Juvenile Law Case Summaries

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Failure to object to admission of unadjudicated juvenile offenses at criminal sentencing not ineffective assistance [Giddens v. State] (01-3-17).

On July 18, 2001, the Texarkana Court of Appeals held that failure to trial counsel to object to the admission before the jury of evidence of a defendant's juvenile arrests did not constitute ineffective assistance of counsel because of lack of proof of prejudice from the admission of the evidence.

¶ 01-3-17. Giddens v. State, ___ S.W.3d ___, No. 06-00-00157-CR, 2001 WL 803767, 2001 Tex.App.Lexis ____ (Tex.App.—Texarkana 7/18/01) [Texas Juvenile Law (5th Edition 2000)].

Facts: Decarlos Giddens was charged with aggravated robbery. He was accused of robbing the cashier of a truck stop while exhibiting a firearm. Giddens was sixteen years old at the time of the offense, and the case was transferred from juvenile court to district court. Giddens pleaded guilty, and a jury set his punishment at sixty years' confinement.

Held: Affirmed.

Opinion Text: Giddens does not challenge the sufficiency of the evidence; rather, he contends he received ineffective assistance of counsel at the punishment phase of the trial. The standard for testing claims of ineffective assistance of counsel was set out by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted for Texas constitutional claims in Hernandez v. State, 726 S.W.2d 53, 57 (Tex.Crim.App.1986). The Strickland test applies to claims of ineffective assistance at the punishment phase of trial as well as the guilt/innocence phase. See Hernandez v. State, 988 S.W.2d 770 (Tex.Crim.App.1999).

In order to prevail on an ineffective assistance claim, the appellant must show that his counsel's representation fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense. To meet this test, the appellant must prove that his counsel's performance fell below the standard of prevailing professional norms and there is a reasonable probability that but for counsel's failings the result of the punishment trial would have been different.

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. Rodriguez v. State, 899 S.W.2d 658, 665 (Tex.Crim.App.1995). Our review of counsel's representation is highly deferential, and we indulge a strong presumption that counsel's conduct falls within a wide range of reasonable representation. Strickland v. Washington, 466 U.S. at 689; Tong v. State, 25 S.W.3d 707, 712 (Tex.Crim.App.2000). We will not second-guess through hindsight the strategy of counsel at trial, nor will the fact that another attorney might have pursued a different course support a finding of ineffectiveness. Blott v. State, 588 S.W.2d 588, 592 (Tex.Crim.App.1979). The fact that another attorney, even Giddens' attorney on appeal, might have pursued a different course of action does not necessarily indicate ineffective assistance. Harner v. State, 997 S.W.2d 695, 704 (Tex.App.--Texarkana 1999, no pet.).

Giddens contends his attorney was deficient for failing to object when the State introduced testimony that he had been arrested three previous times as a juvenile--for arson, burglary of a building, and burglary of a coin-operated machine--but that because of a lack of evidence, he was not prosecuted on those charges. The State contends that counsel was not deficient, because the evidence was admissible as part of Giddens' prior criminal record.

Tex.Code Crim.Proc.Ann. art. 37.07, § 3(a) makes evidence of the defendant's prior criminal record admissible at the punishment phase. [FN1] The State notes that under a previous version of Article 37.07, § 3(a), the phrase "prior criminal record" was defined as a "final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged." See Tex.Code Crim.Proc.Ann. art. 37.07, § 3(a) (Vernon 1981), amended by Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 5.05, 1993 Tex.Gen.Laws 3759. The State argues that by amending Article 37.07, the Legislature expanded the definition of prior criminal record to include, among other things, previous arrests.

FN1. Tex.Code Crim.Proc.Ann. art. 37.03, § 3(a) (Vernon Supp.2001) provides in relevant part:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Criminal Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

In Rodriguez v. State, 975 S.W.2d 667, 686 (Tex.App.--Texarkana 1998, pet. ref'd), we held that evidence of a defendant's prior unadjudicated juvenile offense is admissible at the punishment phase under Article 37.07, § 3(a), so long as the requirements set out in that statute are met. Id. at 687.

