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COURT OF CRIMINAL APPEALS
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In the Texas Court of Criminal Appeals

FILED
COURT OF CRIMINAL APPEALS
8/9/2018
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Maurice Lamar Piper
Petitioner-Appellant

v.

The State of Texas
Respondent-Appellee

From the Fifth Court of Appeals,
Cause No. 05-16-01321-CR

Appealed from the 283rd Judicial District Court
of Dallas County, Cause No. F15-75812-T

Appellant's Petition for Discretionary Review

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Trial judge:

The Honorable Rick Magnis
283rd Judicial District Court of Dallas County

Table of Contents

Index of Authorities

Cases

Statutes

Rules

Statement Regarding Oral Argument

In affirming the trial court's judgment, the court of appeals conspicuously ignored the record's illustration of trial counsel's defensive strategy. This case is thus important—in ignoring the record, the court of appeals departed from the accepted and usual course of judicial proceedings (*see* Tex. R. App. P. 66.3(f))—but it's not complex. Accordingly, while this Court should exercise its power of supervision, oral argument is unlikely to be helpful.

Statement of the Case

In this murder prosecution, the jury found Piper guilty of the unsupported lesser-included offense of manslaughter, instead of not guilty altogether, because of Piper's trial counsel's ineffective assistance. The court of appeals then affirmed the judgment by ignoring the record.

Statement of Procedural History

In the summer of 2015, Piper shot and killed a close friend. The State charged him with murder (CR: 12; *see* Tex. Pen. Code § 19.02),

and, at his subsequent trial, presented evidence that he had, indeed, intentionally shot the victim. Piper testified, however, that though he had pointed a gun at the victim, he involuntarily pulled the trigger when his brother grabbed him by his shoulders. RR5: 85.

Under the evidence presented (and as the State did not dispute on appeal), Piper was thus either guilty of murder or not guilty of any criminal homicide. *See Brown v. State*, 955 S.W.2d 276, 277 (Tex. Crim. App. 1997) (if, while "raising [a] handgun," a person is "bumped from behind by another person," prompting the handgun's "accidental" fire, the shot is not a voluntary act, and a "homicide that is not the result of voluntary conduct is not to be criminally punished"). The jury, though, found him guilty of manslaughter and sentenced him to 18.5 years' imprisonment. RR5: 132; RR6: 104.

Before the Fifth Court of Appeals, Piper urged that this was the rare case in which the record on direct appeal shows that counsel provided ineffective assistance. Br. at 12; *see Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (explaining that deficient performance can rarely be shown on direct appeal). For, the jury found Piper guilty of manslaughter, rather than not guilty altogether, because

counsel incorrectly exhorted that that's what Piper's testimony, if credible, required. Apparently, counsel mistakenly conflated the scenario testified to by Piper with one in which a person points a gun at another and, *absent third-party intervention*, "accidentally" fires. *Compare George v. State*, 681 S.W.2d 43, 47 (Tex. Crim. App. 1984) (explaining that that is manslaughter); *Yates v. State*, 624 S.W.2d 816, 817 (Tex. App.—Houston [14th Dist.] 1981, no pet.) (same). As a result, counsel (1) failed to request that the jury charge include the voluntary-conduct charge instruction to which Piper was entitled, and (2) invited the court to include in the charge the unsupported lesser-included offense of manslaughter.

The court of appeals did not agree that this case was special. Adopting the State's argument from its brief in response, the court, in an opinion filed June 15, 2018, reasoned that "[c]ounsel is under no duty to raise every defense available"—every *defense*, not every charge instruction that comports with a raised defense—"so long as counsel presents a defense that is objectively reasonable or strategically sound." *Piper v. State*, 05-16-01321-CR, 2018 WL 3014578, at *2 (Tex. App.—Dallas June 15, 2018, no pet. h.). And because counsel had not had "an

opportunity to explain himself," the court held that it could not know whether counsel's failure was the product of "sound trial strategy." *Id.* at *3. The court altogether ignored trial counsel's invitation to the court to include manslaughter in the jury charge: "The issue is whether appellant received ineffective assistance of counsel for failing to request an instruction on one of the defensive issues raised by the evidence. The issue of whether the evidence supported an instruction on the lesser-included offense of manslaughter has no bearing on that question." *Id.* at *3 n. 1.

