NUMBER 13-22-00099-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

BRADRICK GERLMAINE TANNER, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court
of Jackson County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Silva and Peña
Memorandum Opinion by Justice Peña

Appellant Bradrick Gerlmaine Tanner appeals his conviction for unlawful possession of a firearm by a felon, a second-degree felony. *See* TEX. PENAL CODE ANN. § 46.04. After a trial, a jury found Tanner guilty of unlawful possession of a firearm by a felon and acquitted him of theft of a firearm. *See id*. §§ 46.04, 31.03(e)(4)(C). The trial court sentenced Tanner to twenty years' imprisonment. In his sole issue, Tanner argues

that he received ineffective assistance of counsel because defense counsel failed to timely file a written election for the jury to assess punishment. We conclude that the judgment of the trial court should be affirmed in part and reversed in part, and the case should be remanded to the trial court.

I. Background

A grand jury indicted Tanner with one count of unlawful possession of a firearm by a felon, and one count of theft of a firearm. *See id*. §§ 46.04, 31.03(e)(4)(C). The indictment contained enhancement paragraphs alleging Tanner was a habitual felony offender. *See id.* § 12.42(d). On October 11, 2021, Tanner pleaded guilty to count one of the indictment and the State recommended dismissing count two and recommended a sentence of four years' confinement in the Texas Department of Criminal Justice (TDCJ) on count one. On February 17, 2022, Tanner appeared for sentencing, but the trial court "withdrew" the plea and set the case for trial on February 28, 2022, after Tanner raised questions concerning punishment. In particular, Tanner was concerned that the indictment needed to be amended to authorize the agreed-to term of confinement.[1] After Tanner's plea was "withdrawn," the case proceeded to a jury trial. As the State was concluding its portion of voir dire, the trial court addressed whether Tanner had properly elected to have the jury assess his punishment. According to defense counsel, it was his "understanding

[1] These concerns are reflected in a pre-trial application for writ of habeas corpus filed by Tanner in which he argued that the indictment would not authorize his plea because he had agreed to plead guilty to unlawful possession of a firearm by a felon, a second-degree felony, but the indictment contained two enhancement paragraphs which "raise[d] the issue of punishment as a habitual offender with one or more prior felony convictions." *See* Tex. Penal Code Ann. § 12.42(d) (providing that, upon conviction of a felony other than a state-jail felony, the minimum term of imprisonment for a habitual felony offender is twenty-five years). Tanner requested that the indictment be "amended to correctly reflect his range of punishment and allow him to serve" the sentence agreed upon on October 11, 2021. The record does not contain a ruling on this request, nor does it contain an amended indictment.

[that] the election needed to be made before the jury was empaneled." However, the trial court informed defense counsel that Tanner needed to make a written request for the jury to assess punishment before voir dire had begun. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (providing that punishment shall be assessed by the jury "where the defendant so elects in writing before the commencement of the voir dire examination of the jury panel").

Defense counsel stated that his client would be prejudiced if the trial court were to assess punishment because of the trial court's history with Tanner. In particular, defense counsel argued that

> on February 17th of 2022, Mr. Tanner was here to accept his punishment of four years TDC[J], and this Court would not accept it, for whatever reason. It was not accepted, and the record will also show that prior to him not accepting it, the Court inquired regarding the plea memorandum, the pleading to verify it was the correct range of punishment, which got us here to this trial setting, and Mr. Tanner had no intention of having the Court assess punishment, specifically based on the actions of the Court from February 17th of this year.[[2]]

The trial court ruled against Tanner on his request to have the jury assess punishment and voir dire continued. The day after the jury was selected, Tanner filed a written election for the jury to assess punishment and a motion to recuse the trial judge. In his recusal motion, defense counsel alleged that on February 17, 2022, after Tanner raised an issue with a possible discrepancy between the indictment and the plea agreement, the trial court unfairly rejected Tanner's plea because he was "not comfortable" proceeding to sentencing. The motion states that the trial court then

[2] As Tanner acknowledges, the appellate record does not contain the plea agreement or a transcript of the October 11, 2021 or February 17, 2022 hearings. However, there is a docket entry reflecting that on February 17, 2022, Tanner "appeared for sentencing, but raised question concerning punishment," after which the trial court "withdrew [Tanner]'s plea and set the case for trial on February 28, 2022."

