COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN THE MATTER OF R.R.S., A JUVENILE,	§	No. 08-16-00042-CV
	§	Appeal from the
Appellant.	§	65th District Court
	§	of El Paso County, Texas
	§	(TC# 1500853)

DISSENTING OPINION

The majority opinion holds that Appellant's plea of true to the petition was involuntary because he misunderstood the defenses available to him and his attorney did not inform him prior to the entry of his plea regarding the potential defense of lack of capacity to consent to sex as matter of law. I disagree with this decision for four reasons. First, the majority opinion finds the plea involuntary due to faulty legal advice, but it does not review counsel's performance under the standard required by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See In re R.D.B.*, 102 S.W.3d 798, 800 (Tex.App.--Fort Worth 2003, no pet.)(holding that a juvenile is entitled to the effective assistance of counsel and that the effectiveness of counsel's representation must be analyzed under the *Strickland* standard). Second, Appellant did not raise the ineffective assistance of counsel/involuntariness claim in his motion to withdraw the plea or at the hearing. Third, the appellate record does not contain evidence to support the majority opinion's

factual and legal conclusions. Fourth, the majority errs by concluding that *In re B.W.*, 313 S.W.3d 818 (Tex. 2010) is applicable to this aggravated sexual assault case. I respectfully dissent.

The State filed a petition alleging Appellant engaged in delinquent conduct by committing two counts of aggravated sexual assault of a child under the age of fourteen. Counts I and II each contain two paragraphs. Paragraph A of Count I alleged that Appellant intentionally or knowingly caused his sexual organ to penetrate the anus of V.S., a child under the age of fourteen, and Paragraph B alleged that he intentionally or knowingly caused the sexual organ of V.S. to contact or penetrate Appellant's mouth. Paragraph A of Count II alleged that Appellant intentionally or knowingly caused his sexual organ to penetrate the anus of R.S., a child younger than fourteen years of age, and Paragraph B alleges that Appellant caused the sexual organ of R.S. to contact or penetrate Appellant's mouth.

Paragraph A of Counts I and II allege aggravated sexual assault of a child under Section 22.021(a)(1)(B)(i) of the Penal Code. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(i)(West Supp. 2016). Under this section, a person commits aggravated sexual assault of a child if he intentionally or knowingly causes the penetration of the anus of a child by any means. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(i). Paragraph B of Counts I and II allege aggravated sexual assault of a child under Section 22.021(a)(1)(B)(iii). TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(iii)(West Supp. 2016). Under Section 22.021(a)(1)(B)(iii), a person commits aggravated sexual assault of child if he intentionally or knowingly causes the sexual organ of a child to contact or penetrate the mouth of another person, including the actor. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(iii). In contrast with aggravated sexual assault under Section 22.021(a)(1)(A), the State is not required to prove that the sexual contact occurred without the child victim's consent.

In a document titled, "WAIVER, STIPULATION AND ADMISSION," Appellant waived his rights to a jury trial and to confront the witnesses against him, and he judicially confessed to Count I-Paragraph A and Count II-Paragraph B set forth in the State's petition.[1] Appellant expressly agreed that the document containing his waivers and judicial confession could be introduced in support of the juvenile court's judgment. At the adjudication hearing, the juvenile court admonished Appellant in accordance with the requirements of the Texas Family Code, and he informed the court that he understood those rights and confirmed that he had signed the waiver and stipulation document of his own free will. Appellant waived his rights in open court and he entered a plea of true to Count I-Paragraph A and Count II-Paragraph B. At the conclusion of the hearing, the juvenile court accepted the plea of true and set the case for a disposition hearing approximately one month later.

Prior to the disposition hearing, Appellant retained a different attorney, and he filed a "Motion to Withdraw Stipulation and Motion for New Trial" which alleged the following: "The Court has not entered a judgment against the Respondent and desires to withdraw his stipulation to challenge the factual and legal sufficiency of the evidence in a Jury Trial." Significantly, the motion did not allege ineffective assistance of counsel as a basis for finding the plea involuntary. At the hearing on the juvenile Appellant's motion to withdraw his plea of true and stipulation, Appellant's attorney argued that his client wanted to exercise his right to a jury trial and test the sufficiency of the State's evidence before a jury. Counsel directed the juvenile court's attention to the pre-disposition report in the court's file which contained evidence that Appellant had been sexually abused by his father when he was between five and seven years of age. Counsel argued

[1] At the adjudication hearing, the State abandoned Count I-Paragraph B and Count II-Paragraph A. The majority opinion states that Appellant's plea of true is not supported by any evidence, but this is incorrect. Appellant judicially confessed to Count I-Paragraph A and Count II-Paragraph B, and the judicial confession was admitted into evidence at the adjudication hearing pursuant to Appellant's agreement.

that Appellant would like for a jury to hear this evidence and then decide whether Appellant had committed aggravated sexual assault of a child. The juvenile court engaged in the following exchange with Appellant's attorney:

> [The Court]: I guess what I'm missing is the reason why he stipulated to something.
>
> Did he just change his mind?
>
> [Defense counsel]: Yes, Your Honor, he changed his mind.

