Affirmed and Opinion filed December 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00636-CR

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PAUL DOUGLAS CELESTINE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 796,641

O P I N I O N

Appellant, an investigator looking for a person who had jumped bond, gained access to complainant's apartment by misleading him into believing he was a police officer. While there, he pulled a gun on complainant and took his money. Appellant was convicted of aggravated robbery. At trial, the state introduced evidence of appellant's being on deferred adjudication for impersonating a police officer. Appellant now asserts ineffective assistance of counsel, claiming that counsel's performance fell below an objective standard of reasonableness by his (1) failing to object to the testimony of the unadjudicated offense, and

(2) failing to request two lesser included offenses. We affirm.

Background

Appellant worked for an investigation firm that, among other things, located persons who had absconded on their bond. In 1998, the complainant and his friend arrived at their apartment to see appellant attempting to enter through the front door. Complainant noticed appellant had a gun on his waist and a star-shaped badge clipped to his waist. With his friend waiting in the car, he asked appellant what he was doing, to which appellant replied he was looking for a Michael Taylor. When complainant told him Taylor wasn't there, appellant displayed some "paperwork" and stated he had a right to look in the apartment. Believing appellant was a police officer, complainant allowed him into the apartment. Appellant began a search for Taylor, but also began looking through small cabinets and appellant's other belongings. When complainant complained of the extent of the search, appellant pulled his gun and aimed it at complainant. In response, complainant put his hands on the wall. Appellant patted him down, cuffed his hands behind his back and had him lie on his stomach. He also took over $200 in cash and other personal property from complainant. Appellant then summoned complainant's friend to come inside. Once there, he ordered her to empty her purse. Appellant took her driver's license and ordered her to return to the car. She, too, saw that appellant carried a badge and gun and believed him to be a police officer. Appellant then unlocked the cuffs from complainant and left, without returning any of his property. Complainant eventually suspected appellant was not an officer and called the real police.

At trial, appellant denied carrying a gun, using handcuffs, and taking complainant's property. On cross-examination, the state approached the bench and informed the court it wanted to go into appellant's being on deferred adjudication for the felony offense of impersonating a police officer. Appellant's counsel answered, "Judge, he's on deferred adjudication probation. That has not been adjudicated in court." The court replied, "But it's the same thing as being on probation for purposes of this trial. I'll let you go into that." The

state was then able to elicit this testimony from appellant.

Ineffective Assistance of Counsel

Appellant contends he was denied effective assistance of counsel because trial counsel did not: (1) request lesser included offenses of robbery and theft; and (2) object to the state's improper impeachment of appellant's testimony by evidence of his deferred adjudication.

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). It is the appellant's burden to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Scrutiny of counsel's performance must be highly deferential. *Id.* We must indulge a strong presumption that counsel's representation falls within the wide range of reasonable professional assistance; that is, counsel's actions (or inactions) might be considered "sound trial strategy." *See Young v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App. 1999). We presume "that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that counsel made all significant decisions in the exercise of reasonable professional judgment." *Id.* Further, we must evaluate the quality of the representation from counsel's perspective at trial, rather than counsel's isolated acts or omissions in hindsight. *Strickland*, 466 U.S. at 689.

The court of criminal appeals has set an extremely high bar for proving ineffective assistance claims on direct appeal. *See Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999). In *Thompson*, the state doggedly attempted to introduce clearly inadmissible hearsay testimony implicating the defendant. Defense counsel objected to the testimony twice, the court sustaining the objection both times. However, the third time, the state was able to introduce the testimony because counsel inexplicably failed to object. The court of criminal appeals held that even under these facts, the record that the appellant brought on direct appeal nonetheless failed to rebut the presumption of reasonable counsel. The court explained:

> [A] substantial risk of failure accompanies an appellant's claim of ineffective assistance on direct appeal. Rarely will a reviewing court be provided the

> opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel. Indeed in a case such as this, where the alleged derelictions primarily are errors of omission de hors the record rather than commission revealed in the trial record, collateral attack may be the vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record.

Id. at 813-14 (citations and quotation marks omitted). The court went on to postulate, "[i]t is possible, given the artful questions employed by the prosecutor, appellant's counsel, *at that moment* may have reasonably decided the testimony was not inadmissible and an objection was not appropriate. *Id.* at 814 (emphasis in original).[1]

Though the claimed "errors of omission" by counsel in this case may raise an eyebrow, they are not of such a nature that we could say they fall outside the realm of sound trial strategy, especially in light of *Thompson*. Although appellant filed a motion for new trial, he failed to raise ineffective assistance of counsel, and has failed to develop a record that would have supported his claim. Thus, to find that trial counsel was ineffective based on appellant's asserted ground would call for speculation, which we will not do. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App.1994). Without an adequate record, we find these alleged omissions by counsel could have been reasonable trial strategy.

Lesser Included Offenses

Appellant complains his trial counsel should have requested lesser included offenses of robbery and theft. However, even assuming in this case that the lesser included offenses were raised under the evidence, it may nonetheless be reasonable trial strategy to decide not to request a charge on a lesser included offense. *See Riddick v. State*, 624 S.W.2d 709, 712

[1]It warrants noting the *Thompson* dissent's apt observation that the majority's approach "requires that we ignore an abundance of circumstantial evidence indicating that counsel's omission was not the result of a deliberate decision." *Thompson*, 9 S.W.3d at 815 (Meyers, J., dissenting).

(Tex. App.—Houston [14th Dist.] 1981, no pet.); *Lynn v. State*, 860 S.W.2d 599, 603 (Tex. App.—Corpus Christi 1993, pet. ref'd). Counsel could have foregone requesting the lesser included offense for any number of plausible reasons. For instance, it is not uncommon for counsel to employ an "all or nothing" tactic, especially in this case where appellant likely foreclosed a finding of the lesser included offenses by his denial of taking complainant's property. We thus hold that appellant failed to meet his burden to show trial counsel's performance fell below an objective standard of reasonableness by not requesting the lesser included offenses.

Failure to Object

Appellant next asserts that counsel's failure to object to inadmissible testimony constituted ineffective assistance. However, defense counsel's failure to object to inadmissible testimony can constitute a sound and plausible trial strategy. *See Heiman v. State*, 923 S.W.2d 622, 626 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (holding that failure to object to inadmissible extraneous offense testimony, in the absence of a record showing counsel's reasons for not doing so, did not rise to level of ineffective assistance). During a bench conference prior to the testimony, though appellant's counsel did not formally object, he clearly made the trial court aware that he believed the evidence was inadmissible. In response, the court informed counsel he disagreed and that it was admissible. Knowing the trial court's viewpoint, counsel may have reasonably decided not to lodge an objection to the testimony in front of the jury when the testimony was elicited so as to call any more attention to it than necessary. *Id.* While it may be difficult for us to imagine why a proper objection to the court's erroneous ruling would not have been made by competent counsel at the bench, we are not allowed to speculate. *See Jackson*, 877 S.W.2d at 771. We therefore hold that appellant failed to meet his burden to show trial counsel's performance fell below an objective standard of reasonableness by not objecting to the complained-of testimony.

In light of this, and in the absence of an adequate record supporting his claim, appellant

has failed to overcome the strong presumption that trial counsel's strategy was reasonable from counsel's perspective at trial. Appellant's ineffective assistance of counsel issue is therefore overruled.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed December 7, 2000.

Panel consists of Justices Yates, Wittig, and Frost.

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