In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00196-CR

DANNA MARIE MONTANEZ A/K/A DANNA MARIE HARVEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 75th District Court
Liberty County, Texas
Trial Cause No. CR27817

MEMORANDUM OPINION

Danna Marie Montanez a/k/a Danna Marie Harvey failed to stop her vehicle at a stop sign at 2:15 in the morning. A police officer stopped her for the traffic violation. Montanez and her daughter were the only occupants of the car. The officer found a crushed glass crack pipe near the gas pedal. The pipe tested positive for cocaine.

Montanez's daughter testified at trial that the pipe was hers, not her mother's. Montanez testified she was not aware of any cocaine residue on the drug paraphernalia, and she testified she did not even know the drug paraphernalia was there. The jury

convicted Montanez of possession of cocaine in an amount less than one gram. *See* Tex. Health & Safety Code Ann. § 481.115(b) (West 2010). The court sentenced Montanez to two years in state jail.

In this appeal, Montanez argues that the conviction should be attributed to her attorney's ineffectiveness at trial, and that she should receive a new trial. She argues that "[t]rial counsel was ineffective in stipulating to all elements of the offense, not requesting limiting instructions regarding prior convictions (both at the time of their introduction and in the charge), and not objecting to the introduction of other unadjudicated bad acts during the guilt/innocence phase of the trial." The State responds that the claim "is meritless[,]" that "trial counsel did not stipulate 'to all elements of the offense[,]'" and that without a record of trial counsel's reasons for his actions and strategy, "an appellate Court should not engage in speculation."

The Sixth Amendment to the Constitution of the United States confers a right to effective representation by counsel. *See Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, the defendant must show that 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 would have been different. *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. 668). An appellate court presented with a claim of ineffectiveness conducts a review in the light of a "strong presumption that [trial] counsel's conduct falls

within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689. To fairly assess an attorney's conduct when a claim like this is made, an appellate court must make every effort "to eliminate the distorting effects of hindsight[.]" *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992). The failure of a trial strategy does not necessarily mean the challenged conduct of an attorney was beneath the standard of professional competence. What may seem inadvisable at the time the jury returns the verdict may have been perceived differently by competent counsel during the trial. The Court of Criminal Appeals cautions that "[a] reviewing court will rarely be in a position on direct appeal to fairly evaluate the merits of an ineffective assistance claim." *Salinas*, 163 S.W.3d at 740 (citing *Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999).

"To overcome the presumption of reasonable professional assistance, 'any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness.'" *Id.* (quoting *Thompson*, 9 S.W.3d at 813). A sufficient record to prove an alleged deficient representation by counsel usually includes direct evidence explaining why trial counsel acted in a certain way. *See Thompson,* 9 S.W.3d at 813-14. Time constraints, the problem of timely obtaining a transcript of the trial record, and the risk of alienating counsel are circumstances that may make the development of the record on a direct appeal difficult. *See Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997); *Jackson v. State*, 877 S.W.2d 768, 772 n.3

(Tex. Crim. App. 1994) (Baird, J., concurring); *Randle v. State*, 847 S.W.2d 576, 580 (Tex. Crim. App. 1993). The record from below in the majority of cases "is undeveloped and cannot adequately reflect the motives behind trial counsel's actions." *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001). In the rare instance when the record on direct appeal is sufficient to prove an ineffective assistance claim, an appellate court addresses the claim. *Robinson v. State,* 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000). When a defendant does not litigate the claim of ineffectiveness in the trial court through a motion for new trial or other method, however, the appellate court generally will overrule the claim without prejudice to the defendant's ability to raise the claim in a collateral proceeding. *Id.*

Montanez asserts that trial counsel was ineffective in stipulating to all elements of the offense. What was stipulated to was the entry of a "no contest" plea in the possession-of-drug-paraphernalia case. Montanez's attorney apparently did not contest the fact that Montanez had entered a no contest plea to the possession of drug paraphernalia, but he denied her intentional or knowing possession of cocaine. Montanez also contends trial counsel was ineffective because he failed to request limiting instructions regarding her prior convictions and did not object to the introduction of other unadjudicated bad acts during the trial's guilt/innocence phase. Trial counsel apparently did not contest all of the prior convictions and acts. We do not know trial counsel's strategy, and we do not speculate on it.

The defense tried to persuade the jury that the cocaine was the daughter's, and that Montanez did not intentionally or knowingly possess the drug. The attempt failed. Montanez did not litigate her ineffectiveness claim in the trial court. No motion for new trial was filed. The record does not include an explanation or reason why counsel acted or failed to act in the challenged instances. *See Thompson*, 9 S.W.3d at 814. We conclude this appeal does not present "the rare case where the record on direct appeal is sufficient to prove that counsel's performance was deficient[.]" *Robinson*, 16 S.W.3d at 813 n.7. Therefore, the proper procedure is to overrule "appellant's Sixth Amendment claim without prejudice to appellant's ability to dispute counsel's effectiveness collaterally." *Id.*; *see Ex parte Torres*, 943 S.W.2d at 475 ("[I]n most ineffective assistance claims, a writ of habeas corpus is essential to gathering the facts necessary to adequately evaluate such claims."). Appellant's sole issue is overruled. The trial court's judgment is affirmed.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on March 8, 2011
Opinion Delivered April 13, 2011
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Before Gaultney, Kreger, and Horton, JJ.