be firmly founded in the record.'"); *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *see Thompson*, 9 S.W.3d at 813 (stating that record must affirmatively demonstrate alleged ineffectiveness). "In the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions." *Mallett*, 65 S.W.3d at 63 (citing *Thompson*, 9 S.W.3d at 813–14). Because the reasonableness of trial counsel's choices often involves facts that do not appear in the appellate record, the Court of Criminal Appeals has stated that trial counsel should ordinarily be given an opportunity to explain his actions before a court reviews the record and concludes that counsel was ineffective. *See Rylander*, 101 S.W.3d at 111; *Bone*, 77 S.W.3d at 836.

B. Analysis

Appellant argues that his initial appellate counsel—Lawrence—was ineffective because he did not amend appellant's motion for new trial to assert a claim that his trial counsel—Hadley—was ineffective, nor did he set the motion for a hearing. The State responds that appellant fails to demonstrate his counsel was

ineffective; that Lawrence addressed Hadley's effectiveness in the *Anders* brief and concluded she was effective; and that the record does not support appellant's claim that his first appellate counsel was ineffective.

Although appellant argues that Lawrence was ineffective, his argument is premised on the ground that Hadley was ineffective and that such ineffectiveness was compounded by Lawrence's failure to amend the motion for new trial and set it for a hearing. Appellant argues that Hadley "failed to consult with him, was not prepared, did not present a defense, did not object at trial, and failed to subject the State's case to adversarial testing." Appellant does not further explain these alleged failures or cite any supporting record evidence; instead, he relies solely on his own statements in his pro se response to the *Anders* brief filed in this appeal, in which he generally recited the same failures. *See Mallett*, 65 S.W.3d at 63 (requiring record to affirmatively demonstrate alleged ineffectiveness).

Our review of the record before us reveals that appellant's contentions are either unsupported or contradicted. There is no record evidence showing whether Hadley consulted with appellant. *See id.* And contrary to appellant's argument that Hadley was unprepared, did not present a defense, and did not subject the State's case to adversarial testing, the record on appeal shows that Hadley filed motions requesting notice from the State of its intention to introduce evidence of other crimes, to which the State responded, and she filed appellant's election for the jury

to assess his punishment. Hadley asked pointed questions during voir dire, gave an opening statement, cross-examined every witness, presented a case-in-chief for appellant, presented appellant as a witness, and gave a closing argument. At the punishment phase, Hadley directly examined appellant and gave a closing argument. On the record before us, it appears that Hadley was prepared for trial, that she presented a defense, and that she subjected the State's case to adversarial testing. *See id.*; *Rylander*, 101 S.W.3d at 111.

Appellant also argues that Hadley did not object at trial, a claim that is supported by the record, but appellant does not specify the evidence to which she should have objected. The physical evidence introduced at the guilt-innocence phase of appellant's trial included photographs of a pipe and two small baggies of methamphetamine found on appellant, the scale found in his car, an evidence submission form, and results from the Texas Department of Public Safety's Crime Laboratory analysis report showing that the drugs found on appellant tested positive for methamphetamine. At the punishment phase, the State introduced public records concerning appellant's prior offenses to prove the enhancement and habitual-offender paragraphs of the indictment. None of this evidence is objectionable on its face, and appellant does not explain why counsel should have objected to it. Similarly, appellant does not explain what witness testimony, if any, was objectionable. Appellant has not met his burden to provide a record affirmatively

showing that Hadley's conduct fell below an objective standard of reasonableness based on prevailing professional norms. *See Mallett*, 65 S.W.3d at 63. Thus, the record does not support appellant's contentions that his trial counsel's performance was deficient. *See id.*

Because we conclude that the record does not show appellant's *trial counsel*, Hadley, was ineffective, we also conclude that the record does not show that appellant's *initial appellate counsel*, Lawrence, was ineffective for failing to raise the issue of trial counsel's effectiveness. Appellant's argument against Lawrence is premised solely on his contention that Lawrence did not amend the motion for new trial and set it for a hearing to assert that Hadley had been ineffective. Lawrence addressed the effectiveness of Hadley in the *Anders* brief, concluding that she was effective. In his pro se response, appellant disputed that Hadley was effective. But the record does not affirmatively show that Lawrence's decision not to amend the motion for new trial or to set it for a hearing was unreasonable. *See Bone*, 77 S.W.3d at 835 ("Ineffective assistance of counsel claims are not built on retrospective speculation; they must 'be firmly founded in the record.'"); *Mallett*, 65 S.W.3d at 63 ("In the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions."); *Thompson*, 9 S.W.3d at 814 ("To defeat the presumption of reasonable professional assistance, 'any

allegations of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness.'").

Moreover, we have concluded above that the record on appeal does not affirmatively show that appellant's trial counsel was ineffective, and thus we cannot conclude on this record that appellant's initial appellate counsel was ineffective for not raising the issue. *Cf. Ex parte Miller*, 330 S.W.3d at 624 ("[I]f appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it."). On this record, appellant has not met his burden to show that his claims of ineffectiveness of trial or appellate counsel have indisputable merit under well-settled law and would necessarily result in reversible error. *See id.* We cannot speculate about Lawrence's reasons for not amending the motion for new trial or setting it for a hearing—although the *Anders* brief indicates Lawrence believed Hadley was constitutionally effective—and nothing in the record shows that such a failure was unreasonable trial strategy.[4] *See Bone*, 77 S.W.3d at 835.

[4] Because we conclude that, on this record, neither appellant's trial nor his initial appellate counsel performed deficiently, we do not consider whether any deficient performance prejudiced appellant. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").

We hold that, on this record, appellant has not shown that he was deprived of effective assistance of counsel.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of conviction by the trial court. We dismiss any pending motions as moot.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Kelly, and Landau.

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