Affirmed and Opinion filed March 28, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00079-CR

KEELON JMAR SENEGAL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 00CR1629

O P I N I O N

Appealing his conviction of possession of a controlled substance, appellant Keelon Jmar Senegal contends the trial court abused its discretion in denying his motion for new trial based on allegations of jury misconduct and ineffective assistance of counsel. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 6, 2000, Galveston Police Officer David Torres, knowing appellant had several outstanding municipal warrants, made a traffic stop. Officer Torres arrested and searched appellant and then took him to the Galveston City jail. The police placed appellant

in a holding cell which was monitored by a surveillance camera. Officer George Richard Riveaux searched appellant and discovered cocaine after removing appellant's left shoe. At that time, Officer Riveaux made a comment that the discovery of the cocaine might be on videotape. Appellant's sole defense at trial was that the officer planted the cocaine next to his shoe.

Appellant was indicted for possession of a controlled substance (cocaine) weighing more than one gram but less than four grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(b). Appellant pleaded not guilty. A jury found him guilty as charged and appellant elected to have the court assess punishment. At the punishment hearing, the court found the enhancement paragraph true and assessed punishment at thirteen years' confinement in the state penitentiary.

The court entered judgment on appellant's sentence on January 17, 2001. Within thirty days, appellant filed a motion for new trial; however, appellant's motion for new trial was not presented to the court until February 19, 2001, and a hearing on the motion was not commenced until February 27, 2001. The day before the hearing, appellant filed a motion for leave to file an amended motion for new trial. The trial court granted the motion for leave at the beginning of the hearing, but ultimately denied appellant's motion for new trial on February 28, 2001.

II. JURY MISCONDUCT

In his first point of error, appellant argues the trial court erred in denying his motion for new trial on the basis of jury misconduct. More specifically, he contends there is evidence that the jurors, during their deliberations, took into account appellant's failure to testify at trial. The State counters that this ground was raised only in appellant's amended motion for new trial and that motion was untimely filed. The State argues the trial court did not have jurisdiction to grant leave to file an amended motion for new trial thirty days after judgment had been entered. We agree.

The original trial judgment was entered and signed on January 17, 2001. A timely motion for new trial was filed on February 13, 2001. An amended motion for new trial was filed on February 26, 2001, which was not within the thirty-day period prescribed by the procedural rules. *See* TEX. R. APP. P. 21.4 (b). To be timely, an original or amended motion for new trial must be: (1) filed within thirty days of the date the trial court imposes or suspends sentence in open court; and (2) presented to the trial court within ten days of its filing, unless the trial court in its discretion permits the motion to be presented and heard within seventy-five days from the date the court imposes or suspends sentence in open court. *See* TEX. R. APP. P. 21.4 and 21.6. Even if the original motion for new trial is timely, an untimely amended motion for new trial is a nullity and cannot form the basis for points of error on appeal. *Dugard v. State*, 688 S.W.2d 524, 529-30 (Tex. Crim. App. 1985), *overruled on other grounds by Williams v. State*, 780 S.W.2d 802, 803 (Tex. Crim. App. 1989); *Heckathorne v. State*, 697 S.W.2d 8 (Tex. App.—Houston [14th Dist.] 1985, pet ref'd.) (stating that untimely motions for new trial are nullities and cannot form the basis for points of error on appeal); *Grohr v. State*, 725 S.W.2d 282, 285 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). Accordingly, no amended motion for new trial may be filed after the thirty-day period, even with leave of court. *Drew v. State*, 743 S.W.2d 207, 222-23 (Tex. Crim. App. 1987); *Dugard*, 688 S.W.2d at 530; *Belton v. State*, 900 S.W.2d 886, 902 (Tex. App.—El Paso 1995, pet. ref'd); *Pena v. State*, 767 S.W.2d 206, 207 (Tex. App.—Corpus Christi 1989, no pet.).

In this case, even though the trial court purported to grant leave to file, the amended motion was untimely and a nullity. Therefore, we may not consider the affidavits attached to the amended motion or the testimony at the hearing as it relates to the amended motion. *See Drew*, 743 S.W.2d at 223 (finding that court was without jurisdiction to consider the untimely second amended motion and the hearing was a nullity). The procedural provisions governing motions for new trial in a criminal case require strict compliance and failure to comply leaves the trial court without jurisdiction to consider the motion. *Oldham v. State*,

977 S.W.2d 354, 361 (Tex. Crim. App. 1998); *Stone v. State,* 931 S.W.2d 394, 396 (Tex. App.—Waco 1996, pet. ref'd.). When a trial court lacks jurisdiction, any action taken on a matter is void. *See Garcia v. Dial,* 596 S.W.2d 524 (Tex. Crim. App. [Panel Op.] 1980); *Hagens v. State,* 979 S.W.2d 788, 791 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *State v. Mapp,* 764 S.W.2d 823, 824 (Tex. App.—Houston [14 th Dist.] 1989, no pet). In *Mapp*, this court stated that a trial court lacked jurisdiction after the thirty-day period and therefore it need not review whether the appellants met the requirements for granting of a new trial. *Id.* Thus, it follows that the only new trial motion that we can consider is appellant's timely-filed original motion for new trial.

