

Affirmed and Opinion filed August 2, 2001.



In The

Fourteenth Court of Appeals

NOS. 14-00-00162-CR

14-00-00163-CR

EVERARDO GARCIA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause Nos. 808,186 & 820,859**

OPINION

In trial cause No. 808,186 (appellate cause No. 14-00-00162-CR), appellant was charged by indictment with the offense of aggravated robbery, enhanced by a prior conviction for possession of marihuana. In trial cause No. 820,859 (appellate cause No. 14-00-00163-CR), appellant was charged by indictment with the offense of aggravated robbery, with no enhancement paragraph. Appellant pleaded guilty to both charged offenses without a plea agreement. In cause No. 808,186, the trial court found appellant guilty as charged, found the allegation in the enhancement paragraph true, and assessed punishment at forty years in prison. In cause No. 820,859, the court found appellant guilty

of the charged offense and assessed punishment at forty years in prison. We affirm both convictions.

In his first appellate issue, appellant contends the trial court erred in enhancing appellant's sentence where the enhancement paragraph in the indictment in cause No. 808,186 failed to allege a prior felony.¹

The enhancement paragraph in connection with cause at issue states that on April 20, 1997, in cause No. 93-0149-CR in Guadalupe County appellant was convicted of "Possession of Marihuana." Appellant argues that the enhancement paragraph is fatally defective because the paragraph does not specify that the conviction was for a felony.

If a defendant fails to object to a defect of form or substance in an indictment before the date on which the trial commences, he waives and forfeits the right to object and may not raise the objection on appeal. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 2001). This objection requirement applies to defects in an enhancement paragraph. *See Muhammad v. State*, 846 S.W.2d 432, 437 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd); *Goins v. State*, 841 S.W.2d 527, 532-33 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd).

Appellant failed to raise any objection before the trial court in connection the enhancement paragraph and, thus, waived any complaint about a presumed defect. Having found appellant waived his complaint, we overrule his first issue.

In his second issue, appellant complains he was denied effective assistance of

¹ The indictment in cause No. 820,859 contained no enhancement paragraph. Appellant's judicial confession to that cause number, however, bore a handwritten interlineation that read as follows:

Before the commission of the offense alleged above on April 20, 1999 in cause # 93-0149-CR in the 25th Judicial District Ct of Guadalupe County the Defendant was convicted of the *felony* offense of Possession of Marijuana. [Italics added.]

Regarding cause No. 820,859, the trial court made no findings of fact as to an enhancement paragraph.

counsel

when his trial counsel failed to timely object to the enhancement paragraph in question.

To prevail on an allegation of ineffective assistance of counsel, appellant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced appellant's defense. *Strickland v. Washington*, 466 U.S. 668, 687, 692 (1984). We use the same standard at both guilt-innocence phase and at the punishment phase of a noncapital trial. *Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). We must indulge a strong presumption that an attorney's actions were sound trial strategy. *Strickland*, 446 U.S. at 689. A claim of ineffectiveness must be supported by the record. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

Because appellant did not file a motion for a new trial to develop a record, we know nothing about counsel's performance or motivations. Although counsel did not challenge the enhancement paragraph, appellant in connection with trial cause No. 820,859 acknowledged that the marihuana possession conviction was a felony. We do not know if counsel investigated the prior conviction, found it was a felony, and decided not to challenge the paragraph because ultimately a challenge would have made little difference. In the absence of a record affirmatively demonstrating counsel's ineffectiveness, we must presume counsel's actions were sound trial strategy. *See Laurant v. State*, 926 S.W.2d 782, 783-84 (Tex. App.—Houston [14th Dist.] pet. ref'd) (given silent record, counsel's failure to object to prior conviction used for enhancement does not demonstrate ineffectiveness). Having determined that appellant failed to demonstrate ineffectiveness, we overrule his second appellate issue and affirm the trial court's judgment.

PER CURIAM

Judgment rendered and Opinion filed August 2, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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