Affirmed and Memorandum Opinion filed August 16, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00744-CR

JONUS LAWRENCE WASHINGTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1253126

MEMORANDUM OPINION

Appellant Jonus Lawrence Washington was convicted by a jury for possessing between one and four grams of cocaine. After pleading true to two enhancement paragraphs, the jury assessed punishment at thirty years' imprisonment. In two issues, appellant contends that he received ineffective assistance of counsel and that the trial court erred by refusing to excuse a prospective juror for cause. We affirm.

BACKGROUND

One evening in October 2009, while patrolling for suspicious activity, Officers Michael Agee and Jacob Ruiz discovered appellant loitering in a grassy courtyard of the Breckenridge at CityView apartments. The apartment complex is located in an area known for its high level of narcotics arrests, burglary of motor vehicles, and trespassing. To combat crime in the community, the complex works with the Houston Police Department by employing officers for additional security detail.

The officers found appellant's conduct suspicious because the hour was late, appellant was by himself, and he did not appear to be heading towards any particular building or vehicle. When they approached appellant to learn his identity, the officers detected a strong odor of alcohol and noticed that appellant had bloodshot, glassy eyes. Appellant told the officers that he was not a resident of the complex, and further admitted that he had been drinking vodka and smoking marijuana. His speech was slurred and he had some difficulty walking. To prevent any harm to himself or to others, the officers took appellant into custody for public intoxication. In a search incident to arrest, they discovered a plastic bag in appellant's right pocket containing rocks of cocaine.

At trial, appellant testified in his own defense that he was waiting outside the complex for a friend to arrive and take him home. Appellant denied telling the officers that he had been drinking alcohol or smoking marijuana. He also claimed that the officers planted the cocaine on his person.

In his first issue on appeal, appellant argues in six subpoints that he received ineffective assistance of counsel. In his first subpoint, appellant complains that counsel failed to request a limiting instruction when the State introduced evidence of extraneous offenses during appellant's cross-examination. In his second subpoint, appellant complains that counsel failed to object to the admission of a Louisiana pen packet, which reflected a number of arrests and unadjudicated offenses. In his third subpoint, appellant

complains that counsel failed to request an additional peremptory strike after being forced to expend one on a prospective juror who should have been excused for cause. In subpoints four through six, appellant complains that counsel failed to move to suppress evidence admitted pursuant to an allegedly illegal arrest. Finally, in his second issue on appeal, appellant argues that the trial court erred in refusing to excuse a prospective juror for cause. Because of their overlapping discussions, we analyze this second issue together with subpoint three of issue one.

STANDARD OF REVIEW

We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, appellant must prove (1) that his trial counsel's representation was deficient, and (2) that the deficient performance was so serious that it deprived appellant of a fair trial. *Id.* at 687. To establish the first prong, appellant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 688. Regarding the second prong, appellant must demonstrate that counsel's deficient performance prejudiced his defense. *Id.* at 691–92. To demonstrate prejudice, appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the claim of ineffectiveness. *Id.* at 697. This test is applied to claims arising under both the United States and Texas Constitutions. *Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986).

Our review of defense counsel's performance is highly deferential, beginning with the strong presumption that the attorney's actions were reasonably professional and were motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). When the record is silent as to trial counsel's strategy, we will not conclude that appellant received ineffective assistance unless the challenged conduct was "so

outrageous that no competent attorney would have engaged in it." *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Rarely will the trial record contain sufficient information to permit a reviewing court to fairly evaluate the merits of such a serious allegation. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). In the majority of cases, the appellant is unable to meet the first prong of the *Strickland* test because the record on direct appeal is underdeveloped and does not adequately reflect the alleged failings of trial counsel. *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007).