We need not decide whether Giddens' prior arrests constitute a part of his criminal record, because at the same time the Legislature deleted the definition of prior criminal record from Article 37.07, § 3(a), it added language to make it clear that extraneous transaction evidence was also admissible at the punishment phase. Act of May 29, 1993, 73rd Leg., R.S., ch. 900, § 5.05, 1993 Tex.Gen.Laws 3759. Because the Legislature expanded the breadth of evidence admissible at the punishment phase, a prior arrest for an offense for which the defendant was not convicted or otherwise found culpable is an extraneous transaction admissible under Article 37.07, § 3(a).

Giddens contends that, though evidence of prior arrests may be admissible at the punishment phase in general, evidence regarding the arrests at issue here was inadmissible because there was insufficient evidence to show beyond a reasonable doubt that he committed the offenses for which he was arrested. He contends the record affirmatively shows there was not enough evidence for the State to even prosecute him for those offenses, and that the State did not present other evidence that would have allowed a reasonable fact finder to conclude he had committed the acts for which he was arrested.

Article 37.07 § 3(a) provides that extraneous transaction evidence may not be considered in assessing punishment unless the fact finder is satisfied beyond a reasonable doubt that the defendant committed the acts. Huizar v. State, 12 S.W.3d 479, 481 (Tex.Crim.App.2000) (quoting Fields v. State, 1 S.W.3d 687, 688 (Tex.Crim.App.1999)). Further, the jury must be instructed concerning the burden of proof for such evidence. Huizar v. State, 12 S.W.3d at 484. Here the jury was instructed that it could not consider evidence of other crimes, wrongs, or bad acts unless it found beyond a reasonable doubt that Giddens committed those crimes, wrongs, or bad acts.

The question remains whether Giddens' attorney was deficient for failing to object that the trial court did not make a preliminary determination concerning the admissibility of the testimony regarding the arrests. Giddens' contention assumes that the trial court must make such a threshold determination.

The Texas Court of Criminal Appeals addressed this question in a plurality opinion in Mitchell v. State, 931 S.W.2d 950 (Tex.Crim .App.1996). In Mitchell, the Court held that under Article 37.07 § 3(a), the trial court must make a preliminary determination whether the evidence shows beyond a reasonable doubt that the defendant committed the extraneous transaction or that he could be held criminally responsible for it, and that the jury must also find beyond a reasonable doubt that the defendant committed the act and should be instructed accordingly. Therefore, Giddens' counsel at least had grounds for an objection under Article 37.07, § 3(a). He could have asked the Court to exclude the evidence based on a lack of proof that he committed the three offenses.

The State contends Giddens has not shown from the record that his counsel's actions in this regard did not have a basis in sound trial strategy. The State contends Giddens' attorney could have rationally chosen to allow evidence of his prior arrests to go before the jury to fully disclose the details of his past as a way of seeking leniency by being

open and candid before the jury.

Giddens pleaded guilty and testified about the robbery. He also admitted to participating in underage drinking, using marihuana, shoplifting, and associating with persons he knew participated in criminal activity. He also admitted that he assaulted another inmate in the juvenile detention facility. As for the State's evidence regarding his three previous arrests, Giddens contended that he did not commit the arson offense. He did not comment directly about the two burglary arrests.

From this record, it is clear that defense counsel could have made a strategic decision not to object to the State's evidence in an effort to be open with the jury about Giddens' past. In any event, Giddens has presented no evidence or argument that his counsel's actions were not based on sound trial strategy. Consequently, Giddens has not overcome the strong presumption that counsel's actions fall within a wide range of reasonable representation.

Further, Giddens has failed to demonstrate prejudice from counsel's errors. He contends he was prejudiced because he received a sixty-year sentence, which he says amounts, in effect, to the maximum punishment available for the offense, because he will be eligible for parole after thirty years, the same as he would be if the maximum sentence had been assessed. He notes that he had no previous felony convictions and so was eligible for community supervision.

Nevertheless, the maximum punishment for aggravated robbery is confinement for life. Tex.Pen.Code Ann. §§ 12.32, 29.03(b) (Vernon 1994). The jury heard evidence that Giddens pointed the firearm at the truck stop's cashier and pulled the trigger several times, but that the weapon jammed. The cashier also testified that while Giddens was looking for money underneath the counter, he physically pinned her against the counter.