"revoked [Tanner's] bond alleging he was a flight risk despite [Tanner] appearing for sentencing on that day" and making all but one of his court appearances, which was excused. Defense counsel stated that he also requested a continuance to prepare for trial, which was denied. In the recusal motion, defense counsel further alleged that the trial court denied a motion to suppress filed by Tanner without a hearing, denied his pre-trial writ of habeas corpus which raised issues with the sentencing, and impermissibly commented on Tanner's guilt in the presence of the jury during voir dire. Tanner's various motions were denied, and the trial commenced over his objections. The jury found Tanner guilty of unlawful possession of a firearm by a felon and acquitted him of theft of a firearm. Following a punishment hearing, the trial court sentenced Tanner to twenty years' imprisonment. This appeal followed.

II. Ineffective Assistance of Counsel

"The burden of proving ineffective assistance of counsel is on the appellant by a preponderance of the evidence." *Munoz v. State*, 24 S.W.3d 427, 434 (Tex. App.—Corpus Christi–Edinburg 2000, no pet.); *see Herrera v. Stahl*, 441 S.W.3d 739, 741 (Tex. App.—San Antonio 2014, no pet.) ("The particular meaning of 'preponderance of the evidence' in both civil and criminal cases means the greater weight and degree of credible evidence that would create a reasonable belief in the truth of the claim."). Claims of ineffective assistance of counsel are evaluated under the two-step analysis articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), and "an appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001).

The first step requires the appellant to demonstrate that defense counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. To satisfy this step, the appellant must identify the acts or omissions of counsel alleged to be ineffective assistance and affirmatively prove that they fell below the professional norm of reasonableness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Our review is highly deferential and we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. We will not find ineffectiveness by isolating any portion of defense counsel's representation but will judge the claim based on the totality of the representation and the particular circumstances of each case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Strickland*, 466 U.S. at 695.

The second *Strickland* prong requires the appellant to affirmatively prove prejudice from the deficient performance of his defense counsel. *Strickland*, 466 U.S. at 687; *see Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). "This means that the appellant must show a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). "If the deficient performance pertained to punishment, then prejudice would depend on a reasonable probability that the sentencer would have assessed a more lenient punishment absent the errors." *Swinney v. State*, 663 S.W.3d 87, 90 (Tex. Crim. App. 2022). "But if the deficient performance might have caused the defendant to waive a proceeding he was otherwise entitled to, then a

reasonable probability that the deficient performance caused the waiver fulfills the prejudice requirement." *Id.* (citations omitted).

Defense counsel is constitutionally ineffective where an appellant is "not given competent advice and was prevented from making an informed and conscious choice regarding his right to a jury trial." *Ex parte Walker*, 794 S.W.2d 36, 37 (Tex. Crim. App. 1990); *see White v. Johnson*, 180 F.3d 648, 652 (5th Cir. 1999) (noting that defense counsel provides "constitutionally deficient performance within the meaning of *Strickland*" when he fails to properly advise the defendant of his right to appeal, including the procedural requirements for asserting that right). Even if an appellant receives competent advice, defense counsel is ineffective if he "fail[s] to effectuate [appellant's] decision" to have the jury assess punishment. *Walker*, 794 S.W.2d at 37. In such a situation, "counsel's inaction render[s] [appellant's] decision meaningless." *Id*.

III. Discussion

A. Deficiency

Here, the record shows that while defense counsel was unaware of when to file Tanner's jury election as to punishment, counsel was aware that Tanner "had no intention of having the Court assess punishment." Regardless of whether defense counsel altogether failed to provide Tanner competent advice regarding the forum of punishment or provided delayed advice, Tanner was prevented from "making an informed and conscious choice," rendering Tanner's choice meaningless. *See Id*. Thus, defense counsel's conduct was constitutionally deficient "because the Sixth Amendment at a minimum guarantees an accused the benefit of trial counsel who is familiar with the applicable law." *Ex parte Lewis*, 537 S.W.3d 917, 921 (Tex. Crim. App. 2017) (cleaned

up); *see also Ex parte Williams*, 753 S.W.2d 695, 698 (Tex. Crim. App. 1988) (noting that "[t]o be reasonably likely to render reasonably effective assistance to his client, a lawyer must be sufficiently abreast of developments in criminal law aspects implicated in the case at hand"). As the United States Supreme Court explained in *Strickland*:

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty. . . . From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Strickland, 466 U.S. at 688 (citations omitted).

