NO. 12-17-00159-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CHRISTOPHER LYNE JOHNSON, APPELLANT	***§***	***APPEAL FROM THE 369TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Christopher Lyne Johnson appeals his conviction for aggravated assault with a deadly weapon. In his sole issue, Appellant contends that he received ineffective assistance of counsel. We affirm.

BACKGROUND

Appellant was indicted for aggravated assault with a deadly weapon. Appellant made an open plea of "guilty" to the offense. At the plea hearing, the trial court admonished Appellant, explained that it could sentence him to imprisonment or place him on deferred adjudication community supervision, and ordered a presentence investigation.[1]

At the sentencing hearing, the record showed that Appellant cut the victim's throat with a knife. Although the knife was sheathed during the assault, Appellant applied enough force so that the knife's tip pierced the sheath along with the victim's throat, causing profuse bleeding. Realizing the magnitude of the injury he caused, Appellant transported the victim to the hospital. The trial court ultimately found Appellant guilty of the charged offense, sentenced him to eight

[1] Appellant initially elected that that the jury assess his punishment, but he later amended his request and elected that the trial court assess his punishment.

years of imprisonment, and assessed restitution to the victim in the amount of $6,000.00 for her medical bills incurred in connection with the assault. This appeal followed.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his sole issue, Appellant contends that he received ineffective assistance of counsel.

Standard of Review and Applicable Law

In reviewing an ineffective assistance of counsel claim, we apply the United States Supreme Court's two-pronged test established in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ***Hernandez v. State***, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986). To prevail on an ineffective assistance of counsel claim, an appellant must show that (1) trial counsel's representation was deficient, and (2) the deficient performance prejudiced the defense to the extent that there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064. An appellant must prove both prongs of ***Strickland*** by a preponderance of the evidence. ***Tong v. State***, 25 S.W.3d 707, 712 (Tex. Crim. App. 2002). Failure to make the required showing of either deficient performance or sufficient prejudice defeats an appellant's ineffectiveness claim. ***Thompson v. State***, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

To establish deficient performance, an appellant must show that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See* ***Strickland***, 466 U.S. at 687–88, 104 S. Ct. at 2064–65. "This requires showing that [trial] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.***, 466 U.S. at 687, 104 S. Ct. at 2064. To establish prejudice, an appellant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. ***Id.***, 466 U.S. at 694, 104 S. Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** The prejudice prong, as it relates to the incorrect advice of counsel on community supervision eligibility, requires a showing that: (1) the defendant was initially eligible for community supervision; (2) counsel's advice was not given as a part of a valid trial strategy; (3) the defendant's election of the assessor of punishment was based upon his attorney's erroneous advice; and (4) the results of the proceeding would have been different had his attorney correctly informed him of the law. ***Burch v. State***, 541 S.W.3d 816, 820 (Tex.

Crim. App. 2017). When a reviewing court may more efficiently dispose of an ineffective assistance of counsel claim on the prejudice prong without determining whether counsel's performance was deficient, the court should follow that course. *See* ***Strickland***, 466 U.S. at 697, 104 S. Ct. 2069.

Review of trial counsel's representation is highly deferential. *See* ***id.***, 466 U.S. at 689, 104 S. Ct. at 2065. In our review, we indulge a strong presumption that trial counsel's actions fell within a wide range of reasonable and professional assistance. ***Id.*** It is the appellant's burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ***Id.***; ***Tong***, 25 S.W.3d at 712. Moreover, "[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." ***Thompson***, 9 S.W.3d at 813 (citation omitted). When, as here, no record specifically focusing on trial counsel's conduct was developed at a hearing on a motion for new trial, it is extremely difficult to show that counsel's performance was deficient. *See* ***Bone v. State***, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002); ***Thompson***, 9 S.W.3d at 814. Absent an opportunity for trial counsel to explain the conduct in question, we will not find deficient performance unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." ***Goodspeed v. State***, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (citation omitted).

Discussion

Appellant first argues that trial counsel failed to inform him that the trial court could sentence him only to imprisonment or deferred adjudication community supervision and not simply a "straight" term of community supervision, and that had he known of this limitation, he would have elected that the jury assess his punishment.

At the conclusion of the plea hearing, the trial court deferred a finding of guilt and ordered a presentence investigation and report (PSI). The trial court did not indicate that it considered placing Appellant on "straight" community supervision, a disposition that it could not make. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.054(b) (West 2018) (stating that trial court may not place defendant on straight community supervision when finding that he used or exhibited deadly weapon during commission of offense). Instead, the trial court admonished Appellant that it could sentence him to a term of imprisonment or place him on deferred adjudication community supervision.

