NO. 12-16-00096-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

LONNIE EDWARD SMITH, JR., APPELLANT	***§***	***APPEAL FROM THE 241ST***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Lonnie Edward Smith, Jr. appeals his conviction for the offense of delivery of a controlled substance. In one issue, Appellant contends that he received ineffective assistance of counsel. We affirm.

BACKGROUND

Appellant was charged by indictment with two counts of delivery of a controlled substance. The State elected to proceed on one count of delivery of a controlled substance, namely oxycodone, in an amount of one gram or more but less than four grams.[1] Appellant pleaded "not guilty," and the matter proceeded to a jury trial.

At trial, the evidence showed that Appellant was twice recorded selling drugs to a confidential informant working with the Tyler Police Department. Ultimately, the jury found Appellant "guilty" as charged. Appellant pleaded "true" to two prior felony convictions, increasing his punishment range to imprisonment for twenty-five to ninety-nine years or life.[2] The jury assessed his punishment at imprisonment for life. This appeal followed.

[1] Delivery of oxycodone in an amount of one gram or more but less than four grams is a second degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102, 481.112(c) (West 2010).

[2] TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2015).

INEFFECTIVE ASSISTANCE OF COUNSEL

In Appellant's sole issue, he contends that he received ineffective assistance of counsel. Specifically, Appellant contends that his trial counsel was ineffective when he failed to (1) object to the State's closing argument, and (2) request a proper instruction in response to a jury question.

Standard of Review and Applicable Law

In reviewing an ineffective assistance of counsel claim, we follow the United States Supreme Court's two-pronged test in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See* ***Hernandez v. State***, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986). Under the first prong of the ***Strickland*** test, an appellant must show that counsel's performance was deficient. *See* ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064. This requires the appellant to demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See* ***id.***, 466 U.S. at 688, 104 S. Ct. at 2064-65. To satisfy this requirement, the appellant must identify the acts or omissions of counsel alleged to constitute ineffective assistance and affirmatively prove that they fell below the professional norm for reasonableness. *See* ***McFarland v. State***, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

In any case considering the issue of ineffective assistance of counsel, we begin with a strong presumption that counsel was effective. *See* ***Jackson v. State***, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See* ***id.***; *see also* ***Okonkwo v. State***, 398 S.W.3d 689, 693 (Tex. Crim. App. 2013). Appellant must rebut this presumption by presenting evidence illustrating the reasons for counsel's actions and decisions. *See* ***Jackson***, 877 S.W.2d at 771. Appellant cannot meet this burden if the record does not affirmatively support the claim. *See* ***Menefield v. State***, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012). An ineffective assistance claim cannot be built upon retrospective speculation. ***Bone v. State***, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Moreover, before being condemned as unprofessional and incompetent, counsel should be given an opportunity to explain his actions. *See* ***id.*** at 836. Thus, absent a properly developed record, an ineffective assistance claim must usually be denied as speculative. *See* ***id.*** To successfully argue that trial counsel's failure to object to the state's argument constitutes ineffective assistance, an appellant must show that the trial court would have erred in overruling the objection. ***Vaughn v. State***, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996).

Under the second prong of the ***Strickland*** test, the appellant must affirmatively prove prejudice from the deficient performance of his counsel. *See* ***Strickland***, 466 U.S. at 687, 104 S.

Ct. 2064; ***Burruss v. State***, 20 S.W.3d 179, 186 (Tex. App.–Texarkana 2000, pet. ref'd). The appellant must prove that his counsel's errors, judged by the totality of the representation and not by isolated instances of error, denied him a fair trial. ***Burruss***, 20 S.W.3d at 186. It is not enough for the appellant to show that the errors had some conceivable effect on the outcome of the proceedings. ***Id.*** He instead must show that there is a reasonable probability that, but for his counsel's errors, the outcome would have been different either as to a reasonable doubt about his guilt or the extent of his punishment. *See* ***id.***; *see also* ***Bone***, 77 S.W.3d at 836. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong v. State***, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000).

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. ***Thompson v. State***, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Appellant must prove both prongs of the ***Strickland*** test by a preponderance of the evidence in order to prevail. ***Tong***, 25 S.W.3d at 712.

Failure to Object to the State's Closing Argument

Appellant first argues that his trial counsel was ineffective for failing to object to certain closing arguments by the State. Specifically, the State argued in its initial closing argument at the punishment phase as follows:

> The way the law works is anything past sixty is fifteen years' parole eligibility, okay? So then what's the difference between a life sentence and a sixty-year sentence if he's eligible for parole at fifteen no matter what?
>
> Well, for one, it sends a message to the community that we're not going to stand for this type of repeat criminal activity, but it also ensures that this person will be monitored and supervised for the rest of his life, period, no matter what. And I can't really think of anybody who needs to be monitored and supervised for the rest of his life more than Lonnie Smith. That's the only way you're going to ensure that.

