TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00076-CR

Darla Wilcox, Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 1 OF HAYS COUNTY
NO. 14-0106CR, THE HONORABLE ROBERT UPDEGROVE, JUDGE PRESIDING

MEMORANDUM OPINION

A jury found appellant Darla Wilcox guilty of misdemeanor driving while intoxicated, *see* Tex. Penal Code § 49.04, and the trial court placed her on community supervision for 18 months, *see* Tex. Code Crim. Proc. art. 42A.053. In a single point of error on appeal, appellant asserts that she suffered ineffective assistance of counsel at trial. We affirm the trial court's judgment of conviction.

BACKGROUND[1]

The jury heard evidence that on December 2, 2013, at approximately 2:30 in the morning, a patrol officer with the Kyle Police Department was driving on Interstate 35, just north

[1] Because the parties are familiar with the facts of the case, its procedural history, and the evidence adduced at trial, we provide only a general overview of the facts of the case here. We provide additional facts in the opinion as necessary to advise the parties of the Court's decision and the basic reasons for it. *See* Tex. R. App. P. 47.1, 47.4.

of Kyle, and observed appellant driving 90 miles per hour in a 70 mph zone as she approached him from behind. The officer testified that he noticed that she accelerated as she passed his patrol car, which he thought unusual, and then saw her change lanes without signaling. He initiated a traffic stop for the traffic violations he observed. According to the officer, on making contact with appellant, he noted "typical indicators that [police] would look for in a possibly intoxicated driver"—he detected "a really strong odor of an alcoholic beverage coming from her breath" and perceived her "red and bloodshot eyes." He said that during their encounter, appellant provided inconsistent explanations for her driving and changed her story about where she was coming from. The officer testified that based on his police experience with intoxicated drivers and his observations of appellant's inattentive driving at a high rate of speed, the typical indicators of intoxication that appellant exhibited, and the inconsistent and changing information that appellant provided, he concluded that appellant was intoxicated and arrested her for driving while intoxicated.

The record reflects that in January of 2014, appellant was formally charged by information with driving while intoxicated. A letter of representation in the record shows that in April of 2014, appellant hired an attorney to represent her on this charge. The record shows that in March of 2016, after multiple court settings, the parties filed a certificate of conference reflecting that appellant had rejected the State's plea bargain offer and requesting that the case be set for trial. The record demonstrates that the case went to trial in September of 2016, and, after a two-day trial, the jury found appellant guilty. A sentencing hearing before the court was scheduled for the following month. The record reflects that appellant retained new counsel and, three days before the sentencing hearing, filed a motion to substitute counsel and requested that her sentencing be

postponed. The court's docket sheet shows that the sentencing hearing was reset, and the record reflects that on that date, the trial court sentenced appellant to 180 days in the county jail, imposed a $500 fine, and placed appellant on community supervision for 18 months.

Appellant filed a motion for new trial complaining that her first retained attorney rendered ineffective assistance of counsel.[2] No supporting affidavits were attached to the motion. The trial court conducted a hearing on the motion. Appellant was the only witness to testify; no affidavits or other exhibits were offered or admitted. After the hearing, the trial court signed an order denying the motion for new trial.

DISCUSSION

In her sole point of error, appellant contends that her trial attorney rendered ineffective assistance of counsel because, according to appellant, he failed to adequately prepare for trial and did not adequately communicate the State's plea bargain offer to her.

To establish ineffective assistance of counsel, an appellant must demonstrate by a preponderance of the evidence both deficient performance by counsel and prejudice suffered by the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Nava v. State*, 415 S.W.3d 289, 307 (Tex. Crim. App. 2013). The appellant must first demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687–88; *Nava*, 415 S.W.3d at 307. The appellant must then show the existence of a reasonable probability—one sufficient to undermine confidence in the outcome—that the result of the

[2] The motion for new trial was filed by appellant's second retained attorney, the attorney she hired before the sentencing hearing.

proceeding would have been different absent counsel's deficient performance. *Strickland*, 466 U.S. at 694; *Nava*, 415 S.W.3d at 308. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700; *see Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010).

Appellate review of counsel's representation is highly deferential; we must "indulge in a strong presumption that counsel's conduct was *not* deficient." *Nava*, 415 S.W.3d at 307–08; *see Strickland*, 466 U.S. at 686. To rebut that presumption, a claim of ineffective assistance must be "firmly founded in the record," and "the record must affirmatively demonstrate" the meritorious nature of the claim. *See Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012); *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Rarely will the trial record by itself be sufficient to demonstrate an ineffective-assistance claim. *Nava*, 415 S.W.3d at 308. If trial counsel has not been afforded the opportunity to explain the reasons for his conduct, we will not find him to be deficient unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Id.* (quoting *Menefield*, 363 S.W.3d at 593, in turn quoting *Goodspeed*, 187 S.W.3d at 392).

As noted previously, a motion for new trial alleging ineffective assistance of counsel was filed in this case, and the trial court conducted a hearing on the motion. However, while appellant testified at the hearing, appellant did not call her trial attorney as a witness. Thus, the record is silent as to what trial counsel did to prepare for trial, and trial counsel was not afforded the opportunity to explain his preparation or what he communicated to appellant about the State's plea bargain offer.