At the sentencing hearing, the State offered testimony from the victim, law enforcement, and the community supervision officer who conducted the PSI. Appellant also testified at the hearing. Defense counsel stated in his cross-examination of the victim that "[t]he possibilities that the Judge has is to put [Appellant] on probation, or to sentence him to a term of incarceration." When counsel referred to "probation," a common term used to describe community supervision, there is no indication that he meant anything other than deferred adjudication community supervision. *See* ***Burch***, 541 S.W.3d at 818 n.1 (explaining difference between "straight" community supervision and deferred adjudication community supervision); ***Ballard v. State***, 126 S .W.3d 919, 919 n.1 (Tex. Crim. App. 2004) (describing "community supervision" as general statutory term for what was commonly called "probation").

Even assuming that defense counsel provided incomplete disclosure of all the ramifications of Appellant's punishment election, Appellant failed to show that he was prejudiced thereby because the record does not reflect that he elected that the trial court assess his punishment solely because of incomplete or incorrect legal advice. *See* ***State v. Recer***, 815 S.W.2d 730, 731–32 (Tex. Crim. App. 1991) (holding no ineffective assistance when counsel failed to inform defendant that trial court could not grant community supervision under similar circumstances), *reaff'd*, ***Miller v. State***, 548 S.W.3d 497, 502 (Tex. Crim. App. 2018) (stating that "we reaffirm our ***Recer*** opinion" after it had been called into doubt by prior opinions). Instead, the record shows that his punishment decision was also based on other factors, and as a result, the record does not reflect "that the decision to have the judge assess punishment was not a valid tactical strategy[.]" ***Id.*** at 732. Particularly, since deferred adjudication community supervision does not result in a finding of guilt or conviction, and the trial court indicated that it considered that disposition as a possibility, this course of conduct was a valid trial strategy. *See* ***Donovan v. State***, 68 S.W.3d 633, 636 (Tex. Crim. App. 2002) (explaining that placement on deferred adjudication community supervision is not a finding of guilt or conviction, which is advantage over straight community supervision).

Appellant also argues that counsel was deficient in neglecting to object to the trial court's alleged failure to read the PSI prior to sentencing him. Appellant contends that the trial court "could not remember if there had been a trial or open plea," "obviously the [c]ourt had not even scanned through the PSI," and there was no indication that the court "read it prior to sentence or

that counsel requested that the [c]ourt do so." The record does not support Appellant's contentions.

Appellant relies on the following colloquy:

> [The trial court]: Are you set for sentencing?
>
> [Defense counsel]: He is, Judge.
>
> [The trial court]: Did I try that case?
>
> [Defense counsel]: It's an open plea, Judge.
>
> [The trial court]: Okay. But I have a Pre-Sentence Investigation, I think. Okay. Are we ready to proceed?
>
> [The prosecutor]: No, Your Honor. We have witnesses, so if we're going—we're going to have a full hearing.
>
> [The trial court]: All right. Well, let's go through the docket call, and I'll come back to it.

The record also shows that the trial court then recessed the proceeding from 9:27 a.m. to 10:59 a.m. After the parties announced that they were ready to proceed, the following discussion occurred:

> [The prosecutor]: [. . . .] Do you have the PSI?
>
> [The trial court]: I have the PSI. Have you had an opportunity to look at it?
>
> [The prosecutor]: I've had time to scan it, yes, Your Honor.
>
> [The trial court]: Does the State have any objection to the introduction of it?
>
> [The prosecutor]: No, Your Honor.
>
> [The trial court]: Does the defense have any objection to the introduction to it?
>
> [Defense counsel]: No, sir.
>
> [The trial court]: All right.

Given the length of the recess, along with the trial court's indication that it had the PSI and its question to the State concerning whether the prosecutor read the report, the record simply does not support Appellant's contention that the trial court failed to read the PSI prior to sentencing him. Consequently, counsel could not have been deficient in neglecting to object or request that the trial court read it, nor could Appellant have been harmed thereby. *See*

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064 (requiring defendant show both (1) that his counsel performed deficiently, and (2) deficient performance prejudiced him). Appellant's sole issue is overruled.

DISPOSITION

Having overruled Appellant's sole issue, the judgment of the trial court is ***affirmed***.

JAMES T. WORTHEN
Chief Justice

Opinion delivered August 31, 2018.
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

AUGUST 31, 2018

NO. 12-17-00159-CR

CHRISTOPHER LYNE JOHNSON,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 369th District Court
of Anderson County, Texas (Tr.Ct.No. 369CR-15-32395)

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.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.