In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00231-CR

JOE DANIEL LUNA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 242nd District Court
Hale County, Texas
Trial Court No. B19852-1501, Honorable Kregg Hukill, Presiding

March 25, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Appellant, Joe Daniel Luna, pleaded guilty, without a plea agreement, to the offense of possession of a controlled substance in an amount of less than one gram.[1] Appellant elected to have punishment determined by a jury. After hearing the punishment evidence, the jury assessed appellant's punishment at confinement in a State Jail Facility (SJF) for a period of two years with a fine of $10,000 being assessed. Appellant has perfected his appeal. Appellant presents two issues for our

[1] *See* TEX. PENAL CODE ANN. § 481.115(a), (b) (West 2010).

consideration. First, appellant contends that the trial court committed reversible error by failing to admonish him on the record of the consequences a plea of guilty would have regarding deportation or naturalization.[2] Second, appellant contends that his trial counsel was ineffective. We will affirm.

Factual and Procedural Background

Appellant was stopped for a traffic offense by the Plainview police on March 6, 2014, when Officer Sergio Trevino noticed the vehicle appellant was driving had an expired registration. Upon stopping appellant's vehicle, Trevino made contact with appellant and learned that appellant did not have a driver's license. Trevino conducted a pat down search of appellant while arresting him. During the subsequent search incident to arrest, Trevino located a chrome cylinder on a chain around appellant's neck. After removing the cylinder from the chain, it was found to contain an amount of suspected methamphetamine.

Appellant's case was initially set for a guilty plea on May 29, 2015. On that day, trial counsel advised the trial court that appellant was not going to accept the plea agreement. Appellant confirmed that he was not going to accept the plea agreement. The trial court set the case for trial on June 2, 2015.

At the trial setting on the 2nd of June, appellant entered a plea of guilty without a plea agreement. Before the trial court visited with appellant about the plea of guilty, the trial court asked trial counsel if he had explained all of appellant's rights to him. Upon receiving an affirmation from trial counsel, the trial court visited with appellant.

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[2] *See* TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West Supp. 2015). Further reference to the Texas Code of Criminal Procedure shall be by reference to "article ___" or "art. ____."

Prior to entering the plea of guilty, the trial court admonished appellant regarding the range of punishment and the waiver of certain rights under the laws of the State of Texas and the United States. The trial court further interrogated appellant and established that appellant was thirty years old and went through the 11th grade in school. Further, the exchange revealed that appellant could read, write, and understand the English language.

The trial court subsequently accepted appellant's plea of guilty and found that the same was freely, voluntarily, knowingly, and intelligently made. The trial court also found appellant competent to enter his plea of guilty.

A jury panel was brought in and a jury was selected. In addition to the facts regarding the initial stop of appellant and the finding of the methamphetamine, the jury received exhibits demonstrating that appellant had five previous convictions. The defense produced witnesses to demonstrate that appellant had a drug problem but had been attempting to find employment in an effort to improve his situation.

After hearing the evidence, the jury sentenced appellant to serve two years in an SJF and assessed a $10,000 fine. Appellant appeals, contending that the trial court committed reversible error by failing to properly admonish him regarding the consequences of his plea and that his trial counsel was ineffective. We will affirm.

Guilty Plea Admonishments

Before a trial court accepts a guilty plea, the court is required to admonish the defendant of, among other things, the fact that, if the defendant is not a citizen of the United States of America, a plea of guilty may result in deportation, exclusion from

admission to this country, or the denial of naturalization. Art. 26.13(a)(4). The record before the Court demonstrates that the trial court did not admonish appellant regarding the citizenship consequences of a plea of guilty. Accordingly, the trial court committed error. *See VanNortrick v. State,* 227 S.W.3d 706, 708 (Tex. Crim. App. 2007). We review this error under the non-constitutional error standard of rule 44.2(b) of the Texas Rules of Appellate Procedure; that is to say, any error that does not affect appellant's substantial rights must be ignored, held to be harmless. *See* TEX. R. APP. P 44.2(b).

To ascertain whether appellant's substantial rights have been affected, we are directed to review the entire record. *See Anderson v. State,* 182 S.W.3d 914, 919 (Tex. Crim. App. 2006) (en banc). There is no burden on either party to prove harm or harmlessness resulting from the error. *See VanNortrick,* 227 S.W.3d at 709. In our review of the entire record, we must decide if we have a fair assurance that the appellant's decision to plead guilty would not have changed had the court admonished him. *See id.*

When we review the entire record to ascertain whether we have a fair assurance that appellant's decision to plead guilty would not have changed had the court properly admonished him, we are concentrating on three issues. *See id.* at 708. They are (1) whether defendant knew the consequences of his plea, (2) the strength of the evidence of appellant's guilt, and (3) appellant's citizenship and immigration status. *See id.* at 712. Should the record demonstrate affirmatively that appellant is a citizen of the United States, the error is harmless. *Lawrence v. State,* 306 S.W.3d 378, 379 (Tex. App.—Amarillo 2010, no pet.). However, if the record fails to affirmatively demonstrate

that appellant is a citizen of the United States, we may draw reasonable inferences from the facts in the record. *See VanNortrick,* 227 S.W.3d at 710.

