Affirmed and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00247-CR

ALLEN JAMES HYPOLITE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Cause No. 10,420

O P I N I O N

Appellant, Allen James Hypolite, was convicted of possession of 200 to 400 grams of cocaine with intent to deliver and was sentenced to thirty years imprisonment. On appeal, he argues (1) there was insufficient evidence to prove he intended to deliver the cocaine; (2) there was insufficient evidence to prove that he possessed more than 200 grams of cocaine; (3) the court erred in denying his motion to suppress; and (4) he was denied effective assistance of counsel. We affirm.

Appellant was driving through Chambers county on I-10 when a Department of Public Safety trooper pulled him over for impeding traffic by driving too slowly in the inside lane. Appellant gave the trooper consent to search his vehicle. While searching under the hood, the trooper noticed a recent hand

print on the cover of the vehicle's air cleaner. He opened the cover and found a brown paper bag containing a substance later identified as crack cocaine. Appellant was placed under arrest and ten "cookies" of crack cocaine, weighing slightly over 222 grams, were recovered from the vehicle.

Intent to Deliver

Appellant first contends the evidence was legally insufficient to support the conviction because the State failed to prove he intended to deliver the cocaine.

Intent to deliver is usually shown by circumstantial evidence. *See Williams v. State*, 902 S.W.2d 505, 507 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). The factors commonly considered when assessing circumstantial proof of intent include: (1) the nature of the place where the defendant was arrested; (2) the quantity of controlled substance possessed by the defendant; (3) the manner of packaging; (4) the presence of drug paraphernalia; (5) the defendant's possession of a large amount of cash; and (6) the defendant's status as a drug user. *Id*. at 506.

Here, the State presented testimony that appellant was arrested on an interstate highway in Texas while on his way to Louisiana. The cocaine was formed into ten separate "cookies" of crack, wrapped in a brown paper bag and hidden in the air cleaner compartment of the car. The State also presented testimony from an expert witness who testified that (1) cocaine is usually shipped in cookie form and then broken up into individual "rocks" for sale and personal consumption; (2) each rock is usually only one tenth of a gram, so that the cocaine seized here was enough for more than 2200 rocks; (3) crack users with access to this volume of cocaine who intended it for personal consumption would probably "smoke themselves to death;" and (4) no "shooter" or pipe was found in the car to actually smoke the cocaine.[1] Appellant presented no testimony as to his intent to deliver.

The test for legally sufficient evidence is whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

[1] Expert testimony by experienced law enforcement officers may be used to show intent to deliver. *See Mack v. State*, 859 S.W.2d 526, 529 (Tex. App.–Houston [1st Dist.] 1993, no pet.); *Branch v. State*, 833 S.W.2d 242, 244-45 (Tex.App.–Dallas 1992, pet. ref'd).

beyond a reasonable doubt." *Staley v. State*, 887 S.W.2d 885, 888 (Tex. Crim. App. 1994); *Geesa v. State*, 820 S.W.2d 154, 156 (Tex. Crim. App. 1991). After viewing the evidence in the light most favorable to the prosecution, we hold a rational trier of fact could have found that appellant intended to deliver the cocaine. The contentions raised by appellant in his first two questions for review are overruled.

Amount of cocaine

Because the State failed to show that the additives in the cookies had not affected the chemical activity of the cocaine, appellant next contends the State was required to prove that he possessed more than 200 grams of *pure* cocaine. In other words, appellant claims the State should not have been able to include the weight of adulterants and dilutants in computing the total weight of the cocaine.

Adulterants and dilutants are "any material that increases the bulk or quantity of a controlled substance, regardless of its effect on the chemical activity of the controlled substance." TEX. HEALTH & SAFETY CODE ANN. § 481.002(49) (Vernon Supp. 1999). The State's expert witness testified that the contraband at issue weighed 222.02 grams, of which 76% (approximatley169 grams) was pure cocaine and the rest consisted of unidentified adulterants and dilutants. Because the State is not required to identify the adulterants and dilutants, why they were added, or their chemical effect, the evidence is legally sufficient. *See Hines v. State*, 976 S.W.2d 912, 913 (Tex. App.–Beaumont 1998, no pet.); *Warren v. State*, 971 S.W.2d 656, 660 (Tex. App.–Dallas 1998, no pet.); *Williams v. State* 936 S.W.2d 399, 405 (Tex. App.–Fort Worth 1996, pet. ref'd). The contentions raised by appellant in his third and fourth issues for review are overruled.

