Affirmed and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00537-CR

GLORIA J. MCGILBERRY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 278th District Court
Walker County, Texas
Trial Court Cause No. 19,754-C

O P I N I O N

Charged by indictment with the offense of driving while intoxicated, appellant, Gloria J. McGilberry, was convicted by a jury and sentenced by the trial court to five years' imprisonment. The trial court probated her sentence for five years. In her sole point of error, appellant claims her trial counsel was ineffective at the guilt-innocence phase of the trial. We affirm.

BACKGROUND

The State offered evidence to show appellant committed the offense of driving while intoxicated on November 18, 1997, in Walker County. In addition, the State also introduced evidence to show that

appellant committed the same offense on at least two prior occasions: in Montgomery County on December 8, 1989, and in Walker Country on May 19, 1995.

To prove the Montgomery County prior offense, the State offered into evidence a fingerprint card from the Montgomery County Jail for Gloria Joyce McGilberry, which was signed by Joyce McGilberry on December 8, 1989. An officer from of the Montgomery County Sheriff's Department, testifying for the State, acknowledged that she could not determine from the fingerprint card itself the offense for which McGilberry had been arrested in Montgomery County in 1989; however, the officer testified that she had learned McGilberry had been arrested for the offense of driving while intoxicated. The State also introduced a judgment from Montgomery County showing Gloria Joyce McGilberry was convicted on June 8, 1990, for the offense of driving while intoxicated on December 8, 1989. The judgment also bears the signature of Joyce McGilberry.

INEFFECTIVE ASSISTANCE OF COUNSEL

In her sole point of error, appellant contends that she was denied effective assistance of counsel when trial counsel failed to object to hearsay evidence linking appellant to the Montgomery County conviction. We evaluate claims of ineffective assistance of counsel under the two prong analysis articulated in *Strickland v. Washington*, 466 U.S. 668, 686 (1984). *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). *Strickland* held that the appellant must show: (1) trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) this deficient performance resulted in prejudice to the appellant. *See id*. The appellant must prove her claim by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998)

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We presume trial counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id*. The appellant cannot meet this burden if the record does not specifically focus

on the *reasons* for the conduct of trial counsel. *See Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (citing *Jackson v. State*, 877 S.W.2d at 771).

In *Thompson*, the State repeatedly tried to elicit inadmissible hearsay, and defense counsel correctly objected. 9 S.W.3d at 810-11. In its last attempt to get the hearsay testimony into evidence, the State managed to elicit the hearsay without an objection by defense counsel. *See id.* at 811. The Court of Criminal Appeals found that the appellant failed to defeat the strong presumption of competence because the record was silent as to defense counsel's strategy. *See id.* at 814. The *Thompson* court warned,

> [a]n appellate court should be especially hesitant to declare counsel ineffective based upon a single alleged miscalculation during what amounts to otherwise satisfactory representation, especially when the record provides no discernible explanation of the motivation behind counsel's actions -- whether those actions were of strategic design or the result of negligent conduct.

Id. The *Thompson* court opined that defense counsel might have decided that the testimony sought was not inadmissible based on the artful questioning of the State. *See id.*

Here, appellant claims her counsel was ineffective because he failed to object when the State elicited what the appellant claims is hearsay evidence from the testifying officer about the nature of the Montgomery County offense. Even assuming the officer's statement constituted inadmissible hearsay,[1] the record is silent as to trial counsel's strategy. We will not speculate in hindsight that there is no conceivable reason to support trial counsel's decision not to object to the officer's testimony. In fact, there are several

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[1] Out-of-court statements offered at trial to prove the truth of the matter asserted are inadmissible hearsay unless the statements fall within a hearsay exception found in the statutes or rules of evidence. *See* TEX. R. EVID. 801-802. The record contains no information on the source from which the testifying officer discovered appellant was arrested for driving while intoxicated. She could have learned the nature of the offense for which appellant was arrested from looking at the judgment or at police records as well as from talking to another officer. Therefore, we cannot conclude her statements were inadmissible hearsay.

possible strategies for defense counsel's failure to object. As in *Thompson*, defense counsel might have concluded the inquiry was not designed to elicit inadmissible hearsay due to the questioning employed by the prosecutor. Defense counsel might have decided not to object because he knew the State could produce other witnesses to discuss the Montgomery County conviction, a tactic which, if employed, might have drawn more attention to this conviction. Because the record is silent, appellant has not overcome the strong presumption that counsel acted in accordance with sound trial strategy and was competent; therefore, the first prong of *Strickland* is not met. Having found that appellant failed to satisfy the first prong of *Strickland*, we do not even reach the second prong.

We overrule appellant's sole point of error and affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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