Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00947-CR

RICHARD GLEN STURGEON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 812,784

O P I N I O N

Appellant, Richard Glen Sturgeon, was convicted of the offense of aggravated robbery. The indictment contained two prior felony convictions for enhancement purposes. The jury found appellant guilty of aggravated robbery, and found the enhancement paragraphs to be true. The jury assessed appellant's punishment at imprisonment for 50 years. Appellant appeals his conviction on two points of error. First, the trial court erred by refusing to grant a writ of attachment for a properly subpoenaed defense witness. Second, appellant received ineffective assistance of counsel because trial counsel failed to obtain and present an alibi witness. We affirm.

F A C T U A L B A C K G R O U N D

Minh Nguy returned home from work early on Christmas morning in 1998, when a man approached and struck him repeatedly in the face with a pistol. Nguy fell to the ground and a second man went through his pockets, taking his keys, wallet and money. One of the assailants left in Nguy's blue Ford automobile while the other drove away in a different vehicle. Nguy sustained a broken tooth and a cut over the eye.

Subsequently, Houston police officers stopped a car driven by appellant during the afternoon of December 26, 1998. The officers found Nguy's driver's license and credit card in the possession of Gregory Tobias, one of the occupants of the vehicle. In addition, the officers found Nguy's car registration in the trunk of the vehicle driven by appellant.

Tobias provided investigators with a written statement, and he testified at trial, that appellant and Elvin Bonner took him to a location where appellant and Bonner removed items from a blue Ford automobile. Tobias testified that the items belonging to Nguy, found in his pockets, were given to him by Bonner.

Following the arrest and search of Tobias, Bonner, and appellant, all three were placed in a police line-up. Nguy viewed the line-up and positively identified appellant as one of the assailants. Further, Nguy identified the appellant in the courtroom as the robber who repeatedly struck him in the face with a firearm.

Attachment

In his first point of error, appellant asserts that the trial court erred in refusing his request for a writ of attachment for Patricia Smith. Once the State rested its case, in a hearing outside the jury's presence defense counsel asked for a continuance and asked that the court issue a writ of attachment for Patricia Smith. Counsel maintained that Smith was an alibi witness and could place appellant at her home, a significant distance from the place of the offense, at the time of the robbery. The trial court denied the writ, based on article 24.14 of the Code of Criminal Procedure, which requires proof a material witness

is about to move out of the county in order to obtain a writ of attachment. TEX. CODE CRIM. PROC. ANN. art. 24.14 (Vernon 1989). The facts of the case *sub judice* suggest article 24.12 is more pertinent to the question presented.[1] TEX. CODE CRIM. PROC. ANN. art. 24.12 (Vernon 1989).

The Code of Criminal Procedure provides that when a properly subpoenaed witness fails to appear, the State or the defendant shall be entitled to have an attachment issued for the witness. *Id*. Additionally, judges have inherent power to issue compulsory process without regard to statutory authorization, in order to protect the rights guaranteed by the Texas Constitution. TEX. CONST. art. I, § 10.

When a subpoenaed witness does not appear, the party calling him must follow three steps to preserve error. *Erwin v. State,* 729 S.W.2d 709, 714 (Tex. Crim. App. 1987). First, the party must request a writ of attachment, which must be denied by the trial court. *Id.* Second, the party must show what the witness would have testified to. *Id.* Third, the testimony that the witness would have given must be relevant and material. *Id.* If all three requirements are met, reversible error will result unless the error made no contribution to the conviction or to the punishment. *Id*.

In the instant case, Smith was properly served with a subpeona, and appellant requested a writ of attachment when she failed to appear. The trial court denied the writ of attachment. Thus, the first requirement is met.

Appellant's counsel stated Smith would place the appellant in Humble at the time of the robbery in Houston. Appellant, however, did not offer any sworn testimony supporting that assertion. An attachment authorizes a "seizure" of the witness within the

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[1] That the trial court adverted to article 24.14 instead of article 24.12 as the basis for its ruling on appellant's request for a writ of attachment is of no moment. If the trial court's decision is correct on any theory of law applicable to the case, it will be sustained. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

meaning of the Fourth Amendment, and Article I § 9 of the Texas Constitution. Thus, like an arrest warrant or a capias, a writ of attachment should issue only upon a judicial showing that the seizure is justified. *In Re Barr,* 13 S.W.3d 525, 546 (Tex. Rev. Trib. 1998). Therefore, an affidavit or sworn testimony by the appellant reciting what the witness would testify to is a minimum requirement. *Id.* at 547; *Hardin v. State,* 471 S.W.2d 60, 62 (Tex. Crim. App. 1971).

