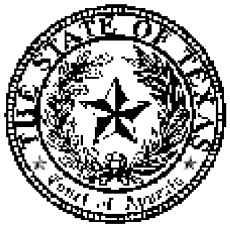
Affirmed and Opinion filed May 4, 2000.



In The

Fourteenth Court of Appeals

NO. 14-97-00656-CR

ROY LEE SALLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District
Harris County, Texas
Trial Court Cause No. 711,675

O P I N I O N

A jury found Appellant Roy Lee Salley guilty of murder and assessed punishment at fifteen years' imprisonment. In a single point of error, Appellant claims that his trial counsel was ineffective in failing to request a jury instruction on the use of deadly force to protect property. Because we find that his counsel was not ineffective, we affirm the trial court's judgment.

BACKGROUND

On New Year's Eve, December 31, 1995, Appellant spent the evening at the home of the victim, Joe Washington. Before midnight, Appellant asked Washington for some crack cocaine. Washington gave him a $10 rock of crack cocaine, and Appellant handed his .32 caliber revolver to Washington. Around midnight, Washington celebrated the turn of the new year by shooting the revolver out a window. Appellant then asked for it back, but Washington wanted to keep it until Appellant paid him for the crack cocaine.

Appellant became angry at Washington's refusal to return the revolver. Washington in turn asked Appellant to leave and had a friend escort him out of the house. Appellant retrieved a shotgun from his van, which was parked outside, and walked upstairs. He pointed the shotgun at Washington's head and said, "I want my gun." Washington told him that he would give back the revolver and begged him to put the shotgun down. A struggle ensued in which Appellant grabbed the revolver and Washington grabbed the barrel of the shotgun. A third man in the room tried to separate the two and yelled for the help of the friend who had previously escorted Appellant outside. By the time this friend arrived upstairs, Appellant had gained control of both the revolver and the shotgun. When the friend attempted to wrestle the shotgun away from Appellant, it discharged. The friend ran downstairs. The third man then managed to grab the shotgun, but he too ran down the stairs. One of the men testified that he heard a shot from upstairs as he fled and heard Washington screaming. The other man testified that he heard two shots as he fled. Both fled down the street.

A short time later, one of the men returned to the home and found Washington alive. Washington told his friend, "He got me." Washington died before help arrived. A medical examiner retrieved two .32 caliber bullets from Washington's body and testified the wound that killed him was caused by a gunshot to the chest. The autopsy revealed that the tip of the gun was within six inches of his chest when fired. The other gunshot was to Washington's shoulder. This wound was caused by a gun fired more than two feet away from his body.

Appellant testified at trial on his own behalf. He agreed that he arrived at Washington's house with a .32 revolver. According to Appellant, Washington took the gun and shot it before midnight. Appellant yelled at him for this, and Washington tucked the pistol into his waistband. Then Washington started

smoking crack. Appellant testified that he grabbed Washington's crack pipe and threw it on the ground. Washington responded by pulling out the revolver and declaring that Appellant owed him ten dollars. Appellant testified that he informed Washington that he had another gun, and he went downstairs and retrieved his shotgun from his van. He went back upstairs and pointed it at Washington and the two other men in the room. When Appellant reached for the revolver, one of the other men snatched the shotgun. It discharged. Appellant still held the front of the revolver, and it also discharged, shooting part of his thumb. While he, Washington, and a third man struggled over possession of the revolver, it fired a second time. Washington fell backwards, Appellant ran away, the man with the shotgun ran away, and the third man stayed with Washington. Appellant testified that when he left, the revolver was still in Washington's hand. He claimed that he did not intend to kill him and that he was only trying to preserve his own life

The trial court charged the jury on murder, manslaughter, self-defense, and provoking the difficulty. The charge did not include an instruction on defense of property.

INEFFECTIVE ASSISTANCE OF COUNSEL

The standard for appellate review of effectiveness of counsel was set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), and adopted by the Court of Criminal Appeals in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). *See Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993). The claimant must prove that his counsel's representation so undermined the "proper functioning of the adversarial process that the trial cannot be relied on having produced a just result." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064. Appellant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, appellant must show that his counsel's performance was deficient; second, he must show the deficient performance prejudiced the defense. *See id.* at 687, 104 S. Ct. at 2064.

