In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-09-00224-CR

TAVARES SPIKES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 188th Judicial District Court
Gregg County, Texas
Trial Court No. 37,940-A

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Having before us only the sketchy facts set out in a police officer's offense report, we learn that Tavares Spikes was stopped in Gregg County for a traffic violation, that, sometime later, a drug dog alerted on the vehicle and that the officer searched the vehicle and found illegal drugs. Spikes later pled guilty to possession of a controlled substance with intent to deliver. The trial court sentenced Spikes to forty years' imprisonment.

On appeal, Spikes argues that he received ineffective assistance of counsel because his trial counsel failed to file a motion to suppress the evidence found during the traffic stop.

We affirm the trial court's judgment because, in the very limited record before us, there is insufficient evidence to demonstrate that the trial counsel was ineffective for failing to file a motion to suppress.

While observing traffic on Interstate 20 in Gregg County, Texas, Sergeant Bruce Dalme saw Spikes' vehicle traveling in the left lane. After pursuing and initially being unable to locate the vehicle, Dalme saw and stopped Spikes' vehicle for traveling "in the right lane following a truck tractor semi-trailer at an unsafe following distance." Dalme described questioning Spikes about his travel plans, destination, and travel behavior, and Dalme described Spikes as nervous. Spikes became increasingly nervous every time Dalme mentioned "the possibility of drugs being in the vehicle." During conversation with the officer, Spikes exhibited dry mouth, hurried and shaky speech, lack of eye contact, and appeared to have to think about simple questions. When

asked for permission to search the vehicle, Spikes denied consent. Dalme detained Spikes for about twenty-three minutes until a drug dog arrived. The drug dog indicated a positive alert; the officer searched the vehicle and discovered marihuana in the passenger area and a white powdery substance that he recognized to be consistent with cocaine in the trunk. These were the basic facts set out in the offense report. Because of Spikes' guilty plea, there was no testimony from Dalme to establish what else he knew during, or what other circumstances surrounded, his stop and search of Spikes' vehicle.

Ineffective assistance of counsel claims are evaluated under a two-part test formulated by the United States Supreme Court, requiring a showing of both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *Fox v. State*, 175 S.W.3d 475, 485 (Tex. App.—Texarkana 2005, no pet.). First, Spikes must show that his counsel's representation fell below an objective standard of reasonableness. *Fox*, 175 S.W.3d at 485 (citing *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000)). A *Strickland* claim must be "firmly founded in the record," and "the record must affirmatively demonstrate" the meritorious nature of the claim. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Thompson*, 9 S.W.3d at 813. The second *Strickland* prong requires a showing that the deficient performance prejudiced the defense to the degree that there is a reasonable probability that, but for the attorney's deficiency, the result of the trial would have been different. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. Failure to

satisfy either prong of the *Strickland* test is fatal. *Ex parte Martinez*, 195 S.W.3d 713, 730 (Tex. Crim. App. 2006).

Trial counsel's conduct is reviewed with great deference, without the distorting effects of hindsight. *Thompson*, 9 S.W.3d at 813. We indulge a strong presumption that counsel's conduct falls within the wide range of reasonable, professional assistance, and motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). The defendant must rebut the presumption that the challenged conduct can be considered sound strategy. *Id.*

Here, Spikes argues that his trial counsel was ineffective because he failed to file a motion to suppress the evidence found during the traffic stop. One problem with Spikes' claim is that nothing in the record explains why trial counsel declined to file a motion to suppress. The Texas Court of Criminal Appeals has said that "trial counsel should ordinarily be afforded an opportunity to explain his actions" before a court finds that he or she rendered ineffective assistance. *See Goodspeed*, 187 S.W.3d at 392 n.14 (quoting *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003)); *Fox*, 175 S.W.3d at 485.

Where an appellate record is silent as to why trial counsel failed to take certain actions, the appellant has failed to rebut the presumption that trial counsel's decision was in some way—be it conceivable or not—reasonable.[1] *See Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App.

[1]Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision-making as to overcome the presumption that counsel's conduct was reasonable and professional. *Mallett v. State*, 65 S.W.3d 59, 69 (Tex. Crim. App. 2001); *Fuller v. State*, 224 S.W.3d 823, 828–29 (Tex. App.—Texarkana 2007, no pet.). In addressing this reality, the Texas Court of

2007); *see also Thompson*, 9 S.W.3d at 814 (if record is silent as to attorney's particular course of action, defendant did not rebut presumption). The ineffectiveness of counsel must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See Smith v. State*, 51 S.W.3d 806, 813 (Tex. App.—Texarkana 2001, no pet.).

Here, there is no record at any level to indicate why counsel declined to file a motion to suppress. In the absence of such a record, and in the lack of anything that would indicate such completely ineffective assistance as could be shown without such a record, we overrule the point of error and affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 9, 2010
Date Decided: July 14, 2010

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Criminal Appeals has explained that appellate courts can rarely decide the issue of ineffective assistance of counsel because the record almost never speaks to the strategic reasons that trial counsel may have considered. The proper procedure for raising this claim is therefore almost always habeas corpus. *Freeman v. State*, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003); *Aldrich v. State*, 104 S.W.3d 890, 896 (Tex. Crim. App. 2003).