

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00159-CR

JUSTIN MARVIN SCHREIBER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 1
Montgomery County, Texas
Cause No. 14-297556

MEMORANDUM OPINION

Justin Marvin Schreiber appeals his sentence of ninety days in jail following his conviction for harassment. In one issue, Schreiber argues that his attorney provided constitutionally ineffective assistance during the punishment phase of trial by failing to investigate and present evidence of Schreiber's mental health problems as a mitigating circumstance. Schreiber contends that as a result of his attorney's deficient performance, he is entitled to a new sentencing hearing. We overrule Schreiber's issue and affirm the judgment of the trial court.

I. Background

The State of Texas charged Schreiber with the misdemeanor offense of harassment and sought a 180-day sentence as punishment. Schreiber's original trial counsel for this matter withdrew from representation after Schreiber filed a grievance against him. Thereafter, Schreiber and his wife met with Schreiber's newly-appointed attorney on multiple occasions and had multiple telephone conversations with him in preparation for trial. Schreiber informed his counsel that he suffered from post-traumatic stress disorder (PTSD) and that as a result, he was seventy-percent disabled.

Schreiber pleaded not guilty to the harassment charge and his single-day jury trial resulted in a conviction. Schreiber elected to have the trial court assess punishment, and the trial court conducted the sentencing hearing that same day.

During sentencing, the State presented evidence that in the two years leading up to the commission of the present offense of harassment, Schreiber had accumulated six misdemeanor convictions. With respect to three of those convictions, Schreiber had initially been placed on deferred adjudication community supervision. However, Schreiber failed to meet the conditions imposed in the deferred adjudication orders, including conditions that he attend PTSD treatment, and he was adjudicated guilty of the offense in each case.

Schreiber's trial counsel called Schreiber's wife to testify on his behalf during the sentencing phase. Schreiber's wife testified that Schreiber served in the Army, suffered from PTSD, received regular treatment from the Veterans Affairs hospital, and that Schreiber's disability status had escalated from seventy percent to one-hundred percent since the events in question. During the defense's closing argument, the trial judge interrupted and stated:

THE COURT: Let me say this. I'm not going to put him on probation. So you need to talk in terms of what you think would be reasonable as time because I don't have any confidence that this gentleman can make probation. I wish that it was -- he was a candidate for it for a number of reasons. But I don't think he's going to make it, and I'm not going to do a futile thing if I know it or feel it.

After hearing all of the evidence, the trial judge sentenced Schreiber to confinement in the county jail for a period of ninety days.

Schreiber filed a motion for new trial alleging ineffective assistance of counsel. In the motion for new trial, Schreiber presented affidavits from himself and his wife, each indicating that Schreiber sustained severe injuries while honorably serving in the U.S. Army in Afghanistan and suffers from PTSD. Schreiber also attached his medical records from the Veterans Affairs hospital as an exhibit to his motion for new trial. Schreiber explained that his injuries and PTSD affect his temperament and judgment and require ongoing therapy. Schreiber argued that his trial attorney "appeared uninterested and never inquired" into his conditions. The

trial court conducted a hearing on Schreiber's motion, during which Schreiber's trial counsel testified that other than his few discussions with Schreiber and his wife, he conducted no other investigation into possible mitigating evidence related to Schreiber's conditions because counsel did not believe additional evidence was relevant or would have affected the outcome. The trial court denied Schreiber's motion for new trial.

II. Ineffective Assistance of Counsel

In his only issue, Schreiber argues that his trial attorney provided constitutionally ineffective assistance during the punishment phase of trial. Specifically, Schreiber contends that his trial counsel failed to investigate or to present evidence to explain to the court the continuing effects of the traumatic brain injury that Schreiber suffered while he was deployed with the military or the continuing consequences of his post-traumatic stress disorder. Further, Schreiber argues that his attorney's deficient performance during the punishment phase of trial prejudiced his defense because it precluded the trial court from considering any connection between his mental health condition and his "anti-social conduct" for the purposes of mitigating his punishment.