The first component of this test is met when appellant's trial counsel made errors so significant that he was not functioning as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution. *See id.* The second prong of *Strickland* requires a showing that counsel's errors were so serious that they deprived the defendant of a fair trial, i.e., a trial whose result is reliable. *See id.* at 687, 104 S. Ct. at 2064. This means an appellant must prove by a preponderance of the evidence that his

defense attorney's representation fell below the standard of prevailing professional norms, and that there is a reasonable probability that but for counsel's deficiency the result of the trial would have been different. *See id*. at 694, 104 S. Ct. at 2068; *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

The second component is whether there is a reasonable probability that, absent counsel's errors, the fact-finder would have had a reasonable doubt on the issue of guilt, considering the totality of the evidence. *See Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069. Our scrutiny of counsel's performance must be highly deferential, and every effort must be made to eliminate the distorting effects of hindsight. *See id.* at 689, 104 S. Ct. at 2065. Allegations of ineffective assistance of counsel must be firmly founded in the record because the reviewing court may not speculate about counsel's trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

A defense attorney's failure to request a jury instruction can render his assistance ineffective if, under the particular facts of the case, the trial judge would have erred in refusing the instruction had counsel requested it. *See Vasquez v. State*, 830 S.W.2d 948, 951 (Tex. Crim. App.1992). The defendant bears the burden of rebutting the strong presumption that, under the circumstances, counsel's decision not to request the instruction was sound trial strategy. *See Jackson*, 877 S.W.2d at 771-72 (citing *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). Thus, the accused must provide a record on appeal from which the reviewing court can determine that trial counsel's performance was not based on sound strategy. *See id.*

Appellant contends that the evidence shows Washington was exercising control over Appellant's revolver, with the intent to deprive him of it, without Appellant's effective consent. According to Appellant, he used force to retrieve his revolver from Washington. Appellant thus argues this evidence amply raises the defense of use of deadly force to protect property. *See Booth v. State*, 679 S.W.2d 498 (Tex. Crim. App. 1984) (holding the trial court must instruct the jury on every defensive theory raised by the evidence). TEX. PENAL CODE ANN. §§ 9.41 & 9.42 (Vernon 1994).

We disagree that the evidence entitled Appellant to an instruction on deadly force to protect his personal property. First, a person unlawfully dispossessed of tangible, movable property is justified in using

force to the degree he reasonably believes the force is *immediately necessary* to recover the property. *See* TEX. PENAL CODE ANN. § 9.41 (emphasis added). To claim defense of property, the person must use force "immediately or in fresh pursuit after the dispossession." *Id.* Further, to defend property with deadly force, the person can act only to prevent the other's *imminent* commission of certain enumerated crimes or "to prevent the other who is fleeing immediately . . . from escaping with the property." TEX. PENAL CODE ANN. § 9.42(2)(A)-(B). When Appellant retrieved his shotgun and came back to struggle with Washington over the revolver, Washington's action in taking the revolver had been completed and was not imminent. *See Hernandez v. State,* 914 S.W.2d 218, 224 (Tex. App.–El Paso 1996, pet. ref'd). Washington was also not fleeing with the revolver. Appellant's force was not immediately after or in fresh pursuit when he walked down to his van, retrieved a shotgun, returned upstairs, and threatened Washington and others with it. *See Jones v. State,* 680 S.W.2d 25, 28 (Tex. App.–Houston [1st Dist.] 1984), *rev'd on other grounds,* 706 S.W.2d 664 (Tex. Crim. App. 1986).

Further, even if the evidence raised the issue of defense of property, Appellant has failed to rebut the strong presumption that his trial counsel was acting on sound trial strategy. The record reveals that trial counsel's argued at trial that Appellant acted in self-defense and that Washington pulled the trigger of the revolver for both shots. We have no record that, under the circumstances, counsel's decision not to request an instruction on defense of property was sound trial strategy. *See Jackson,* 877 S.W.2d at 771-72.

Accordingly, we overrule Appellant's sole point of error and affirm his conviction.

Ross A. Sears
Justice

Judgment rendered and Opinion filed May 4, 2000.
Panel consists of Justices Sears, Cannon, and Draughn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon, and Joe L. Draughn sitting by assignment.