Piper did not move the court to rehear the case.

Ground for Review

In concluding that Piper's trial counsel may have had a reasonable strategic reason for failing to request a voluntary-conduct charge instruction, the court of appeals reasoned that attorneys are under no duty to raise every defense available. But counsel *did* raise a voluntary-conduct defense—he just didn't then ask for the corresponding charge instruction. In ignoring this, did the court of appeals so far depart from

the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

Argument

> Piper's counsel's (1) failure to request a voluntary-conduct charge instruction and (2) invitation to the court to include in the charge the lesser-included offense of manslaughter was not a reflection of counsel's reasonable strategic decision not to pursue a voluntary-conduct defense. Counsel *did* pursue that defense.

◆ ◆ ◆

The court of appeals's holding is totally predicated on the premise that Piper's counsel might have reasonably strategized not to raise a voluntary-conduct defense. *Piper*, 2018 WL 3014578, at *2. This follows the State's brief in that court, in which the State argued that Piper's counsel might have reasonably strategized not to argue Piper was not guilty because counsel might have recognized that Piper's testimony was incredible. St. Br. at 21-27.

As explained in Piper's reply brief, however, we know that's not what happened. Counsel's defense *was* that Piper's involuntary-conduct story was truthful. As counsel argued at closing:

> Now what establishes credibility? Credibility can be established when you hear somebody you believe them. What gave you an initiative to believe someone? They don't make themselves out to be perfect. [….] Only it was Maurice who came and laid it out for you in a logical concise manner. He told you what he did that was right, but you can really tell that Maurice is being honest with you because he told you what he did wrong. He told you what he's not proud of, and he told you how he hates that this happened.
>
> Yeah, could he have said a bunch of statements about Hardy Wilson to perhaps save his skin? Well, he didn't. Why? Why do you think Maurice Piper didn't make those statements? Folks, it's because he's telling you the truth. And if he's going to unlike the State's bag of witnesses, obviously they wanted to get you with—they figure, well, maybe if we bring you more that's better. We brought you a good honest witness.

RR5: 118-19. Counsel continued:

> But if we look at the totality of what you've been presented by the State, you cannot really figure out what occurred out there. It is only through Maurice Piper's testimony are you provided a clear insight to what occurred.

RR5: 120. And again:

> [W]ho gave you the most accurate and detailed description of what occurred? Maurice. Maurice got up there, he told you his arm was pulled, he told you the gun went off.
>
> Did he make some fanciful statement like the pull weight or anything? She asked him about the trigger pull weight. He said, "Honestly, I don't know about those things." And he doesn't know about those things. He just answered honestly. I'm sure they're going to try to paint him to be deceivious [*sic*] for just—for saying he didn't know.

> …. he's the only one who's shown in this whole situation any remorse or any honesty or any integrity.

RR5: 122-123. And finally:

> But what you did hear from Maurice is, he had no intention of using that weapon, none. He wanted to meet Hardy over there. You heard from many witnesses that Hardy advanced at that time. And then you heard—you heard testimony that at that time Dominique grabbed Maurice and the gun went off.
>
> Folks, it is consistent, it is logical.

RR5: 124.

Counsel did not make a reasonable strategic choice "not to argue a voluntariness-of-conduct defense." St. Br. at 25. He *did* argue a voluntary-conduct defense. He just misunderstood the law to mean that Piper was still guilty of manslaughter. *See George v. State*, 681 S.W.2d 43, 47 (Tex. Crim. App. 1984) (when an accused voluntarily engages in conduct that includes a bodily movement sufficient for the gun to discharge a bullet, without more—such as precipitation by another individual—a jury need not be charged on the voluntariness of the accused's conduct); *Yates v. State*, 624 S.W.2d 816, 817 (Tex. App.—Houston [14th Dist.]