A sound trial strategy may be imperfectly executed, but the right to effective assistance of counsel does not entitle a defendant to errorless or perfect counsel. *See Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). "[I]solated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective assistance of counsel be established by isolating one portion of trial counsel's performance for examination." *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994). Moreover, "[i]t is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Mata*, 226 S.W.3d at 430. Rather, to establish that the attorney's acts or omissions were outside the range of professionally competent assistance, appellant must show that counsel's errors were so serious that he was not functioning as counsel. *Patrick v. State*, 906 S.W.2d 481, 495 (Tex. Crim. App. 1995).

ANALYSIS

Limiting Instruction

In his first subpoint, appellant argues that he received ineffective assistance of counsel because his attorney did not request a limiting instruction when the State

introduced evidence of extraneous offenses during appellant's cross-examination. Appellant presents this subpoint as an "Issue for Review," but his brief wholly fails to discuss or analyze the argument. Without citations to the record or authority, we conclude that appellant has waived this subpoint. *See* Tex. R. App. P. 38.1(i).

Pen Packet

In his second subpoint, appellant contends he received ineffective assistance of counsel because his trial attorney did not object to the admission of a Louisiana pen packet during the punishment stage of trial. The pen packet contained records of nearly thirty arrests, but not all of those arrests resulted in final judgments. Appellant accordingly insists that counsel should have objected to the pen packet, inasmuch as it contained inadmissible hearsay of unadjudicated offenses.

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged failings of trial counsel. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Normally, counsel is afforded an opportunity to explain his actions before being condemned as unprofessional or incompetent, such as with a hearing on a motion for new trial or with the filing of an affidavit. *See Bone*, 77 S.W.3d at 836; *Anderson v. State*, 193 S.W.3d 34, 39 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). But appellant never filed a motion for new trial, and the record is likewise devoid of any explanation regarding counsel's reasons or strategy in not objecting to the admission of the pen packet. Accordingly, appellant has failed to overcome the presumption that counsel's actions were sound trial strategy. *See Thompson*, 9 S.W.3d at 814; *see also Bollinger v. State*, 224 S.W.3d 768, 781 (Tex. App.—Eastland 2007, pet. ref'd) (observing that counsel may choose not to object to evidence because "an objection might draw unwanted attention to a particular issue").

Moreover, appellant has not shown a reasonable probability that the result of the proceedings would have been different but for counsel's failing to object. The pen packet

was offered into evidence at the beginning of the punishment hearing, but the State never introduced any additional evidence regarding the allegations contained within it. In fact, the State only referenced a series of convictions to which appellant himself had stipulated, including two prior convictions for possession of a controlled substance in Texas, one conviction for attempted possession of a firearm in Texas, and two convictions for possession of a controlled substance in Louisiana. Appellant also testified previously that he was on parole at the time of his arrest and that he had been convicted of other crimes, including several crimes in Louisiana. Although the State referred to appellant as a "habitual" offender during closing argument, no specific references were made to any of the unadjudicated offenses in the pen packet.

Defense counsel pleaded with the jury to return a verdict of twenty-five years' imprisonment, which was the minimum punishment allowed for the charged offense. The State asked the jury to confine appellant for fifty years. Appellant ultimately received thirty years. Viewing the record as a whole, we conclude that appellant has not shown a reasonable probability that the result of the proceedings would have been different if counsel had objected to the admission of the pen packet.

Peremptory Strike and Challenge for Cause

In his third subpoint of issue one, appellant complains that counsel failed to request additional peremptory strikes. Counsel initially challenged a venireperson for cause because the venireperson suggested that she might be predisposed to believing a police officer who testifies. The trial court denied the challenge, leading appellant to expend one of his peremptory strikes. In his second issue, appellant complains the trial court erred in refusing to excuse the same prospective juror for cause. We examine both of these arguments together.

