Affirmed and Memorandum Opinion filed January 28, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00615-CR
NO. 14-08-00620-CR

JOYAL LEE LACKEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Seventh District Court
Smith County, Texas
Trial Court Cause Nos. 007-2037-03 & 007-2038-03

MEMORANDUM OPINION

In this consolidated appeal, appellant Joyal Lee Lackey appeals the sentences imposed after the trial court adjudicated him guilty of violating a condition of his deferred adjudication community supervision in both cases. In his sole issue, appellant contends he was denied effective assistance of counsel. We affirm.

I. BACKGROUND

On June 21, 2004, appellant was indicted in cause number 007-2037-03[1] for the offense of indecency with a child and in cause number 007-2038-03[2] for the offense of aggravated sexual assault of a child. Appellant pleaded guilty to the offenses alleged in the indictments. On May 13, 2005, pursuant to a plea agreement between the parties, the trial court deferred adjudication of guilt and sentenced appellant to ten years' probation. Under the terms of the agreement, the deferred adjudication probation was to run concurrently but any subsequent sentences imposed following an adjudication of guilt would run consecutively.

On November 28, 2007, the State filed an Application to Proceed to Final Adjudication in both cases alleging appellant had violated the conditions of his community supervision by possessing "a firearm, explosive device or ammunition, to wit: 'Remington CORE-LOKT .270 caliber PSP.'"[3] On March 31, 2008, appellant entered pleas of true to the allegations in the State's applications. At the revocation hearing, the court accepted appellant's pleas, adjudicated his guilt, and sentenced appellant to fifteen years' incarceration in cause number 007-2037-03 and fifty-eight years' incarceration in cause number 007-2038-03. Pursuant to the prior plea agreement, the trial court ordered that the sentences be served consecutively. Appellant now appeals his judgment of conviction and sentence in each cause.[4]

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[1] Appellate case number 14-08-00615-CR.

[2] Appellate case number 14-08-00620-CR.

[3] Pursuant to a program implemented by the Smith County Probation Department requiring compliance checks and field visits of sex offenders on Halloween, David Wood, appellant's probation officer, visited appellant's residence on the evening of October 31, 2005. Although appellant was still at work, his wife invited Woods into the house. Woods testified that, while talking with appellant's wife, he noticed several boxes in plain view containing items typically used in deer hunting, among them a green and yellow Remington Core-Lokt ammunition box.

[4] Texas Code of Criminal Procedure, article 42.12, section 5(b) provides in relevant part:

> On violation of a condition of community supervision imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 21 of

II. ANALYSIS

In a single issue, appellant argues he received ineffective assistance of counsel because counsel allegedly recommended appellant plead true to the allegations in the State's applications and appellant's counsel then presented evidence which, if true, would exonerate appellant.

Both the federal and state constitutions guarantee an accused the right to have the assistance of counsel. *See* U.S. Const. amend. VI; Tex. Const. art. I, § 10. The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

In reviewing claims of ineffective assistance of counsel, we apply a two-pronged test. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 687–88). A defendant must prove by a preponderance of the evidence (1) his trial counsel's representation was deficient in that it fell below the standard of prevailing professional norms and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Id.* (citing *Strickland*, 466 U.S. at 687–88).

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (citing *Strickland*, 466 U.S. at 694). To satisfy the "prejudice" requirement in a guilty plea case, the defendant must show there is a reasonable probability that, but for counsel's errors, he

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> this article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. This determination is reviewable in the same manner as a revocation hearing conducted under Section 21 of this article in a case in which an adjudication of guilt had not been deferred. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred.

Tex. Code Crim. Proc. Ann. art. 42.12, § 5(b) (Vernon Supp. 2009).

would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). If a defendant makes an insufficient showing on one prong, the court need not address the other in order to dispose of an ineffective assistance claim. *Strickland*, 466 U.S. at 697.

We can sustain an allegation of ineffective assistance of counsel only if firmly founded and affirmatively demonstrated in the appellate record. *Stephens v. State*, 15 S.W.3d 278, 279 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The record on direct appeal is, however, often inadequate to overcome the presumption of competent representation and show counsel's conduct fell below an objectively reasonable standard of performance. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

In the present cases, the record contains no evidence appellant's counsel engaged in the conduct appellant alleges, that is, advising appellant to plead true to the allegations in the State's application. Rather, the record contains the following colloquy between the court and appellant:

> THE COURT: Mr. McClain is your counsel. Have you been satisfied with his representation?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Here during the midst of the trial of your cases, do you have any complaints about that representation?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: The law provides you have a number of rights when the State files applications like they have filed. You have a right to have a hearing on those applications. You have a right to be here for the hearing, so you can see who the State's witnesses are and what they have to say or not say.
>
> You have a right to have your attorney represent you, for you to get legal advice from, for your lawyer to confront and cross-examine the State's witnesses on your behalf, test their knowledge, see if they're telling the truth.

