Affirmed and Memorandum Opinion filed August 25, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00525-CR

WILLIAM HOWARD CAVE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 7
Harris County, Texas
Trial Court Cause No. 1619724

MEMORANDUM OPINION

Appellant, William Howard Cave, was convicted of operating a motor vehicle in a public place while intoxicated. He entered into a plea agreement for punishment of 180 days' confinement, probated for one year, and a fine of $500. Appellant contends his trial attorney provided ineffective assistance of counsel and the trial court erred in denying his motion for new trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 1:00 a.m. on August 10, 2009, Officer Juan Rincon of the Houston Police Department ("HPD") initiated a traffic stop because he believed appellant

was speeding. Officer Rincon noticed appellant had poor balance as he dismounted his motorcycle. Officer Rincon testified appellant's breath smelled of alcohol, his eyes were bloodshot, and his speech was slurred; on cross examination, however, he acknowledged he did not note those observations on his police report. Officer Rincon also stated that appellant's balance continued to be unsteady throughout the traffic stop.

As a result of these factors, Officer Rincon explained that he suspected appellant was drunk and asked appellant to perform field sobriety tests. Appellant consented to perform the horizontal gaze nystagmus ("HGN"), which is a test to see if there is "involuntary jerking of the eyes" when they follow a stimulus like a pen or finger. The HGN test has six "clues" to determine if someone might be under the influence of alcohol or narcotics. Officer Rincon testified that appellant's HGN test showed the presence of all six signs of intoxication. He also stated that head injuries and certain mental disorders can cause involuntary jerking of eyes, but in those cases there is also a failure of the person's pupils to show "equal tracking" and "equal pupil size." Officer Rincon explained appellant's eyes tracked equally and had equal pupil size.

After completing the HGN test, Officer Rincon requested appellant perform two other field sobriety tests known as the "one leg stand" and the "walk and turn" tests. Appellant refused to do either and also declined to take a Breathalyzer exam. As a result, Officer Rincon arrested appellant. Officer Rincon testified that upon arrest, appellant became belligerent.

Appellant was transported to "Central Intox,"[1] where Officer Jose Aguilar of the HPD met him. Officer Aguilar testified appellant was belligerent and disrespectful throughout the encounter. Officer Aguilar also explained that he smelled alcohol on appellant's breath and appellant's eyes were bloodshot and glassy. Officer Aguilar requested that appellant perform all field sobriety tests, but appellant refused. He also

[1] The formal name and location of "Central Intox" is not in the record.

declined breath, blood, and urine exams to test for alcohol in his body. The jury saw portions of a videotaped recording of appellant's behavior at Central Intox.

Officer Aguilar also testified that HGN is caused by alcohol and certain narcotics. He stated categorically that diabetes, a prior concussion, injuries to the leg, hip, or knee, fatigue, the presence of contact lenses or the fact that someone has undergone LASIK surgery will not cause a failure on the HGN test.

Appellant's chiropractor testified that appellant suffered injuries as a result of falling off a ladder. The chiropractor explained the unsteady balance that Officer Rincon witnessed was a result of that event. The chiropractor also stated there "would be times [appellant] could [physically perform the one leg stand] and times he couldn't."

Appellant testified he drank one beer that night, but he also helped change a keg of beer. Two other witnesses testified that they had only seen appellant drink one beer. They also stated appellant had changed a keg and the beer in the keg had spilled onto his clothing.

The jury found appellant guilty and appellant entered into a plea agreement for sentencing on May 5, 2010.

On July 13, 2010, the trial court held a hearing on appellant's motion for new trial. Appellant submitted an affidavit from an optometrist named Dr. Larry Cohen, who stated that several parts of Officers Rincon and Aguilar's testimony was factually incorrect. Dr. Cohen asserts, among other things, that "hypertension, high degrees of myopia, cataracts and inner ear disorders all contribute to nystagmus." He also contends appellant has an inner ear disorder and "early cataract formation" that could cause "natural nystagmus." Dr. Cohen also explained that appellant had LASIK surgery causing "dry eye" which make it difficult to track objects as a required in an HGN test. As a result, appellant argued he should have a new trial to bring Dr. Cohen's testimony to a jury.