We review the trial court's ruling denying a challenge for cause for an abuse of discretion. *Swearingen v. State*, 101 S.W.3d 89, 98–99 (Tex. Crim. App. 2003). For

challenges based on a venireperson's alleged bias against the law, we must determine whether the venireperson's beliefs would prevent or substantially impair her from following the law as set out in the trial court's instructions. *Lagrone v. State*, 942 S.W.2d 602, 616 (Tex. Crim. App. 1997). We review the trial court's decision in light of the venireperson's voir dire as a whole. *Swearingen*, 101 S.W.3d at 99. When the record does not contain a clearly objectionable declaration by the venireperson, or the record demonstrates a vacillating or equivocal venireperson, we accord great deference to the judgment of the trial judge, who was in a better position to evaluate the venireperson's demeanor and responses. *Id.*

A challenge for cause is an objection made to a particular venireperson, alleging some fact which renders the venireperson incapable or unfit to serve on the jury. Tex. Code Crim. Proc. Ann. art. 35.16(a) (West 2010). A venireperson may be challenged for cause if she has a bias or prejudice in favor of or against the defendant. *Id.* arts. 35.16(a)(9), (c)(2).

The proponent of a challenge for cause carries the burden of establishing that his challenge is proper. *Gardner v. State*, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009). This burden is not met until the proponent has demonstrated that the venireperson understood the requirements of the law and was not able to overcome her prejudice well enough to follow it. *Id.*

As a reviewing court, we must uphold the trial court's decision on a challenge for cause if the court's decision was correct under any theory of law applicable to the case, even if the trial court gave an incorrect reason for its decision. *Jones v. State*, 982 S.W.2d 386, 389 (Tex. Crim. App. 1998). If the trial court errs in denying a challenge for cause, the defendant is harmed only if he uses a peremptory strike to remove the venireperson and thereafter suffers a detriment from the loss of the strike. *Colella v. State*, 915 S.W.2d 834, 843 (Tex. Crim. App. 1995); *Demouchette v. State*, 731 S.W.2d 75, 83 (Tex. Crim.

App. 1986). Thus, for error to be reversible, appellant must (1) exercise his peremptory strike on the venireperson whom the trial court erroneously failed to excuse for cause; (2) exhaust all remaining peremptory strikes; (3) be denied a request for additional peremptory challenges; and (4) identify an objectionable juror who sat on the jury and whom appellant would have otherwise excused had the trial court granted him additional peremptory strikes or a challenge for cause. *See Johnson v. State*, 43 S.W.3d 1, 6 (Tex. Crim. App. 2001).

Appellant focuses on the prejudice demonstrated by Juror No. 24. When defense counsel questioned whether she would be more inclined to believe that a police officer is truthful because of his occupation, Juror No. 24 stated that she "would evaluate the testimony, but there would be kind of a little more trust of an officer." The prosecutor subsequently attempted to rehabilitate the venireperson:

[Prosecutor]:	[Juror No. 24], I believe you indicated at some point to defense counsel especially that you would tend to believe a police officer because they are a police officer, but I think at the same time you also said, what I wrote down, you would listen to all the testimony before you decided or not?
Venireperson:	Yes.
[Prosecutor]:	Is it fair for me to say that you would listen to the testimony of an officer or any other witness before you decided if they were credible or not?
Venireperson:	Yes. As one of the guys put it, an officer would have a little bit of an edge before they started. I am a high school teacher, I have to listen to sides all the time, so just because you start off with a[n] edge doesn't mean my opinion won't change.
The Court:	Any questions from the defense?
[Defense Counsel]:	No, sir.

The Court: Thank you, ma'am. You may have your seat with the other panel members. Challenge will be denied. On 24.

[Defense Counsel]: On 24, I was going to renew my challenge based on her response that she was still giving an edge to a police officer.

The Court: Based on the totality of all she said, I'll deny your challenge. There's your way out.

