Simmons v. Texas

Texas Court of Appeals
UNPUBLISHED, 2003 WL 21470387
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Summary of Opinion

Defendant Simmons was convicted of cruelty to horses and appealed, claiming that his lawyer did not properly do his job in representing him. In this opinion, the Court of Appeals examines the evidence at the civil hearing to determining the fate of the seized horses and at the criminal cruelty to animals trial and concludes that defendant did not prove that his lawyer did not do his job properly.

Text of Opinion

Charles Jansen, an investigator for the Society for the Prevention of Cruelty to Animals (SPCA), testified that, on April 1, 2001, he responded to a report of a "downed" horse at 12866 Reevston, in Harris County, Texas. The property at this address is a five-acre pasture leased by appellant.

When Jansen arrived at the property, he found an emaciated mare lying in a field, not moving. Jansen also saw six other horses which, in his opinion, had "inadequate body weight." Jansen did not see any water pumps, water hoses, or food for the horses and noticed that the grass in the pasture was "very short." In a corner of the property, Jansen saw a tub containing some rainwater and another tub with "two to three inches" of water in it.

The "downed" mare had made a circle in the dirt around it from its unsuccessful attempts to stand by "thrashing" its legs. The horse was unable to stand up, and Jansen, after obtaining a civil warrant to seize the horse, used a sled to lift the horse into a trailer and then transported it to the Houston SPCA shelter.

Chief SPCA Investigator Jim Boller testified that he was called to assist Jansen with the removal of the "downed" mare and the investigation of this case. Boller evaluated the body condition of the mare using the Hanneke scoring method, which rates the condition of horses on a range from 1 (extremely emaciated) to 9 (extremely fat). Boller explained that the "norm" score on the Hanneke scale is 5. Boller testified that he gave the mare a Hanneke score of 1.75. In his opinion, the mare was approximately 400 pounds underweight. Boller also evaluated the other six horses on the property, and their scores ranged from 2 to 3.75. In his opinion, it would take longer than six weeks for a horse that was not being properly fed and watered to drop from a Hanneke score of 5 to a score of 2.

Boller described the grass in the pasture as "minimal" and testified that the size of the pasture was inadequate to sustain the horses without supplemental feed. From his examination of the water trough, it was Boller's opinion that the horses had not been provided with water on a regular basis and that the water level of the trough had been low for an extended period of time. Boller testified that horses require proper feeding every day, and he estimated the cost of feeding seven horses at approximately $700 per month. From his examination of the horses, Boller concluded that they had not received routine dental or hoof care. Fecal testing indicated that the horses suffered from "heavy infestations" of stomach parasites. In Boller's opinion, appellant's horses had not been adequately cared for.

Jansen subsequently obtained another civil warrant for the seizure of the remaining horses. Two days after Jansen's initial visit to the property, the remaining horses were seized and taken to the SPCA shelter. [FN2] Precinct One Constable Officer C. Kendrick testified that she posted the notices of the seizure of the horses on the gate of the pasture.

FN2. The surviving horses were subsequently adopted by persons approved by the SPCA.

Shortly after the horses were seized, appellant telephoned Jansen at the number listed on the posted notices and identified himself as the owner of the horses and as a Harris County Sheriff's Deputy. During their telephone conversation, appellant told Jansen that the horses were being fed regularly and that appellant had been to the property on the previous day. Appellant explained that he had given some money to a man he identified as "Mr. Chavez" to care for the horses during the previous month, but appellant could not provide Jansen with Chavez's telephone number or address.

Dr. Timothy Harkness, the chief veterinarian for the Houston SPCA, testified that the mare seized by Jansen and Boller was very emaciated, was in an acute state of dehydration, and was suffering acute anemia caused by internal parasites and lack of proper nutrition. Dr. Harkness testified that the mare was given intravenous fluids, antibiotics, and pain medications, but it died the following morning. Based on his examination and subsequent autopsy of the mare, Dr. Harkness concluded that the horse had not been fed properly for "a period greater than six months." In Dr. Harkness's opinion, the horse died as a result of a "heavy" infestation of stomach parasites and malnutrition. Dr. Harkness explained that stomach parasites can be treated with "routine veterinary care and maintenance," including "worming" medications that an owner can purchase at a feed store and administer to his horses.

Boller testified that, at a civil hearing to determine whether the surviving horses would be permanently taken from appellant, appellant appeared and claimed "custody" of the seized horses. Jansen also testified that he first saw appellant at the civil hearing. Officer Kendrick attended the civil hearing, and she testified that, at that hearing, appellant stated that he had been paying someone to care for the horses.