Analysis

The record before the Court reveals that appellant had previously entered pleas of guilty to five different offenses in various counties in the State of Texas. The exhibits admitted during the punishment trial reflect pleas of guilty as follows:

1. Exhibit 7 - Plea of guilty to assault with bodily injury in Floyd County, Texas, on January 28, 2003 with the notation that appellant was duly admonished.

2. Exhibit 9 - Judgment in Hale County, Texas, for assault.

3. Exhibit 10 - Judgment revoking probation in Bexar County, Texas, reflecting plea of guilty entered on April 19, 2001.

4. Exhibit 11 - Judgment of guilt by jury trial on charge of assault in Hale County, Texas, dated December 8, 2001.

5. Exhibit 12 - Judgment on plea of guilty to offense of theft in Briscoe County, Texas, with the notation that "the defendant was admonished by the court of the consequences of said plea" dated October 27, 2010.

There is nothing in the record to lead to the conclusion that appellant was ever deported as a result of any of the convictions noted above. In fact, the inference from the dates of the convictions is that appellant remained in the State of Texas the entire time.

Further, the record reflects that appellant's aunt, Martha Torres, testified that she had known appellant since his birth. Likewise, appellant's mother, Esperanza Torres Luna, testified in his behalf. The mother's testimony does not address the place of appellant's birth. The record also reflects that, during the colloquy with the trial court

prior to entering his plea of guilty, appellant stated that he went to the 11th grade in school and that was in the United States.

During voir dire examination, appellant's trial counsel made the following statement to the jury panel:

> I need to know that Mr. Luna is going to get a fair shake in this trial today. This is his right as a citizen of the United States.

The statement of trial counsel is not a substitute for admissible evidence, yet we may consider the statement in our overall review of the record to ascertain whether the appellant understood the consequences of entering a plea of guilty. *See Burnett v. State,* 88 S.W.3d 633, 641 (Tex. Crim. App. 2002). *Burnett* involved a situation in which the trial court did not admonish the defendant regarding the proper range of punishment. In reviewing the entire record to ascertain whether the defendant understood the consequences of his plea, the Texas Court of Criminal Appeals cited to the numerous times the proper range of punishment was referred to during the voir dire of the jury panel to determine that the defendant did understand the consequences of his plea of guilty. *See id.*

This record provides the Court with enough facts that we may infer that appellant was a citizen of the United States. *See VanNortrick,* 227 S.W.3d at 710. Accordingly, the failure of the trial court to admonish appellant pursuant to article 26.13 was not harmful. *See* TEX. R. APP. P. 44.2(b).

Further, even if the record did not support the finding that appellant was a citizen of the United States, from our review of the total record, we are convinced that appellant understood the consequences of his plea of guilty. *See VanNortrick,* 227 S.W.3d at

709. Accordingly, we have confidence that the failure to admonish appellant regarding any adverse consequences of a plea of guilty on his citizenship status would not have altered appellant's decision to plead guilty. *See id.* at 708. The error of the trial court was, therefore, harmless. *See* TEX. R. APP. P. 44.2(b). Appellant's first issue is overruled.

Ineffective Assistance of Counsel

By his second issue, appellant contends that he received ineffective assistance of counsel. Appellant's complaint is twofold: (1) trial counsel's failure to advise appellant of the consequences of a plea on his citizenship status or possibility of deportation was ineffective representation, and (2) trial counsel was not prepared and should have requested a continuance.

Regarding the second of appellant's ineffective assistance allegations, his position seems to be centered on the time line between the time counsel was appointed to represent him, April 27, 2015, and the date on which he ultimately went to trial, June 2, 2015. According to appellant, some twenty-six days after appointment, trial counsel admitted in a hearing before the trial court that he had not discussed the facts of the case with him. Additionally, appellant contends that there was bad blood between him and trial counsel arising from some prior dealings. We note that these matters were discussed with the trial court during a hearing on trial counsel's motion to withdraw. It is of note that when discussing his prior dealings with trial counsel, appellant represented to the trial court that he was willing to work with trial counsel. After hearing these facts, the trial court denied the motion to withdraw.