In contrast, Giddens' attorney thoroughly cross-examined the State's witness about Giddens' previous arrests. The witness admitted there was not enough evidence to prosecute Giddens for the offenses, that a jury would have found him not guilty of those offenses, and that he could be innocent of those offenses.

In addition, as mentioned previously, the jury was instructed not to consider evidence of extraneous transactions unless it was convinced beyond a reasonable doubt that Giddens was guilty of those offenses. Generally, we presume the jury follows the trial court's instructions. Colburn v. State, 966 S.W.2d 511, 520 (Tex.Crim.App.1998).

We conclude, therefore, that Giddens' has failed to affirmatively demonstrate prejudice. His assertions that he would have received a lighter sentence or even community supervision are only speculation.

The judgment is affirmed.

GRANT.

CONCURRING OPINION

In our system of justice, it is important that any showing of extraneous crimes, which are not final convictions, or bad acts be shown beyond a reasonable doubt as required by Tex.Code Crim.Proc.Ann. art. 37.03, § 3(a) (Vernon Supp.2001). An example of the proof that appears in the record in the present case to establish prior criminal acts is the testimony of the probation officer. These excerpts relate to the alleged prior criminal acts:

> [CROSS EXAMINATION BY MR. LEE]:
> Q Let me go back to your initial response to Mr. Elliott with regard to Mr. Giddens. You noted that there were two offenses for which he was investigated at his high school setting.
> A That's correct.
> Q The first one being an arson offense. Now when you tell this jury that there was conflicting evidence, you're saying that basically, between what he said, what other people said and what the evidence was, there was no clear way to say that he and he alone did this.
> A That's correct.
> Q So that he wasn't prosecuted for it.
> A That's correct.
> Q It's basically the same thing that a jury would do if they came to the conclusion that he was not guilty of a charge.
> A That's correct. Well, I make a recommendation through our office to the District Attorney's office on felonies, and we were in agreement at that point that this was not a charge that could be successfully prosecuted.

Q Quite possibly he was innocent.
A Possibly.
Q Okay. Then we have another situation where you say that again, a vending machine is broken into; there's a burglary of a building, an uninhabited building.
A That's correct.
Q Okay, and once again, the evidence is such that probably couldn't get a conviction, could you?
A Not on that charge.
Q Okay. So that what you're telling this jury in essence is as to his juvenile record, the two things that would point to the kind of defiant behavior were things that there was evidence that cut both ways.
A That's correct.
Q Quite possibly he didn't do it or if he did do it, he didn't act alone; or at least the facts, as they were reported to you, did not suggest that a conviction was likely.
A That's correct.
Q And you say that's basically the extent of his juvenile record.
A That's all he has been caught doing.

This is not sufficient evidence to prove the commission of a crime. This evidence strongly shows a reasonable doubt. This is the type of evidence that should not go to a jury to establish an extraneous crime, and allowing this type of evidence before a jury should be highly discouraged.

Our system of justice requires proof by witnesses who are aware of the facts of the guilt of a party, not a witness who can testify merely about an arrest on a matter that was dismissed for want of evidence.

The trial judge should have been requested to evaluate this evidence before allowing it before a jury. This screening process would keep out evidence that proves nothing more than the fact that a party was charged with the offense.

Because this is a case challenging whether Giddens had effective counsel, and thus whether there was a reasonable probability that but for counsel's failings the result of the punishment trial would have been different, the impact on the jury must be carefully considered. The jury had been duly instructed that it would only consider extraneous matters that were proven beyond a reasonable doubt. This is a difficult standard to apply, but based on the evidence cited above, it is difficult to believe that any juror should have believed that the alleged extraneous offenses were proved beyond a reasonable doubt when no evidence was presented that Giddens committed these offenses and when the testimony admitted that these charges were dismissed because of lack of evidence. Thus, the standard requiring the reasonable probability that the result of the punishment trial would have been different had it not been for counsel's failing has not been shown. For that reason, I concur with the majority opinion.

I reiterate that it is wrong and violative of the statute to introduce and allow such evidence before the jury in an attempt to influence the jury's verdict on sentencing.

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