Affirmed and Memorandum Opinion filed March 2, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01000-CR

JUSTIN ROSS DESHAYES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 1114542

M E M O R A N D U M O P I N I O N

Appellant Justin Ross DeShayes pleaded guilty to aggravated robbery, a first-degree felony carrying a sentence ranging from five to ninety-nine years' confinement. Following his plea, the court sentenced him to fifteen years' confinement. Appellant contends (1) his sentence violates the Eighth Amendment of the United States Constitution and (2) defense counsel was ineffective. We affirm.

I. BACKGROUND

Appellant was charged with the felony offense of aggravated robbery with a firearm. Appellant pleaded guilty as charged, and the court sentenced appellant to fifteen years' confinement. Appellant did not request a court reporter to record his sentencing hearing. Appellant now contends (1) his sentence violates the Eighth Amendment of the United States Constitution, and (2) defense counsel was ineffective for failing to request a court reporter.

II. DISCUSSION

A. Eighth Amendment

Appellant contends his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment because he received a sentence of fifteen years' confinement when he was otherwise eligible for probation. We disagree. Appellant's belief that he was eligible for probation is misplaced. A judge may not assess probation where a defendant is adjudged guilty of aggravated robbery, as is the case here. Tex. Code Crim. Proc. Ann. art. 42.12(3g)(F) (Vernon Supp. 2009).

Additionally, aggravated robbery carries a sentence ranging from five to ninety-nine years' confinement. Tex. Penal Code Ann. § 12.32 (Vernon Supp. 2009), § 29.03 (Vernon 2003). Appellant's fifteen-year sentence was well within this range. We also note that appellant was not a first-time offender, having already been convicted of one count of assault and two counts of possession of marijuana. *See* §§ 12.32, 29.03; Tex. Penal Code Ann. § 22.01 (Vernon Supp. 2009); Tex. Health & Safety Code Ann. § 481.121 (Vernon Supp. 2009).

Furthermore, to preserve error for appeal, a defendant must object to his sentence during the sentencing phase or in a post-trial motion. *See Curry v. State*, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995); *Cruz v. State*, 838 S.W.2d 682, 687 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd). Appellant nowhere points to any such objection. Thus, he has not preserved error for our review. *See id.* Accordingly, we overrule this issue.

B. Ineffective Assistance of Counsel

Appellant contends he received ineffective assistance of counsel because his attorney did not request a court reporter for his sentencing hearing. Both the federal and state constitutions guarantee an accused the right to the reasonably effective assistance of counsel. *See* U.S. CONST. Amend. VI; Tex. Const. art. I, § 10; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). When we review claims of ineffective assistance, 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). The defendant must prove by a preponderance of the evidence that (1) 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 would have been different. *Id.* (citing *Strickland*, 466 U.S. at 687). 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).

We consider the totality of the representation and the particular circumstances of each case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We begin with the strong presumption that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *Salinas*, 163 S.W.3d at 740; *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). To overcome the presumption, a defendant must show that his allegation of ineffectiveness is firmly established in the record. *Thompson*, 9 S.W.3d 814.

When the record is silent as to the reasons for counsel's conduct, a finding that counsel was ineffective would generally call for impermissible speculation by the appellate court. *Stults*, 23 S.W.3d at 208. Therefore, it is critical for an accused relying on an ineffective-assistance claim to make the necessary record in the trial court. *Id.*

When a defendant desires to have a court reporter make a record of the testimony at trial, he has a duty to timely and properly request it. *Boykin v. State*, 487 S.W.2d 128, 131 (Tex. Crim. App. 1972); *Palka v. State*, 435 S.W.2d 525, 526 (Tex. Crim. App. 1969); *Green v. State*, 841 S.W.2d 926, 927 (Tex. App.—Corpus Christi 1992, no pet.).

Courts have routinely held the absence of a court reporter from a sentencing hearing is not grounds for reversal. *See, e.g.*, *Garza v. State*, 212 S.W.3d 503, 506 (Tex. App.—Austin 2006, no pet.); *Green*, 841 S.W.2d at 927; *Gonzales v. State*, 732 S.W.2d 67, 68 (Tex. App.—Houston [1st Dist.] 1987, no pet.).

In response, appellant argues that a record would have revealed whether counsel, with regard to appellant's sentence and an victim impact statement, might have either (1) failed to object, or (2) objected but failed to preserve error. Appellant, however, has presented no evidence regarding the content of the victim impact statement or how the result would have been different had counsel objected and preserved error to the statement.[1] Since appellant has not shown harm, he fails the second prong of *Strickland*. *See Strickland*, 466 U.S. at 687. We also note that he has offered no evidence from which we can conclude counsel's representation was deficient. Therefore, appellant does not meet either prong of *Strickland*, and, we overrule appellant's second issue.

III. CONCLUSION

Having overruled appellant's issues, we affirm the judgment and sentence.

/s/ Kent C. Sullivan
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.
Do Not Publish — TEX. R. APP. P. 47.2(b).

[1] Appellant contends he need only show the result *might* have been different had counsel objected and preserved error regarding the statement. However, precedent requires that he show there is a *reasonable probability* that the result would have been different. *See Strickland*, 466 U.S. at 687 (emphasis added). Aside from speculating what the record *might* show, appellant presents no evidence from which we can conclude there is a reasonable probability the result would have been different. *See id.*