Affirmed and Opinion filed September 30, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01372-CR

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JEROME DICKEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 94-10289

O P I N I O N

Jerome Dickey, appellant, appeals his murder conviction. After entering a guilty plea, the trial judge assessed his punishment at twenty-five years in the Institutional Division of the Texas Department of Criminal Justice. Appellant brings two points of error.

First, appellant asserts the trial court erred by failing to grant his motion for new trial, based on his contention that his guilty plea was entered unknowingly and involuntarily because he was not properly advised by his attorneys. Second, appellant contends he was denied effective assistance of counsel at the punishment stage of his trial. We affirm.

Because appellant's points of error are based solely on facts that occurred after his indictment, we will proceed directly to his points of error without a recitation of the facts relating to his indictment.

I.
Motion For New Trial

In his first point of error, appellant contends the trial court erred in failing to grant his motion for new trial where the evidence demonstrated his guilty plea was not knowingly and voluntarily made. He asserts that his plea was not knowing and voluntary because he was not properly advised by his attorneys on the law applicable to his case or the alternatives available to him. Specifically, appellant argues that his attorneys failed to advise him of his right to raise the issue of self-defense under Penal Code Section 9.32, which defines the circumstances in which deadly force is justified, and did not explain that he had the option to plead guilty to a jury and have a trial on punishment only.

It is well established that the granting or denying of a motion for new trial lies within the discretion of the trial court. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). An appellate court does not substitute its judgment for that of the trial court, but rather decides whether the trial court's decision was arbitrary or unreasonable. *See id*. At a hearing on a motion for new trial, the trial judge is the trier of fact and her findings should not be disturbed unless abuse of discretion has been demonstrated. *See Reissig v. State*, 929 S.W.2d 109, 113 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). In addition, the trial judge can consider the interest and bias of any witness, and the judge is not required to accept as true the testimony of the accused or any defense witness simply because it was not contradicted. *See id*.

We construe appellant's first point of error as a complaint that his guilty plea was involuntary because he received ineffective assistance of counsel. In determining the voluntariness of the plea, we consider the entire record. *Williams v. State*, 522 S.W.2d 483, 485 (Tex. Crim. App. 1975).

When a defendant enters his plea upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel, the voluntariness of such plea depends on (1) whether counsel's advice was within the range of competence demanded of attorneys in criminal cases and if not, (2) whether there is a reasonable probability that, but for counsel's errors, he would not

have pleaded guilty and would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 56 and 59 (1985) (holding the two part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to challenges to guilty pleas based on ineffective assistance of counsel); *Ex Parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997). Therefore, the question posed in this case is whether appellant has met his burden and proven that: (1) counsel's alleged failure to inform appellant of the viability of his defense under Penal Code Section 9.32, and of the availability of the jury to assess punishment, was outside the range of competence demanded of attorneys in criminal cases; and (2) that but for defense counsel's errors, appellant would not have pleaded guilty and would have insisted on going to trial. *See Morrow*, 952 S.W.2d at 536.[1]

The record of the hearing on appellant's motion for new trial does not support appellant's contentions. As to appellant's allegation that his attorneys failed to advise him of the availability of self-defense for purposes of an acquittal, the record reflects the following during direct examination of witness Mark Racer, appellant's defense counsel, by the prosecutor:

> Q. Okay. Did you discuss the self-defense issues that were involved in the particular case with the defendant?
>
> A. On several occasions.
>
> Q. Okay. Did you explain to him that if he pled guilty to this offense, either to a jury or to the Judge, that the self-defense evidence would only be used or could only be used to mitigate his punishment, if at all, as opposed to finding him not guilty?
>
> A. In my opinion, he understood that he wasn't going to be found not guilty after he pled on the case. It was just a question of what sort of sentence he was going to receive at the- -
>
> Q. Okay. But did you explain to him that self-defense- - the self-defense issue was unavailable as to guilt when you plead guilty to the crime?
>
> A. That's correct.
>
> Q. Okay. But that- - Did you - - did you explain to him that it's possible that he could mitigate or lessen his punishment if the Judge sentenced him or the jury sentenced him?
>
> A. That was a mitigating factor, yes.

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[1] The *Morrow* court applied the preponderance of the evidence standard to determine whether appellant had met his burden of proving his plea was involuntary.

Q. And you explained that to him in that context?

A. Yes.

Earlier during the direct examination of Mark Racer, the prosecutor addressed the issue of appellant's right to have a jury assess punishment after entering a plea of guilty to that jury as follows:

> Q. Well, did you tell Mr. Dickey that he had the right to have a jury assess punishment after he pled guilty to a jury?
>
> A. Sure, yes.
>
> Q. Okay. And did he seem to understand that particular option?
>
> A. Yeah, he understood all of his options.
>
> Q. Okay. And did it appear that he understood that particular option?
>
> A. Yes.

