



Ortiz v. State

2001 | Cited 0 times | Court of Appeals of Texas | April 11, 2001

AFFIRMED.

OPINION

Appellant, Rafael Ortiz, was convicted by a jury of the offense of burglary of a habitation and sentenced to a term of fifty years' imprisonment. In three points of error, appellant complains he was denied effective assistance of counsel. We affirm.

On December 15, 2000, a lawnmower, assorted coins, and a video camera in a silver case were stolen from the home of Angel Williams. A witness observed appellant both loading the lawnmower into his vehicle and, later that day, toting the silver case. The authorities were alerted, but appellant fled before they could arrive. He left his driver's license at the scene, however, from which he was identified by the Houston Police Department. A police officer then compiled a photospread that contained appellant's picture, from which the witness positively identified appellant as the culprit.

Thereafter, on January 21, 2001, appellant was arrested for shoplifting at a grocery store. Appellant gave a written confession to Officer Raynaldo Calderon that he had burglarized Ms. Williams' home.

Subsequently, appellant sought to suppress his confession, arguing that it had been given involuntarily. In support of his argument, appellant testified that he was under the influence of cocaine on the day of his confession, and Officer Calderon supplied the date and address of the burglary. The officer testified, however, that appellant appeared unimpaired by drugs or alcohol, he supplied Williams' address only upon appellant's request, and he did not tell appellant what to write in his confession. Appellant's motion to suppress was denied, and trial ensued.

On appeal, appellant complains his trial counsel was ineffective for failing to: (1) cross-examine Officer Calderon both as to appellant's physical condition at the time his confession was taken and the officer's provision of details of the offense; (2) object to the admission of the photospread, as it displayed jail identification notations on appellant's photograph; and (3) object to evidence that appellant was in custody for an extraneous theft offense at the time he was questioned.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). The right necessarily includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has



Ortiz v. State

2001 | Cited 0 times | Court of Appeals of Texas | April 11, 2001

established a two-prong test to determine whether counsel is ineffective. *Id.* Appellant must first demonstrate his counsel's performance was deficient and not reasonably effective. *Id.* at 688-92. Thereafter, appellant must demonstrate the deficient performance prejudiced his defense. *Id.* at 693. Essentially, appellant must show that his counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms, and there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*; *Valencia v. State*, 946 S.W.2d 81, 83 (Tex. Crim. App. 1997).

Judicial scrutiny of counsel's performance must be highly deferential and we are to indulge the strong presumption that counsel was effective. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We assume counsel's actions and decisions were reasonably professional and that they were motivated by sound trial strategy. *Id.* Moreover, it is appellant's burden to rebut this presumption, by a preponderance of the evidence, via evidence illustrating why trial counsel did what he did. *Id.* Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland*, 928 S.W.2d at 500.

If appellant proves his counsel's representation fell below an objective standard of reasonableness, he must still affirmatively prove prejudice as a result of those acts or omissions. *Strickland*, 466 U.S. at 693; *McFarland*, 928 S.W.2d at 500. Counsel's errors, even if professionally unreasonable, do not warrant setting the conviction aside if the errors had no effect on the judgment. *Strickland*, 466 U.S. at 691. Appellant must prove that counsel's errors, judged by the totality of the representation, denied him a fair trial. *McFarland*, 928 S.W.2d at 500. If appellant fails to make the required showing of either deficient performance or prejudice, his claim fails. *Id.*

Appellant did not file a motion for new trial and the record contains no evidence of the reasoning behind his trial counsel's actions in failing to cross-examine Officer Calderon or object to the admission of the photospread and evidence of an extraneous offense. Rather than provide insight into the motives for trial counsel's actions (or lack thereof), appellant proffers only inventive speculations as to what trial counsel could have done. We cannot, however, conclude on the basis of such conjectures that counsel's performance was deficient. *Jackson*, 877 S.W.2d at 771-72; see also *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999) (holding that when the record provides no explanation as to the motivation behind trial counsel's actions, an appellate court should be hesitant to conclude that counsel was ineffective). An appellate court is not required to speculate on the reasons behind trial counsel's actions when confronted with a silent record. *Jackson*, 877 S.W.2d at 771. Appellant fails to provide this Court with any evidence to affirmatively demonstrate the ineffectiveness of his trial counsel. Thus, appellant has not satisfied his burden on appeal to rebut the presumption that counsel's actions were reasonably professional and motivated by sound trial strategy.

Moreover, even if the record rebutted the presumption of sound trial strategy, appellant has not demonstrated that trial counsel's performance prejudiced the defense. He has not, therefore, met the



Ortiz v. State

2001 | Cited 0 times | Court of Appeals of Texas | April 11, 2001

second prong of the test. Because appellant produced no evidence concerning trial counsel's reasons for choosing the course he did, nor did he demonstrate prejudice to his defense, his points of error are overruled. McFarland, 928 S.W.2d at 500.

The judgment of the trial court is affirmed.

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