Near the conclusion of the hearing, Appellant's attorney added that he did not believe that Appellant had been sufficiently informed "on every single aspect of this case to be able to make a sufficient and adequate, voluntary decision that led to a stipulation." Counsel did not, however, specify who had failed to sufficiently inform Appellant -- the court or prior counsel -- and he did not present any evidence in support of this claim. The juvenile court denied the motion to withdraw the plea and gave counsel additional time to prepare for the disposition hearing.

Appellant argues for the first time on appeal that his plea is involuntary because it was made "without adequate understanding of any defenses available to him." Appellant identifies the defense as his state of mind and explains that he had been sexually abused by his father, and at the time he committed the offenses he "was thinking of the time his father was abusing him." Appellant relies on his mother's testimony presented at the disposition hearing that Appellant's first attorney did not advise her that Appellant could present evidence he was the victim of sexual abuse. This argument relates exclusively to the advice Appellant was given, or not given, by his first attorney. Although Appellant does not state his issue in terms of "ineffective assistance of counsel," the standard of review is dictated by the nature of the issue presented on appeal. Consequently, Appellant's involuntariness claim, which is based on an allegation of deficient legal advice, must be examined under the standards applicable to ineffective assistance of counsel

claims. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Ex parte Moody*, 991 S.W.2d 856, 857-58 (Tex.Crim.App. 1999). The standard requires Appellant to show that his attorney's advice was not within the range of competence demanded of attorneys in juvenile proceedings, and there is a reasonable probability that, but for counsel's error, Appellant would not have pled true to the petition and would have insisted on going to trial. *See Ex parte Moody*, 991 S.W.2d at 857-58. The appellate court is required to presume that the attorney's representation fell within the wide range of reasonable and professional assistance. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex.Crim.App. 2001). Ineffective assistance claims must be firmly founded in the record to overcome this presumption. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex.Crim.App. 1999). An appellate court must also bear in mind that when the record is silent and does not provide an explanation for the attorney's conduct, the strong presumption of reasonable assistance is not overcome. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex.Crim.App. 2003).

A review of Appellant's motion to withdraw his plea and the reporter's record of the hearing shows that Appellant did not inform the trial court that his plea was involuntary due to the faulty advice of counsel. His attorney instead told the court that Appellant had changed his mind and he wanted to exercise his right to a jury trial. When presented with claims of ineffective assistance of counsel, the State typically responds by presenting the testimony of counsel.[2] The State could not do so here because it had no notice that Appellant was alleging that his plea was involuntary because counsel failed to make him aware of certain defenses. More significantly, Appellant did not present any evidence at the hearing on his motion to withdraw the plea regarding

[2] When a defendant raises an ineffective assistance of counsel claim, he waives the attorney-client privilege and the attorney may testify regarding his actions and representation of the defendant. *See State v. Thomas*, 428 S.W.3d 99, 106 (Tex.Crim.App. 2014).

the advice given to him by counsel. It was not until the disposition hearing that Appellant's mother testified that when she met with Appellant's first attorney he did not explain to her that Appellant could present evidence, including his own testimony, that he had been the victim of sexual abuse. She stated that if she had known this, she would not have recommended to Appellant that he enter a plea of true. There is no evidence that Appellant was present when his mother had this meeting with counsel or what legal advice counsel provided to Appellant in their discussions. Given the lack of evidence regarding the legal advice given to Appellant and the fact that Appellant's attorney has not been given an opportunity to explain his actions, the Court should find that Appellant has not carried his burden of rebutting the presumption of reasonably effective assistance of counsel. *See Rylander*, 101 S.W.3d at 110-11 ("[T]rial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.").

I also disagree with the majority's holding that lack of capacity to consent to sex is an available defense in this case. The majority opinion relies on *In re B.W.*, 313 S.W.3d 818 (Tex. 2010) in support of its holding. In that case, a thirteen-year-old juvenile was adjudicated delinquent for committing the offense of prostitution based on evidence that she had waved over an undercover police officer who was driving by in an unmarked car and offered to engage in oral sex with him for twenty dollars. *In re B.W.*, 313 S.W.3d at 819. B.W. entered a plea of true to the allegation that she had knowingly agreed to engage in sexual conduct for a fee. *Id.*, 313 S.W.3d at 819. On appeal, B.W. challenged the validity of her adjudication of delinquency for prostitution and argued that ". . . the Legislature cannot have intended to apply the offense of prostitution to children under fourteen because children below that age cannot legally consent to sex." *Id.*, 313 S.W.3d at 820. The Supreme Court agreed with this argument.

