AFFIRM; and Opinion Filed May 9, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01306-CR

CHRISTOPHER RYAN WALL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-81132-2015

MEMORANDUM OPINION

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

Christopher Ryan Wall entered an open plea of guilty to aggravated assault with a deadly weapon, and the trial court found him guilty and assessed punishment at twenty years in prison and a $10,000 fine. In his sole issue, appellant contends his retained counsel provided ineffective assistance. We affirm.

Rita Deysarkar was critically injured on February 6, 2015 in a collision involving appellant. Appellant was travelling at a speed of more than 110 mph in a 40 mph speed zone when he hit Deysarkar's vehicle near the driver's side door as she was driving through an intersection. Four hours after the crash, appellant's blood-alcohol content was .11.

Several witnesses testified at the plea hearing: three police officers, three witnesses at the scene of the crash, two medical professionals, Deysarkar, Deysarkar's family members, appellant, and appellant's girlfriend. Evidence showed that when Deysarkar arrived at the emergency room,

she was comatose and bleeding internally. She had suffered significant internal injuries, including lacerated liver and spleen, collapsed lung, torn diaphragm, fractures to her pelvis, skull, and spine, injuries to her kidney and adrenal gland, and a traumatic brain injury. In addition, her stomach had been pushed up into her chest. Her probability of survival was between 8 and 20%. Deysarkar was in a coma for four to six weeks and was transferred to a hospital in Houston, where she underwent a difficult rehabilitative process. At the time of trial, Deysarkar was "almost completely independent." One of her doctors called her recovery "impressive" and the result of "her will to live." In addition to the medical testimony, Deysarkar and her family testified how the accident had changed all of their lives. The State also presented extensive evidence about how the crash occurred, including the speed at which appellant was driving.

Appellant sustained minor injuries in the accident. At the scene, he was concerned about the damage to his car and did not ask whether anyone had been injured. A police officer said appellant's eyes were glassy, watery, and bloodshot. Appellant told her he had two pints of beer at a nearby bar. When he refused to provide breath and blood samples, the officer obtained a blood warrant. The officer said appellant acted like a "jerk" at the hospital as the medical professionals tried to treat him.

In appellant's defense, his girlfriend testified appellant had been living with her since his release from jail. She said he complied with all the rules of his house arrest, maintained two monitoring devices, found employment, attended Alcoholics Anonymous and a divorce class, and attended church services online. From the beginning, she said, appellant was "very remorseful" and felt "horrible" about what happened. She said appellant told her "if he could switch places with [Deysarkar], he'd do it in a heartbeat."

Appellant reiterated much of his girlfriend's testimony. He said he had thought about what Deysarkar had suffered and said it should have been him. He also acknowledged he had been sued

in civil court and agreed Deysarkar should win the suit. He then read a letter expressing his remorse to Deysarkar. Appellant also briefly testified about his childhood, his education, and his employment history. He said he married his childhood girlfriend but they separated several months before the time of crash. He was depressed by the separation but had not sought counseling. The divorce was finalized while he was in jail.

On cross-examination, appellant acknowledged he had received ten speeding tickets and had prior convictions for driving while intoxicated, reckless driving, and driving while license suspended. He had never been convicted of a felony. When asked how fast he was driving that night, appellant said he did not recall but that it was "definitely fair to say" he was speeding. He also said he drank the equivalent of eight beers before the crash. Appellant said his friends and family, who had ridden in a car with him, had told him to quit driving like he drove and warned that he would kill someone if he did not.

In closing arguments, appellant's counsel asked for probation while the State asked for a maximum sentence. The trial court imposed a maximum sentence.

In his sole issue, appellant complains counsel was ineffective by failing (1) to investigate or produce evidence explaining the "continuous effects of depression" brought on by a divorce, (2) to question the complaining witness or her family, (3) to object to "clear hearsay on one or more occasions," (4) to ask any questions "of value" to him during his examination but ensuring that the negligence lawsuit brought against him was "utterly indefensible," and (5) failing to call other witnesses, such as his parents, a psychologist who administered a personality test on appellant, someone with knowledge of the complaining witness's Facebook posts, and the physician who administered an additional blood test. He does not separately argue these alleged deficiencies. Instead, he generally asserts there was no doubt he was guilty, so counsel's "most important service" was to attempt to mitigate his punishment.

To prevail on an ineffective assistance of counsel claim, an appellant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense; that is, but for the deficiency, there is a reasonable probability that the result of the proceeding would have been different. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011), citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Unless appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective. *Lopez*, 343 S.W.3d at 142.

We must make a "strong presumption that counsel's performance fell within the wide range of reasonably professional assistance." *Id*. To find counsel was ineffective, counsel's deficiency must be affirmatively demonstrated in the record, and we must not engage in retrospective speculation. *Id*. When such direct evidence is not available, we will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined. *Id*

The court of criminal appeals has made clear that, in most cases, a silent record which provides no explanation for counsel's actions will not overcome the strong presumption of reasonable assistance. *Rylander v. State*, 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). Further, counsel should ordinarily be accorded the opportunity to explain his actions before being denounced as ineffective. *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012). Because the reasonableness of trial counsel's choices often involve facts that do not appear in the appellate record, an application for writ of habeas corpus is the more appropriate vehicle to raise ineffective assistance of counsel claims. *See Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002).

To support his issue, appellant primarily relies on two cases regarding trial counsel's failure to investigate or produce mitigation evidence, *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam), and *Shanklin v. State*, 190 S.W.3d 154, 162–66 (Tex. App.—Houston [1st Dist.] 2005),

pet. dism'd, improvidently granted, 211 S.W.3d 315 (Tex. Crim. App. 2007). In both cases, evidence was presented post-trial to support the appellant's claims. *Porter*, 558 U.S. at 33 (trial court conducted two-day evidentiary hearing on defendant's petition for postconviction relief during which Porter presented extensive mitigating evidence); *Shanklin*, 190 S.W.3d at 158 (trial court conducted motion for new trial hearing by affidavits).

Here, appellant filed a motion for new trial raising ineffective assistance of counsel, but no hearing was held on the motion and no evidence was presented to support his claims. So, while appellant complains about the failure to call certain witnesses, he does not make a showing those witnesses were available or that he would have benefited from their testimony. *See King v. State*, 649 S.W.2d42, 44 (Tex. Crim. App. 1983). To the extent he complains about the admission of hearsay, he does not identify or direct us to any specific hearsay evidence. As for his remaining complaints about the questioning of witnesses and the alleged lack of an investigation of his depression and failure to produce mitigating evidence of it at trial, the record is silent as to what trial counsel did to prepare for trial and provides no explanation for the actions he took or failed to take pretrial or during trial. Given the record before us, we conclude appellant has not met his burden of overcoming the strong presumption of reasonable assistance. We overrule appellant's sole issue.

We affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHRISTOPHER RYAN WALL, Appellant	On Appeal from the 380th Judicial District Court, Collin County, Texas
No. 05-16-01306-CR V.	Trial Court Cause No. 380-81132-2015.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Francis; Justices Fillmore and Whitehill participating.

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

Judgment entered this 9th day of May, 2018.