Motion to Suppress

Appellant further contends the trial court erred in denying his motion to suppress because his arrest was illegal. He claims the State failed to prove he committed a traffic offense authorizing the trooper to make a traffic stop; thus, all evidence flowing from the traffic stop was illegal.

If an officer has a reasonable basis for suspecting a person has committed a traffic offense, the officer may legally initiate a traffic stop. *See McVickers v. State*, 874 S.W.2d 662, 664 (Tex. Crim.

App.1993); *Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App.1992); *Hernandez v. State*, 983 S.W.2d 867, 870-71 (Tex. App.–Austin 1998, no pet.). Section 545.051 of the Transportation Code provides that "[a]n operator of a vehicle on a roadway moving more slowly than the normal speed of other vehicles at the time and place under the existing conditions shall drive in the right-hand lane." *See* TEX. TRANSP. CODE ANN. § 545.051 (Vernon 1995). A violation of the statute is a criminal offense for which the violator may be arrested. *See id* at § 543.001; *see also Texas Dept. of Public Safety v. Chang*, 994 S.W.2d 875(Tex. App.–Austin 1999, no pet.).

Here, the trooper testified that appellant was driving ten miles an hour below the posted speed limit and was impeding traffic. Thus, the trooper articulated sufficient facts to support a traffic stop. As is evident from the videotaped record of that stop, appellant was nervous and gave confusing and contradictory answers to routine questions. When asked for permission to search the vehicle, appellant unequivocally consented. The evidence flowing from the traffic stop was properly admitted. The contentions raise by appellant in his fifth and sixth questions for review are overruled.

Ineffective Assistance of Counsel

Appellant next contends he was denied effective assistance of counsel. He argues that counsel (1) failed to get a timely ruling on his pre-trial motion to suppress; (2) did not object to the admission of the trooper's testimony, the videotape of the traffic stop, and several photographs; and (3) failed to object properly to two other photographs which he contends were prejudicial and improperly authenticated.

To be successful in a claim for ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ramirez v. State*, 987 S.W.2d 938, 942-43 (Tex. App.–Austin 1999, no pet. h.). In determining whether an appellant has satisfied the first element of the test, we must decide whether the record establishes that counsel made errors so serious that he was not functioning as the kind of "counsel" guaranteed the defendant by the Sixth Amendment. *See Strickland* at 687.

We begin our analysis with the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We must presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* Appellant must also demonstrate that counsel's performance was unreasonable under the prevailing professional norms and that the challenged action was not sound trial strategy. *See Strickland*, 466 U.S. at 688; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App.1991). We do not evaluate the effectiveness of counsel in hindsight, but from counsel's perspective at trial. *See Strickland*, 466 U.S. at 689; *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App.1993); *Stafford*, 813 S.W.2d at 506. Further, we assess the totality of counsel's representation, rather than his or her isolated acts or omissions. *See Strickland*, 466 U.S. at 689; *Ramirez*, 987 S.W.2d at 943.

The appellant cannot meet his burden if the record does not affirmatively support the claim. *See Jackson v. State*, 973 S.W.2d 954, 955 (Tex. Crim. App. 1998); *Beck v. State*, 976 S.W.2d 265, 266 (Tex. App.–Amarillo 1998, pet. ref'd); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex. App.–Corpus Christi 1992, pet. ref'd, untimely filed). Generally, a record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd).

Here, the record is silent as to the reasons appellant's trial counsel chose the course he did. Appellant did not file a motion for a new trial, and therefore failed to develop any evidence of trial counsel's strategy. *See Kemp*, 892 S.W.2d at 115. Due to the lack of evidence in the record concerning trial counsel's reasons for these alleged acts of ineffectiveness, we are unable to conclude that appellant's trial counsel's performance was deficient. *Id.* The first element of *Strickland* is not met. The contentions raised in appellant's seventh and eighth issues for review are overruled.

In a ninth issue for review, appellant claims the videotape of the traffic stop has not been made a part of the record on appeal. The record, however, has been supplemented with the videotape. Accordingly, the issue is moot, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed May 25, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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