Standard of Review and Applicable Law

The United States Constitution's guarantee of the right to counsel encompasses the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In determining whether counsel's representation was so inadequate as to violate a defendant's Sixth Amendment right to counsel, Texas courts apply the two-pronged test enunciated in *Strickland*. *See Hernandez v. State*, 726 S.W.2d 53, 55 (Tex. Crim. App. 1986) (en banc). Judicial review of an ineffective assistance of counsel claim must be highly deferential, and there is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689. An appellant claiming ineffective assistance of counsel bears the burden of proving by a preponderance of the evidence that (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the appellant. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Failure to make the required showing of either deficient performance or sufficient prejudice is fatal to an ineffectiveness claim. *See id.*

The "right to effective assistance of counsel merely ensures the right to reasonably effective [not perfect] assistance." *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006) (quoting, with alteration, *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984) (en banc)). This right does not mean errorless or perfect counsel whose competency of representation is to be judged by hindsight. *See Ingham*, 679 S.W.2d at 509. "Isolated instances in the record reflecting errors of omission or commission do not render counsel's performance ineffective, nor can ineffective

assistance of counsel be established by isolating one portion of trial counsel's performance for examination." *Robertson*, 187 S.W.3d at 483 (quoting *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992) (en banc)). Counsel's performance is judged by "the totality of the representation," and "judicial scrutiny of counsel's performance must be highly deferential" with every effort made to eliminate the distorting effects of hindsight. *Id.* The *Strickland* court cautioned us to avoid an intrusive post-trial inquiry into attorney performance because such an inquiry would encourage the proliferation of ineffectiveness challenges. *Id.* (citing *Strickland*, 466 U.S. at 690). Additionally, claims of ineffective assistance of counsel must be firmly rooted in the record and the record must affirmatively demonstrate the meritorious nature of the claim. *See Goodspeed v. State,* 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

Analysis

Initially, we observe that, in addressing the previous issue, we have found against appellant regarding the failure of the trial court to admonish him regarding the consequences of pleading guilty on his citizenship status. Therefore, we cannot find trial counsel ineffective for a failure to advise appellant about the deportation consequences of a plea of guilty. *Cf. Morales v. State,* 910 S.W.2d 642, 646–47 (Tex. App.—Beaumont 1995, pet. ref'd) (holding, on dissimilar facts, that failure to advise a defendant about deportation consequences of a plea of guilty was ineffective representation).

Appellant next contends that, because his trial counsel was not prepared, he was ineffective in addressing the conflict from the arresting officer's initial report that the

amount of methamphetamine was .01 grams and the Department of Public Safety lab report that concluded the amount of methamphetamine was .22 grams. As appellant's theory goes, trial counsel was ineffective in this regard because he did not object to the admission of Exhibit 6, the lab report, nor did he call the DPS chemist to cross-examine him as to the large discrepancy. We note that the record reflects that, upon cross-examination of the arresting officer, trial counsel elicited testimony that the methamphetamine as weighed by the officers was .01 grams. The subject of the weight of the drugs was revisited by trial counsel on the occasion of additional cross-examination after the State elicited testimony that the lab report came back at .22 grams. The record is silent about why trial counsel agreed to stipulate as to the DPS lab report.

The record before us reflects that no motion for new trial was filed. Therefore, we have nothing in the record regarding why trial counsel conducted his defense in the manner that he did. Thus, we are faced with the question of whether the alleged ineffectiveness of trial counsel is demonstrated in the record before us. *See Goodspeed,* 187 S.W.3d at 392. As a reviewing Court, we are taught that trial counsel's conduct is entitled to a strong presumption of reasonableness. *See Strickland*, 466 U.S. at 689. Further, we are cautioned against using hindsight to second-guess trial counsel. *Robertson*, 187 S.W.3d at 483. Additionally, when the reasons for trial counsel's conduct do not appear from the record and there is a possibility of a legitimate trial strategy, we should defer to trial counsel's decision and deny the claim of ineffective assistance of counsel. *See Ortiz v. State,* 93 S.W.3d 79, 88–89 (Tex. Crim. App. 2002) (en banc).

From our review of the record, it is very possible that trial counsel was trying the case in an effort to avoid as much conflict with the State and its witnesses as possible. In so doing, trial counsel was attempting to cast his client in the best possible light, that is, by showing that appellant was accepting responsibility for commission of the offense while simultaneously trying to show that appellant was attempting to change his life choices. Thus, we cannot find that trial counsel's representation fell below an objective standard of reasonableness. *See Lopez,* 343 S.W.3d at 142. Accordingly, we overrule appellant's second issue.

Conclusion

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

Mackey K. Hancock
Justice

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