Moreover, in a document signed by appellant and his lawyers and entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," appellant agreed with the following statement: "I am satisfied that the attorney representing me today in court has properly represented me and I have fully discussed this case with him." At the end of this document there appears a statement signed by the trial judge, as follows:

> After I admonished the defendant of the consequences of his plea, I ascertained that he entered it knowingly and voluntarily after discussing the case with his attorney. It appears that the defendant is mentally competent and the plea is free and voluntary. I find that the defendant's attorney is competent and has effectively represented the defendant in this case.

Appellant also signed a document dated August 21, 1997, the same date as the "Confession," entitled "Admonishments"[2] which contains the following statements:

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[2] During direct examination of Mark Racer, he testified at the motion for new trial hearing that he explained the Confession and Admonishment documents to appellant.

I fully understand the consequences of my plea herein, and after having consulted with my attorney, request that the trial court accept said plea.[3]

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I am totally satisfied with the representation provided by my counsel and I received effective and competent representation.

We are unpersuaded that appellant's guilty plea was involuntary. Appellant was advised by his attorney that (a) if he plead guilty to the offense of murder, the justification of self-defense would be waived for purposes of a determination of guilt, but could be used for mitigation purposes during the punishment phase; and (b) he had the right to have a jury assess his punishment after a plea of guilty. Appellant's burden under *Hill* and *Morrow* is to prove that his counsel's performance was deficient based on alleged failures to properly inform him of his options during the guilt and punishment stages. Whether or not appellant met his burden was tested by the trial court based on the live testimony in support of appellant's motion for new trial. After hearing the testimony of the witnesses and the argument of counsel, the trial court denied the motion for new trial in all respects. It was the obligation of appellant to establish that his counsel provided ineffective assistance by a preponderance of the evidence. *See Moore v. State*, 694 S.W.2d 528, 531 (Tex. Crim. App. 1985). The trial court's ruling reflects that the court believed appellant failed to establish either of the two prongs of the *Strickland* test, as restated in *Hill* and *Morrow*, by a preponderance of the evidence.

Appellant's burden is then tested by this court, but we assume a deferential position as to the trial court's ruling on the motion, determining only whether the ruling is arbitrary or unreasonable because the trial judge is the trier of fact and her findings should not be disturbed unless abuse of discretion is demonstrated. *See Reissig*, 929 S.W.2d at 113. We have reviewed the entire record to examine the issue of whether appellant's guilty plea was involuntary, as we must under *Williams*, and we cannot

[3] *See Enard v. State*, 764 S.W.2d 574, 575 (Tex. App.—Houston [14th Dist.] 1989, no pet.) (holding appellant's guilty plea was not involuntary because it was based on his attorney's erroneous advice where, among other things, appellant's plea papers reflected he entered his guilty plea voluntarily).

conclude that appellant's plea was involuntary. We hold that the trial court did not abuse her discretion in overruling appellant's motion for new trial, and we therefore overrule appellant's first point of error.

II.
Ineffective Assistance of Counsel

In his second point of error appellant asserts he received ineffective assistance at the punishment stage of his trial because his attorneys failed to secure witnesses for the punishment hearing, and failed to object to certain statements made by the prosecutor during that hearing.[4]

In evaluating a claim of ineffective assistance of counsel at the punishment stage, we apply the two prong test in *Strickland*. *See Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999). The *Strickland* test requires that the defendant demonstrate (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687-88. The "prejudice" requirement in *Strickland* is based on the conclusion that an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *See Hill*, 474 U.S. at 57. Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689. An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *See Bridge v. State*, 726 S.W.2d 558, 571 (Tex. Crim. App. 1986). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *See id.*

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[4] Appellant brings various complaints regarding his counsel's performance under this point of error, including assertions of ineffective assistance at the guilt stage. However, we are guided in our approach to appellant's second point of error by the following statement in appellant's brief just before the prayer: "[S]hould this court refuse to grant appellant a new trial on [the] issue of guilt/innocence, then his attorneys' failure to secure witnesses for the *punishment* hearing or object to the cited inadmissible evidence constitutes ineffective assistance as to *punishment*." (emphasis added)