1981, no pet.) (affirming manslaughter conviction for defendant who admitted to knowingly pointing loaded gun at victim but claimed that it accidentally discharged). The court of appeals's determination otherwise is simply wrong.

If nothing else, this Court should remand this case to the court of appeals to consider whether counsel somehow still may have had a reasonable strategy in failing to request the instruction to which his defense entitled him, and in inviting the court to include in the charge the unsupported lesser-included offense of manslaughter. But this Court can quickly resolve that question itself. *See Mozon v. State*, 991 S.W.2d 841, 848 (Tex. Crim. App. 1999) (Keller, J., dissenting) ("I would not remand this case for the Court of Appeals to articulate what seems to be fairly obvious…"). Ignorance of the law is not a "strategy." *See, e.g., Ex parte Welch*, 981 S.W.2d 183, 185 (Tex. Crim. App. 1998) (holding defense counsel's misunderstanding of law constituted ineffective assistance of counsel); *Ex parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005) (recognizing that "[i]gnorance of well-defined general laws, statutes and legal propositions is not excusable and such ignorance may lead to a finding of constitutionally deficient assistance of counsel").

And on the extremely remote chance that counsel feigned ignorance of the law—well, Piper hasn't found a Texas case that has addressed such a scheme, but the Eleventh Circuit, at least, has said that intentionally misstating the law cannot be a reasonable trial strategy. *See Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992).

This *is* the rare case in which the record on direct appeal shows that counsel performed deficiently. *See Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997); *Goodspeed*, 187 S.W.3d at 392. Piper thus urges this Court to grant this petition, reverse the court of appeals's judgment, and remand this case to that court for the limited purpose of considering whether counsel's deficient performance was prejudicial under *Strickland*.

Prayer for Relief

Piper prays this Court grant this petition so that this Court can reverse the court of appeals's judgment and remand this case to the court of appeals to consider whether counsel's deficient performance was prejudicial under *Strickland*.

Respectfully submitted,

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Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing Appellant's Petition for Discretionary Review was electronically served to the Dallas County District Attorney's Office and the State Prosecuting Attorney on August 9, 2018.

/s/ Bruce Anton
Bruce Anton

Certificate of Compliance

Pursuant to Tex. R. App. P. 9.4(i)(3), undersigned counsel certifies that this petition complies with:

1. the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(D), because this petition contains 1,100 words, excluding the parts of the petition exempted by Tex. R. App. P. 9.4(i)(1); and

2. the typeface and type-style requirements of Tex. R. App. P. 9.4(e), because this petition has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/ Bruce Anton
Bruce Anton

Appendix

Affirmed as modified; Opinion Filed June 15, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01321-CR

MAURICE LAMAR PIPER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 283rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F15-75812-T

MEMORANDUM OPINION

Before Justices Lang-Miers, Evans, and Schenck
Opinion by Justice Evans

Maurice Lamar Piper was indicted for murder. A jury convicted appellant of the lesser included offense of manslaughter and assessed punishment at eighteen and a half years' imprisonment. On appeal, appellant contends that he received ineffective assistance of counsel due to counsel's failure to request a jury instruction on voluntariness and inviting the court to include an instruction on the lesser-included offense of manslaughter. In the alternative, appellant requests that the judgment be modified to correctly reflect that appellant was convicted of the offense of manslaughter. As modified, we affirm the trial court's judgment.

BACKGROUND

On June 18, 2015, appellant shot and killed Hardy Wilson during an altercation at a body shop. The altercation arose from a dispute over appellant's car which was at the shop for repairs

after it had been involved in an accident. Appellant's brother, Dominique Hawkins, accompanied appellant to the shop on the day of the shooting. The owner of the body shop, Ronald Wadley, and two other men present at the shop, witnessed the shooting and testified that appellant pulled out a gun and deliberately shot Wilson.