Hope Simmons, appellant's wife, testified that, during the first week of January 2001, she and her husband met with Jesus Amanderez, Sr., who lived next to the pasture where appellant kept his horses. Simmons testified that she translated for her husband so that he could converse with Amanderez, who speaks mostly Spanish. Simmons testified that appellant and Amanderez discussed the amount of a water bill, and that appellant agreed to pay Amanderez "to take care of everything that needed to be taken care of" for the horses. Simmons could not remember the amount her husband agreed to pay Amanderez, and she was not present for any other conversations between the two men.

Appellant testified that, in January 2001, his wife translated his conversation with Amanderez, concerning appellant's agreement to pay Amanderez to provide water for appellant's horses. Appellant testified that, on February 25, 2001, he spoke to Amanderez again, with Amanderez's son translating, and that during that conversation, appellant and Amanderez agreed that appellant would pay Amanderez to feed and water appellant's horses. Appellant testified that he provided Amanderez with 300 to 500 pounds of feed for the horses. Appellant also testified that he "wormed" the horses in January and February 2001. Appellant did not return to the pasture until March 31, 2001, the day before the downed mare was seized, and he testified that he did not see any horses down at the time. Appellant acknowledged that he was ultimately responsible for the horses.

Jesus Amanderez, Sr. testified that, in November 2000, he agreed to provide water for appellant's horses, and that appellant paid him $40 for the water in January 2001. Amanderez testified that he never met with appellant in February 2001 and did not agree to provide water or feed for the horses after January 2001. Amanderez also testified that appellant never gave him any feed for the horses, and that, after January 2001, Amanderez sometimes provided water to the horses only because he never saw appellant and "felt sorry" for the horses. Amanderez's son, Jesus Amanderez, Jr., testified that he and his father met with appellant once in January 2001 to arrange for Amanderez, Sr. to water appellant's horses. Amanderez, Jr. testified that he never met with appellant again and did not know how often his father watered the horses.

Ineffective Assistance of Counsel

In his sole point of error, appellant contends that his trial counsel rendered ineffective assistance. Specifically, appellant argues that his trial counsel was ineffective for (1) failing to object to testimony from three witnesses concerning appellant's appearance and statements at the civil hearing to determine the fate of the surviving seized horses and (2) introducing testimony from appellant, appellant's wife, and two other witnesses establishing that the horses were in appellant's "custody."

To show ineffective assistance of counsel, an appellant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on prevailing professional norms, and that, but for counsel's errors, there is a reasonable probability the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-65, 2068 (1984); *Hernandez v. State,* 726 S.W.2d 53, 57 (Tex.Crim.App.1986). A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome. *Thompson v. State,* 9 S.W.3d 808, 813 (Tex.Crim.App.1999); *Jackson v. State,* 973 S.W.2d 954, 956 (Tex.Crim.App.1998). It is an appellant's burden to prove a claim of ineffective assistance of counsel by a preponderance of the evidence. *Thompson,* 9 S.W.3d at 813; *Jackson,* 973 S.W.2d at 956; *McFarland v. State,* 845 S.W.2d 824, 843 (Tex.Crim.App.1992). An appellant must satisfy both prongs of the *Strickland* test, or the claim of ineffective assistance will fail. 466 U.S. at 697, 104 S.Ct. 2052; *Garcia v. State,* 57 S.W.3d 436, 440 (Tex.Crim.App.2001).

The assessment of whether a defendant received effective assistance of counsel must be made according to the facts of each case. *Thompson,* 9 S.W.3d at 813. We must look to the "totality of the representation and the particular circumstances of each case" in evaluating the effectiveness of counsel. *Id.* In so doing, we must also recognize the strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065; *Thompson,* 9 S.W.3d at 813. In the absence of evidence of trial counsel's reasons for the challenged conduct, an appellate court commonly will assume a strategic motivation if any can possibly be imagined, and will not conclude the challenged conduct constituted deficient performance unless the conduct was so outrageous that no competent attorney would have engaged in it. *Garcia,* 57 S.W.3d at 440.

Failure to object

Appellant argues that his trial counsel should have objected to what appellant asserts was hearsay testimony from Jansen, Boller, and Kendrick as to appellant's appearance and statements at the civil hearing to determine whether the surviving horses would be removed from appellant's custody. Statements of an animal's owner made at such a hearing are not admissible in the owner's criminal trial for cruelty to the animal. Tex. Health & Safety Code Ann. § 821.023(b) (Vernon Supp.2003).

