In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00337-CR

NIKITA VAN GOFFNEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 410th District Court
Montgomery County, Texas
Trial Cause No. 08-05-05253 CR

MEMORANDUM OPINION

A jury convicted Nikita Van Goffney on two charges, possession with intent to deliver or manufacture a controlled substance and the possession of a firearm by a felon. Based on the jury's recommendation, the trial court sentenced Goffney to ninety-nine years in prison on each conviction. In two issues, Goffney asserts he received the ineffective assistance of trial counsel, and he contends the trial court erred by excluding evidence addressing Goffney's 2002 civil lawsuit against the Conroe Police Department. We affirm the trial court's judgment.

Ineffective Assistance of Counsel

Goffney's first issue asserts that he received the ineffective assistance of counsel because his counsel "failed to file a pre-trial motion to suppress evidence obtained by a search warrant obtained by the use of [an] odor sniffing dog or obtain a ruling by the trial court as to whether or not the search warrant was valid because of the use of a[n] odor sniffing dog." We apply a two-pronged test to resolve ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.E.2d 674 (1984); *Garza v. State*, 213 S.W.3d 338, 347-48 (Tex. Crim. App. 2007); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). To establish the ineffective assistance of counsel, the appellant must show by a preponderance of the evidence that his counsel's representation fell below the standard of prevailing professional norms and that there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Strickland*, 466 U.S. at 687; *Garza*, 213 S.W.3d at 347-48; *Thompson*, 9 S.W.3d at 812. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thompson*, 9 S.W.3d at 812. But, as *Garza* explained, our review of ineffective assistance claims is "highly deferential" to trial counsel, as we presume "that counsel's actions fell within the wide range of reasonable and professional assistance." 213 S.W.3d at 348.

When faced with complaints about trial counsel's alleged deficiencies in a trial, any judicial review must "avoid the deleterious effects of hindsight." *Thompson*, 9

S.W.3d at 813. Trial counsel's decisions are viewed with great deference when trial counsel's reasons for not undertaking a suggested strategy do not appear in the record. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Absent a record that contains an explanation by trial counsel of his strategy, appellate courts are not at liberty to find trial counsel's conduct ineffective, unless the challenged conduct was "'so outrageous that no competent attorney would have engaged in it.'" *Id.* (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). Additionally, any *Strickland* claim must be "'firmly founded in the record' and 'the record must affirmatively demonstrate' the meritorious nature of the claim." *Goodspeed*, 187 S.W.3d at 392 (quoting *Thompson*, 9 S.W.3d at 813 (declining to speculate on counsel's failure to object to hearsay in light of a silent record).

Goffney's complaints address whether trial counsel should have attempted to suppress evidence obtained during a search of 523 South 12th Street, the residence where the State alleged Goffney lived. The record reflects that a drug-sniffing dog alerted at the door of the residence after being taken there by a Conroe Police detective based on information received from a confidential informant. After the dog alerted, the police obtained a search warrant. With respect to why trial counsel did not choose to file a motion to suppress, Goffney's attorney advised the trial court that: "'I wasn't trying to attack the search warrant because the search warrant was based on the dog[] going to the door, and, of course, my research would indicate that that would be sufficient.'"

We determine whether the facts alleged in a probable cause affidavit sufficiently support a search warrant by examining the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Ramos v. State*, 934 S.W.2d 358, 362-63 (Tex. Crim. App. 1996); *see also* Tex. Code Crim. Proc. Ann. art. 18.01(b) (West Supp. 2010). The allegations are sufficient if they "'justify a conclusion that the object of the search is probably on the premises.'" *Ramos*, 934 S.W.2d at 363 (quoting *Cassias v. State*, 719 S.W.2d 585, 587 (Tex. Crim. App. 1986)). Generally, an alert by a drug-sniffing dog at a premises constitutes probable cause sufficient to justify a search. *See Romo v. State*, 315 S.W.3d 565, 573-74 (Tex. App.—Fort Worth 2010, pet. ref'd) ("An alert by a drug-detection dog outside a person's residence is sufficient to provide probable cause to search the site."); *Rodriguez v. State*, 106 S.W.3d 224, 229 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) ("When a trained and certified narcotics dog alerts an officer to apparent evidence or contraband, probable cause exists.").

