

Opinion issued July 28, 2016



In The
Court of Appeals
For The
First District of Texas

NO. 01-15-00397-CR

AUGUSTUS MITCHELL, Appellant
V.
THE STATE OF TEXAS, Appellee

**On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1434115**

MEMORANDUM OPINION

A jury convicted appellant Augustus Mitchell of unlawful possession of a firearm. *See* TEX. PENAL CODE § 46.04(a). The jury found true an enhancement allegation, that Mitchell previously had been convicted of burglary of a habitation, and it assessed punishment at 12 years in prison. In his sole issue on appeal, Mitchell

contends that he received ineffective assistance of counsel during the punishment phase of trial because his attorney failed to object to the admission of juvenile probation records which contained numerous instances of potentially objectionable material, including hearsay. Because Mitchell's allegations of ineffectiveness are not firmly founded in the record, we affirm.

Background

Two off-duty police officers were working a private security job patrolling an apartment complex in west Houston. As they drove through the parking lot, they encountered Mitchell, who was standing between two parked vehicles. Both officers saw Mitchell take a handgun from his pocket and place it on the ground. When they stopped to investigate and secure the weapon, Mitchell told them that he did not live at the apartment complex and that he had a prior felony conviction. He was arrested and charged with unlawful possession of a firearm.

Both officers identified Mitchell at trial, and both testified that it was daylight, they had a clear view of him, and they saw him remove a gun from his pocket and put it on the ground. The gun was loaded. Mitchell testified and denied having any connection to the gun. He testified that he was present and that the officers discovered the gun hidden under a bush near where he had been standing. Mitchell stipulated that he previously had been convicted of the felony offense of attempted possession of a prohibited weapon. On cross-examination, he also admitted that he

previously had been convicted of burglary of a habitation. The jury found Mitchell guilty of possession of the weapon.

During the punishment phase of trial, the State introduced additional evidence of Mitchell's criminal history, including acts committed as a minor. In May 2008, when he was 16 years old, he committed the felony offense of burglary of a habitation with intent to commit theft. He was placed on probation for one year, which had been scheduled to end in June 2009. In September 2008, he was placed in boot camp after violating the conditions of probation, and after several rules infractions, he was transferred to the Texas Youth Commission in January 2009. The juvenile probation records also included references to gang involvement.

In April 2009, when he was 17 years old, Mitchell was convicted of illegally carrying a weapon, a class A misdemeanor. In May 2009, he evaded detention, a class B misdemeanor, to which he pleaded guilty. In July 2009, he committed burglary of a habitation. In April 2010, he pleaded guilty to that offense and was sentenced to two years in prison. In June 2011, he attempted to possess a prohibited weapon, a state jail felony for which he was sentenced to one year in jail. In July 2012, he pleaded guilty to the class B misdemeanor of possession of less than two ounces of marijuana.

In July 2014, Mitchell committed the offense charged in this case. He was 22 years old. Mitchell's brother, a security guard and volunteer firefighter, testified that

two months later, Mitchell stole a handgun from his truck. He also testified that he tried to have the charges against Mitchell dropped.

Mitchell did not introduce any evidence during the punishment phase of trial. However, in closing argument, his trial counsel encouraged the jury to consider the probation records for evidence of the social, emotional, and educational factors that affected Mitchell's childhood. His parents separated when he was 12 years old, after which his family life became chaotic. His relationship with his father was strained, and he did not see his mother often. Child Protective Services was involved twice with the family due to outcries made by his sister, however Mitchell denied there was any abuse and stated that his sister had fabricated the allegations. When he was in the seventh grade, Mitchell saw a man shot to death. He also began associating with "Crips" gang members, though a gang assessment showed that both Mitchell and his father denied that he was a member of a gang. Mitchell had no tattoos, and his father said that he had not observed anything that showed his son was a member of a gang. In addition, despite a "high average" IQ, Mitchell had fallen far behind in school. By tenth grade, he read at a third-grade level and performed at a sixth-grade level for math. While in custody, he was diagnosed with a reading disorder and an unspecified learning disorder.

The jury found the enhancement allegation true, and it assessed punishment at 12 years in prison, which is within the statutory penalty range of two to 20 years. Mitchell appealed.

Analysis

In a single issue, Mitchell contends that he received ineffective assistance of counsel at the punishment phase of trial because his attorney failed to object to the admission of his juvenile record, which included several pages of hearsay and expert opinions. Mitchell argues that admission of these records violated the Confrontation Clause, and he contends that no conceivable trial strategy supported his trial attorney's failure to object to the admission of that evidence.

Claims that a defendant received ineffective assistance of counsel are governed by the standard announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Strickland* mandates a two-part test: (1) whether the attorney's performance was deficient, i.e., whether counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment, and if so, (2) whether that deficient performance prejudiced the party's defense. 466 U.S. at 687, 104 S. Ct. at 2064. "The defendant has the burden to establish both prongs by a preponderance of the evidence; failure to make either showing defeats an ineffectiveness claim." *Shamim v. State*, 443 S.W.3d 316, 321 (Tex. App.–Houston [1st Dist.] 2014, pet. ref'd)

(citing *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011)); accord *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

A reviewing court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,” and the appellant bears the burden to overcome the presumption that, under the circumstances, the challenged action was a result of sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. An accused is not entitled to perfect representation, and a reviewing court must look to the totality of the representation when gauging trial counsel’s performance. *Frangias v. State*, 450 S.W.3d 125, 136 (Tex. Crim. App. 2013).