A person commits the offense of prostitution if he or she knowingly offers to engage, agrees to engage, or engages in sexual conduct for a fee. TEX. PENAL CODE ANN. § 43.02(a)(1)(West 2016). Under the Penal Code's definition of "knowingly", a person acts knowingly, or with knowledge, with respect to the nature of his conduct when he is aware of the nature of his conduct. TEX. PENAL CODE ANN. § 6.03(b)(West 2011). Thus, the Supreme Court observed that a person who agrees to engage in sexual conduct for a fee must have an understanding of what one is agreeing to do. *See In re B.W.*, 313 S.W.3d at 819-20. In reversing the adjudication order, the Supreme Court held as follows:

> Given the longstanding rule that children under fourteen lack the capacity to understand the significance of agreeing to sex, it is difficult to see how a child's agreement could reach the "knowingly" standard the statute requires. Because a thirteen-year-old child cannot consent to sex as a matter of law, we conclude B.W. cannot be prosecuted as a prostitute under section 43.02 of the Penal Code. *In re B.W.*, 313 S.W.3d at 822.

The instant case is distinguishable because the offense of aggravated sexual assault of a child does not require proof that the defendant knowingly agreed to engage in sexual conduct. The petition alleged that Appellant committed aggravated sexual assault of a child under Section 22.021(a)(1)(B)(i) and (iii) of the Penal Code. Under Section 22.021(a)(1)(B)(i), a person commits aggravated sexual assault of a child if he intentionally or knowingly causes the penetration of the anus of a child by any means. TEX.PENAL CODE ANN. § 22.021(a)(1)(B)(i). A person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct. TEX.PENAL CODE ANN. § 6.03(a)(West 2011). Thus, the State was required to prove that Appellant had a conscious objective or desire to cause his sexual organ to penetrate the child victim's anus. Under Section 22.021(a)(1)(B)(iii), a person commits aggravated sexual assault of child if he intentionally or knowingly causes the sexual organ of a child to contact or penetrate the mouth of another person, including the actor. TEX.PENAL

CODE ANN. § 22.021(a)(1)(B)(iii). To obtain a finding of delinquent conduct based on this section, the State was required to prove that Appellant had a conscious objective or desire to cause the child victim's sexual organ to contact or penetrate Appellant's mouth. Section 22.021 does not require proof that Appellant knowingly agreed to engage in sexual conduct. In my opinion, the Supreme Court's holding in *B.W.* is inapplicable here.

Further, the adjudication hearing record shows that the trial judge dutifully followed the dictates of Section 54.03(b). TEX.FAM.CODE ANN. § 54.03(b)(1) – (6)(West 2014). Appellant, in a seemingly well-coached, rehearsed recitation, affirmatively testified he understood the allegations against him, the rights he was waiving and the possible consequences of his plea of true. Appellant informed the trial court he was pleading true because the allegations were true, that he was not forced to plea true nor was he promised anything in return for his plea of true. Appellant was fourteen years old on the date of the adjudication hearing and thirteen years old when the alleged offenses were committed. Clearly, based on the record before us, Appellant's plea of true was legally executed by the trial court.

However, putting aside Appellant's suggestion of ineffective assistance of counsel, I firmly believe Section 54.03(b) does not go far enough to protect juveniles. Children, who legally lack the ability to consent, in a six minute hearing, as in this case, can irrevocably commit themselves to a decision that may affect them lifelong. I am strongly encouraging the legislature to review the child's ability to withdraw or change their plea of true to afford him more procedural protections.

It is in the realm of possibility that Appellant's first attorney gave him faulty legal advice, but the record before this Court is insufficiently developed to permit a finding that this actually occurred here. Appellant is not left without a remedy because he may pursue a petition for writ of

habeas corpus in the trial court. *See* TEX.CONST. art. V, § 8 (district courts have "exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court . . . ."); *see also Ex parte Williams*, 239 S.W.3d 859, 861 (Tex.App.--Austin 2007, no pet.). That will give the parties an opportunity to fully develop the record and the trial court can decide the issue under the appropriate legal standard. In the event the trial court denies Appellant's writ application, he may pursue a direct appeal from that ruling to this Court.

August 25, 2017 YVONNE T. RODRIGUEZ, Justice