Affirmed and Opinion filed February 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00891-CR

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TERRY LEWIS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 806,830

O P I N I O N

Terry Lewis, Jr. (Appellant) was indicted for the first degree felony offense of aggravated robbery. *See* TEX. PENAL CODE ANN. § 29.03(a)(2) (Vernon 1994). He pleaded not guilty and was tried by a jury. The jury found Appellant guilty, fined him $5,000 and sentenced him to eight years' confinement in the Institutional Division of the Texas Department of Criminal Justice. *See* TEX. PENAL CODE ANN. § 12.32 (Vernon 1994). On appeal to this Court, Appellant assigns one point of error, contending that he received ineffective assistance of trial counsel at the punishment phase of his trial because his counsel waived closing argument.

BACKGROUND

After purchasing a $300 money order from a Fiesta store, the victim in this case and her two-year-old son drove home. Unbeknownst to her, she was followed from Fiesta. Upon arriving home, the victim got out of her automobile and began to unbelt her young son from his car seat. At this point, a black male approached her and demanded her purse. The victim refused to comply. To convey his level of seriousness in completing the criminal enterprise, the perpetrator produced a .38 caliber handgun and aimed at the victim. She relinquished her purse to the robber and he fled the scene.

The victim contacted the police and reported the robbery. A trace was placed on the money order by the victim. The trace showed that Appellant cashed the money order at a Fiesta store almost immediately after the robbery. The police contacted Appellant and secured his presence in a line-up. The victim positively identified Appellant from the line-up. Appellant was charged with aggravated robbery.

At trial, Appellant admitted cashing the money order. He testified that the reason he cashed it was because he was asked to cash it by a black male who was not wearing a shirt. Appellant could not identify this person. Appellant testified that his person approached him while he was using a pay phone at a Fiesta store and offered $25 if he would cash the money order. Appellant testified that he was home the entire day that the robbery took place.

By its guilty verdict, the jury rejected Appellant's version of the facts.

DISCUSSION

In his only point of error, Appellant contends that his "trial counsel was ineffective at the punishment stage of the trial as a result of his mistaken belief that if he waived argument the State would be precluded from making a closing argument."[1]

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[1] Following the presentation of evidence at the punishment phase, Appellant's counsel told the trial judge that he was waiving his right to make a closing argument. He believed that if he waived, the State would be prevented from making a closing argument. The trial judge explained that even if he waived, the (continued...)

Prior to the Court of Criminal Appeals' opinion in *Hernandez v. State*, 988 S.W.2d 770 (Tex.Crim.App. 1999), we applied a different standard of review to claims of ineffective assistance during the punishment phase than we applied to claims of ineffective assistance during the pretrial and guilt phase. We now apply a single standard of review for ineffective assistance of counsel during the entire trial process. *See id.* at 772-74. That standard is the two-step analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Under *Strickland*, the appellant must first demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. 466 U.S. at 688. Counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged as ineffective assistance, and then must affirmatively prove that such acts and omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex.Crim.App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Strickland*, 466 U.S. at 695. In addition, the appellant is required to show prejudice from the deficient performance of his attorney. *See Hernandez*, 988 S.W.2d at 772. To establish prejudice, an appellant must prove that but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. In making this showing, the appellant must demonstrate by a preponderance of the evidence that a reasonable probability exists that the deficient performance is sufficient to undermine confidence in the outcome. *See id.*

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[1] (...continued)
State could nevertheless make a closing argument. Defense counsel maintained his position to not make a closing argument. Thus, even if Appellant's trial counsel was unaware of the procedure, he was nonetheless corrected by the trial judge and permitted to make a closing argument if he wished. Appellant maintains that the lack of a closing argument pleading for probation probably affected the jury's decision to not grant probation. However, the only witness who testified during the punishment phase of trial was Appellant's mother. She testified that if the jury granted probation to Appellant, she would be sure that he complied with the terms of probation. She was not cross-examined by the State. Further, when the jurors were deliberating Appellant's punishment, the jury charge contained instructions regarding Appellant's eligibility for probation.

The problem we have with evaluating Appellant's trial counsel's performance in this case is that we have been presented with a record that is silent concerning trial counsel's motivation for waiving closing argument. To hold trial counsel's decision to waive closing argument during the punishment phase of trial as ineffective assistance would call for speculation. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App. 1994). The record lends no support for such holding. *See id.* Consequently, the first prong of *Strickland* is not met in the instant case.[2] Due to the lack of evidence in the record concerning trial counsel's reasons for waiving closing argument, we are unable to conclude that Appellant's trial counsel's performance was deficient. *See id.* Consistent with *Strickland*, we must presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that he "made all significant decisions in the exercise of reasonable professional judgment." *See id.* (citation omitted). The record in the instant case contains no evidence to rebut that presumption.[3] *See id.*

We conclude that Appellant has not met his burden of showing that his trial counsel's assistance was ineffective.

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[2] Assuming *arguendo* that trial counsel's performance was deficient in this case, the second prong of *Strickland* requires Appellant to show that he was prejudiced by such deficiency. We note that the range of punishment in this case was 5 to 99 years and up to a $10,000 fine. Appellant received 8 years and a $5,000 fine. *See* TEX. PENAL CODE ANN. § 12.32 (Vernon 1994). Appellants does not state what his trial counsel might have argued that would have persuaded the jury to grant probation. Therefore, we have no basis to conclude whether probation would have more likely been granted if a closing argument had been made by Appellant's trial counsel.

[3] A trial record is directed to the issues of guilt/innocence and punishment. *See Jackson*, 877 S.W.2d at 772 (Baird, J., concurring). We review that record with an eye toward the errors allegedly committed in relation to those issues. *See id.* However, in order to effectively argue an issue of ineffective assistance of counsel, a record focused on the conduct of trial or appellate counsel should be developed. *See id.* Such a record is generally best developed in the context of a hearing held in relation to an application for writ of habeas corpus or a motion for new trial. *See id.* In such instances, we are better able to gauge the effectiveness of counsel's representation by reviewing the record from such post-trial proceeding, which would be directed to the representation issue. *See id.* at 773. This appeal did not stem from a writ of habeas corpus judgment, nor was a motion for new trial made following Appellant's conviction. Consequently, no record was developed concerning trial counsel's performance.

The judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed February 10, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig.
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