**Affirmed and Opinion Filed June 12, 2018**

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

**No. 05-18-00430-CR**

**JUAN MARRON, Appellant**
**V.**
**THE STATE OF TEXAS, Appellee**

**On Appeal from the Criminal District Court No. 1**
**Dallas County, Texas**
**Trial Court Cause No. F14-76214-H**

## MEMORANDUM OPINION

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

Juan Marron was indicted on a charge of aggravated robbery with a deadly weapon enhanced by a prior conviction. Appellant entered an open plea of guilty to the offense and a plea of true to the enhancement paragraph. The trial court found appellant guilty, found the enhancement paragraph true, and assessed punishment at twenty-five years in prison. In his sole issue, appellant contends counsel provided ineffective assistance. We affirm.[1]

On the day of trial, appellant told the trial judge he wanted to "plea out," but his lawyer set the case for trial without his consent. Appellant said he had a "drug issue" and wanted to "receive help." The judge asked what the State had offered, and the prosecutor said the State offered to strike the enhancement paragraph and allow appellant to plead guilty and receive a twelve-year

[1] On April 21, 2015, this appeal was transferred to the Eighth District Court of Appeals in El Paso under a docket equalization order from the Texas Supreme Court. On April 12, 2018, the supreme court ordered the appeal transferred back to this Court.

sentence. The judge told appellant he could accept or reject the State's offer. The judge also explained appellant could "go open for some kind of drug treatment," but the State would have to agree to waive a jury, appellant would have to plead guilty, and the judge would determine punishment. The judge explained there was "no guarantee" he would give appellant what he wanted because he did not know anything about the case. The judge read the indictment, explained the punishment range, and took a recess to give appellant time to consult with his lawyer. When the proceedings reconvened, appellant waived his right to a jury and entered an open plea of guilty to the offense and a plea of true to the enhancement paragraph. Appellant acknowledged he was making the pleas freely and voluntarily. Appellant's signed, written judicial confession and stipulation of evidence was admitted as evidence.

The judge accepted appellant's plea of guilty and found the evidence sufficient to prove guilt and the enhancement paragraph but said he would hear punishment evidence the following day. He also told appellant he heard he had not been cooperative with his lawyer and suggested he talk to his lawyer "so he can put on a defense for you."

The next day, the State put on the testimony of the complaining witness, Juan Martinez. Martinez testified he was a resident of Alabama but did "concrete work" in different states. In August 2014, he was working in Dallas and staying in a motel. As he walked out of his second-floor room, a masked man put a gun in his face, forced him back inside the motel room, and took $300 from Martinez's wallet. The man then made Martinez walk to the bathroom and told him to get down on his knees and start counting. Once he was on his knees, Martinez said he heard the man pull back the hammer on the gun, but he did not pull the trigger. Martinez thought his "life was over." The man walked out of the bathroom and closed the door. When the man came back, he had Martinez's truck keys and asked which truck was his. Martinez described the truck and told him where it was parked. The man told him to go back to the bathroom and turn on the

shower. Martinez then heard the door close and someone running. He waited for about three minutes before exiting the room and calling the police. Martinez never saw the robber's face.

The State rested, and the judge reset the case to allow the presentence report to be completed. At that hearing a month later, appellant testified. Appellant said he was twenty-one and had been out of prison for about two months when he committed this offense. He understood if the judge gave him probation, placement in a substance abuse felony punishment facility was also recommended. He understood SAFPF was a "very intensive program" and agreed he would "embrace" it and needed it. Appellant knew he could be sentenced to prison for at least fifteen years and said he regretted what he did and said it was wrong but asked for a "second chance." He told the court he did not want to be "another statistic" and said his brother had died in Lew Sterrett Jail. Appellant also said he was his mother's only son and wanted to "help her out, be there for her." He had a child he had never seen because he was in prison when the child was born.

On cross-examination, appellant said a couple of weeks after committing this offense, he was riding in Martinez's truck with friends when the police pulled him over. He told the police he "robbed" the car. He agreed the facts of this offense were similar to the previous aggravated robbery that put him in TYC and then prison. In the earlier offense, he and a friend broke into an elderly woman's house, and he hit her with a baseball bat. He stole items from her house and her car. Appellant said he did not remember the specific details of this offense because he was "high." In closing arguments, appellant asked for probation and to be sent to SAFPF, and the State asked for a prison term. The trial court imposed a prison term.

In his sole issue, appellant contends he received ineffective assistance because counsel did not investigate or present evidence in mitigation of 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. Ap. 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 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).

Here, the record is insufficient to meet the *Strickland* standard. Appellant did not file a motion for new trial complaining about counsel's representation; consequently, there is no record to support appellant's assertions. Although he argues counsel failed to investigate what potential mitigating evidence might exist, nothing in the record supports that claim or that he failed to investigate the case at all. Appellant also contends counsel did not cross-examine Martinez or present any witnesses on his behalf, but he does not identify subjects counsel should have explored

with Martinez nor does he identify any particular witness counsel should have called or specify what he expected that witness to say. While he says counsel did not ask him questions about his drug issues, appellant told the court he had abused about every drug possible and was "high" when he committed the offense. To the extent he complains counsel "let" him "go forward" with an open plea in the absence of mitigating evidence or "hope" that the trial court would place him on probation or in a substance abuse facility when the State had offered twelve years, the record fails to show how counsel advised appellant with regard to the State's offer. Finally, trial counsel has not been given the opportunity to explain why he took the actions he did or did not take other actions. Because the record is not sufficient to show counsel's representation was so deficient as to meet the first prong of *Strickland*, we overrule the sole issue.

In a cross-point, the State contends the judgment incorrectly states the jury assessed appellant's punishment and asks that we modify it to reflect the trial court assessed punishment. The judgment in this case is entitled, "JUDGMENT OF CONVICTION BY COURT–WAIVER OF JURY TRIAL." The judgment does not reflect a jury assessed punishment. We therefore overrule the State's cross-point.

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

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| JUAN MARRON, Appellant | On Appeal from the Criminal District Court No. 1, Dallas County, Texas |
| No. 05-18-00430-CR V. | Trial Court Cause No. F-1476214-H. |
| 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 June 12, 2018.