The trial court did not err in refusing to excuse Juror No. 24 for cause. Although the venireperson initially suggested that she would be biased in favor of a testifying police officer, she later indicated that she would follow the law and listen to the witness's testimony in its entirety. Where, as here, a venireperson's answers are vacillating or equivocal, and the venireperson does not clearly indicate an objectionable declaration, we must defer to the trial court's judgment. *See Feldman v. State*, 71 S.W.3d 738, 744, 747 (Tex. Crim. App. 2002), *superseded by statute on other grounds*, Tex. Code Crim. Proc. Ann. art. 37.071, *as recognized in Coleman v. State*, No. AP-75478, 2009 WL 4696064, at *11 (Tex. Crim. App. Dec. 9, 2009); *see also Jones*, 982 S.W.2d at 389 (observing that challenges for cause are proper where prospective jurors have "extreme or absolute positions" regarding the credibility of witnesses, and not necessarily where they have a "trace of skepticism" or some lack of impartiality). Accordingly, we conclude that the trial court did not abuse its discretion in denying appellant's challenge for cause.

Moreover, even if we were to assume that the trial court erroneously refused to excuse the venireperson for cause, we do not find that counsel was ineffective for failing to request additional peremptory strikes. The record is silent as to why counsel made no such request, and importantly, appellant has not identified on appeal a single objectionable juror who sat on the panel but for his lack of peremptory strikes. *See Jackson*, 877 S.W.2d at 771–72.

Suppression of Evidence

In subpoints four through six, appellant complains that counsel failed to move to suppress evidence obtained pursuant to an allegedly illegal arrest. Specifically, he argues in subpoint four that counsel should have filed a motion to suppress because the officers lacked probable cause to stop appellant for "loitering." In subpoint five, he argues that counsel failed to object to the evidence obtained as a result of the arrest. In subpoint six, he argues that counsel failed to request a jury instruction under article 38.23 of the Texas Code of Criminal Procedure because a fact issue was raised regarding the legality of the arrest.

Because appellant complains of the admission of evidence, to prevail on his claim of ineffectiveness he must show by a preponderance of the evidence that the result of the proceeding would have been different but for counsel's failure to file a motion to suppress. *See Strickland*, 466 U.S. at 694. In other words, appellant must demonstrate that the evidence was inadmissible, that the motion to suppress would have been granted, and that the remaining evidence would have been insufficient to support the conviction. *See Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002); *Jackson v. State*, 973 S.W.2d 954, 956–57 (Tex. Crim. App. 1998) (per curiam); *Hollis v. State*, 219 S.W.3d 446, 456 (Tex. App.—Austin 2007, no pet.). Appellant has failed to carry this burden because the evidence was admissible, having been obtained pursuant to a legal arrest.

Under the exclusionary rule, evidence seized in violation of the Fourth Amendment may not be admitted against a defendant in a criminal proceeding. *See Terry v. Ohio*, 392 U.S. 1, 12 (1968). This rule serves to discourage lawless police conduct and to maintain the "imperative of judicial integrity" by ensuring that courts do not become parties to unconstitutional invasions of the rights of citizens. *Id.* at 12–13. In determining whether the evidence in this case was properly admissible, we must therefore consider the

circumstances under which it was seized and whether the officers had probable cause for their arrest. *See Johnson v. State*, 912 S.W.2d 227, 235 (Tex. Crim. App. 1995).

We have previously recognized three distinct categories of interactions between citizens and police officers: neutral encounters, investigative detentions, and arrests. *See State v. Perez*, 85 S.W.3d 817, 819 (Tex. Crim. App. 2002); *Banda v. State*, 317 S.W.3d 903 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Neutral or consensual encounters do not implicate Fourth Amendment protections. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991). Law enforcement officers are free to stop and question fellow citizens, without any justification required for the request. *See Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 185 (2004). Citizens, in turn, may terminate such encounters at will. *See Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010). Even where citizens are unaware that requests by officers may be ignored, the citizen's acquiescence does not cause the encounter to lose its consensual nature. *See I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984). We consider the totality of the circumstances surrounding the interaction when determining whether a reasonable person in the defendant's shoes would have felt free to ignore the request or terminate the interaction. *Brendlin v. California*, 551 U.S. 249, 255 (2007). If the defendant had an option to ignore the request or terminate the interaction, then a Fourth Amendment seizure has not occurred. *Id.* The surrounding circumstances, including time and place, are taken into account, but the officer's conduct is the most important factor when determining whether an interaction was consensual or a Fourth Amendment seizure. *State v. Garcia-Cantu*, 253 S.W.3d 236, 244 (Tex. Crim. App. 2008).