A. Standard of Review

Schreiber presented his ineffective-assistance claim to the trial court in a motion for new trial, which the trial court denied after a hearing. We therefore review Schreiber's ineffective-assistance-of-counsel claim as a challenge to the denial of his motion for new trial. *See Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004), *superseded by rule on other grounds as stated in State v. Herndon*, 215 S.W.3d 901, 905 n.5 (Tex. Crim. App. 2007); *Shamim v. State*, 443 S.W.3d 316, 321 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). We review a trial court's denial of a motion for new trial under an abuse-of-discretion standard. *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). Under this deferential review, we will reverse the trial court's ruling only if it was "clearly erroneous and arbitrary." *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012). "A trial court abuses its discretion if no reasonable view of the record could support the trial court's ruling." *Id.* In our review of the ruling, we view the evidence in the light most favorable to the ruling and defer to the trial court's credibility determinations. *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim. App. 2014). As long as the ruling falls within the zone of reasonable disagreement, we will affirm the ruling of the trial court. *Riley*, 378 S.W.3d at 457.

B. Applicable Law

A defendant has a Sixth Amendment right to the effective assistance of counsel. U.S. CONST. amend. VI; *see Strickland v. Washington*, 466 U.S. 668, 685–86 (1984). Trial counsel has a “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *see also Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990).

When evaluating claims of ineffective assistance of counsel, Texas courts follow the standard set forth by the United States Supreme Court in *Strickland v. Washington*, which requires a defendant to establish two prongs: (1) deficient performance of trial counsel; and (2) harm resulting from that deficiency sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 687; *Ex parte Moore*, 395 S.W.3d 152, 157 (Tex. Crim. App. 2013); *Smith v. State*, 286 S.W.3d 333, 340–41 (Tex. Crim. App. 2009); *Lampkin v. State*, 470 S.W.3d 876, 896 (Tex. App.—Texarkana 2015, pet. ref’d). The defendant bears the burden of proving each prong by a preponderance of the evidence. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011). The reviewing court applies a strong presumption that counsel’s actions fell within the wide range of reasonable professional assistance. *Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App.

1997). Absent both showings, a defendant cannot prevail on his claim of ineffective assistance of counsel. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

To show deficient performance, the defendant must demonstrate that his counsel's representation fell below an objective standard of reasonableness. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). To show prejudice, the defendant must show that but for his trial counsel's deficiency, there is a reasonable probability that he would have received a different sentence. *Porter v. McCollum*, 558 U.S. 30, 41 (2009). In assessing prejudice, the reviewing court reweighs the evidence in aggravation against the totality of available mitigating evidence. *Wiggins*, 539 U.S. at 534.

C. Analysis

Without deciding whether Schreiber's trial counsel adequately investigated and presented evidence of his client's medical condition as mitigating evidence during sentencing, we conclude that the resulting harm—if any—from trial counsel's alleged deficiencies did not undermine confidence in the trial court's outcome. Schreiber's trial counsel presented evidence, and thus the trial court was aware, of Schreiber's service with the military and his resulting PTSD. Schreiber has not established a reasonable probability that additional evidence on the subject

would have swayed the trial court to impose a less harsh sentence. The trial court was aware of Schreiber's previous failure to comply with conditions of his deferred adjudication orders. In this case, although the State requested the maximum sentence (180 days), the trial court imposed a relatively moderate ninety-day sentence. The trial court found that Schreiber would be unlikely to adhere to the terms of community supervision. Weighing the evidence of Schreiber's guilt in the instant case, his multiple past crimes, and his failure to adhere to previous deferred adjudication requirements against the totality of available mitigating evidence, we conclude that Schreiber failed to establish that trial counsel's performance during the punishment phase prejudiced his defense. We therefore conclude that the trial court did not abuse its discretion in denying Schreiber's motion for new trial.

We overrule Schreiber's issue and affirm the trial court's judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on April 8, 2016
Opinion Delivered April 19, 2017
Do Not Publish

Before Kreger, Horton, and Johnson, JJ.