Affirmed and Opinion filed July 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01090-CR

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THELMA ASHWOOD PELMORE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 13
Harris County, Texas
Trial Court Cause No. 98-29651

O P I N I O N

Thelma Ashwood Pelmore appeals her conviction by a jury for interfering with a public servant. The jury assessed her punishment at 30 days confinement in the county jail and a $500.00 fine. In four points of error, or issues, appellant contends she did not receive a fair trial due to ineffective assistance of counsel. We affirm.

On April 22, 1998, appellant's common-law husband (Mitchell) had a one-car accident on Highway 59 in Houston which was investigated by sheriff's deputies. Deputy Mehring smelled alcohol on Mitchell's breath, and started to have Mitchell perform field sobriety tests. Mehring attempted to perform an HGN test when appellant came up and told Mitchell not to

look at Mehring or do what he said. Mehring asked his partner, Deputy Burkett, to escort appellant away from the investigation scene. After Burkett escorted appellant away, Mehring completed the HGN test, and determined that he had probable cause to arrest Mitchell on suspicion of driving while intoxicated. Appellant came back and told Mehring that she was an attorney, and that she had the right to be there. Mehring told her that he would tell her anything she wanted to know after he finished his investigation. While Mehring was attempting to interview a witness, appellant came over and pulled on his helmet strap to get his attention. Appellant demanded to know the names and badge numbers of Mehring and Burkett, and Mehring told her to step back and leave the scene. Mehring told the wrecker driver to move Mitchell's vehicle because it was a traffic hazard, and appellant again came up and told Mehring and Burkett not to move Mitchell's vehicle because she had to investigate. After some more interruptions, Burkett arrested appellant for interfering with a police officer.

In her four points of error, appellant contends she received ineffective assistance of counsel for the following reasons:

1. During the guilt/innocence phase, counsel failed to exclude evidence of her prior Illinois convictions in 1984 for deceptive practices and in 1989 for forgery.

2. During the guilt/innocence phase, counsel failed to object to irrelevant and prejudicial remarks by the State concerning appellant's common-law marriage to Mitchell and Mitchell's arrest for DWI.

3. During the guilt/innocence phase, counsel failed to object to appellant's statements at the police station.

4. During the punishment phase, counsel failed to prove that appellant qualified for probation.

Claims of ineffective assistance of counsel are evaluated under the two-step analysis articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). The first step requires appellant to demonstrate that trial counsel's representation fell below an objective standard of

reasonableness under prevailing professional norms. *See Strickland,* 466 U.S. at 688. To satisfy this step, appellant must identify the acts or omissions of counsel alleged as ineffective assistance and affirmatively prove they fell below the professional norm of reasonableness. *See McFarland v. State,* 928 S.W.2d 482, 500 (Tex.Crim.App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Strickland*, 466 U.S. at 695.

The second step requires appellant to show prejudice from the deficient performance of his attorney. *See Hernandez v. State,* 988 S.W.2d 770, 772 (Tex. Crim.App. 1999). To establish prejudice, an appellant must prove that but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

In any case analyzing the effective assistance of counsel, we begin 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 cannot meet this burden if the record does not affirmatively support the claim. *See Jackson v. State*, 973 S.W.2d 954, 955 (Tex.Crim.App. 1998) (inadequate record on direct appeal to evaluate whether trial counsel provided ineffective assistance); *Phetvongkham v. State,* 841 S.W.2d 928, 932 (Tex.App.–Corpus Christi 1992, pet. ref'd, untimely filed) (inadequate record to evaluate ineffective assistance claim); *see also Beck v. State*, 976 S.W.2d 265, 266 (Tex.App.–Amarillo 1998, pet. ref'd) (inadequate record for ineffective assistance claim, citing numerous other cases with inadequate records to support ineffective assistance claim). 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).

We address appellant's contentions, as follows:

1. During the guilt/innocence phase, counsel failed to exclude evidence of prior Illinois convictions in 1984 for deceptive practices and in 1989 for forgery. Appellant contends her counsel was ineffective because he failed to request written notice of the State's intent to use the convictions under rule 609(f), Texas Rules of Evidence. She further asserts that counsel was deficient in "opening the door" by asking her questions about past arrests.

Appellant's trial counsel asked appellant on direct examination if she had completed the terms of a probated sentence she received in Illinois. She stated she did complete the probated sentence, and paid a requested $17.00 to the probation department they said was still owing. After appellant testified that she was "shocked" when the officers arrested her, trial counsel asked her: "[Y]ou're not used to being arrested?" She answered, "no." On cross-examination, the State asked appellant if she had been convicted in 1989 of the felony offense of forgery. Appellant admitted she had been placed on probation for this offense. The State then asked her about a conviction for a 1984 felony offense of deceptive practices, and she denied any knowledge of such a conviction.

The record is silent as to the reasons appellant's trial counsel "opened the door" to appellant's impeachment by having her testify as to her 1989 conviction, and as to why he did not request notice from the State of intent to use such convictions. The first prong of *Strickland* is not met in this case because we are unable to conclude that appellant's trial counsel's performance was deficient without evidence in the record. *See Jackson*, 973 S.W.2d at 955. We overrule appellant's point of error one.

2. During the guilt/innocence phase, counsel failed to object to irrelevant and prejudicial remarks by the State concerning appellant's common-law marriage to Mitchell and Mitchell's arrest for DWI. The record is silent as to the reasons appellant's trial counsel chose the course he did. The first prong of *Strickland* is not met in this case because we are unable to conclude that appellant's trial counsel's performance was deficient without evidence in the record. *See Jackson*, 973 S.W.2d at 955. We overrule appellant's point of error two.

3. During the guilt/innocence phase, counsel failed to object to appellant's statements at the police station. The record is silent as why counsel failed to object, and we will not speculate as to why he did not object. The first prong of *Strickland* is not met in this case because we are unable to conclude that appellant's trial counsel's performance was deficient without evidence in the record. *Id.* We overrule appellant's point of error three.

4. During the punishment phase, counsel failed to prove that appellant qualified for probation. Appellant filed a sworn motion for probation. At the guilt/innocence phase and punishment phase, appellant admitted to having been placed on probation in Illinois for the felony offense of forgery. If appellant's prior probationary term resulted from a felony conviction, then she would not have been eligible for probation. *See Ex parte Welch*, 981 S.W.2d 183, 184 (Tex.Crim.App. 1998). We have not had our attention directed to any sworn evidence establishing that appellant was eligible for probation nor have we been able to find any such evidence in the record. To support a claim of ineffective assistance of counsel at the punishment stage, there must be evidence that the defendant was initially eligible to receive probation. *State v. Recer*, 815 S.W.2d 730, 731 (Tex.Crim.App. 1991); *Mercado v. State*, 615 S.W.2d 225, 228 (Tex.Crim.App. 1981). Because the record does not contain any sworn evidence that appellant was eligible for probation, we cannot conclude that appellant's trial counsel was ineffective for failing to qualify her. *Id.* Furthermore, the record is silent as to why counsel chose not to question appellant about her eligibility for probation. The first prong of *Strickland* is not met in this case because we are unable to conclude that appellant's trial counsel's performance was deficient without evidence in the record. *See Jackson,* 973 S.W.2d at 955. We overrule appellant's point of error four.

We affirm the judgment of the trial court.

/s/ Bill Cannon

Justice

Judgment rendered and Opinion filed July 13, 2000.

Panel consists of Justices Robertson, Sears, and Cannon.[*]

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

[*] Senior Justices Sam Robertson, Ross A. Sears, and Bill Cannon sitting by assignment.