Affirmed and Memorandum Opinion filed February 25, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00956-CR

JESSIE COLEMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1422875

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

A jury found appellant Jessie Coleman guilty of possession of a controlled substance. *See* Tex. Health & Safety Code Ann. § 481.116(c) (Vernon 2010). The jury assessed an enhanced sentence of 32 years' imprisonment. In a single issue, appellant contends he received ineffective assistance of counsel. We affirm.

BACKGROUND

Sergeant David Helms was on patrol around 11 p.m. on March 28, 2014, when he observed a suspicious vehicle parked in front of an apartment complex leasing office. The vehicle was sticking out of the parking space by one or two feet and had its reverse lights on, but the vehicle was stationary. Sergeant Helms observed the vehicle for several minutes, and it remained in reverse without moving. Concerned that the vehicle's driver may have fallen asleep, Sergeant Helms parked and approached the vehicle on foot.

As Sergeant Helms approached the vehicle, the driver cracked his door open. Sergeant Helms immediately detected the odor of phencyclidine — commonly referred to as PCP. Besides the driver, Sergeant Helms observed a second individual in the passenger seat, and believed there to be a third individual in the back seat. Sergeant Helms asked the driver his name, but the driver was very confused and unable to provide his name. The driver's speech was slow and slurred and the driver's eyes appeared glassy.

Although Sergeant Helms suspected narcotics activity, he did not make an arrest at that time because it was dark, and he was alone and outnumbered. Sergeant Helms retreated to his patrol car and backed out of the parking lot to the street, intending to stop the vehicle with backup in a safer, less confined location. Sergeant Helms radioed for backup, but before backup arrived the suspect vehicle pulled out and exited the parking lot.

Sergeant Helms immediately pulled the vehicle over. The driver attempted to exit the vehicle and flee, but Sergeant Helms pulled his pistol and ordered the driver to get back into the vehicle. Sergeant Helms placed a more urgent radio request for backup.

Once other officers arrived, they handcuffed the vehicle's occupants. Upon approaching appellant, Sergeant Helms noticed a "strong smell of phencyclidine coming from his person." Sergeant Helms also observed tinfoil and cigarette filters — paraphernalia commonly associated with PCP use — in the vehicle. A search of appellant's person revealed cigarettes that had been dipped in PCP.

A jury convicted appellant of possession of phencyclidine weighing more than one gram and less than four grams by aggregate weight, including any adulterants and dilutants — a third degree felony. Based on appellant's prior felony convictions for aggravated assault and possession of a controlled substance, the jury assessed an enhanced punishment of 32 years' imprisonment. This appeal ensued.

STANDARD OF REVIEW AND APPLICABLE LAW

In a single issue, appellant contends that he was denied effective assistance of counsel. Specifically, appellant contends that trial counsel was ineffective for failing to call a witness during his case-in-chief in order to put the legality of appellant's search before the jury.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

In order to satisfy the first prong, appellant must prove by a preponderance of the evidence that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. *Lopez*, 343 S.W.3d at 142. A defendant must overcome the presumption that trial counsel's actions fell

within the wide range of reasonable and professional assistance. *See Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been grounded in legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim. *Id.*

To satisfy the second prong, appellant must show that there is a reasonable probability — or a probability sufficient to undermine confidence in the outcome — that the result of the proceeding would have been different but for counsel's unprofessional errors. *Lopez*, 343 S.W.3d at 142.

In determining whether counsel was ineffective, we consider the totality of the circumstances of the particular case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id.*; *see also Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) ("Direct appeal is usually an inadequate vehicle for raising [an ineffective assistance] claim because the record is generally undeveloped."). Failure to satisfy either prong of the *Strickland* test defeats an ineffective assistance claim. *Strickland v. Washington*, 466 U.S. 668, 697 (1984).

ANALYSIS

Appellant moved to suppress evidence of the PCP, contending that such evidence was the result of an illegal search and seizure. At a hearing on the motion to suppress outside the presence of the jury, the defense called Kelvin Williams, the driver of the vehicle stopped by Sergeant Helms. Williams's testimony differed from Sergeant Helms's testimony in certain respects.

Williams testified that on the evening of appellant's arrest, Williams was sitting in his parked vehicle waiting for appellant to come out of the apartment complex for approximately 30 minutes. Williams testified that his car was not protruding from the parking space and was not in reverse. Williams testified that Sergeant Helms approached the vehicle and knocked on the window, and that Williams rolled the window down. Williams contended that Sergeant Helms commented that Williams had his brake lights on, Williams responded that he must have had his feet on the brake pedal, and Sergeant Helms left. Williams contended that nobody else was in the vehicle with him at that time.

At the conclusion of the suppression hearing, the trial court denied appellant's motion to suppress. The defense subsequently rested without calling Williams to testify in its case-in-chief.

Appellant contends on appeal that his trial counsel was ineffective for failing to call Williams during the defense's case-in-chief. Appellant argues that, because Williams did not testify before the jury, there was no conflicting testimony before the jury sufficient to raise an issue of fact as to the legality of the search and, in turn, secure an Article 38.23[1] instruction in the jury charge.

Based on the record before us, we conclude that appellant has not established that his trial counsel rendered ineffective assistance. Nothing in the

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[1] Texas Code of Criminal Procedure article 38.23(a) states:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

Tex. Code Crim. Proc. Ann. art. 38.23(a) (Vernon 2005).

record from the trial sheds light on trial counsel's decision not to question Williams before the jury. Nor did appellant's appellate counsel pursue a motion for new trial hearing to develop a record as to trial counsel's failure to call Williams.

Moreover, assuming without deciding that appellant would have been entitled to an article 38.23 instruction had Williams testified before the jury, the record does not reveal that a decision by appellant's trial counsel not to call Williams before the jury was objectively unreasonable. Without evidence to the contrary, trial counsel's decision not to call Williams may have been motivated by a legitimate trial strategy. *See, e.g.*, *Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) (the decision whether to call a witness is "clearly trial strategy and, as such, is a prerogative of trial counsel" that "will be reviewed only if an attorney's actions are without any plausible basis").

Appellant's trial counsel may have believed that Williams would not be credible before a jury. Williams testified that he did not know what PCP was, had never seen it, and had never smelled it, but also testified that he knew that there was no PCP in his car and that his car did not smell like PCP. Moreover, trial counsel may have wished to distance appellant from Williams, considering that Williams testified on cross-examination that he had been convicted of possession of a controlled substance the day before trial.[2] Finally, it is unclear from the record whether Williams was available to testify before the jury during the defense's case on the second day of trial.[3] *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) ("Counsel's failure to call witnesses at the guilt-innocence and punishment

[2] Williams also testified that he had been convicted of burglary in 2007.

[3] Williams testified during the motion to suppress hearing on the first day of trial.

stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony.").

Regardless of trial counsel's reason or lack thereof for not calling Williams to testify before the jury, we cannot say based on the record before us that trial counsel's performance fell below an objective standard of reasonableness. *See Thompson*, 9 S.W.3d at 813-14; *see also Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) ("When the record is silent on the motivations underlying counsel's tactical decisions, the appellant usually cannot overcome the strong presumption that counsel's conduct was reasonable."). Accordingly, we overrule appellant's sole issue.

CONCLUSION

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

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby, and Brown.
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