You also enjoy your Fifth Amendment privileges, your right to remain silent, your right not to have to get up and say or do anything.

As I said, this State's Exhibit 1 [the stipulation of evidence] you signed, the law doesn't compel or require you to sign. You have to volunteer to do that. You don't have to. . . .

. . . The law also provides if you claim your Fifth Amendment privileges, remain silent, plead not true, not put on any evidence, none of those things are held against you. Just means the State has to prove their allegations without any help from you. Do you understand all of those things?

THE DEFENDANT: Yes, sir.

. . . .

THE COURT: In fact, by pleading true and signing this paperwork, you relieve the State of the obligation of bringing any other witnesses or any other evidence in the courtroom. Your plea of true in this paperwork would be all I would need to grant their application, find you guilty based upon your original pleas of guilty, and assess punishment within those ranges of punishment that I've already discussed with you. Do you understand those things?

THE DEFENDANT: Yes, sir.

Appellant next affirmed he had not taken any medication or intoxicating substances in the last twenty-four hours, understood where he was and what he was doing, could read, write and understand English, and had not been confined in a mental institution or been under the care of a psychiatrist.

Appellant's counsel affirmed he was satisfied appellant was competent to stand trial and able to understand his rights, as well as the consequences of waiving those rights by entering a plea to the State's charges. Counsel further affirmed appellant was able to discuss his cases and any possible defenses he might have to the State's charges in its applications, and otherwise assist counsel in the preparation of his cases. The court then took appellant's plea of true and questioned appellant:

THE COURT: Are you pleading true to these applications because those allegations are true and for no other reason?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading true because someone has threatened you or tried to force you or coerce you into pleading true today?

THE DEFENDANT: No, sir.

THE COURT: Are you pleading true today because someone promised to give you something or do something for you if you would plead true today?

THE DEFENDANT: No, sir.

THE COURT: Was your decision to enter your plea of true a personal decision you made for yourself and that no one else made for you?

THE DEFENDANT: Yes, sir.

Thus, in addition to signing the stipulation of evidence, appellant asserted in open court that pleading true was his personal decision and he was doing so because the allegations were true.[5] There is no indication counsel advised him to plead true, much less advised him to do so against his will. Without appellant's or counsel's testimony regarding their interactions, appellant has not met his burden of proving deficient performance.[6]

[5] It is also notable that the trial court specifically reminded appellant of the unusual nature of the plea agreement that any sentencing in the two cases would be "stacked" or otherwise be assessed cumulatively.

[6] Appellant argues counsel's performance was per se deficient because, after appellant pleaded true, counsel presented evidence which, if believed, would have exonerated him. Counsel called appellant's wife and grandson who testified to the effect that the ammunition Woods saw in appellant's home belonged to the grandson and appellant was never at home while the ammunition was there. Contrary to appellant's representation, the evidence would not have exonerated him because appellant was charged with, and confessed to, possessing .270 caliber ammunition and his wife and grandson's testimony concerned .30-06 ammunition. Appellant also conceded he had been hunting several days after the visit from Woods. Admittedly, without testimony from appellant or his trial counsel, we cannot discern counsel's strategy in presenting this specific evidence. However, the burden of proof is appellant's, and his counsel otherwise provided a spirited defense in the examination of witnesses and his argument for

In sum, (1) appellant stated he was pleading true to the allegations in the applications because the allegations were true, and (2) there is no evidence in the record suggesting appellant's counsel advised him to plead true or, if so, why. A case involving somewhat similar issues is *Labib v State*, 239 S.W.3d 322, 331 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In *Labib*, the defendant alleged counsel erroneously advised him about the length of time before his case could be heard at trial and had pressured him into pleading guilty. The *Labib* court wrote:

> Here, appellant's counsel has not testified concerning his interactions with appellant, nor do any other sources in the record indicate that appellant was pressured into pleading guilty. On the contrary, the record shows that appellant asserted in open court that he was entering his plea freely and voluntarily, and that he had not been promised anything in return, threatened in any way, or forced into making the plea. The record does not affirmatively demonstrate the alleged ineffectiveness brought about by counsel's action. We cannot conclude that counsel's assistance was ineffective.

Id. at 335.

As in *Labib*, on the record before us, we cannot conclude counsel's assistance in the present case was ineffective. Accordingly, we overrule appellant's sole issue.

Having overruled appellant's sole issue, we affirm the trial court's judgment.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Seymore, Brown, and Sullivan.
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leniency.