The State similarly argued in its final closing argument as follows:

> [T]here's one thing we do know, and that is that there's no guarantee what the parole board is going to do. It's a quarter time offense. We know what the eligibility is. But what we can guarantee is that with a life sentence, at a minimum Lonnie Smith will be supervised for the remainder of his natural life. That's what a life sentence means. What the parole board does between now and then is up to them.

Appellant's trial counsel did not object to the statements.

On appeal, Appellant contends that these statements are improper argument because they encouraged the jury to improperly apply parole law in sentencing him. There are four permissible areas of jury argument: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) pleas for law enforcement. ***Felder v. State***, 848 S.W.2d 85, 94-95 (Tex. Crim. App. 1992). An argument that accurately restates the law given in the jury charge is not improper. ***Taylor v. State***, 233 S.W.3d 356, 359 (Tex. Crim. App. 2007).

The code of criminal procedure requires trial courts to give juries certain instructions regarding parole eligibility. In a case where, as here, the state seeks to enhance punishment under penal code section 12.42(d), the trial court must charge the jury as follows:

> Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed or 15 years, whichever is less. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(b) (West Supp. 2015). The trial court's charge in this case contains these instructions, with the exception of certain parts of the third paragraph.[3] Appellant's arguments focus on the last paragraph.

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[3] The trial court's charge precisely tracks the statute except in the third paragraph, which reads as follows:

> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-quarter (1/4) of the sentence imposed, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.

Appellant apparently construes the last sentence of the instruction's final paragraph to mean that a jury cannot consider a defendant's parole eligibility when determining his sentence. This construction fails to give meaning to the first sentence of the paragraph. A more reasonable construction is that the jury may consider a defendant's parole eligibility in determining his sentence,[4] but it must not speculate about when or whether he will actually be awarded parole.[5] ***Waters v. State***, 330 S.W.3d 368, 373-74 (Tex. App.—Fort Worth 2010, pet. ref'd).

Here, the State's argument encouraged the jury to consider the length of time Appellant would be on parole if it were awarded. It did not encourage the jury to speculate about when or whether Appellant would be awarded parole. *See* ***id.*** Rather, the State discouraged such speculation by informing the jury that "there's no guarantee what the parole board is going to do." Thus, the State encouraged the jury to consider Appellant's parole eligibility, which it could properly consider. *See* ***id.***; TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(b). Furthermore, the State's argument that the jury should ensure Appellant will be supervised or imprisoned for the rest of his life was proper argument as a plea for law enforcement. *See* ***Felder***, 848 S.W.2d at 94-95. Accordingly, the trial court would not have erred in overruling an objection to the argument, and Appellant's trial counsel was not ineffective for failing to object. *See* ***Vaughn***, 931 S.W.2d at 566.

Even assuming the argument was improper, Appellant has not met his burden of rebutting the presumption that his trial counsel's actions and decisions were reasonably professional and motivated by sound trial strategy. *See* ***Jackson***, 877 S.W.2d at 771. In assessing whether Appellant has met this burden, we initially note that although he indicated after the verdict was read that he was not satisfied with his counsel's representation, we have no record that he filed a motion for new trial on this ground. Nor do we have a record in which Appellant's trial counsel was asked to articulate his reasoning or trial strategy for his decisions. Thus, our review of Appellant's complaint is impacted by the state of the record. *See* ***Bone***, 77 S.W.3d at 836.

Absent evidence that trial counsel's performance was not reasonably based in sound trial strategy, we consider ways in which his actions were within the bounds of professional norms. ***Mata v. State***, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007). The assessment of whether trial

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Appellant does not argue that he was harmed by the third paragraph's failure to precisely track the statute. Therefore, we need not address whether error arises from this failure to track the statute.

[4] "You may consider the existence of the parole law[.]"

[5] "You are not to consider the manner in which the parole law may be applied to this particular defendant."

counsel was ineffective must be made according to the facts of each case. ***Thompson***, 9 S.W.3d at 813. Our review of the record reveals that, despite Appellant's "not guilty" plea, the jury was presented with strong evidence of his guilt.[6]

Gregory Harry, a Tyler Police Department special investigations detective, learned that Appellant was allegedly selling drugs. To investigate the allegation, Detective Harry obtained the assistance of a confidential informant who knew Appellant. Under Harry's supervision, the confidential informant purchased oxycodone pills from Appellant and recorded the transaction. The pills were tested and found to contain oxycodone.

The record further reveals that Appellant has a substantial criminal history. He pleaded "true" to two prior felony convictions. Moreover, the State presented evidence that Appellant was convicted of several additional offenses beginning in his teens and continuing into his fifties.[7] The jury also heard testimony that Appellant brought two young children to a drug transaction with the confidential informant on a separate occasion, and he referred to the children as his "pillers."