Although Goffney acknowledges that drug-dog alerts are usually sufficient to establish probable cause, he argues "that does not absolve counsel in his task to totally represent his client and seek to argue against the admission of such evidence even in the face of prevailing law." Goffney then attempts to analogize his case with the Court of Criminal Appeals recent decision in *Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010). However, *Winfrey* involved whether a dog could discriminate between human

scents "to identify a specific person in a lineup[.]" *Id.* at 883. In *Winfrey*, the Court of Criminal Appeals did not address a dog's general abilities to detect the presence of drugs. *Id.* at 883-84.

Having reviewed the record, we cannot conclude that the challenged conduct was "'so outrageous that no competent attorney would have engaged in it.'" *Goodspeed*, 187 S.W.3d at 392 (quoting *Garcia*, 57 S.W.3d at 440); *see also Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005) ("[A] reasonably competent counsel need not perform a useless or futile act[.]"). Based on the record before us, we conclude that trial counsel's decisions appear to have been grounded on a reasonable appreciation of a reasonable trial strategy. We hold that Goffney's ineffective assistance claim is not firmly founded in the record, and that the record does not affirmatively demonstrate the meritorious nature of Goffney's claim. *See Goodspeed*, 187 S.W.3d at 392. We overrule Goffney's first issue.

Limitation of Cross-Examination

In his second issue, Goffney contends the trial court erred by "not allowing [Goffney] to place into evidence any matter regarding the ill will, animus, bias, prejudice[,] or dislike [that] members of the Conroe Police Department held against him for his filing a civil lawsuit in 2002 against the department." Goffney argues that trial judges should allow parties great latitude when the evidence that is sought to be admitted concerns an issue of a witness's bias, motive, or interest to testify in a particular fashion.

Prior to trial, the State filed a motion in limine seeking to exclude any testimony or reference by counsel or the witnesses of any pending civil action against the Conroe Police Department or the Montgomery County District Attorney's Office. Several times before the close of evidence, Goffney requested the opportunity to cross-examine witnesses regarding his civil suit to show bias. The parties informed the trial court that in 2002, Goffney filed a civil suit against the Conroe Police Department and the Montgomery County District Attorney's Office. The State advised the trial court that the suit against the District Attorney's Office had been dismissed, but the suit against the Police Department was still pending. The trial court ruled that Goffney could not go into evidence surrounding the suit, as it would "confuse the issue" for the jury. The trial court also held that the probative value of the evidence concerning Goffney's civil suit was outweighed by the "prejudicial or confusing nature" of the evidence. Nonetheless, the trial court did not prevent Goffney from cross-examining the State's witnesses regarding Goffney's past interactions with them. Also, Goffney did not make an offer of proof to demonstrate whether his having filed the civil suit led to any animus on the part of the specific witnesses who testified in his criminal trial. While Goffney filed a motion for new trial, he presented no evidence to show that the witnesses who testified at his criminal trial had been motivated to testify against him as a result of the pending civil suit. Goffney's motion for new trial was overruled by operation of law.

Initially, the State contends that because Goffney did not make a record of the details of the suit, he failed to preserve error. Under the Texas Rules of Evidence, a party must make an offer of proof to preserve error when evidence is excluded, unless the substance of the evidence was apparent from the context. Tex. R. Evid. 103(a)(2); *see Holmes v. State*, 323 S.W.3d 163, 168-69 (Tex. Crim. App. 2009) (holding that an offer of proof is required when the defendant seeks to challenge the credibility of a witness's testimony, or the substance of the witness's testimony). However, an offer of proof is not required when a defendant is cross-examining a State's witness "about matters that might affect the witness's credibility." *Holmes*, 323 S.W.3d at 168. The *Holmes* Court explained:

> [W]here the defendant, in cross-examining a State's witness, desires to elicit subject matters that tend to impeach the witness's character for truthfulness--for example, to show malice, ill-feeling, ill-will, bias, prejudice, or animus on the part of the witness toward the defendant--in order to preserve the issue for appellate review, he is not required to show that his cross-examination would have affirmatively established the facts sought, but merely that he desired to examine the witness with regard to those specific subject matters that tend to impeach the witness during his cross-examination.

Id. at 170.

Here, Goffney claims that he was seeking to introduce evidence regarding the 2002 civil suit to demonstrate that the officers testifying against him were biased. Although the specifics about Goffney's civil suit are not contained in the record before us, Goffney argued to the trial court that the officers might have falsified facts in

response to his having filed the civil suit. We conclude that Goffney's complaint regarding the trial court's decision to exclude evidence addressing his civil suit was not waived by Goffney's failure to make an offer of proof. *See Holmes*, 323 S.W.3d at 170.

