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

No. 06-18-00071-CR

CASEY GWEEN MILES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 8th District Court
Hopkins County, Texas
Trial Court No. 1726247

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

MEMORANDUM OPINION

Casey Gween Miles pled guilty to and was convicted of the offense of aggravated sexual assault of a child younger than fourteen years of age.[1] After a bench trial on punishment, Miles was sentenced to twenty-five years' imprisonment.[2] In his sole issue on appeal, Miles argues that his counsel rendered ineffective assistance by failing to present any mitigating evidence during the punishment phase of his trial. We find that the record does not affirmatively demonstrate counsel's ineffectiveness. Accordingly, we affirm the trial court's judgment.

As many cases have noted, the right to counsel does not mean the right to errorless counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*. 466 U.S. 668, 687–88 (1984); *see also Ex parte Imoudu*, 284 S.W.3d 866, 869 (Tex. Crim. App. 2009); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The first prong requires a showing that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. The second *Strickland* prong, sometimes referred to as "the prejudice prong," requires a showing that, but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

[1]In our companion cause numbered 06-18-00072-CR, Miles also appeals from another conviction for aggravated sexual assault of a child.

[2]This case involved a charge-bargain like the one discussed in *Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003). However, under Rule 25.2(a)(2) of the Texas Rules of Appellate Procedure, the trial court has given Miles permission to appeal. *See* TEX. R. APP. P. 25.2(a)(2). Accordingly, we address Miles' complaint on the merits.

"Failure to satisfy either prong of the *Strickland* test is fatal." *Johnson v. State*, 432 S.W.3d 552, 555 (Tex. App.—Texarkana 2014, pet. ref'd) (citing *Ex parte Martinez*, 195 S.W.3d 713, 730 n.14 (Tex. Crim. App. 2006)). "Thus, we need not examine both *Strickland* prongs if one cannot be met." *Id*. (citing *Strickland*, 466 U.S. at 697). Also, "[i]neffective assistance of counsel claims must be firmly rooted in the record, with the record itself affirmatively demonstrating the alleged ineffectiveness." *Johnson*, 432 S.W.3d at 555 (citing *Lopez v. State*, 343 S.W.3d 137, 142–43 (Tex. Crim. App. 2011)).

"We indulge a strong presumption that counsel's conduct falls within the wide range of reasonable, professional assistance and that it was motivated by sound trial strategy." *Id*. (citing *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994)). "If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." *Id*. (quoting *Ortiz v. State*, 93 S.W.3d 79, 88–89 (Tex. Crim. App. 2002)). "Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing an evaluation of the merits of ineffective assistance claims." *Id*. (citing *Thompson*, 9 S.W.3d at 813). "'In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect' the reasoning of trial counsel." *Id*. at 813–14 (quoting *Thompson*, 9 S.W.3d at 813–14).

"Only in the rare case 'in which trial counsel's ineffectiveness is apparent from the record' may the appellate court 'address and dispose of the claim on direct appeal.'" *Id*. (quoting *Lopez*, 343 S.W.3d at 143). This is not such a case.

During punishment, Miles' counsel directed the trial court to the presentence investigation report, which established that he was exposed to drugs at an early age, was enrolled in special education classes at school, was treated at a psychiatric hospital and mental health/mental retardation facility, was on several medications, and had previously attempted suicide. Counsel also called Miles' father, Darryl Miles, and guardian, Debra McGary, as mitigating witnesses. McGary testified that Miles had been sexually abused as a child, had been removed from his mother's home by the Texas Department of Family and Protective Services, and was living on the streets when she took him in. McGary described Miles, who she believed had the functioning capacity of a fourteen- or fifteen-year-old child, as respectful and caring. Darryl testified that he was not actively involved in Miles' life. Miles informed the trial court that he was sexually abused, that drugs had compelled his behavior, and that he was in love with his victim. Yet, on appeal, Miles argues that counsel was ineffective because he "failed to present evidence of mitigating factors to the trier of fact."

Miles simply suggests that "[a]t the least, Counsel could have called Appellant's family or friends to testify about Appellant's good qualities, his work history, and his family ties." However, as the State points out, Mills called McGary and Darryl. We may presume that counsel did not call additional witnesses during punishment because no one would testify on Miles' behalf or because cross-examination of those witnesses might be unfavorable to Miles. We may also presume that the only mitigating evidence that existed was the evidence presented by counsel at punishment.

Simply put, the absence of any record demonstrating counsel's reasons for his actions makes it impossible for us to find deficient performance on the part of Miles' trial counsel. "Failure to make the required showing of . . . deficient performance . . . defeats the ineffectiveness claim." *Strickland*, 466 U.S. at 700. Accordingly, we overrule Miles' sole point of error.

We affirm the trial court's judgment.

Bailey C. Moseley
Justice

Date Submitted: August 22, 2018
Date Decided: August 30, 2018

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