A trial court does not err in denying a motion for a writ of attachment where appellant did not offer a sworn statement at the time of the motion stating what the witness would have testified to. *Hardin,* 471 S.W.2d at 62. An affidavit or sworn testimony by appellant saying what the witness would testify to is the minimum requirement for demonstrating the materiality of the witness' testimony. *Id*. Appellant neither made a sworn statement, nor submitted an affidavit describing the testimony of Smith. Instead, after the State rested, appellant's attorney asked the court for a writ of attachment for Smith asserting she was an alibi witness. This hearsay does not properly demonstrate the materiality of the witness' testimony as required by *Hardin*. Absent a proper showing *by appellant* that Smith's testimony was relevant and material to the presentation of appellant's defense, the trial court properly denied appellant's request for a writ of attachment for Smith.

The Court of Criminal Appeals has reaffirmed its holding in *Hardin* that where there is a denial of a request for a writ of attachment, the failure of the defendant to offer sworn testimony or an affidavit showing what the witness would have testified to in order to establish materiality is sufficient to support the conclusion that materiality was not shown. *White v. State,* 517 S.W.2d 543, 545 (Tex. Crim. App. 1974) (original submission). Accordingly, appellant's point of error one is overruled.

Ineffective Assistance of Counsel

In point of error two, appellant contends he was denied effective assistance of

counsel for failing to obtain and present the alibi witness Patricia Smith. Appellant's brief sets out the basis for the ineffective assistance argument as follows: "If the Court finds that Appellant's counsel did not preserve error under the first issue presented, then this failure represents ineffective assistance of counsel. Where if a defendant's counsel had properly objected to a trial court's action, the trial court would have erred by overruling that objection, the lawyer's failure to properly object amounts to ineffective assistance of counsel. *This was the case here*." (citation omitted) (emphasis added)

In order to prevail on a claim of ineffective assistance of counsel, appellant has the burden to prove by a preponderance of the evidence that: (1) counsel's performance was deficient, i.e., his assistance fell below an objective standard of reasonableness; and (2) appellant was prejudiced, i.e., a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Any allegation of ineffectiveness must be firmly founded tn the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id*. at 813. An appellate court looks to the totality of the representation and the particular circumstances of each case in evaluating the effectiveness of counsel. *Id*. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

As the analysis of appellant's point of error one above demonstrates, appellant's counsel did not fail to preserve error regarding the trial court's refusal to grant an attachment for Patricia Smith simply because no error was committed when the trial court refused to issue the attachment for that defense witness. The trial court correctly refused to grant an attachment for Smith because appellant failed to provide an affidavit or sworn testimony saying what Smith would testify to. Thus, appellant failed to demonstrate Smith's testimony was material, one of the criteria for establishing the right to an attachment for a subpoenaed witness who later fails to appear. *Erwin*, 729 S.W.2d 714. The materiality of a witness' testimony is the touchstone for determining whether

reversible error was committed in denying compulsory process. *Hardin*, 471 S.W.2d at 62. Here, appellant's counsel could not have preserved error when the trial court denied his request for a writ of attachment for Smith because the trial court's ruling was correct in light of the absence of a showing of the materiality of Smith's testimony in support of the writ of attachment. Thus, an objection to the trial court's correct ruling would have been futile, and trial counsel is not required to make futile gestures to avoid claims of ineffective assistance. *Holland v. State*, 761 S.W.2d 307, 319 (Tex. Crim. App. 1988).

In addition, appellant has failed to establish in the record what Smith's testimony would have been for purposes of appellate review of his claim of ineffective assistance. Appellant has failed to rebut the strong presumption his counsel was operating within the wide range of reasonable professional assistance. During trial, appellant's counsel stated generally that Smith would be an alibi witness for appellant because she could place him in Humble at the time of the offense. Those statements are hearsay—a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence for the truth of the matter asserted. TEX. R. EVID. 801(d). The prosecutor pointed out to the trial court that the statements by appellant's counsel were hearsay, thus depriving those statements of any probative value. TEX. R. EVID. 802. Thus, the trial record contains no sworn testimony as to whether Smith would in fact testify as an alibi witness, or that she was in fact available to testify. Indeed, appellant's counsel at one point described Smith as very hostile regarding her appearance as a witness for appellant. Further, there are no affidavits attached to appellant's motion for new trial describing what Smith would have said if called as a witness for appellant, or that she had been located following the conclusion of the trial and was available to testify. We will not engage in speculation as to why defense counsel chose not to obtain an affidavit from appellant, or indeed from Smith herself, describing the substance of her testimony or her availability. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (eschewing speculation as a basis for analyzing an ineffective assistance claim). Absent a showing that a potential defense

witness was available, and that her testimony would have benefitted appellant's defense, counsel's failure to obtain a writ of attachment for that witness is of no moment. *Wilkerson v. State*,726 S.W.2d 542, 551(Tex. Crim. App. 1986). Accordingly, we hold appellant was not denied effective assistance of counsel, and his second point of error is overruled.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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