

IN THE COURT OF APPEALS 05/21/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00976 COA

OSCAR THOMAS, JR.

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. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HANCOCK COUNTY

ATTORNEY FOR APPELLANT:

JAMES G. TUCKER, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: WAYNE SNUGGS

DISTRICT ATTORNEY: CHARLES E. WOOD

NATURE OF THE CASE: CRIMINAL: INEFFECTIVE ASSISTANCE OF COUNSEL

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO TEN YEARS IN THE
MDOC

BEFORE FRAISER, C.J., McMILLIN, AND PAYNE, JJ.

PAYNE, J. FOR THE COURT:

Thomas appeals his conviction for sale of a controlled substance (cocaine) and sentence of ten years in the custody of the Mississippi Department of Corrections. Thomas' only assignment of error is that he was denied effective assistance of counsel at trial. Finding no error, we affirm.

STATEMENT OF THE FACTS

Oscar Thomas was tried and convicted of selling cocaine and sentenced to ten years in the custody of the Mississippi Department of Corrections. At trial Thomas was represented by counsel. After the State made its opening statement during the trial, counsel for Thomas reserved his opening statement. The record does not reflect that Thomas' counsel ever made an opening statement.

When the time for submission of jury instructions arose, Thomas' counsel did not submit any instructions. The record reveals that the trial court submitted seven instructions and the State submitted two additional instructions. The record also reveals that Thomas' counsel participated in the discussion of the proposed jury instructions. Three of the court's submitted instructions addressed the defendant's right to remain silent and not testify against himself, that the indictment creates no evidence or inference of guilt, and Thomas' presumption of innocence.

The record reflects that Thomas' counsel participated in voir dire and selection of the jury panel, moved to limit the testimony of a witness for an alleged discovery violation, cross-examined every witness presented by the State, moved for a directed verdict at the close of the State's case, presented a witness on Thomas' behalf, made a closing statement during which he discussed the testimony of particular witnesses, discussed with Thomas his decision not to testify on his own behalf leaving the ultimate decision to Thomas, asked that the jury be polled, and filed a written motion for JNOV or new trial.

DISCUSSION

ISSUE: WAS THOMAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

Thomas argues ineffective assistance of counsel because his trial counsel failed to take an active part in the trial. At trial, defense counsel did not make an opening statement (neither at the start of the trial nor at the beginning of Defendant's case), and defense counsel did not file jury instructions.

The State argues that Thomas' argument is procedurally barred because he did not raise the issue in the trial court. Substantively, the State argues that Thomas has failed to overcome the strong presumption that counsel functioned professionally and that counsel's decisions were strategic, nor has Thomas shown that he was prejudiced. Also argued by the State is that a claim of ineffective assistance of counsel may be rejected where the defendant is hopelessly guilty.

Since we are able to dispose of Thomas' argument on its merits, we decline to address the procedural bar issue.

The standard of review for an ineffective assistance of counsel argument is the two-prong test: (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Mississippi Supreme Court adopted the *Strickland* standard for an ineffective assistance of counsel argument in *Stringer v. State*, 454 So. 2d 468, 476-77 (Miss. 1984). See *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). "The burden is on the defendant to demonstrate both prongs." *McQuarter*, 574 So. 2d at 687 (citing *Leatherwood v. State*, 473 So. 2d 964, 968-69 (Miss. 1985)). This standard is based upon the totality of the circumstances surrounding each case. *Id.* (citing *Waldrop v. State*, 506 So. 2d 273, 275 (Miss. 1987)).

Mississippi "recognizes a strong but rebuttable presumption that counsel's conduct falls within a broad range of reasonable professional assistance. *Id.* (citing *Gilliard v. State*, 462 So. 2d 710, 714 (Miss. 1985)). The court recognized "[t]o overcome this presumption, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Schmitt v. State*, 560 So. 2d 148, 154 (Miss. 1990) (quoting *Strickland*, 466 U.S. at 694). There is also a presumption that counsel's decisions are strategic. See *Handley v. State*, 574 So. 2d 671, 684 (Miss. 1990) (citation omitted); *Leatherwood v. State*, 473 So. 2d 964, 968-69 (Miss. 1985)).

In the present case, the record is silent as to why Thomas' counsel did not make an opening statement. The Mississippi Supreme Court has held that the decision of whether or not to make an opening statement is a strategic one. See *Cabello v. State*, 524 So. 2d 313, 318 (Miss. 1988); *Gilliard v. State*, 462 So. 2d 710, 716 (Miss. 1985). The court has also held that the failure to submit any jury instructions or request a jury polling did not satisfy the *Strickland* test. See *Frierson v. State*, 606 So. 2d 604, 607 (Miss. 1992).

In the present case, Thomas has not met his burden of satisfying the two prongs of *Strickland*. Thomas has failed to show this Court that his trial counsel was deficient nor has he demonstrated how his trial counsel's actions, or inactions, prejudiced him. We have reviewed the record and looking at the totality of the circumstances, we cannot say that the assistance provided by Thomas' counsel rises to the level required under *Strickland*. Thus, we are compelled to affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF HANCOCK COUNTY OF CONVICTION OF TRANSFER OF A CONTROLLED SUBSTANCE (COCAINE) AND SENTENCE OF TEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HANCOCK COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.