

IN THE COURT OF APPEALS 02/13/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-00542 COA

KENNETH L. BOUNDS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LARRY E. ROBERTS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF LAUDERDALE COUNTY

ATTORNEYS FOR APPELLANT:

ROGERS DRUHET (TRIAL)

CHARLES WRIGHT, JR. (APPEAL)

ATTORNEY FOR APPELLEE: STATE ATTORNEY GENERAL'S OFFICE

BY JEAN SMITH VAUGHAN

DISTRICT ATTORNEY: LAUDERDALE COUNTY BY DAN ANGERO AND DAVE
HARBOUR

NATURE OF THE CASE: THIRD OFFENSE FELONY DRUNK DRIVING

TRIAL COURT DISPOSITION: FOUND GUILTY, SENTENCED TO FOUR (4) YEARS IN
CUSTODY OF MISSISSIPPI DEPARTMENT OF CORRECTIONS; CRIMINAL FINE OF \$5,000

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

BARBER, J., FOR THE COURT:

Appellant Kenneth Bounds appeals from his conviction in the Circuit Court of Lauderdale County for felony drunk driving. As a result of this conviction, Bounds received a four-year sentence of incarceration and a fine of \$5,000. Bounds now appeals from this conviction, asserting that the performance of his court-appointed counsel was constitutionally deficient. We find that Bounds' specific contentions concerning the alleged ineffective performance of his counsel are without merit. Accordingly, we affirm.

I. BACKGROUND

On the night of October 3, 1992, Kenneth Bounds was arrested for driving while under the influence of alcohol. Officer E.J. McElheny of the Meridian Police Department stopped Bounds' car. Officer McElheny testified that his radar showed that Bounds was traveling eighty miles per hour in a forty-five mile per hour zone. McElheny further testified that when Bounds exited the car, he smelled a strong odor of alcohol on Bounds' person. McElheny then summoned Officer Chuck Jordan, a Meridian policeman who specializes in drunk driving arrests, to the scene. Jordan testified that he also smelled the odor of alcohol coming from Bounds. Among the various tests that Jordan proceeded to administer to Bounds was a field intoxilyzer test. The results of this test showed a blood alcohol count of .16 percent. Bounds was then placed under arrest and taken to the police station. At the station, Bounds refused to submit to an in-station intoxilyzer test.

At the time of his arrest, Bounds was driving with a suspended driver's license. Bounds' license had been suspended as a result of numerous previous convictions for driving under the influence of alcohol. Indeed, the pre-sentence report prepared on Bounds showed that he had five such previous convictions. On November 8, 1992, a Lauderdale County grand jury indicted Bounds for violation of section 63-11-30(c) of the Mississippi Code (1972 & Supp. 1994) which makes it a crime punishable by a maximum of five years of imprisonment and a maximum fine of \$5,000 for any person to be convicted a third time for driving while intoxicated.

Bounds was tried on April 21 and 22, 1993, in the Circuit Court of Lauderdale County. At trial, Bounds was represented by Rogers Druhet, a court-appointed attorney working for the Lauderdale County Public Defender system. At the trial's conclusion, the jury returned a verdict of guilty. On May 11, 1993, after the trial judge sentenced Bounds to a term of four years of imprisonment and imposed a \$5,000 fine, Bounds, who by that time had retained attorney Charles W. Wright, Jr. to represent him, filed a motion for a new trial. Bounds asserted that Druhet's performance had been constitutionally defective. The trial judge held an evidentiary hearing on the matter and denied the motion.

On appeal, Bounds raises a single assignment of error. Bounds asserts that Druhet's performance in representing him was constitutionally deficient under the Sixth Amendment of the United States Constitution and that he is therefore entitled to a new trial.

II. DISCUSSION

With respect to an ineffective assistance of counsel claim, the Mississippi Supreme Court has stated:

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), the United States Supreme Court established a two-prong test, required to prove the ineffective assistance of counsel: the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense The burden of proof then rests with the movant

Under the first prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." . . . In short, defense counsel is presumed competent.

Under the second prong, even if counsel's conduct is "professionally unreasonable," the judgment stands "if the error had no effect on the judgment." . . . Consequently, the movant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Handley v. State, 574 So. 2d 671, 683 (Miss. 1990) (quoting *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988)).

The substance of Bounds' initial appellate brief as well as of his reply brief consists of numerous factual assertions regarding various acts and omissions of which Druhet was allegedly guilty. These acts and omissions are meant to leave us with the overall impression that Druhet was painfully delinquent in his duties to communicate with Bounds and his witnesses and to prepare an adequate defense. After examining these assertions in further depth, however, we are persuaded that, with the exception of two specific assertions, they do not amount to deficient performance on the part of Druhet and merit no further discussion. Furthermore, we note that for all of his ability to heap example of supposed deficiency upon example of a supposed deficiency, Bounds has completely failed to argue the second prong of the *Strickland* test. Specifically, Bounds has made no attempt to persuade us of how the outcome would have been different had these supposed deficiencies not occurred. As a result, even if we were to agree with Bounds' present counsel and find that his assertions as to Druhet's performance amounted to constitutional deficiencies, we would be at a loss to see how things would have turned out any differently for Bounds had Druhet pursued different courses of action.

There are, however, two exceptions to this last statement which merit further discussion. They are: (1) Druhet failed to object to testimony regarding the .16 reading from the field intoxilyzer test administered by Officer Jordan; and (2) before trial, Druhet failed to communicate to Bounds a plea offer put forth by the prosecuting attorney.