Appellant's original motion for new trial (filed on February 13, 2001) alleged grounds of jury misconduct based on his contention that one of the jurors knew him and was prejudiced against him. On appeal, appellant does not even mention this ground but instead asserts grounds of jury misconduct based on an allegation that the jurors considered his failure to testify. To preserve error, the complaint on appeal must correspond to the objection made at trial. *See Thomas v. State,* 723 S.W.2d 696, 700 (Tex. Crim. App. 1986). Because appellant's complaint on appeal was not the complaint he made below, appellant has not preserved error. *See* TEX. R. APP. P. 33.1. Accordingly, we overrule appellant's first point of error.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

In his second point of error, appellant argues the trial court abused its discretion in denying his motion for new trial on the basis he was denied effective assistance of counsel.

The grant or denial of a motion for new trial is a matter entirely within the trial court's discretion. *State v. Gonzalez,* 855 S.W.2d 692, 696 (Tex. Crim. App. 1993); *Melton v. State*, 987 S.W.2d 72, 75 (Tex. App.—Dallas 1998, no pet.). An abuse of discretion occurs when the trial court's decision is so clearly wrong as to lie outside the zone within which reasonable persons disagree. *Cantu v. State,* 842 S.W.2d 667, 682 (Tex. Crim. App. 1992).

At a hearing on the motion for new trial, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). The trial judge may properly consider the interest and bias of any witness and is not required to accept as true the testimony of the accused or any defense witness simply because it is uncontradicted. *Melton*, 987 S.W.2d at 75.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See* U.S. CONST. AMEND. VI; TEX. CONST. art. I, 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). This right to counsel includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *see Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). To prove ineffective assistance of counsel, appellant must show that (1) counsel's representation or advice fell below objective standards of reasonableness and (2) the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland*, 466 U.S. at 688-92. Moreover, the appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In assessing appellant's claims, we apply a strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Appellant has the burden to rebut this presumption by presenting evidence illustrating why trial counsel did what she did. *See id.* An appellant cannot meet this burden if the record does not specifically focus on the reasons for trial counsel's conduct. *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

When there is no proper evidentiary record developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. *See Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). If there

is no hearing, or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective-assistance claim. Because appellant obtained a hearing on his motion for new trial and presented testimony from his trial counsel, we consider the ineffective assistance grounds asserted in appellant's timely-filed original motion, in determining whether the trial court abused its discretion in denying his motion for new trial.

Appellant alleges on appeal that he was denied effective assistance of counsel because trial counsel: (1) failed to properly prepare for trial; (2) failed to consult with appellant until seven days before trial; (3) failed to file any motion requesting the video surveillance tape from the Galveston City jail; (4) failed to obtain a record of his oral motion for continuance; (5) failed to properly advise appellant before he chose to have the court assess punishment; (6) failed to request a hearing or obtain a ruling on his motion to suppress; (7) failed to request a writ of attachment or continuance when an essential defense witness failed to return and resume cross-examination by the State; and (8) failed to tell appellant about statements by a juror at the end of trial regarding his failure to testify. Appellant's original motion did not allege grounds four and eight. Thus, in determining whether the trial court abused its discretion in denying appellant's motion for new trial, we do not consider those grounds. *See Henderson v. State,* 962 S.W.2d 544, 558 (Tex. Crim. App. 1997) (holding that if appellant chooses to litigate ineffective assistance at the trial court, appellant must present all claims of ineffective assistance to preserve individual complaints for appeal).[1]

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[1] We note that these grounds are included in the amended motion and were presented at the motion for new trial hearing. However, because the amended motion is a nullity and the trial court did not have jurisdiction to consider the issues included in the amended motion, these grounds are not properly before this court to review. *See Laidley v. State*, 966 S.W.2d 105, 107-08 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). Appellant also raises on appeal as grounds for ineffective assistance of counsel that defense counsel made almost no objections, indicating a lack of assertiveness, and that his counsel was ineffective for failing to object to improper jury argument by the State. Again, because these grounds were not before the trial court at the motion for new trial hearing, we do not consider them in addressing whether the trial court abused its discretion in denying appellant's motion on grounds of ineffective assistance. *See Reyes v. State*, 849 S.W.2d 812, 816 (Tex. Crim. App. 1993); *Rangel v. State*, 972 S.W.2d 827, 838 (Tex. App.—Corpus Christi 1998, pet. ref'd).

