**Affirmed and Opinion filed May 4, 2000.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00100-CR**

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**GABRIEL DEON MYLES, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 182nd District Court**
**Harris County, Texas**
**Trial Court Cause No. 785,349**

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## O P I N I O N

Appellant, Gabriel Deon Myles, pled guilty to possession of four to 200 grams of a controlled substance and possession of four to 200 grams of a controlled substance with intent to deliver. The trial court found him guilty only of the possession charge and sentenced him to eight years imprisonment. On appeal, he challenges the voluntariness of his plea, claiming that his trial counsel was ineffective and the trial court failed to admonish him regarding the applicable range of punishment. We affirm.

Appellant was charged with both possession and possession with intent to deliver cocaine following an HPD officer's investigation of a parked car occupied by appellant and another man. As the officer

questioned appellant, he noticed an envelope sticking out of his pocket and a clear plastic bag hanging out of his sock. The officer also noticed another clear plastic bag on the floor near the driver. The envelope was found to contain a green, leafy plant substance. The contents of the plastic bags field-tested positive for cocaine. During a search of the car, the officer discovered a bottle of syrup-like substance that likewise field-tested positive for cocaine. Appellant was arrested and charged with possession of the 27.61 grams of cocaine. The driver was released at the scene.

Appellant claims his plea was involuntary because he was denied effective assistance of counsel. He bases this claim on the assertion that his trial counsel advised him to plead guilty without challenging the State's evidence linking him to the bag of cocaine found on the driver's side of the car. He also claims that his trial counsel failed to adequately investigate the facts of the case.

Because appellant couches his voluntariness argument in terms of ineffective assistance of counsel, we will apply the two-pronged test elucidated in *Strickland v. Washington*. *See* 466 U.S. 668 (1984); *see also McFarland v. State*, 928 S.W.2d 482, 500 (Tex.Crim.App.1996). To prevail on this claim, the appellant must first demonstrate his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688. Second, the appellant must prove that but for counsel's deficiency the result of the trial would have been different. *See McFarland*, 928 S.W.2d at 500. Under this analysis, trial counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged to be ineffective. *See id.* at 500. The appellant must also affirmatively prove that these acts fell below the norm of professional reasonableness. *See id.* Appellate courts will not speculate about counsel's effectiveness. *See Huynh v. State*, 833 S.W.2d 636, 638 (Tex. App.–Houston [14th Dist.] 1992, no pet.). Rather, such a claim must be firmly supported by the record. *See McFarland*, 928 S.W.2d at 500.

Here, there is no evidence in the record supporting appellant's claim that his trial counsel did not properly advise him nor is there any evidence that his trial counsel failed to perform an adequate investigation of the facts. Rather, to find in favor of appellant, we must speculate about these essential facts, which is something we refuse to do.

Moreover, appellant has failed to show how the result of his trial would have been different had his attorney decided to challenge the evidence linking appellant to the cocaine found on the driver's side of the car. The range of punishment for a conviction of cocaine possession is dependent upon the amount of cocaine one is charged with possessing. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115 (Vernon Supp. 2000). Here, appellant was found to have possessed two bags of cocaine and a liquid cocaine substance in a cough syrup bottle. On appeal, he admits to possessing the bag of cocaine found in his sock and apparently admits to possessing the syrup-like cocaine. Appellant, however, claims that his attorney should have challenged the admission of the second bag of cocaine before advising him to plead guilty.

The only way the result of his trial would be different is if the cocaine in the bag found on appellant and the liquid cocaine had a combined weight of less than four grams, and the cocaine in the second bag was used to increase the total weight of the cocaine over four grams, thereby increasing appellant's punishment range. The record, however, does not show the respective weights of the two bags and the syrup; rather, the record only reflects that the total weight of all three was 27.61 grams. Thus, we cannot determine if appellant might have been charged with a lesser offense (e.g., possession of a controlled substance weighing one or more grams but less than four grams) if his counsel were successful in challenging appellant's possession of the second bag of cocaine. Any determination about his punishment, therefore, would be completely speculative and does not satisfy the second prong of the *Strickland* test.

Because appellant has failed to prove that his trial counsel was ineffective, we overrule his first point of error.

In his second point of error, appellant complains that the trial court erred by failing to admonish him regarding the range of punishment for all charged offenses, making his plea involuntary. Appellant was charged with possession of between four and 200 grams of a controlled substance–a second degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(d) (Vernon Supp. 2000). With one enhancement paragraph, appellant was subject to imprisonment for five to ninety-nine years if found guilty of this offense. *See* TEX. PEN. CODE ANN. § 12.42(b) (Vernon 1994). Appellant was also charged with possession of

between four and 200 grams of a controlled substance with intent to deliver–a first degree felony. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.112(d) (Vernon Supp. 2000). With one enhancement paragraph, appellant was subject to imprisonment for a range from fifteen years to life imprisonment if convicted of this offense. *See* TEX. PEN. CODE ANN. § 12.42(c)(1) (Vernon 1994). Because the trial court failed to admonish him of the penalty ranges for both crimes, he claims his plea was involuntary.

We fail to see how the trial court's failure to admonish appellant on the range of punishment for possession with intent to deliver, a crime of which he was not convicted, relates in any way to his conviction for possession. Any error on the part of the trial court on that issue would not have made his plea of guilty to this crime involuntary. The record does disclose that he was properly admonished as to the range of punishment for the convicted offense and his sentence of eight years fits within the punishment range for that crime. Finding no error, we overrule appellant's second point on appeal and affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed May 4, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
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