(1) The Results of the Field Intoxilyzer Test

At trial, Officer Jordan testified that after he arrived at the scene of the stop, he administered a field intoxilyzer test to Bounds and that the reading from this test showed a blood alcohol count of .16 percent. During pre-trial discovery, the prosecution did not disclose to the defense the substance of Jordan's testimony as to the field intoxilyzer test. Thus, Bounds faults Druhet for not objecting to the

admission of this evidence.

During the evidentiary hearing on the motion for new trial, Druhet testified that the reason that he did not object to Jordan's testimony about the field intoxilyzer results was that he was attempting to pursue a specific trial strategy. Although Jordan testified at trial that he administered the field intoxilyzer test to Bounds, the two policemen included nothing in the arrest report and the other accompanying documentation noting that such a test was ever given. At the evidentiary hearing, Druhet testified that in view of this fact, he chose to use Jordan's testimony as to the field intoxilyzer test to impeach his credibility in the eyes of the jury.

We cannot say that Druhet's decision not to object to Jordan's testimony amounted to a deficiency in his performance. The record discloses that this decision was a result of a calculated strategy aimed at impeaching the credibility of the arresting officers as to whether Bounds was indeed drunk at the time they arrested him. The fact that this strategy may not have ultimately had the desired effect may have been unfortunate for Bounds. Nevertheless, we will not engage in what the trial judge referred to as "Monday morning quarter backing," using the benefit of hindsight to find that a certain course of action fell below reasonable standards of attorney conduct.

Even if we were to find, however, that Druhet's decision not to object to Jordan's field intoxilyzer testimony amounted to a deficiency in his performance, the evidence at trial was more than adequate to support a finding that he was driving while intoxicated at the time he was arrested. Thus, even had this evidence not come before the jury, there is no reasonable probability that the jury's verdict would have been different from what it turned out to be. Thus, this specific contention also fails under the second prong of the *Strickland* standard.

(2) The Alleged Failure to Communicate the Plea Offer

It is undisputed that before Bounds was tried the district attorney extended an offer to Druhet to the effect that Bounds would only have to serve a six month sentence of incarceration if he pled guilty. At the evidentiary hearing held on the motion for new trial, Druhet testified that he communicated this offer to Bounds before trial and that Bounds refused it. In direct contradiction to this testimony, Bounds testified that Druhet never communicated the plea offer to him and that had Druhet done so, he would have accepted the offer in exchange for the reduced sentence.

So far, no Mississippi decision has addressed the question of whether a criminal lawyer's failure to inform his client of a plea offer constitutes ineffective assistance of counsel. However, under the well-established *Strickland* approach, it would seem that it does. Rule 1.4 of the Mississippi Rules of Professional Conduct states:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Mississippi Rules of Professional Conduct Rule 1.4 (1987). The comment to this Rule states that "A lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case should

promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable." *Id.* cmt. In addition, Rule 1.2 states that "[i]n a criminal case, a lawyer shall abide by the client's decision, *after consultation with the lawyer*, as to a plea to be entered, whether to waive jury trial and whether the client will testify." *Id.* Rule 1.2 (emphasis added). We think that these two Rules adequately support the conclusion that an attorney's failure to communicate a plea offer to his criminal client falls below reasonable standards of professional conduct. We therefore also conclude that such a failure could amount to a deficiency such as is contemplated by the first prong of *Strickland*.

With respect to the prejudice prong of *Strickland*, it is undisputed that the State offered Bounds' attorney a plea offer in which Bounds would have had to serve six months of jail time. Bounds was tried and convicted of the offense with which he was charged, and the trial judge gave him a sentence of four years of incarceration. Clearly, if as a result of not having the plea offer communicated to him, Bounds chose to go to trial, then there is a reasonable probability that had that offer been communicated to him and he had accepted it, the final outcome would have been different. Thus, there is a valid claim that Bounds was prejudiced by the failure on the part of his counsel to communicate the plea offer - *if in fact Druhet did not communicate the offer*. We hold, therefore, that failure by an attorney to communicate a plea offer to his criminal client, the acceptance of which would have resulted in the client having to serve a shorter period of incarceration than the period of time to which he was ultimately sentenced as a result of going to trial, comprises constitutionally ineffective assistance of counsel. (Of course, this holding does not apply to those situations where the client has previously made it clear he would reject any or at least that particular plea offer.)

When this case was first considered by us, we noted that the trial judge had failed to make a factual determination as to whether Druhet had communicated to Bounds the prosecution's plea offer. We, therefore, remanded this case to the trial court with a directive to the trial judge to make the appropriate findings that would help us determine whether Druhet's performance was constitutionally deficient. Pursuant to our order, the trial judge held an evidentiary hearing on October 19-20, 1995. At this hearing, five different witnesses, including Bounds and Druhet, testified and were cross-examined. After considering the extensive and often conflicting testimony, the judge found that "there was in fact a plea offer communicated by Rogers Druhet to Kenneth L. Bounds prior to trial." The judge further found that this offer was communicated not later than April 19, 1993, (the day before Bounds' trial) and that had Bounds "filed a sworn plea petition . . . and thereby indicate[d] a desire to enter a plea of guilty, this Court would by all means have accepted the plea."

In view of the trial judge's findings, which are supported by substantial evidence, we hold that there is no factual basis to Bounds' claim that his attorney failed to communicate the prosecution's plea offer to him. Accordingly, this specific ineffective assistance of counsel contention is also without merit.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court.

THE JUDGMENT OF THE CIRCUIT COURT OF LAUDERDALE COUNTY OF CONVICTION OF THIRD OFFENSE FELONY DRIVING UNDER THE INFLUENCE OF ALCOHOL AND SENTENCE OF FOUR YEARS IN THE CUSTODY OF THE

**MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF \$5,000 IS AFFIRMED.
COSTS ARE ASSESSED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN,
PAYNE, AND SOUTHWICK, JJ., CONCUR.**