Failure to Properly Prepare for Trial

In his first and second grounds for ineffective assistance of counsel, appellant alleges his counsel, Gerson Bloom, was ineffective for failing to prepare for trial and consult with appellant until seven days before trial. Bloom testified that, although he was not prepared to go to trial on appellant's case because it was being tried out of sequence, he was aware of the situation and filed a motion for continuance in October 2000. The trial court granted a continuance and trial was re-set for December 1, 2000. Bloom then filed another motion for continuance and the trial court delayed trial for another week.

A criminal defense attorney must have a firm command of the facts of the case as well as the governing law before the attorney can render reasonably effective assistance of counsel. *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990). Counsel has a duty to make an independent investigation of the facts of a client's case and prepare for trial, rather than relying on the facts as represented by the district attorney's office. *Ex parte Langley*, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992). Counsel must make reasonable investigations, or make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 691. A decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to trial counsel's judgments. *Strickland*, 466 U.S. at 691.

The record reflects that trial counsel had full command of the facts, made reasonable decisions in conducting the investigation of the case, adequately communicated with appellant, and provided appellant with reasonable advice. We find trial counsel's performance was within the wide range of professionally competent assistance. Bloom testified that he conducted an independent investigation of appellant's version of the events. He went to the Galveston City jail to determine the whereabouts of the surveillance tape appellant claimed would show the officer planting the cocaine by appellant's shoe. Bloom testified that he did not file any pretrial discovery motions or motions requesting exculpatory evidence because appellant's appointed counsel, his predecessor, already had done so.

Moreover, as soon as appellant told Bloom that he had a witness that would testify in his defense, Bloom subpoenaed the witness. Bloom also testified that he consulted with appellant several times, both in the jail and in the courtroom, and met with appellant at the jail three weeks before trial. Bloom adequately cross-examined each witness for the State and presented the only evidence available supporting appellant's claim that the officer planted the cocaine by his shoe. Appellant fails to demonstrate how his counsel was deficient on these grounds and how the proceedings would have been different had Bloom prepared for trial in a different manner.

Failure to File Motion Requesting the Surviellance Videotape

Appellant next argues his counsel was ineffective for failing to file any motion requesting or attempting to locate the surveillance videotape. Appellant claimed the tape would show him being searched, which, in turn, would support his contention that the officer planted the cocaine next to his shoe. Bloom did not file any pretrial motions because appellant's prior court-appointed counsel had filed motions for pretrial discovery requesting all exculpatory materials and notice of the State's intent to use extraneous offenses. Bloom testified that he attempted to confirm the existence of the videotape and/or locate it on several occasions. Bloom went to the city jail with the prosecutor and viewed the video system and the surveillance camera. After several attempts to locate the videotape, Bloom was told there was none, either because the system was not working at the time of appellant's arrest, or because the police department had recycled the tape, a common practice of the department.

Appellant fails to identify any evidence in the record that would demonstrate a videotape could have been discovered by a pretrial motion. Bloom investigated the possibility of a videotape and realized that the videotape, if it ever existed, no longer did. Therefore, the filing of a motion would not have made any difference. The mere failure to file an appropriate pretrial motion cannot be categorically deemed ineffective assistance of counsel. *Madden v. State*, 911 S.W.2d 236, 241 (Tex. App.—Waco 1995, pet. ref'd.); *Jaile*

v. State, 836 S.W.2d 680, 687 (Tex. App.—El Paso 1992, no pet.); *Gallegos v. State*, 754 S.W.2d 485 (Tex. App.-Houston [1st Dist.] 1988, no pet.) (holding that the failure to provide proof of any exculpatory evidence that would have been obtained bars claim of ineffective assistance). Appellant has not shown that his counsel was ineffective because he failed to file a pretrial motion requesting the videotape.

Failure to Properly Advise Appellant As to His Election for Punishment

In his fifth ground for ineffective assistance of counsel, appellant argues his counsel was ineffective for failing to properly advise him before he elected for the court to assess punishment. Bloom testified that it in his twenty-six years of practice he found it to be in the best interest of the defendant to have the court decide punishment rather than the jury because the average juror in Galveston tended to assess harsher punishments than the court. Bloom testified that he recommended that appellant elect the court for punishment, and after a full discussion, appellant agreed. According to Bloom, it was only after he advised appellant of his options that appellant elected to have the court assess punishment. Appellant's only contradictory evidence is contained in an affidavit attached to his untimely amended motion for new trial, which, as previously noted, we may not consider. Appellant received thirteen years' confinement in the state penitentiary, a sentence that is well within the punishment range for possession of a controlled substance, a second degree felony. *See* TEX. PEN. CODE ANN. § 12.33 (Vernon 1994) (stating that a felony in the second degree is punishable by a term of not less than two years but not more than twenty years). Therefore, we find appellant has not shown ineffective assistance of counsel on this ground.

