

Affirmed and Opinion Filed January 27, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00453-CR

**TILWEN JOSEPH GREEN, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the Criminal District Court No. 5
Dallas County, Texas
Trial Court Cause No. F-0930331-L**

MEMORANDUM OPINION

Before Justices Fillmore, Myers, and Whitehill
Opinion by Justice Whitehill

This direct appeal involves an ineffective assistance of counsel claim on a silent record following a hearing on a motion to adjudicate guilt where defense counsel did not request a court reporter.

The State moved to adjudicate guilt after appellant violated the terms of his community supervision, and appellant plead true to the alleged violations. At a hearing on the motion, the trial court sentenced appellant to six years' imprisonment.

In a single issue, appellant argues he was denied the effective assistance of counsel because his attorney failed to request that a record be made of the adjudication hearing. Because the failure to request a court reporter is not ineffective assistance of counsel *per se*, and the record is silent as to the reason for counsel's performance, we conclude appellant has failed to

overcome the presumption that counsel rendered effective assistance and affirm the trial court's judgment.

I. Background

Appellant plead guilty to aggravated assault with a deadly weapon for cutting and stabbing his victim with a knife. The trial court accepted the plea but deferred further proceedings without entering an adjudication of guilt, and placed appellant on six years' community supervision.

The State subsequently moved to proceed with an adjudication of guilt, alleging that appellant violated four conditions of his community supervision. Appellant signed an open plea agreement, pleading true, and judicially confessing to all four violations.

The trial court conducted a hearing on the motion to adjudicate guilt, and sentenced appellant to six years' imprisonment. The record includes the court reporter's statement that defense counsel waived the reporter's presence at that hearing.

II. Analysis

Appellant argues that his trial counsel was ineffective because he did not request that the court reporter transcribe the adjudication hearing and that a record is required to determine "what, if any, errors occurred."

A. Standard of Review and Applicable Law.

Texas courts apply the two-pronged *Strickland* test to determine whether counsel's representation was so inadequate as to violate a defendant's Sixth Amendment right to counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) (adopting *Strickland* two-prong test). Under this two-part test, appellant must establish that: (1) counsel's performance was deficient and that his assistance fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of

the proceeding would have been different. *Strickland*, 466 U.S. at 687. Unless appellant can prove both prongs, an appellate court must not find counsel's representation ineffective. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

To satisfy the first prong, appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Further, there is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

To prove the second prong, appellant must show that there is a reasonable probability, or a probability sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different. *Lopez*, 343 S.W.3d at 142.

We ordinarily will not declare trial counsel ineffective where there is no record showing counsel had an opportunity to explain himself. *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Without evidence of the strategy employed, we will presume sound trial strategy. *See Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003).

The rules of appellate procedure provide that a court reporter is required to attend court sessions and make a full record of the proceedings unless excused by agreement of the parties. TEX. R. APP. P. 13.1(a). A failure to request that a court reporter record trial proceedings, however, is not *per se* ineffective assistance of counsel. *Young v. State*, 425 S.W.3d 469, 473 (Tex. App.—Houston [1st Dist.] 2012, pet. ref'd). As a result, any deficient performance in this case must be established on the record.

Here, appellant did not file a motion for new trial raising ineffective assistance of counsel and there was no evidentiary hearing. Therefore, the record was not developed as to the reasons underlying counsel's conduct. *See Thompson*, 9 S.W.3d at 813. Significantly, appellant does not identify any specific error that occurred, but argues instead that the absence of a record prevents

him from searching for error. In essence, appellant seeks to have us speculate about what transpired. We decline to engage in such speculation. *See McQueen v. State*, 702 S.W.2d 302, 304 (Tex. App.—Houston [1st Dist.] 1985, no writ).

With this record that is silent as to the reasons underlying trial counsel’s conduct, we conclude that appellant failed to overcome the strong presumption that counsel rendered effective assistance. *See Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012); *Kelly v. State*, Nos. 05-11-00842-CR, 05-11-00843-CR, 2013 WL 363751, at *2 (Tex. App.—Dallas Jan. 31, 2013, pet. ref’d (mem. op.)).

We resolve appellant’s issue against him and affirm the trial court’s judgment.

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/Bill Whitehill/

BILL WHITEHILL
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

TILWEN JOSEPH GREEN, Appellant

No. 05-15-00453-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court

No. 5, Dallas County, Texas

Trial Court Cause No. F-0930331-L.

Opinion delivered by Justice Whitehill.

Justices Fillmore and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered January 27, 2016.