Here, Jansen testified that he saw appellant for the first time at the civil hearing. Jansen did not relate any statements made by appellant at that hearing. Therefore, appellant's counsel was not ineffective for failing to object to this testimony.

Boller testified that appellant appeared at the civil hearing and "claimed ownership" of the horses. However, this testimony was merely cumulative of Jansen's earlier testimony that he spoke with appellant on the telephone, and that appellant admitted he was the owner of the horses in question. Moreover, isolated failures to object to improper evidence or certain procedural mistakes do not constitute ineffective assistance of counsel. *Ingham v. State,* 679 S.W.2d 503, 509 (Tex.Crim.App.1984). We cannot conclude that appellant's counsel was ineffective for not objecting to this testimony.

Officer Kendrick testified that appellant appeared at the civil hearing. When Kendrick was asked, on

direct examination, whether appellant had said anything at the hearing, appellant's trial counsel timely objected to the question as calling for hearsay, and a bench conference followed. No record was made of the discussion at the bench. At the conclusion of the bench conference, the trial court overruled the objection, and Kendrick testified that, at the civil hearing, appellant explained that "he had been paying someone to take care of the animals." Contrary to appellant's assertion, his trial counsel *did* object to the question posed to Kendrick, but the record is silent as to any detailed basis counsel may have given for the objection, or any explanation the trial court may have given for overruling the objection. Based on the record presented, we cannot conclude that appellant's trial counsel was ineffective in his efforts to keep out this testimony.

Presentation of Evidence

Appellant also argues that his trial counsel was ineffective for eliciting testimony from appellant, appellant's wife, Jesus Amanderez Sr., and Jesus Amanderez, Jr. concerning appellant's efforts to care for the horses and to arrange for the provision of food and water for them. Appellant argues that, had his trial counsel not offered the testimony of appellant and appellant's wife, and not called the Amanderezes to testify, there would have been no evidence presented to the jury to establish that the horses were in appellant's "custody."

A person commits the offense of cruelty to animals if he intentionally or knowingly "fails unreasonably to provide necessary food, care, or shelter for an animal" in his custody. Tex. Pen.Code. Ann. § 42.09(a)(2) (Vernon 2003). Here, the jury charge accurately tracked the language of this statute. "Custody" is defined by the statute as including "responsibility for the health, safety, and welfare of an animal subject to the person's care and control, regardless of ownership of the animal." *Id.* § 42.09(c)(4) (Vernon 2003).

At the close of the State's case, the jury had heard evidence that (1) appellant owned the horses at issue, (2) the horses were malnourished, dehydrated, and poorly cared for, and (3) one of the horses had died as a result of malnutrition and an infestation of stomach parasites. Appellant's trial counsel then presented evidence, through the testimony of appellant and appellant's wife, that appellant had cared for the horses and had arranged for the Amanderezes to water and feed them. The Amanderezes' testimony supported appellant's testimony concerning the arrangement to provide water for the horses, although the Amanderezes denied the existence of any agreement to provide food for the horses.

Appellant argues that because the Amanderezes denied the existence of an agreement to care for the horses, trial counsel must have been ineffective for presenting witnesses "without ascertaining if they will testify favorably or unfavorably." *See Ex parte Duffy,* 607 S.W.2d 507, 517 (Tex.Crim.App.1980). However, the record is silent as to trial counsel's motives in calling these witnesses and in regard to appellant's decision to testify. Finding counsel ineffective without a record or evidence of counsel's reasons for the alleged acts of ineffectiveness would amount to improper speculation. *Jackson v. State,* 877 S.W.2d 768, 771 (Tex.Crim.App.1994).

Without the testimony of appellant, appellant's wife, and the Amanderezes, the jury would have heard no evidence of appellant's attempts to care for and arrange proper feeding and watering for the horses, which testimony served to contradict and mitigate the evidence presented by the State. From the record presented, we cannot conclude that counsel was ineffective in eliciting the complained of testimony.

We overrule appellant's sole point of error.

Conclusion

Appellant has not met his burden to prove his claim of ineffective assistance of counsel. Based on the record, we cannot conclude that appellant's counsel's conduct was so outrageous that no competent attorney would have engaged in it. *See Garcia,* 57 S.W.3d at 440.

We affirm the judgment of the trial court.