Failure to Obtain a Ruling and a Hearing on Motion to Suppress

In his sixth ground, appellant contends his counsel was ineffective for failing to request a hearing or obtain a ruling on appellant's motion to suppress. Merely showing a failure to obtain a ruling or a hearing on pretrial motions does not establish ineffective assistance of counsel. *Wills v. State*, 867 S.W.2d 852, 857 (Tex. App.—Houston [14th Dist.]

1993, pet. ref'd.). If an appellant makes no showing that a ruling on pretrial motions would have changed anything in the case, he has failed to establish ineffective assistance. *Roberson v. State*, 852 S.W.2d 508, 511 (Tex. Crim. App. 1993).

Even assuming trial counsel's performance in failing to obtain a ruling on the suppression motion fell below an objective standard of reasonableness, appellant does not explain how he was prejudiced by the failure. Moreover, appellant has not shown that a "properly prepared attorney" would have persuaded the trial court to grant the motion to suppress. *See Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (holding appellant is required to prove motion to suppress would have been granted to show ineffective assistance of counsel).

Officer Torres stopped appellant based on his knowledge that appellant had several outstanding municipal warrants. Bloom testified that he saw the outstanding warrants and knew the warrants were valid. The officers did not find the cocaine until after appellant was arrested and brought to the station. Appellant's counsel was not ineffective for failing to obtain a ruling or a hearing on a motion to suppress evidence that is clearly admissible. *See Godwin v. State*, 899 S.W.2d 387, 391 (Tex. App.—Houston [14th Dist.] 1995, pet. ref'd) (stating that appellant has failed to show not only ineffectiveness when he fails to show who would have testified at the hearing, but also, whether their testimony, if any, would have produced a different result). Accordingly, appellant has not satisfied his burden in showing counsel was ineffective on this ground. *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex Crim. App. 1999).

Failure to Request a Writ of Attachment or Continuance for Defense Witness

In his seventh ground for ineffective assistance of counsel, appellant argues his counsel was ineffective for his failure to request a writ of attachment or a continuance when defense witness, Leon Cooper failed to return to court to resume his testimony. An attorney's strategic decision not to call a witness will not be reviewed unless there was a

plausible reason for calling the witness. *See Brown v. State*, 866 S.W.2d 675, 678 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd.); *Velasquez v. State*, 941 S.W.2d 303, 310 (Tex. App.—Corpus Christi 1997, pet. ref'd.). Bloom's reasons for not requesting a writ of attachment, or a continuance to ensure Cooper's return, is plausible. Bloom testified that he had finished his direct examination of Cooper and the State had conducted only a brief cross-examination before court adjourned for the day. When Cooper did not return for the completion of cross-examination the following day, Bloom did not request a writ of attachment or continuance because: (1) he thought that it would be in the best interest of appellant; (2) appellant told him during consultation that he did not wish to have Cooper arrested and wanted to proceed with trial; (3) he did not want to give the State another opportunity to discredit the defense's only witness who testified in support of appellant's claim that the officers planted the cocaine by appellant's shoe; (4) he had another witness waiting to testify; and (5) he feared the State would move to have Cooper's entire testimony stricken from the record. Bloom further testified that he did not think Cooper's failure to return to resume cross-examination would have any impact on the jury. There is nothing in the record to indicate Bloom's failure to request a writ of attachment for Cooper's testimony was anything other than trial strategy. Accordingly, we cannot conclude that Bloom's performance was deficient. *See Howard*, 894 S.W.2d at 106.

Reviewing all the evidence the jury heard and evaluated in reaching its verdict, we cannot say that but for the trial counsel's alleged errors the jury would have had a reasonable doubt as to appellant's guilt. Appellant has failed to demonstrate that, as a result of any specified deficient acts of trial counsel, appellant was so prejudiced by counsel's performance as to undermine our confidence in the outcome. On this record, we cannot conclude the trial court abused its discretion in denying appellant's motion for new trial on his claim of ineffective assistance of counsel. *See Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001). Therefore, we overrule appellant's second point of error.

We affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed March 28, 2002.

Panel consists of Chief Justice Brister and Justices Anderson and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).