Wadley testified that appellant accused Wilson of taking parts off his car, and shot him after Wilson denied the accusation and threw his hands up in the air after appellant told him not to come any closer. He also testified that Hawkins was over thirty feet away from appellant at the time of the shooting. Freddie Whitaker and Colvin Nickerson testified that although Hawkins had earlier grabbed appellant by the arm in an attempt to get him to leave the premises, neither Hawkins nor anyone else, was near appellant when he shot Wilson. Ladon McKinney, another witness to the shooting, gave a recorded statement to police at the crime scene. After McKinney testified he could not remember what happened that day because he was high on marijuana, his statement was played for the jury. McKinney told police that he saw appellant pull out the gun and shoot Wilson after Wilson threw up his hands. McKinney also told police that Hawkins was trying to stop everything and tried to pull appellant back.

Appellant testified that Wadley and Wilson were complicit in facilitating an insurance fraud scheme involving the car. On the day of the shooting, appellant called Wadley and threatened to report the fraud to the insurance company because he believed Wadley was keeping the insurance checks and taking parts off the car to fix other vehicles. Appellant and Hawkins went to the shop after Wadley told him to come by and get his money. Appellant brought his gun with him because he suspected that Wadley was setting him up. After Wilson denied taking parts from his car and started approaching appellant, he drew his gun on him. When appellant told Wilson not to approach him, Wilson threw his hands up in the air and started taking steps backward. Hawkins was next to appellant and grabbed his neck and shoulder. The sudden jerk

from his brother's grabbing caused the gun to go off. Appellant testified that he had no intention of shooting Wilson and that if his brother had not pulled his arm, he would not have shot him. Appellant turned himself into the police six days later; Hawkins turned himself into the police sometime earlier. The jury found appellant guilty of manslaughter.

ANALYSIS

I. Ineffective Assistance of Counsel.

To prevail on an ineffective assistance of counsel claim, appellant must establish both that his trial counsel performed deficiently and that the deficiency prejudiced him. *State v. Morales,* 253 S.W.3d 686, 696 (Tex. Crim. App. 2008) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). With respect to the first prong, the record on appeal must be sufficiently developed to overcome the strong presumption of reasonable assistance. *See Thompson v. State,* 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999). Absent an opportunity for trial counsel to explain his actions, we will not conclude his representation was deficient "unless the challenged conduct was so outrageous that no competent attorney would have engaged in it." *Garcia v. State,* 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). Texas procedure makes it "'virtually impossible' " for appellate counsel to present an adequate ineffective assistance claim on direct review. *See Trevino v. Thaler,* 133 S. Ct. 1911, 1918 (2013) (quoting *Robinson v. State,* 16 S.W.3d 808, 810–11 (Tex. Crim. App. 2000)). This is because the inherent nature of most ineffective assistance claims means that the trial court record "will often fail to 'contai[n] the information necessary to substantiate' the claim." *Id.* (quoting *Ex parte Torres,* 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc)). As a result, the better procedural mechanism for pursuing a claim of ineffective assistance is almost always through writ of habeas corpus proceedings. *Freeman v. State,* 125 S.W.3d 505, 506 (Tex. Crim. App. 2003).

The record shows that at a pretrial hearing, appellant's counsel informed the trial court that he believed the lesser-included offenses of manslaughter and criminally negligent homicide would be raised by the evidence at trial and that he would be filing a notice of eligibility for community supervision. During voir dire, both the State and counsel discussed manslaughter with the jury panel. Counsel also discussed criminally negligent homicide and self-defense. The jury charge included an instruction on the lesser-included offense of manslaughter. Counsel's request for an instruction on criminally negligent homicide was denied. During closing argument, counsel argued that appellant was not criminally liable for the offense of murder but that if he did anything, he acted recklessly in pulling out the weapon itself.