Nevertheless, Goffney recognizes that trial courts do have discretion in admitting evidence during a trial. On appeal, we review a trial court's decision to limit cross-examination for an abuse of discretion. *See Sansom v. State*, 292 S.W.3d 112, 118 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd). The scope of cross-examination in Texas is broad and extends to facts that may affect the witness's credibility. *See Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996); *see also* Tex. R. Evid. 611(b). Generally, the scope of cross-examination may, but does not always, include civil suits between witnesses and defendants. *See Shelby v. State*, 819 S.W.2d 544, 545 (Tex. Crim. App. 1991); *Cox v. State*, 523 S.W.2d 695, 700 (Tex. Crim. App. 1975); *Blake v. State*, 365 S.W.2d 795, 796 (Tex. Crim. App. 1963); *but see Hoyos v. State*, 982 S.W.2d 419, 421-22 (Tex. Crim. App. 1998) (holding that trial court did not err in preventing cross-examination of complainant regarding civil suit against apartment complex where robbery occurred). However, the scope of appropriate cross-examination is not unlimited, and the trial court generally has "wide discretion in limiting the scope and extent of cross-examination." *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009); *Carroll*, 916 S.W.2d at 498. For example, a trial court may properly limit the scope of cross-examination to prevent harassment, prejudice, confusion of the issues, harm to the

witness, and repetitive or marginally relevant interrogation. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Carroll*, 916 S.W.2d at 498.

While there is little in the record regarding the circumstances that led Goffney to file the civil suit, there is no claim that Goffney's civil suit and his trial on the charges in this case grew out of the same incident. Additionally, with respect to his claim of bias, the trial court was informed that only the Conroe Police Department and Officer Sauceda were still parties in the civil case.

Even were we to assume that the civil suit against Officer Sauceda and the Conroe Police might raise an inference of bias that would make it the subject of cross-examination in a criminal trial, Goffney is required to show that the exclusion of the evidence about the pending civil case affected his substantial rights. *See* Tex. R. App. P. 44.2(b).[1] A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000).

"A criminal conviction should not be overturned for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect." *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998). Important considerations include "any testimony or physical

[1]To the extent Goffney's brief attempts to argue that the trial court's ruling violated his rights under the Confrontation Clause, Goffney failed to raise this argument to the trial court, and thus it is waived. *See* Tex. R. App. P. 33.1(a); *Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005). Therefore, we review this issue solely for non-constitutional error. *See* Tex. R. App. P. 44.2.

evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how [the alleged error] might be considered in connection with other evidence in the case. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

Goffney did not contend that the drugs were not discovered at the house; rather, his defense focused on whether he occupied the residence where the drugs were found and whether the drugs were his. While Goffney admitted he was the lessee of the residence, had placed the utilities in his name, received mail at the residence, and kept a dog there, he denied that he had ever lived there. But, evidence admitted during Goffney's trial suggests otherwise. The owner of the residence testified that Goffney leased the home from her. The utility billing manager for the City of Conroe stated that Goffney completed the application for utilities, that the utility bills were in his name, and that utility bills addressed to Goffney were sent to the residence during months consistent with the date the police found the drugs. Officer Vogel testified that when he had previously given Goffney a ticket, Goffney stated his address was at the residence where the drugs were later found. Vogel added that he had seen Goffney at the residence "on numerous occasions" and that even a few days before the search, he saw Goffney in the yard at the residence where the drugs were found. According to Vogel, a confidential informant told him that Goffney lived at the residence. The officers seized a number of items from the residence addressed to Goffney at the residence, including numerous

pieces of general mail, bills, correspondence from various courts, other legal papers, a vehicle registration renewal notice, and automobile insurance papers on Goffney's vehicles. While Detective Roberts explained that he had not recently seen Goffney at the residence, he testified that he had previously seen Goffney and Goffney's vehicles at the residence.

In summary, the record includes evidence that tends to show that Goffney lived at the residence where the drugs were found independent from the testimony of Sauceda or from that of any of the Conroe Police Department's employees. Considering the probative value of the evidence Goffney contends shows bias in the context of all of the evidence introduced during the trial, we conclude that the trial court's alleged error, if any, was harmless. *See* Tex. R. App. P. 44.2(b). We overrule Goffney's second issue and affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on April 1, 2011
Opinion Delivered July 13, 2011
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.