



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

Nos. 04-19-00292-CR & 04-19-00293-CR

Gerald Edwin **HODGES**,  
Appellant

v.

The **STATE** of Texas,  
Appellee

From the 186th Judicial District Court, Bexar County, Texas  
Trial Court Nos. 2018CR8989 & 2018CR8986  
Honorable Jefferson Moore, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Luz Elena D. Chapa, Justice  
Beth Watkins, Justice  
Liza A. Rodriguez, Justice

Delivered and Filed: May 13, 2020

**AFFIRMED**

Gerald Erwin Hodges was convicted by a jury of possession of marijuana and possession of cocaine. The sole issue he raises on appeal is that trial counsel rendered ineffective assistance of counsel by failing to make certain objections or requests during trial. We affirm the trial court's judgments.

**BACKGROUND**

Hodges was charged with five separate offenses: (1) possession of marijuana; (2) possession of delta-9-tetrahydrocannabinol; (3) possession of a firearm by a felon; (4) possession

of cocaine; and (5) possession of methamphetamine. He was also charged with using a deadly weapon in relation to all of the offenses except the possession of a firearm by a felon. Finally, he was charged as a repeat offender for having been convicted of a prior felony. A jury found Hodges guilty only of the possession of marijuana and possession of cocaine offenses.

Hodges elected for the trial court to assess his punishment. The trial court found the prior felony enhancement allegation to be not true and did not make an affirmative deadly weapon finding. The trial court sentenced Hodges to two years' state jail for the possession of marijuana offense and to ten years' imprisonment for the possession of cocaine offense, with the sentences to run concurrently. Although Hodges filed a motion for new trial, the motion did not raise ineffective assistance of counsel as a ground. In addition, the record does not contain any indication that a hearing was held on the motion.

#### **APPLICABLE LAW**

“To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate two things: deficient performance and prejudice.” *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). An appellant “bears the burden of proving by a preponderance of the evidence that counsel was ineffective.” *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

To establish deficient performance, an appellant must show counsel’s assistance “fell below an objective standard of reasonableness.” *Id.* at 812. To establish prejudice, an appellant “must show a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

An appellant must overcome the “strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance.” *Id.* at 813. In order to defeat this presumption,

“[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness.” *Id.*

“Trial counsel should generally be given an opportunity to explain his actions before being found ineffective.” *Prine v. State*, 537 S.W.3d 113, 117 (Tex. Crim. App. 2017). “In the face of an undeveloped record, counsel should be found ineffective only if his conduct was so outrageous that no competent attorney would have engaged in it.” *Id.* (internal quotation marks omitted).

“A substantial risk of failure accompanies an appellant’s claim of ineffective assistance of counsel on direct appeal.” *Thompson*, 9 S.W.3d at 813. “In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel.” *Id.* at 813–14.

#### ANALYSIS

Hodges first contends trial counsel was ineffective in failing to object or correct the trial court when it failed to fully admonish him regarding the possible range of punishment as it related to the possession of marijuana offense. Specifically, Hodges contends the trial court did not admonish him regarding the range of punishment if both the deadly weapon and prior felony enhancement allegations were found to be true, which would make the offense a second degree felony.

Before the venire was brought into the courtroom for voir dire, the trial court admonished Hodges regarding the range of punishment applicable to each of the charged offenses. With regard to the possession of marijuana offense, the trial court admonished Hodges as follows:

THE COURT: We’re here today for trial. In each case they — being the State — has made a repeat offender enhancement allegation. I’ll go over those with you on each of those cases to talk to you about the sentencing ranges on those cases. And then on all the cases, except for the felon in possession of a firearm case, the State has also alleged a deadly weapon allegation. I’m going to go over those with you.

In the first case, which is the possession of marijuana case, normally it's a State jail felony. But because the State is alleging a deadly weapon is involved, that moves it from a State jail felony to a third-degree felony. In addition, even if that were to go away, the State — meaning, the deadly weapon allegation [were] to go away, the State has said you are a repeat offender and that, as well, would make this a third-degree felony — felony, which the sentencing range is from two to 10 years in the Texas Department of Criminal Justice and up to a \$10,000 fine.

After this admonishment, Hodges acknowledged that he understood the range of punishment.

Even if we assume trial counsel was deficient in failing to object to the admonishment, Hodges cannot show he was prejudiced. First, the jury was not present when Hodges was admonished, so the admonishment could not have affected the jury's verdict. In addition, the trial court did not make a deadly weapon finding and found the prior felony enhancement allegation to be not true. Accordingly, Hodges never faced the range of punishment that would have been applicable to a second degree felony. Because Hodges had the burden to show both deficient performance and prejudice, he failed to meet his burden with regard to this first complaint. *Id.* at 813 (“Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.”).

Hodges next argues trial counsel was ineffective by “ma[king] no effort — either through a motion in limine or a timely objection — to stop the State's witnesses from attributing testimonial hearsay to a so-called ‘credible & reliable’ informant.” Because Hodges did not raise ineffective assistance of counsel as a ground in his motion for new trial and no hearing was held on his motion, the record is silent regarding the reason trial counsel chose not to object to a detective's reference to information he heard about Hodges dealing drugs which he later attributed to a credible, reliable informant. In its brief, the State speculates trial counsel had a sound trial strategy in questioning the detective to undermine the reliability of the investigation and the reliability of the informant. When we are faced with a silent record on direct appeal, however, we do not speculate about trial counsel's possible strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994);

*Rodriguez v. State*, 425 S.W.3d 655, 669 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Instead, based on the record before us, we hold Hodges failed to overcome the “strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance.”<sup>1</sup> *Thompson*, 9 S.W.3d at 813

Finally, Hodges contends trial counsel was ineffective in failing to request that a reference to a second, concurrent conviction be redacted from the judgment admitted into evidence to prove his prior felony conviction in relation to the possession of a firearm by a felon offense.<sup>2</sup> The jury, however, found Hodges not guilty of the possession of a firearm by a felon offense, and the record contains no indication that the reference was considered by the jury in relation to any other offense.<sup>3</sup> Accordingly, Hodges cannot meet his burden to establish he was prejudiced by the unredacted judgment.

#### CONCLUSION

The trial court’s judgments are affirmed.

Liza A. Rodriguez, Justice

DO NOT PUBLISH

---

<sup>1</sup> We note our decision does not preclude Hodges from “resubmit[ting] his claim via an application for writ of habeas corpus,” which will “provide an opportunity to conduct a dedicated hearing to consider the facts, circumstances, and rationale behind counsel’s actions” and allow trial counsel to explain the reason he chose not to object. *Thompson*, 9 S.W.3d at 814–15.

<sup>2</sup> The judgment stated, “This sentence shall run concurrent with 2016CR9905 in Bexar County, Texas.”

<sup>3</sup> In fact, we note the jury charge instructed the jury, “With respect to the evidence admitted in this case concerning the defendant having been previously convicted of a felony, if he was, you are instructed that such evidence cannot be considered by you as in any manner proving or tending to prove that the defendant was in unlawful possession of a firearm on or about the 2nd Day of July, 2018.”