By being unfamiliar with the applicable law defense counsel failed his basic function "to assist" Tanner and he failed to fulfill his "overarching duty to advocate" Tanner's cause, leading to the deprivation of Tanner's legal right to a jury trial on punishment. *See Id*.; *ABA Standards for Criminal Justice* 4-1.2(b) (4th ed. 2015) ("The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with courage and devotion; [and] to ensure that constitutional and other legal rights of their clients are protected."); *Id.* 4-8.3(a) (noting that "[e]arly in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing," and that "[*d*]*efense counsel should become familiar with* . . . *applicable sentencing laws and rules*" (emphasis added)); *United States v. Gipson*, 985 F.2d 212, 215 (5th Cir. 1993) (finding defense counsel to be constitutionally deficient based on the *ABA Standards Relating to the Administration of Criminal Justice*).

Under these circumstances, defense counsel's failure to timely assert Tanner's right to have the jury assess punishment cannot be considered a strategic decision, as defense counsel's ignorance of the law deprived Tanner of the ability to reasonably rely on defense counsel to effectuate his desires. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (noting that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable," that "[t]his is so because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice," and that defense counsel's "failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes").

Accordingly, based on the totality of the representation and the particular circumstances of this case, we find that Tanner has shown that defense counsel's performance was constitutionally deficient. *See Thompson*, 9 S.W.3d at 813; *United States v. Kelley*, 318 Fed. App'x 682, 687-88 (10th Cir. 2009) (finding deficiency although appellant did not directly request an appeal because "the record convinces us that [appellant] reasonably demonstrated his interest in filing an appeal" by asking defense counsel if he would "take care of everything," and finding that defense counsel "should have realized that [appellant] was interested in a possible appeal").

B. Prejudice

After revealing that he did not know when to timely file the election to have the jury assess punishment, Tanner's defense counsel acknowledged that Tanner "had no intention of having the Court assess punishment," and specifically noted that the trial court's prior rejection of Tanner's plea was the reason he did not wish for the trial court to

assess punishment. After voir dire, Tanner filed an untimely motion to have the jury assess punishment, and a motion to recuse, which in effect argued that the trial court was biased and had acted unfairly towards Tanner, including by rejecting his guilty plea, revoking his bond, and denying defense counsel's motion to continue the trial date. Such a record is consistent with Tanner's intent not to have the trial court assess punishment.

Regardless of whether defense counsel failed to advise Tanner, or advised him and simply failed to effectuate Tanner's decision, given his clear intent to not have the trial court assess punishment, we conclude that Tanner has satisfied his burden of showing by a preponderance of the evidence that there is "a reasonable probability that the deficient performance [of defense counsel] caused the waiver" of his right to have the jury assess punishment. *See Swinney*, 663 S.W.3d at 90; *United States v. Rivas*, 450 Fed. App'x 420, 428–29 (5th Cir. 2011) (finding prejudice because the court "had little trouble concluding that if counsel had properly consulted with Rivas by either asking Rivas if he wanted to appeal or informing Rivas about the procedures and time limits to take an appeal . . . , Rivas would have timely appealed or, at minimum, expressed his desire to appeal to counsel by the . . . deadline"). Had defense counsel known when to file the election to have the jury assess punishment and adequately advised Tanner, there is a reasonable probability that Tanner would have timely exercised his right, and there is no basis on this record to conclude otherwise. *See Thompson v. United States*, 504 F.3d 1203, 1208 (11th Cir. 2007) (finding prejudice because the record showed that appellant was "dissatisfied with what he perceived to be a disparate sentence," and finding that "[h]ad counsel adequately consulted with him about an appeal, there is a reasonable

probability that [appellant] would have exercised his right to appeal," and that "there is no basis on this record to conclude otherwise"). We sustain Tanner's sole issue.

IV. Conclusion

We conclude that the judgment of the trial court should be affirmed in part and reversed in part, and the case should be remanded to the trial court. *See* TEX. CODE CRIM. PROC. ANN. art. 44.29(b) (providing for a new trial as to punishment only "on the basis of an error or errors made in the punishment stage of trial").

L. ARON PEÑA JR.
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed on the
18th day of January, 2024.