NO. 12-11-00093-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MERRICK DESMOND SMITH, APPELLANT	***§***	***APPEAL FROM THE 294TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***VAN ZANDT COUNTY, TEXAS***

MEMORANDUM OPINION

Merrick Desmond Smith appeals his conviction for possession of marihuana. In two issues, Appellant argues that he received ineffective assistance of counsel and that his guilty plea was not voluntarily, knowingly, or intelligently made. The State did not file a brief. We affirm.

BACKGROUND

A Van Zandt County grand jury indicted Appellant for the state jail felony offense of possession of marihuana in February 2010. Appellant pleaded guilty to that offense and to another offense in December 2010 without a plea agreement. Following a sentencing hearing, the trial court assessed a sentence of confinement in a state jail for two years and a fine of $2,500. The court did not suspend the sentence.

Appellant filed a motion for new trial. At the hearing on his motion, Appellant testified that his attorney told him that he should plead guilty without a plea agreement and that the trial court would give him "probation." The parties agreed that the State could supplement the record of the hearing with an affidavit from trial counsel. The State filed an affidavit from trial counsel in which counsel denied that he told Appellant that the judge "was going to give him probation." Appellant's motion for new trial was overruled by operation of law. This appeal followed.

VOLUNTARINESS OF GUILTY PLEA

In two issues, Appellant argues that his guilty plea was involuntary because his attorney told him that he would receive community supervision if he pleaded guilty and that his attorney's advice was ineffective assistance of counsel.

Applicable Law

Claims of ineffective assistance of counsel are evaluated under the two step analysis articulated in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). The first step requires an appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See* ***Strickland***, 466 U.S. at 688, 104 S. Ct. at 2065; ***McFarland v. State***, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). Counsel's representation is not reviewed for isolated or incidental deviations from professional norms, but on the basis of the totality of the representation. *See* ***Strickland***, 466 U.S. at 695, 104 S. Ct. at 2069.

The second step requires the appellant to show prejudice from the deficient performance of his attorney. *See* ***Hernandez v. State***, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, an appellant must show that there is a reasonable probability that the result of the proceeding would have been different but for counsel's deficient performance. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068.

We begin with the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See* ***Jackson v. State***, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). An appellant has the burden of proving ineffective assistance of counsel and must overcome the presumption that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id***. (internal quotations omitted).

An involuntary guilty plea must be set aside. *See* ***Boykin v. Alabama***, 395 U.S. 238, 244, 89 S. Ct. 1709, 1713, 23 L. Ed. 2d 274 (1969); ***Williams v. State***, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975). To determine if a plea is voluntary, we consider the record as a whole. ***Williams***, 522 S.W.2d at 485. In some instances, a guilty plea may be involuntary if counsel conveys erroneous information to the defendant. *See* ***Tollett v. Henderson***, 411 U.S. 258, 266-67, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973); ***Ex parte Moody***, 991 S.W.2d 856, 858 (Tex. Crim. App. 1999) ("Even when a defendant wholly relies upon erroneous advice of counsel, the magnitude of the

error as it concerns the consequences of the plea is a relevant factor; not every reliance on erroneous advice is sufficient to justify rendering the plea vulnerable to collateral attack."); ***Ex parte Griffin***, 679 S.W.2d 15, 17 (Tex. Crim. App. 1984).

We review the denial of a motion for new trial for an abuse of discretion. *See* ***Holden v. State***, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006); ***Charles v. State***, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004). A trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling. ***Holden***, 201 S.W.3d at 763.

Analysis

Appellant asserts that his plea was involuntary and he received ineffective assistance of counsel because his attorney told him that he would receive a suspended sentence and be placed on community supervision if he pleaded guilty.

The record in this case shows that the trial court admonished Appellant both orally and in writing about the consequences of his open plea of guilty. Specifically, the written plea documents, which Appellant signed, state that the range of punishment was confinement in the state jail for a term of not more than two years or less than 180 days. The trial court explained the range of punishment to Appellant prior to his plea, and he stated that he understood it. When questioned by his attorney prior to sentencing, Appellant acknowledged that he had rejected a plea agreement that would have required a custodial sentence, and he agreed with his attorney's statement that he wished to "ask the judge to consider a probated sentence." He acknowledged that his attorney had told him that he could be sentenced to prison and said that he understood that his attorney did not know "if the judge will sentence [him] to prison or if she will grant [him] probation."

By contrast, Appellant testified at the hearing on his motion for new trial that his attorney had told him to go along with whatever was said at the plea hearing and that he would be placed on community supervision. Trial counsel's affidavit flatly contradicts this part of Appellant's account.

To show that a guilty plea is involuntary due to ineffective assistance of counsel, the defendant must show that counsel's advice was outside the range of competency demanded of attorneys in criminal cases and that, but for counsel's erroneous advice, the defendant would not have pleaded guilty and would instead have gone to trial. *See* ***Ex parte Harrington***, 310 S.W.3d

452, 458 (Tex. Crim. App. 2010). Assuming that a false promise of community supervision would render a guilty plea involuntary, we defer to the implicit finding of the trial court that such a promise was not made. *See*, *e.g.*, ***Ex parte Wheeler***, 203 S.W.3d 317, 325–26 (Tex. Crim. App. 2006) ("[R]eviewing courts defer to the trial court's implied factual findings that are supported by the record, even when . . . the evidence is submitted in written affidavits."); ***Charles***, 146 S.W.3d at 213. The credibility of witnesses who testify at a motion for new trial hearing is primarily a determination for the trial court. *See* ***Lewis v. State***, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). And we must view the evidence in the light most favorable to the trial court's ruling and presume that all reasonable factual findings that could have been made against the losing party were made against that losing party. *See* ***Charles***, 146 S.W.3d at 213.

In light of the standard of review, we hold that the trial court did not abuse its discretion when it overruled the motion for new trial. The trial court could have reasonably decided that Appellant's testimony was inaccurate, concluded that Appellant understood the consequences of his plea at the time it was given, and found that his plea had been freely, intelligently, and voluntarily made. Accordingly, Appellant has not shown that his attorney's representation failed to meet professional norms. We overrule Appellant's first and second issues.

DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered September 12, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, Jr.

(DO NOT PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

SEPTEMBER 12, 2012

NO. 12-11-00093-CR

MERRICK DESMOND SMITH,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 294th Judicial District Court
of Van Zandt County, Texas. (Tr.Ct.No. CR10-00066)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.