Affirmed and Opinion filed March 28, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00268-CR

JOSE ROBERTO AMEZQUITA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 824,170

O P I N I O N

Appellant Jose Roberto Amezquita pleaded guilty to the charge of intoxication assault and filed a sworn motion that he had never before been convicted of a felony offense. At the punishment phase, appellant asked the jury to recommend community supervision. The jury recommended a sentence of five years' imprisonment instead of probation. In a single point of error, appellant argues his trial counsel was ineffective in failing to elicit evidence of the appellant's eligibility for community supervision. We affirm.

On April 14, 1999, appellant was driving east on FM 2920 when he ran a red light at the intersection of FM 2920 and Kuykendahl Road. Frederick Bartosh, who was headed north on Kuykendahl Road, had just entered the intersection when appellant struck the driver's side of his van. A witness who saw the accident testified appellant never swerved or slowed down before the crash. Both Bartosh and appellant were knocked unconscious, and a former paramedic who witnessed the wreck said they both could have easily died. An officer found two cold bottles of beer in appellant's truck. Sometime after the accident, appellant's blood-alcohol level measured between .264 and .267. The crash broke Bartosh's left femur, requiring multiple surgeries to replace his hip and insert a prosthesis.

Before trial on the charge of intoxication assault, appellant filed his sworn motion for probation pursuant to Texas Code of Criminal Procedure article 42.12, section 4(e). The appellant testified at trial, but counsel did not ask him if he had been convicted of a felony offense. No other evidence affirmatively established that he had no felony convictions, but the State never introduced evidence or argued to the contrary. There was, however, evidence of appellant's 1981, 1984, and 1996 convictions for driving while intoxicated ("DWI") in Texas. Appellant stipulated that the 1981 conviction was a misdemeanor conviction, but there was no evidence before the jury about whether the other convictions were felony or misdemeanor convictions. Under Texas law, they were clearly misdemeanor convictions.[1]

To be eligible for jury-recommended community supervision, a defendant must file a written sworn motion that he has not previously been convicted of a felony, and the jury must find in its verdict that he has never been convicted of a felony in this or any other state.

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[1] Ordinarily, DWI is a Class B misdemeanor. TEX. PEN. CODE ANN. § 49.04(b) (Vernon Supp. 2002). While under the law effective in 1996, two prior convictions for DWI would ordinarily elevate a defendant's third DWI offense from a Class B misdemeanor to a third-degree felony, the offense would not be elevated if all of a defendant's previous DWI convictions were more than ten years old. Act of Apr. 25, 1995, 74th Leg., R.S., ch. 76, § 14.56, 1995 Tex. Gen. Laws 841 (amended 2001) (current version at TEX. PEN. CODE ANN. §§ 49.09(b), 49.09(e)). In this case, since appellant's 1981 and 1984 convictions occurred more than ten years before the 1996 offense, the earlier convictions could not be used for enhancement.

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4(e). The defendant bears the burden of proving he has no prior felony convictions. *Speth v. State*, 6 S.W.3d 530, 533 (Tex. Crim. App. 1999). For submission of probation to the jury, record evidence must support the defendant's eligibility for probation. *Beyince v. State*, 954 S.W.2d 878, 880 (Tex. App.—Houston [14th Dist.] 1997, no pet.). Consequently, if the trial court in the instant case refused to instruct the jury on the option of community supervision, we would have upheld the court's ruling on appeal. *See Green v. State*, 658 S.W.2d 303, 309 (Tex. App.—Houston [1st Dist.] 1983, pet. ref'd). Here, the court gave the jury the option of community supervision.

Appellant argues his counsel was ineffective in failing to elicit testimony regarding his eligibility for probation. To prevail on a claim of ineffective assistance of counsel, the appellant must show (1) that his counsel's performance was deficient, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. S*trickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The court need not address both prongs of the *Strickland* standard if the appellant has made an insufficient showing on one. *Strickland*. 466 U.S. at 697.

To demonstrate prejudice in this context, appellant must show his counsel's failure to elicit testimony that he was eligible for probation undermines confidence in the jury's decision to recommend a five-year sentence. The right to be considered for probation is valuable, even if probation is not given, because the jury instruction concerning probation forcefully directs the jury's attention to the lowest punishment allowed by law. *Snow v. State*, 697 S.W.2d 663, 668 (Tex. App.—Houston [1st Dist.] 1985, pet. dism'd). Here, the charge did direct the jury's attention towards probation (though erroneously so, due to the missing proof). Nevertheless, the jury rejected the lower range of punishment and assessed

a sentence in the middle of the range.[2] Furthermore, given the severity of the accident, the impact of the accident on the complainant, and the evidence of appellant's repeated behavior of driving while intoxicated despite three separate interventions of the criminal justice system, appellant has failed to sustain his burden of showing prejudice so as to undermine confidence in the jury's sentence. We overrule appellant's sole point of error and affirm the judgment.

/s/ Scott Brister
Chief 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).

[2] The sentencing range for intoxication assault is two to ten years and a fine not to exceed $10,000. TEX. PEN. CODE ANN. §12.34 (Vernon 1994), §49.07 (c) (Vernon Supp. 2002).