Affirmed and Opinion filed June 14, 2001.

In The

Fourteenth Court of Appeals

———————————

NO. 14-00-00557-CR

———————————

KERRY REYNOLDS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 825544

M E M O R A N D U M O P I N I O N

The parties are already familiar with the background of the case and the evidence adduced at trial, therefore, we limit recitation of the facts. We issue this memorandum opinion pursuant to Texas Rule of Appellate Procedure 47.1 because the law to be applied in the case is well settled.

Appellant was convicted for possession of cocaine and sentenced to eight years' confinement. He complains that (1) the evidence was factually insufficient to support his conviction, and (2) trial counsel was ineffective for failing to object to the State's closing argument. We affirm.

Background

HPD Officers Greg Ford and Travis Merrill investigated drug activity at the Airways Motel, reputed as a place where narcotics transactions and other criminal activity occurred. The officers found three men entering into a drug transaction and arrested them. According to the officers, one of the men, identified as "Savage," asked them to go to his nearby room and make sure it was locked. Savage told the officers the key was in the room and that there had been someone else in the room earlier. The officers knocked on the door. Appellant answered and, upon seeing the officers, looked shocked and dropped what appeared to the officers to be three or four rocks of crack cocaine to the carpeted floor. Appellant immediately began to crush the substance into the carpet with his foot. The officers detained appellant, scraped the substance into a baggie and, utilizing a field test, identified it as crack cocaine. Appellant was charged with felony possession of less than one gram of cocaine. The officers testified at trial that the area where appellant dropped the cocaine was well-lit and that they had both seen crack cocaine hundreds of times in their careers. Ford said he was "100 percent positive" the substance coming from appellant's hand was crack cocaine.

In the hotel room with appellant at the time of the events was Brian Toy Richard. Richard testified that he pretended to be sleeping when appellant let the officers in but was actually watching. Both officers testified that the sleeping man in the hotel room had his head turned away from them. Richard testified that the officers just barged in the room when appellant opened the door and that he did not see appellant drop anything. Instead, Richard asserted that the cocaine "fell off of me" and was just sitting on the floor, next to the door when the officers came in. Richard did admit, as a normal practice, he does not leave crack lying on the floor.

At closing argument, the State argued it was obvious that Savage and appellant were drug dealers, and they worked in a team in which Savage made the deal outside but sent the buyer to the hotel room to pick up the drugs. Appellant's counsel did not object to the argument.

Factual Sufficiency

In a factual sufficiency review, we examine the evidence in a neutral light, favoring neither party. *See Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d. 126,134 (Tex. Crim. App. 1996). We examine the evidence weighed by the jury that tends to prove the existence of an elemental fact in dispute and comparing it with the evidence tending to disprove that fact. *Johnson*, 23 S.W.3d at 7. Under a factual sufficiency review, a court will set aside a verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.*

Appellant contends that, even taking everything the officers stated as true, there is no way they could knowthat the substance appellant dropped was cocaine. Additionally, appellant cites the testimony of Richard who asserted that the cocaine belonged to him, but that he had dropped it by the door and just left it there. We disagree the evidence is factually insufficient. First, the officers both testified that they had seen cocaine many times before and they recognized the substance falling from appellant's hand as cocaine. Second, the jury clearly did not accept Toy's farfetched story and we see no reason to do so on appeal. We overrule this issue.

Ineffective Assistance of Counsel

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). It is the appellant's burden to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Scrutiny of counsel's performance must be highly deferential. *Id.* We indulge a strong presumption that counsel's representation falls within the wide range of reasonable professional assistance; that is, counsel's actions (or inactions) might be considered "sound trial strategy." *See Young v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App. 1999). We presume "that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that counsel made all significant decisions in the exercise of reasonable professional judgment." *Id.* The court of criminal appeals has set an extremely high bar for proving ineffective assistance claims on direct appeal. *See Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App.

1999). The court explained:

> [A] substantial risk of failure accompanies an appellant's claim of ineffective assistance on direct appeal. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel. Indeed in a case such as this, where the alleged derelictions primarily are errors of omission de hors in the record rather than commission revealed in the trial record, collateral attack may be the vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record.

Id. at 813-14 (citations and quotation marks omitted).

Here, since the record is silent as to the reasoning behind counsel's omissions, appellant has failed to overcome the presumption that counsel acted competently, especially in light of *Thompson*. Thus, to find that trial counsel was ineffective based on appellant's asserted ground would call for speculation, which we will not do. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Without an adequate record, we find the alleged omission by counsel could have been reasonable trial strategy. For instance, appellant defended that he was just an unknowing visitor in the motel room. However, contrary to appellant's claim, the State offered significant evidence that drug dealing was going on at the motel, in the room, and implicating appellant as a participant in it. Because of this already admitted evidence,[1] counsel could have determined the State's argument was a reasonable deduction from the evidence. By declining to object, counsel's trial strategy may have been to avoid drawing additional undue attention to the damaging evidence introduced earlier. Thus, whether the argument was improper or not, counsel could have made a viable strategic decision to let it pass without objection. We overrule issue appellant's ineffective assistance of counsel issue.

The judgment of the trial court is affirmed.

---

[1] Appellant does not assert counsel was ineffective for failing to object to this evidence.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed June 14, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).