The trial court denied appellant's motion. Appellant brought his case to this court, arguing: (1) his trial counsel provided him with ineffective assistance of counsel by failing to investigate the causes of HGN; and (2) the trial court erred by denying his motion for new trial.

DISCUSSION

I. Did Trial Counsel Provide Ineffective Assistance of Counsel?

Appellant contends his trial counsel failed to meet professional standards because the attorney failed to investigate why appellant failed the HGN test.

A. Standard of Review

In reviewing claims of ineffective assistance of counsel, we apply a two-prong test. *See Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish ineffective assistance of counsel, appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation was deficient to the point it fell below standards of prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficiency, the result of the trial would be different. *Id.* 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).

An accused is entitled to reasonably effective assistance of counsel. *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). When evaluating a claim of ineffective assistance, the appellate court looks to 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). There is a strong presumption that counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *See 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 of reasonably professional assistance, any

allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson,* 9 S.W.3d at 813. When determining the validity of an ineffective assistance of counsel claim, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ingraham v. State,* 679 S.W.2d 503, 509 (Tex. Crim. App. 1984). When the record is silent as to the reasons for counsel's conduct, as in this case, a finding that counsel was ineffective would require impermissible speculation by the appellate court. *Stults,* 23 S.W.3d at 208. Absent specific explanations for counsel's decisions, a record on direct appeal will rarely contain sufficient information to evaluate an ineffective assistance claim. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

B. Analysis

Appellant acknowledges that there is no case law stating that ineffective assistance of counsel occurs when a criminal defense attorney fails to investigate medical causes for failure of an HGN test. Instead, he brings this court's attention to an attorney's obligation to make a reasonable investigation into the facts of any case. *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003); *Ex Parte Briggs,* 187 S.W.3d 458, 469 (Tex. Crim. App. 2005).

On the facts presented, however, we have no ability to determine whether appellant's trial counsel made an appropriate inquiry. We do not have any information to indicate whether trial counsel asked about appellant's medical conditions. Nor does the record include any information about whether the appellant responded to questions, if any, about his medical health. It is also possible that trial counsel made inquiries with other experts about the possibility of medical conditions causing HGN, but received an answer that only alcohol or narcotics could cause a person to fail an HGN test.

As a result, we conclude appellant has failed to meet his burden of showing the alleged ineffectiveness in the record. *Thompson*, 9 S.W.3d at 813. We refuse to speculate about the reasons for the trial counsel's conduct. *Stults,* 23 S.W.3d at 208. We therefore presume that trial counsel both investigated and conducted the trial according to

professional norms. *See 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). We overrule appellant's first issue.

II. Did the Trial Court Err By Denying Appellant's Motion for New Trial?

Appellant presented this second issue, but did not brief it separately. We construe his argument to state that because his counsel was ineffective, the trial court should have granted a new trial to allow appellant to present his new argument regarding the HGN test.

A. Standard of Review

We review the denial of a motion for new trial for an abuse of discretion. *Rodriguez v. State*, 329 S.W.3d 74, 81 (Tex.App.-Houston [14th Dist.] 2010, no pet.). The test for abuse of discretion "is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action; rather it is a question of whether the trial court acted without reference to any guiding rules or principles, and the mere fact that a trial court may decide a matter within its discretionary authority differently than an appellate court does not demonstrate such abuse. *State v. Herndon*, 215 S.W.3d 901, 907–08 (Tex.Crim.App.2007) (quoting *Howell v. State*, 175 S.W.3d 786, 792 (Tex.Crim.App.2005)). We do not substitute our judgment for that of the trial court. *Holden v. State*, 201 S.W.3d 761, 763 (Tex.Crim.App.2006). We review the evidence in the light most favorable to the trial court's ruling and presume that all reasonable findings that could have been made against the losing party were so made. *Id.* Only when no reasonable view of the record could support the trial court's ruling do we conclude that the trial court abused its discretion by denying the motion for new trial. *Id.*

B. Discussion

We previously determined appellant failed to show that trial counsel provided ineffective assistance of counsel. Consequently, we do not find that the trial court abused its discretion by denying appellant's claim for a new trial. *Rodriguez*, 329 S.W.3d at 81.

CONCLUSION

Having overruled each of appellant's points of error, we affirm the trial court's judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Brown, and Christopher.

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