Appellant's first assertion regarding his legal assistance during the punishment stage involves the alleged failure to secure the presence of Mary Brown as a witness on the mitigating issue of self-defense. Turning first to the performance prong of the *Strickland* test, the record of the hearing on the motion for new trial reflects that appellant's trial counsel, Mark Racer, testified that he unsuccessfully attempted to subpoena Ms. Brown, and hired a private investigator to locate her, but again without success. While there may have been additional steps counsel could have taken to insure the presence of Ms. Brown, an appellate court will not use hindsight to second guess a tactical decision made by trial counsel which does not fall below the objective standard of reasonableness. *See Solis v. State*, 792 S.W.2d 95, 100 (Tex. Crim. App. 1990). Further, appellant has not made a showing of exactly how the testimony of Ms. Brown would benefit appellant. Her statement, contained in the pre-sentence investigation report, indicates some individuals surrounded appellant's automobile, and one of the men began pulling on the door handle of appellant's car. Her statement also indicates appellant produced his gun, and fired through the closed car window at the group, then chased after them, and fired at least one more shot. Ms. Brown's statement about the number of shots appellant fired is inconsistent with the crime scene evidence where the investigating officers discovered four spent shell casings and four bullet holes in the van occupied by the deceased complainant. Ms. Brown's statement would certainly not have helped appellant with his self-defense justification of the use of deadly force, at either the guilt or punishment stages, since her statement did not contain any evidence to show that a reasonable person in the appellant's circumstances would not have retreated. *See* TEX. PEN. CODE ANN. § 9.32(a)(2) (Vernon Supp. 1994). Nowhere in appellant's brief is there any indication of how Ms. Brown's testimony would have benefitted him.

Counsel's failure to call witnesses at the punishment stage is irrelevant to an ineffectiveness claim absent a showing that such witnesses were available *and* appellant would benefit from their testimony. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) (emphasis added). Here, the record reflects that Ms. Brown was not available and that appellant would not benefit from her testimony. Under *Moore*, an attorney's deficient performance must be established by a preponderance of the evidence. *See* 694 S.W.2d at 531. We hold appellant has failed to demonstrate by a preponderance of the evidence that his trial counsel's inability to secure witness Brown constituted deficient performance. Because we indulge,

under *Strickland*, a strong presumption that counsel's conduct was reasonable, and appellant has not rebutted that proposition, we overrule appellant's first allegation of ineffective assistance.[5]

Appellant's second assertion of ineffective assistance involves his counsel's failure to object to a statement made by the prosecutor during the sentencing hearing. During closing argument when the prosecutor said the defendant had lied in his testimony, the trial court asked the prosecutor about the corroborating statement by a witness in the PSI that the complainants surrounded appellant's car and began pulling on the door handle. The prosecutor replied that one witness had made that assertion, but that the other witnesses interviewed by the investigators did not indicate that appellant's vehicle was surrounded or that anyone tried to open the door of appellant's vehicle. The prosecutor then made the gratuitous remark that Ms. Brown was the only witness who stated that the complainants tried to open appellant's car door, and based on that unique feature of her statement, he believed she was not telling the truth. The following colloquy then occurred between the trial judge and the prosecutor:

> COURT: Oh, [Ms. Adams] never indicated they surrounded the car?
> PROSECUTOR: No.
>
> COURT: So other than this one witness, I guess I am concerned about *Brady* material, you never found any witness who corroborated, other than Ms. [Brown], no one ever said they surrounded the vehicle and were trying to get in?
>
> PROSECUTOR: That's correct.
>
> COURT: That's the only person who said that?
>
> PROSECUTOR: That's correct.
>
> COURT: Thank you. And you [defense counsel] don't have any witnesses to corroborate Ms. [Brown's] story other than your client?
>
> PROSECUTOR: No, Judge.

[5] During closing arguments in the hearing on appellant's motion for new trial, the trial court asked his appellate counsel whether he had subpoenaed Ms. Brown for that hearing. Appellate counsel admitted that he had made no effort to find her, but appellant has not challenged that inaction on appeal.

We agree that appellant's trial counsel should have objected to this unsworn testimony attacking the credibility of the statements made by Ms. Brown to the investigating officers. Argument that injects the prosecutor's opinion of a witness's credibility is improper. *See Williamson v. State*, 771 S.W.2d 601, 608 (Tex. App.—Dallas 1989, pet. ref'd). However, the statement by Ms. Brown to the investigators was not under oath, suggesting that the impropriety found in *Williamson*, based on the disparity in the sworn and unsworn nature of the two statements, would not apply with equal force here because the unsworn statements of the prosecutor and the witness were in parity. Nevertheless, while the failure to object here may constitute performance outside the range of reasonable professional assistance, appellant has failed to demonstrate, on appeal, that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694.

Moreover, this failure to object is the only instance cited by appellant wherein appellant's representation arguably fell below an objective standard of reasonableness. Counsel's performance must be judged by the totality of the representation, and an ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *See Bridge*, 726 S.W.2d at 571. Accordingly, we hold that this single instance of an error by counsel, if indeed it were an error, during the sentencing hearing was not demonstrated by appellant to have affected the outcome of the proceeding; therefore, it did not constitute ineffective assistance of counsel. Accordingly, because we overrule appellant's second allegation of ineffective assistance of counsel during the sentencing stage of his trial, we overrule appellant's second point of error.

We affirm the judgment of the trial court.

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John S. Anderson
Justice

Judgment rendered and Opinion filed September 30, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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