Affirmed and Opinion filed March 29, 2001.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01133-CR

———————————

LEON ALLEN GAMBLE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 774, 043

O P I N I O N

Over his plea of not guilty, a Harris County jury found Leon Allen Gamble, appellant, guilty of possessing cocaine, weighing more than four grams and less than 200 grams. After entering a plea of "true" to two enhancement allegations, the jury assessed punishment at forty-seven years' confinement in the Texas Department of Criminal Justice, Institutional Division. In his sole point of error, appellant contends that his counsel was ineffective for failing to have a pretrial hearing or obtain a trial ruling on his motion to suppress. We affirm.

Both the federal and state constitutions guarantee an accused the right to have the assistance of counsel. *See* U.S. CONST. AMEND. VI; TEX. CONST. Art. I, § 10; TEX. CODE CRIM. PROC. art. 1.05 (Vernon 1977). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). Both state and federal claims of ineffective assistance of counsel are evaluated under the two prong analysis articulated in *Strickland*. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *Stults v. State*, 23 S.W.3d 198, 208-09 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.). The first prong requires the 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, 104 S.Ct. 2052. To satisfy this prong, the appellant must (1) rebut the presumption that counsel is competent by identifying the acts and/or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts and/or omissions 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 Thompson*, 9 S.W.3d at 813.

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of his attorney. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). To establish prejudice, the appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id*. The appellant must prove his claims by a preponderance of the evidence. *See id.*

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*,

877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *See Stults*, 23 S.W.3d at 208; *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or a motion for new trial. *See Stults*, 23 S.W.3d at 209; *see also Jackson*, 973 S.W.2d at 957 (stating that when counsel is allegedly ineffective because of errors of omission, collateral attack is the better vehicle for developing an ineffectiveness claim).

When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (citing *Jackson v. State*, 877 S.W.2d at 771). An appellate court will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused relying on an ineffective assistance of counsel claim to make the necessary record in the trial court. Even though the appellant may file a motion for new trial, failing to request a hearing on a motion for new trial may leave the record bare of trial counsel's explanation of his conduct. *See Stults*, 23 S.W.3d at 208; *Gibbs v. State*, 7 S.W.3d 175, 179 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). If there is no hearing, or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective assistance claim. *See Howard v. State*, 894 S.W.2d 104, 107 (Tex. App.—Beaumont 1995, pet. ref'd).

Here, appellant did not move for a new trial. We can find no evidence in the record regarding trial counsel's strategy. Accordingly, there is nothing in the record to support appellant's ineffective assistance of counsel claim. Because we are unable to conclude that defense counsel's performance fell below an objective standard without evidence in the record,

we find that the appellant has failed to meet the first prong of *Strickland*. *See Stults*, 23 S.W.3d at 209.

Accordingly, we overrule appellant's sole point of error.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed March 29, 2001.

Panel consists of Justices Cannon, Draughn and Lee.*

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

* Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.