

Affirmed and Opinion filed August 31, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00942-CR

CRAIG ALAN DAY, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the County Criminal Court No. 13
Harris County, Texas
Trial Court Cause No. 99-15738**

OPINION

Craig Alan Day appeals his conviction by jury for driving while intoxicated. The trial court assessed punishment at a fine of \$500 and confinement for 180 days in the Harris County Jail probated for 18 months. In one point of error, appellant contends that he was denied his constitutional right to effective assistance of counsel. For the reasons stated below, we affirm the judgment of the trial court.

BACKGROUND

Appellant was charged with the offense of misdemeanor driving while intoxicated. During trial, appellant's counsel told him "you can't testify." Appellant claims that even though he wanted to testify, he did not question his counsel's judgment. After the jury found appellant guilty, his counsel stated, "I guess that you should have testified." Appellant states that up until this point he believed that he did not have a right to testify in his own behalf. His counsel informed appellant that he meant appellant should not testify, not that he could not.

Appellant's motion for new trial included two affidavits, one from appellant and one from appellant's trial counsel. Appellant's affidavit states that he interpreted his counsel's "you can't testify" remark to mean that he could not testify in his own behalf. Appellant ended the affidavit by stating, "I believe the jury would have found me not guilty if I testified like I wanted to. I never meant or intended to give up my right to testify on my own behalf."

The affidavit of appellant's trial counsel corroborates appellant's account of the misunderstanding. Counsel testified that "I should have explained Mr. Day's right to testify to him and then let him decide on his own if he wanted to testify or remain silent. Looking back on the way that this situation happened, I realize that I decided that Mr. Day would not testify in this case without fully consulting with Mr. Day and without giving Mr. Day the opportunity to explain to me what he wanted to do regarding testifying or not testifying."

DISCUSSION

In his sole point of error, appellant asserts that he was denied the effective assistance of counsel. Specifically, appellant contends that his counsel was ineffective because he told appellant that he could not testify during trial.

The U.S. Supreme Court established a two-prong test to determine whether counsel is ineffective at the guilt/innocence phase of a trial. First, appellant must demonstrate that counsel's performance was deficient and not reasonably effective. Second, appellant must

demonstrate that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668 (1984). Essentially, appellant must show (1) that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and (2) that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *See id.*; *Hathorn v. State*, 848 S.W.2d 101, 118 (Tex. Crim. App. 1992). Allegations of ineffective assistance will be sustained only if they are firmly founded in the record. *See Mercado v. State*, 615 S.W.2d 225, 228 (Tex. Crim. App. 1981).

In the present case, appellant only provided this court with the clerk's record. The two affidavits included in the record may be sufficient to show that the trial counsel's representation fell below an objective standard of reasonableness. However, we find that appellant has failed to meet his burden under the second prong of *Strickland* to show that the outcome of the proceeding would have been different. *See Brown v. Artuz*, 124 F.3d 73, 79-81 (2d Cir. 1997) (defendant claiming ineffective assistance due to counsel's failure to advise about personal right to testify must still establish prejudice under second prong of *Strickland*). Aside from appellant's unsupported allegation that the jury would have found him innocent had he testified, appellant has offered no evidence demonstrating that his failure to testify prejudiced his defense. Appellant has not provided an affidavit or any other evidence regarding the testimony he would have presented had he testified. Further, because appellant did not present the reporter's record to this court, any analysis of how his testimony would affect the outcome of the trial would be entirely speculative in nature. While it is rarely possible to state with absolute certainty that exculpatory testimony provided by a criminal defendant would not have affected the outcome of the trial that ended with a guilty verdict, the absence of a complete record leads this court to conclude that appellant has not met his burden under the second prong of the *Strickland* analysis. We overrule appellant's

sole point of error and affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed August 31, 2000.

Panel consists of Justices Amidei, Anderson, and Frost.

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