Appellant contends that trial counsel was ineffective for not requesting an instruction on voluntariness. A person commits a criminal offense only if he voluntarily engages in conduct, including an act, an omission, or possession. TEX. PENAL CODE ANN. § 6.01(a) (West 2011). "[T]he issue of the voluntariness of one's conduct, or bodily movements, is separate from the issue of one's mental state." *Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) (quoting *Adanandus v. State*, 866 S.W.2d 210, 230 (Tex. Crim. App. 1993)). When evidence of an independent event, such as the conduct of a third party is met, a defendant is entitled to an instruction on involuntary conduct when requested. *Id.* at 277. However, defensive issues "frequently depend upon trial strategy and tactics." *See Tolbert v. State,* 306 S.W.3d 776, 780 (Tex. Crim. App. 2010) (citing *Delgado v. State,* 235 S.W.3d 244, 249–50 (Tex. Crim. App. 2007)). Thus, the failure to request an instruction on voluntariness, even if the evidence raises the issue, does not automatically render counsel's performance deficient. Counsel is under no duty to raise every defense available, so long as counsel presents a defense that is objectively reasonable or strategically sound. *See Dannhaus v. State,* 928 S.W.2d 81, 85–86 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (counsel's strategy to focus on culpable mental state rather than self-

defense, mistake of fact, or voluntariness was not objectively unreasonable in light of the strong evidence of guilt); *see also Vasquez v. State*, 830 S.W.2d 948, 950 n.3 (Tex. Crim. App. 1992) ("[J]ust because a competent defense attorney recognizes that a particular defense might be available to a particular offense, he or she could also decide it would be inappropriate to propound such a defense in a given case.").

In this case, appellant filed a motion for new trial. However, he did not raise a claim of ineffective assistance of counsel in the motion. Thus, trial counsel did not have an opportunity to explain himself in the trial court. On this record, we cannot conclude counsel's failure to request an instruction on voluntariness was not the result of sound trial strategy. *See Hathorn v. State,* 848 S.W.2d 101, 118 (Tex. Crim. App. 1992) (counsel's attempt to get the jury to find appellant guilty of a lesser offense can be explained as a sound trial tactic). Since appellant has failed to rebut the presumption of counsel's competence under the first prong, we need not consider the requirements of the second prong. We rule against appellant on his first and second issues.[1]

II. Modification of Judgment.

In appellant's third issue, he requests that we modify the judgment to accurately reflect that he was convicted of the lesser-included offense of manslaughter. The State agrees that the judgment should be modified to reflect a conviction for the second-degree felony offense of manslaughter. The trial record shows that the jury convicted appellant of the lesser-included offense of manslaughter. Accordingly, we modify the judgment as follows:

The Section entitled "Offense for which Defendant Convicted" is modified to state "Manslaughter."

[1] Appellant also claims that counsel was ineffective for "inviting the court to include in the jury charge the unsupported lesser-included offense of manslaughter." Appellant does not raise jury charge error in this appeal. The issue is whether appellant received ineffective assistance of counsel for failing to request an instruction on one of the defensive issues raised by the evidence. The issue of whether the evidence supported an instruction on the lesser-included offense of manslaughter has no bearing on that question.

The Section entitled "Statute for Offense" is modified to state "19.04."

The Section entitled "Degree of Offense" is modified to state "2nd Degree Felony."

See TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd.).

CONCLUSION

As modified, we affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MAURICE LAMAR PIPER, Appellant	On Appeal from the 283rd Judicial District Court, Dallas County, Texas
No. 05-16-01321-CR V.	Trial Court Cause No. F15-75812-T.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Evans, Justices Lang-Miers and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

The Section entitled "Offense for which Defendant Convicted" is modified to state "Manslaughter."

The Section entitled "Statute for Offense" is modified to state "19.04."

The Section entitled "Degree of Offense" is modified to state "2nd Degree Felony."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 15th day of June, 2018.