A claim of ineffective assistance of counsel must be “firmly founded in the record and the record must affirmatively demonstrate the meritorious nature of the claim.” *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)); accord *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). “It is a rare case in which the trial record will by itself be sufficient to demonstrate an ineffective-assistance claim.” *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013). The record’s limitations often render a direct appeal inadequate to raise a claim of ineffective assistance of counsel, as trial counsel is unable to respond to any articulated concerns. See *Goodspeed*, 187 S.W.3d at 392. Ordinarily, trial counsel

should be given “an opportunity to explain his actions before being denounced as ineffective.” *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). Therefore, when the record is silent as to trial counsel’s strategy, a reviewing court should not find deficient performance unless the challenged conduct was “so outrageous that no competent attorney would have engaged in it.” *Goodspeed*, 187 S.W.3d at 392 (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). Rather, when direct evidence of trial counsel’s strategy is unavailable, “we will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined.” *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

In his ineffective assistance of counsel claim, Mitchell challenges counsel’s failure to object to statements made on ten of the more than 200 pages admitted from his juvenile record:

1. A reference to an affidavit not included in the records, which stated that Mitchell violated the rules of his juvenile placement 33 times in less than three months. These violations include disruption, verbal and physical altercations, failure to follow instructions, and disrespect.
2. An allegation that Mitchell had stolen his father’s company vehicle and run away.
3. An allegation that Mitchell was arrested for participating in a “gang fight.”
4. An allegation of truancy from school.
5. An allegation that neither Mitchell’s father nor his probation officer trusted him.

6. Assertions that Mitchell had a history of “suspensions from school, anger and aggression, gang involvement, substance abuse, and run away.”
7. A psychological evaluation stating that Mitchell is in the “Crips” gang, failed ninth grade, and is combative with his father.
8. A statement that Mitchell admitted being a Crip.
9. A report signed by a clinician and clinical supervisor stating that Mitchell admitted to witnessing a murder, playing with fire, smoking marijuana, and becoming “aggressive.”
10. More than 14 references to gang affiliation, failure to cooperate in school, and poor grades.

On appeal, he complains that these statements were testimonial in nature and that he had no opportunity to cross-examine the witnesses who made the observations, allegations, or conclusions stated in the records that were admitted without objection. Because this information was “unflattering,” Mitchell reasons that his trial counsel could have had no possible strategy.

Anticipating an argument that his counsel’s strategy might have been to abstain from objecting because the juvenile record in documentary form would be “less harmful than insisting that live witnesses testify,” he notes that the State had not subpoenaed any witnesses and there was no sign that witnesses were prepared to testify. This argument does not overcome the presumption of reasonable professional assistance and a sound trial strategy. The absence of subpoenas is not proof that witnesses were unavailable to testify, especially when the witnesses were

aligned with the prosecution and might not require a subpoena to compel their testimony at trial. Moreover, a claim of ineffective assistance must be firmly founded on what evidence appears in the record, not on speculative inferences from what may be absent from it. *See Lopez*, 343 S.W.3d at 142–43.

The record is silent as to why trial counsel did not object to the admission of Mitchell’s juvenile probation records. The record could have been supplemented by a hearing on a motion for new trial, but no motion for new trial was filed. Mitchell has failed to meet his burden under the first prong of *Strickland* to show that his allegations of ineffective assistance of counsel are firmly founded in the record. *See Menefield*, 363 S.W.3d at 592. This record is inadequate to overcome the presumption of reasonable performance by Mitchell’s trial counsel, who has had no opportunity to respond to the complaints made for the first time on appeal. *See Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Moreover, it is not difficult to imagine reasonably sound motivations for trial counsel to have refrained from objecting to the admission of the juvenile probation records, including that they contained other evidence of Mitchell’s troubled childhood that he used to plead for leniency from the jury during closing arguments in the punishment phase of trial. *See Lopez*, 343 S.W.3d at 143.

Mitchell argues that *Smith v. State*, 420 S.W.3d 207 (Tex. App.—Houston [1st Dist.] 2013, pet. ref’d), compels reversal of his conviction. He contends his case is

factually similar to *Smith*, which held that the admission of disciplinary records from the Texas Youth Commission that contained subjective observations about the defendant from witnesses who did not testify at trial, violated the defendant's rights under the Confrontation Clause, and required reversal. *Smith*, 420 S.W.3d at 225–26.

Smith is procedurally distinguishable and inapposite because it was not a case involving a claim of ineffective assistance of counsel. When the issue on appeal is ineffective assistance of counsel, we cannot reverse unless both prongs of *Strickland* are satisfied. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. We conclude that Mitchell has not satisfied the first prong of the *Strickland* analysis, and we need not consider whether he has satisfied the requirements of the second prong. *See Lopez*, 343 S.W.3d at 143. Accordingly, we overrule Mitchell's sole issue.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.

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