Affirmed and Opinion filed June 29, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00119-CR

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ISAAC ESCAMILLA, SR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 773609

O P I N I O N

Appellant was charged by indictment with the offense of possession of marihuana in a useable quantity of more than fifty but less than 200 pounds. Without the benefit of a plea bargain agreement, appellant pled guilty to the charged offense. The trial court assessed punishment at five years confinement in the Texas Department of Criminal Justice—Institutional Division. Appellant raises a single point of error alleging ineffective assistance of counsel. We affirm.

I. Factual Summary

Appellant and his son were charged in separate indictments with commission of the same offense, namely, possession of marihuana. Both were represented by the same counsel in the trial court. When counsel was unable to reach an acceptable plea bargain with the State, appellant and his son pled guilty to the charged offenses and the trial court assessed punishment at five years and twenty years confinement, respectively. Appellant subsequently filed a motion for new trial alleging ineffective assistance of counsel stemming from a conflict of interest in the representation of both appellant and his son. The motion was overruled by operation of law.

II. Appellant's Argument

Appellant contends the joint representation by trial counsel resulted in appellant receiving ineffective assistance of counsel. This claim is based upon the joint plea bargain agreement offered by the State whereby both appellant and his son would plead guilty to the charged offenses and the State would recommend punishment be assessed at eight years and twelve years, respectively. If appellant and his son did not accept this joint offer, the cases would be scheduled for a joint trial. Appellant argues this offer rendered trial counsel ineffective because the joint representation prevented him from obtaining separate plea bargains for appellant and his son.

III. Standard of Review

Generally, our standard of review for ineffective assistance of counsel claims is the two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This test requires an appellant to demonstrate first that counsel's representation fell below an objective standard for reasonableness, and secondly, that but for counsel's deficient representation, the result of the proceeding would have been different. *Id.*, 466 U.S. at 687, 104 S.Ct. at 2064. An exception to this general rule applies when we review claims stemming from joint representation by trial counsel. Under this exception, the second prong of

Strickland does not apply. *Id.*, 466 U.S. at 692, 104 S.Ct. at 2067. If counsel's performance was adversely affected by his active representation of conflicting interests, prejudice is presumed. *See Cuyler v. Sullivan*, 446 U.S. 335, 345-350, 100 S.Ct. 1708, 1716-19, 64 L.Ed.2d 333 (1980). This is so because a single lawyer cannot simultaneously represent the conflicting interests of two clients. *See Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 465, 86 L.Ed. 680 (1942). However, not all codefendants have conflicting interests, and there may be a tactical advantage from presenting a common defense. *See Raspberry v. State*, 741 S.W.2d 191, 197 (Tex. App.—Fort Worth 1987, pet. ref'd). Consequently, permitting a single attorney to represent codefendants does not always violate the constitutional guarantees to effective assistance of counsel and the mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. *See Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1719.

A defendant who does not complain of a conflict of interest at trial can demonstrate a violation of the right to reasonably effective assistance of counsel if he can show that defense counsel was burdened by an actual conflict of interest that had an adverse effect on specific instances of the attorney's performance. *See Howard v. State*, 966 S.W.2d 821, 826 (Tex. App.—Austin 1998, pet. ref'd). An actual conflict of interest arises when one defendant stands to gain significantly by counsel adducing evidence or arguments that are damaging to the cause of a codefendant whom counsel is also representing. *See Ex parte Alaniz*, 583 S.W.2d 380, 381 n. 3 (Tex. Crim. App. 1979). Where there is evidence of counsel's "struggle to serve two masters" that cannot be seriously doubted, a finding of ineffective assistance based on counsel's conflict of interest necessarily follows. *See Ex parte Acosta*, 672 S.W.2d 470, 474 (Tex. Crim. App. 1984); *Ex parte McCormick*, 645 S.W.2d 801, 806 (Tex. Crim. App. 1983).

Actual conflicts of interest have been found on several occasions. For example, in *Amaya v. State*, 677 S.W.2d 159 (Tex. App.—Houston [1st Dist.] 1984, pet. ref'd), a conflict between the various alibi witnesses could have been exploited to one codefendant's benefit, but this would have harmed the defenses of the other codefendants. Thus, the record showed that one codefendant stood to gain significantly at the guilt stage by counsel adducing evidence or arguments that would have damaged the cause of his codefendants whom counsel was also

representing. In *Maya v. State*, 932 S.W.2d 633 (Tex. App.—Houston [14th Dist.] 1996, no pet.), this court found an actual conflict of interest when an attorney represented a husband and wife in a joint prosecution for attempted murder. There, the husband's theory of self-defense was undermined by the wife's written confession and her testimony before the jury. The joint representation prevented counsel from cross-examining or impeaching the wife to further advance the defense of the husband. Similarly, counsel could not seek to minimize the wife's involvement in the incident without shifting the attention and guilt to the husband. These dilemmas represent actual conflicts of interest. *See* 932 S.W.2d 633, 635-636.

IV. Analysis

As there was no complaint of a conflict of interest in the trial court prior to appellant's guilty plea, the question presented is whether defense counsel was burdened by an actual conflict of interest in his representation of appellant and his son. *See Howard*, 966 S.W.2d at 826. In other words, did either appellant or his son stand to gain significantly and the other stand to be damaged by accepting trial counsel's advice to waive jury trials and plead guilty to the charged offense without the benefit of a plea bargain agreement. *See Alaniz*, 583 S.W.2d at 381.

Here, appellant and his son were confronted by a prosecutor who wished to resolve each of these prosecutions in the same manner, either by plea or by trial. Certainly, it was within the prosecutor's discretion to proceed in this fashion. We have no reason to believe the prosecutor would not have followed this course had appellant and his son been represented by separate trial counsel.

Appellant contends that had trial counsel been free to bargain independently with the State appellant could have received a lesser sentence or even a probated sentence. Appellant had a prior felony conviction for which he had received and successfully completed a probated sentence. Therefore, appellant was not eligible to receive community supervision from a jury. *See* TEX. CODE CRIM. PROC. art. 42.12 § 4(e). Appellant's son also had a prior felony conviction which was alleged to enhance the range of punishment in his case. Consequently,

by advising both appellant and his son to plead guilty without an agreed recommendation as to punishment from the State, trial counsel pursued the only course of action which provided the opportunity for community supervision, not just for appellant but his son as well. Under this strategy, neither appellant nor his son stood to gain at the damage to the other; rather both shared the opportunity to have the trial court assess probated sentences. The fact that appellant did not ultimately receive a probated sentence does not establish an actual conflict of interest stemming from the joint representation of trial counsel.

Accordingly, we hold appellant did not receive ineffective assistance of counsel in the trial court. The point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird[1]
Justice

Judgment rendered and Opinion filed June 29, 2000.
Panel consists of Justices Fowler, Edelman, and Baird.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Judge Charles F. Baird sitting by assignment.