An encounter is no longer consensual when an officer, either through force or a showing of authority, restrains a citizen's liberty. *Brendlin*, 551 U.S. at 254. At this point, the encounter becomes either a detention or an arrest, both of which are seizures under the Fourth Amendment. *Crain*, 315 S.W.3d at 49. In cases involving detentions, courts must decide whether the detaining officer had reasonable suspicion that the citizen is, has

been, or soon will be engaged in criminal activity. *Florida v. Rodriguez*, 469 U.S. 1, 5 (1984). With warrantless arrests, the inquiry is whether the arresting officer had probable cause to believe the same. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). The State carries the burden of producing specific, articulable facts showing probable cause. *Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009); *Garcia v. State*, 43 S.W.3d 527, 530 (Tex. Crim. App. 2001). To meet its burden, the State may present the specific facts known to the officer at the moment the seizure occurred. *Amador*, 275 S.W.3d at 878; *Davis v. State*, 947 S.W.2d 240, 243 (Tex. Crim. App. 1997). In evaluating the facts offered, we employ "commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

In this case, Officers Agee and Ruiz approached appellant as he stood alone in an open courtyard in the middle of the night. Although they were on private property, the officers were entitled to determine if appellant was trespassing because they received authorization from the apartment complex to patrol the community for criminal activity. This initial encounter constituted nothing more than a neutral contact between officer and citizen. Indeed, during trial, Officer Ruiz testified that appellant was doing nothing illegal to warrant an arrest.

Through their questioning, however, the officers eventually obtained probable cause to arrest appellant for public intoxication. At the beginning of their encounter, the officers noticed that appellant had bloodshot eyes and smelled of alcohol. Appellant later admitted that he had been drinking vodka and smoking marijuana. Moreover, he had difficulty walking and his speech was slurred. Appellant was only arrested once the officers formed the opinion that he posed a danger to himself and to others. Because the State produced instances of specific, articulable facts regarding appellant's intoxication, we conclude that the warrantless arrest was supported by probable cause. *See* Tex. Penal Code Ann. § 49.02 (West 2010). We need not consider appellant's argument whether the

officers also had probable cause to stop appellant for "loitering," an offense not defined in our Penal Code.

Evidence is admissible if obtained by a search incident to a lawful arrest. *Crane v. State*, 786 S.W.2d 338, 347 (Tex. Crim. App. 1990). The arrest in this case was lawful, and thus, appellant has not carried his burden of showing that a motion to suppress would have been granted. Therefore, appellant cannot demonstrate that counsel was ineffective for failing to request the motion to suppress or for failing to object to the evidence produced.

Similarly, appellant has not demonstrated that counsel was ineffective for failing to request an Article 38.23 instruction. Before a defendant is entitled to such an instruction, he must show that (1) the evidence heard by the jury raises an issue of fact; (2) the evidence on that fact is affirmatively contested; and (3) the contested factual issue is material to the lawfulness of the seizure. *See* Tex. Code Crim. Proc. Ann. art. 38.23; *Madden v. State*, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007). Appellant has not identified a single factual issue regarding the legality of his seizure, and we perceive none. The officers initially approached appellant in a consensual encounter. Appellant was free to ignore them, but by answering that he had been drinking earlier and by demonstrating that he was presently intoxicated, he gave the officers probable cause for his arrest. There is no indication that appellant was prejudiced by not having the jury charged with an Article 38.23 instruction, and the record is silent as to counsel's reasons for not so requesting the instruction. Appellant has failed to rebut the presumption that counsel's conduct fell within the wide range of reasonable professional assistance.

CONCLUSION

We overrule appellant's two issues and affirm the judgment of the trial court.

/s/ Tracy Christopher
Justice

Panel consists of Justices Anderson, Brown, and Christopher.

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