Appellant bases her claim regarding trial counsel's lack of trial preparation on her impression of what should have occurred before trial and her perception that counsel's performance during trial was lacking. In her testimony at the hearing on the motion for new trial, appellant complained that her trial attorney did not meet with her in person to discuss the facts of her case (although her testimony reflected that they did have several face-to-face meetings, and she provided him information about what had happened), that counsel did not view the dash-cam video recording of the traffic stop with her (although she had seen it previously in connection with her ALR hearing and observed it playing at her attorney's office on an occasion when she was there),[3] and that counsel did not tell her specific questions that he would be asking her when she testified. According to appellant's testimony about the trial, appellant believed that her trial attorney was unprepared for trial based on counsel's lack of notes, his questioning during voir dire, his limited cross examination of the arresting officer and the fact that he consulted appellant to see if she had anything specific she wanted him to ask the officer, counsel's opening statement, and the fact that counsel did not make more objections during trial. However, appellant's ideas about what should have been done before trial and her criticism about what was done during trial do not constitute a demonstration, founded in the record, that trial counsel failed to adequately prepare for trial. *See Villa v. State*, 417 S.W.3d 455, 463 (Tex. Crim. App. 2013) ("[C]ounsel's alleged deficiency must be affirmatively demonstrated in the trial record."). The record does not reflect what actions trial counsel took to prepare for trial, let alone show that such actions were inadequate.

[3] The record also indicates that appellant watched the video with her attorney at his office after jury selection but before the trial continued with arraignment the next day.

As for what trial counsel communicated to appellant regarding the State's plea bargain offer, the record is incomplete. While appellant testified about her understanding of the plea bargain offer, her testimony reflects that she did not remember the full details of what trial counsel communicated to her about the plea bargain offer. She indicated what she "thought" and "believed" he had told her about the offer, and her testimony demonstrated that she could not remember some details, such as the fine amount. Appellant expressed that she did not "feel" that her trial attorney adequately counseled her at the time she rejected the plea bargain offer—about the details of the offer and the pros and cons of the offer—so that she could make "an intelligent decision" about the offer. However, her feelings do not constitute an affirmative demonstration, based on the record, that she was inadequately informed or counseled. The record here does not establish what the actual plea bargain offer was or what her trial attorney communicated to her about it. Rather, the record shows only what appellant understood it to be based on her uncertain memory.

The record before this Court is not sufficiently developed to allow us to conclude that trial counsel performed deficiently regarding the failure to adequately prepare for trial or the failure to adequately communicate the plea bargain offer. Appellant's trial attorney was not afforded the opportunity to describe how he prepared for trial or to explain why he prepared in that manner in order to respond to the claim of ineffectiveness. *See Menefield*, 363 S.W.3d at 593. Likewise, he was not afforded the opportunity to explain what he communicated to appellant about the State's plea offer or to clarify how he counseled appellant about the offer in order to respond to the claim of ineffectiveness. *See id.* Absent record evidence regarding counsel's strategy or reasoning, we will presume that he exercised reasonable professional judgment. *See Hill v. State*, 303 S.W.3d 863, 879

(Tex. App.—Fort Worth 2009, pet. ref'd); *Poole v. State*, 974 S.W.2d 892, 902 (Tex. App.—Austin 1998, pet. ref'd); *see also Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

Appellant has failed to rebut the strong presumption of reasonable assistance concerning counsel's trial preparation and communication of the plea bargain offer. Because the record is not sufficiency developed, we do not know what actions trial counsel engaged in to prepare for trial or to communicate the State's plea offer. Nor can we discern the reasons underlying counsel's actions or his decisions to engage in such actions. Consequently, we cannot conclude that such actions were inadequate or fell below an objective standard of reasonableness under prevailing professional norms. We decline to condemn trial counsel for unknown actions based on speculation or the assumption that whatever counsel's unknown actions were, they were not based on reasonable professional judgment. Further, given the incomplete record, we cannot conclude that counsel's unknown actions were "so outrageous that no competent attorney would have engaged in [them]." *See Goodspeed,* 187 S.W.3d at 392.

Accordingly, based on the record before us, we find that appellant has failed to demonstrate deficient performance on the part of her trial counsel. *See Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013) ("[U]nless there is a record sufficient to demonstrate that counsel's conduct was not the product of an informed strategic or tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'")

(quoting *Goodspeed*, 187 S.W.3d at 392). Thus, she has failed to establish ineffective assistance of counsel.[4] We overrule appellant's sole point of error.

CONCLUSION

Appellant's failure to demonstrate deficient performance on the part of her trial attorney defeats her claim of ineffective assistance of counsel. Accordingly, we affirm the trial court's judgment of conviction.

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Affirmed

Filed: February 9, 2018

Do Not Publish

[4] Because appellant failed to meet her burden on the first prong of *Strickland* regarding deficient performance, we need not consider the requirements of the second prejudice prong. *Lopez v. State*, 343 S.W.3d 137, 144 (Tex. Crim. App. 2011); *see also Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").