Through the testimony of his sister, Patricia McGregor, Appellant attempted to establish that he had a rough childhood. McGregor testified that Appellant's parents were alcoholics and that he spent most of his childhood with his grandparents, who forced him to work rather than attend school. Appellant's grandmother often physically abused him. McGregor stated that she believes Appellant does not know right from wrong and will never learn.

Based on our review of the record, the State's case for a long prison term was strong, and Appellant's case for a short term was weak. However, Appellant's trial counsel constructed an argument for a short prison term by using the State's parole argument. In his closing argument, he reminded the jury of the State's argument that Appellant should be monitored for life, and then argued that this could be accomplished through the assessment of a minimum sentence. Trial counsel argued that if the jury assessed the minimum sentence of twenty-five years, Appellant would not be eligible for parole until he was in his mid-sixties. He further explained that Appellant would be monitored and supervised until he was in his eighties, which counsel argued was beyond his life expectancy. Thus, Appellant's trial counsel used the State's premise that Appellant needed

[6] Appellant does not challenge the legal sufficiency of the evidence or trial counsel's performance during the guilt/innocence phase. Nevertheless, we include the evidence establishing Appellant's guilt because his trial counsel's strategic decisions for defending him at the punishment phase are impacted by the strength of the State's case. *See* ***Thompson***, 9 S.W.3d at 813.

[7] Appellant was fifty-eight years old at the time of trial.

parole supervision for the rest of his life to support his argument that the minimum punishment was sufficient.

While that argument did not carry the day, we cannot say, based on the status of the record before us, that Appellant's trial counsel was ineffective for failing to object to the State's closing argument regarding parole and instead transforming it into an argument for a minimum sentence for his client. *See* ***Hubbard v. State***, 770 S.W.2d 31, 45 (Tex. App.—Dallas 1989, pet. ref'd) ("The decision whether to object to particular statements in closing argument is frequently a matter of trial strategy."); *but see* ***Branch v. State***, 335 S.W.3d 893, 909 (Tex. App.—Austin 2011, pet. ref'd) (trial counsel ineffective for failing to object to improper closing argument regarding parole where counsel's testimony at hearing on motion for new trial revealed decision was not based on trial strategy). Therefore, we conclude that Appellant has not met his burden of rebutting the presumption that his trial counsel was effective. *See* ***Jackson***, 877 S.W.2d at 771.

Failure to Request Proper Response to Jury Question

Next, Appellant argues that his trial counsel was ineffective because he failed to request a proper parole instruction in response to a jury question. During punishment deliberation, the jury asked the trial court whether parole was possible with a life sentence. The jury also asked the trial court to explain the difference between a ninety-nine-year sentence and a life sentence. The trial court responded that it could not give any further instructions. Instead, the trial court referred the jury to the charge and instructed them to continue their deliberations. Appellant's trial counsel did not request any additional instruction.

On appeal, Appellant contends that his trial counsel was ineffective for failing to request that the jury be instructed, "You are not to consider the manner in which the parole law may be applied to this particular defendant." We disagree. First, the jury's consideration of whether parole is possible with a life sentence was proper. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(b); ***Waters***, 330 S.W.3d at 373-74; *see also* ***Taylor***, 233 S.W.3d at 359 (jury argument explaining how parole eligibility rules apply to particular sentences was proper).

Second, even assuming that it was improper, the trial court's response directed the jury to the charge, which contains the same instruction Appellant contends his counsel should have requested. The trial court's punishment charge included the following instructions:

> Under the law applicable in this case, for the offense of Manufacture/Delivery of a Controlled Substance, namely, Oxycodone, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities

> may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-quarter (1/4) of the sentence imposed, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot be accurately predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Thus, by instructing the jury to refer to the charge, the trial court directed it to the instruction that it was not to consider the manner in which the parole law may be applied to Appellant. Appellant concedes that the charge "contain[s] a mostly proper parole instruction and include[s] the admonition that the jury was prohibited from considering how parole law and good time would be applied to [Appellant]." The trial court's instruction referring the jury to the charge is presumed to have been followed. *See* ***Luquis v. State***, 72 S.W.3d 355, 366 (Tex. Crim. App. 2002). Because the charge contains the instruction, the trial court would not have erred in overruling trial counsel's request to give the instruction again in response to the jury questions. Consequently, Appellant's trial counsel was not ineffective for failing to make the request. *See* ***Vaughn***, 931 S.W.2d at 566.

Conclusion

Because Appellant failed to establish that trial counsel's performance was deficient, he has failed to carry his burden of showing that he received ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 687, 104 S. Ct. 2064; ***Tong***, 25 S.W.3d at 712. Accordingly, we overrule Appellant's sole issue.

DISPOSITION

Having overruled Appellant's sole issue, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered June 7, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 7, 2017

NO. 12-16-00096-CR

LONNIE EDWARD SMITH, JR.,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 241st District Court
of Smith County, Texas (Tr.Ct.No. 241-0048-16)

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., Hoyle, J., and Neeley, J.