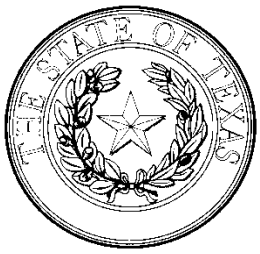
Opinion issued March 10, 2011



In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00866-CR

ABDONAL DELGADO CESPEDES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Case No. 1177834

MEMORANDUM OPINION

Appellant, Abdonal Delgado Cespedes, appeals a judgment finding him guilty of aggravated sexual assault of a child. *See* TEX. PENAL CODE ANN. § 22.021(a)(1)(B) (West 2007). In two issues, appellant contends that he is entitled

to a new trial because he received ineffective assistance of counsel from his trial counsel and his initial appellate counsel. Concluding the record fails to demonstrate that either counsel was ineffective, we affirm.

Background

When the complainant was around eight years old, her mother and appellant began dating. Within a short time, appellant moved in with the complainant's mother, the complainant, and her two brothers. Soon after moving in, appellant began touching the complainant's legs and shoulders. When she was about nine years old, the complainant was watching TV in her mother's room while her mother was at work. Appellant entered the room and locked the door behind him. He approached and began kissing her on the neck and lips. The complainant was in shock. Appellant removed her pants and pulled down his pants. Appellant penetrated her sexual organ with his sexual organ. The complainant protested that it hurt; appellant did not stop. After he ejaculated, appellant, referring to her virginity, told her that "what's done is done" and that she "couldn't go back." Appellant advised that she should not tell anybody because they both "could get locked up." The complainant believed him and felt as if she had done something wrong.

Over the next three years, appellant routinely had sexual intercourse with the complainant, approximately four times a week. When the complainant refused,

appellant would get mad at her or her brothers, and he would withhold money and gifts. In October 2007, when she was about 13 years old, the complainant, while in the bathroom at school, cut her wrists with a razor blade taken from home. With her blood she wrote the words "help me" on the wall. Even though she was taken to see a doctor, she did not reveal the sexual abuse. The last instance occurred about a week before appellant and her mother broke up, while the complainant was still 13.

The next February, the complainant got into a fight with a girl at school. While she was in detention, the teacher, suspecting something was wrong, asked if she had any problems at home and if anybody had hurt her. The complainant admitted she had problems with appellant. Even though her parents had separated about a month before, appellant showed up at the school to take the complainant home. Upon seeing appellant, the complainant began crying, telling him to get away from her. A teacher took the complainant away. The complainant then revealed everything that had happened.

Appellant was indicted for aggravated sexual assault of a child. On September 29, 2009, the case proceeded to a jury trial. Appellant initially entered a plea of not guilty. However, after the complainant testified, appellant decided he wanted to change his plea to guilty. Appellant was advised by his trial counsel

concerning his decision to plead guilty, and the trial court orally admonished appellant when he changed his plea to guilty.

The case proceeded to the punishment stage, where the State called three witnesses before resting. Appellant's trial counsel cross-examined the second witness and made several objections to the third witness's testimony. Trial counsel presented appellant as a witness. While testifying, appellant asked for forgiveness, accepted responsibility for his actions, and offered evidence of his eligibility for community supervision. Trial counsel presented no other witnesses or evidence. The jury found appellant guilty and assessed his sentence at life imprisonment and a $10,000 fine.

On the day of sentencing, trial counsel filed a notice of appeal, requested to withdraw from the case, and asked the trial court to appoint new counsel. The same day, the trial court granted the motion and appointed appellate counsel. Two days after sentencing, appellate counsel swore to the affirmation acknowledging his appointment. No motion for a new trial was filed within the 30-day window. During the pendency of this appeal, initial appellate counsel was substituted by the current appellate counsel, who appellant retained to file the brief in this case.

Ineffective Assistance of Counsel

In his two issues, appellant contends that his trial attorney and initial appellant attorney were ineffective.

A. Applicable General Principles

To prevail on a claim of ineffective assistance of counsel, an appellant must prove by a preponderance of the evidence that (1) counsel's performance was so deficient that that his assistance fell below an objective standard of reasonableness and (2) there is a reasonable probability that but for the deficient performance, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063–64 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). The effectiveness of assistance of counsel is reviewed in context with the totality of the representation and the particular circumstances of each case. *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069; *Thompson*, 9 S.W.3d at 813. In proving that his counsel's performance was deficient, an appellant must overcome a strong presumption that counsel's action was a sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Thompson*, 9 S.W.3d at 813. Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813. When the reasons for counsel's conduct do not appear in the record, an appellate court will conclude counsel performed deficiently only if counsel's decisions could not have been pursuant any reasonable trial strategy that is conceivable, potentially available, and legitimate. *Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005).

B. Trial Counsel's Failure to Call Witnesses

Appellant asserts in this first issue that although trial counsel presented appellant testimony during the punishment phase of trial, the attorney should have presented other witnesses to present mitigation evidence. When the claim of ineffective assistance is based on counsel's failure to call a witness, the appellant must show that the witness was available to testify and that appellant would have benefitted from his testimony. *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004) (citing *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983)); *see Pinkston v. State*, 744 S.W.2d 329, 332 (Tex. App.—Houston [1st Dist.] 1988, no pet.). The decision whether to present witnesses is largely a matter of trial strategy. *Shanklin v. State*, 190 S.W.3d 154, 164 (Tex. App.—Houston [1st Dist.] 2005, pet dism'd). "Moreover, an attorney's decision not to present particular witnesses at the punishment stage may be strategically sound decision if the attorney bases it on a determination that the testimony of the witnesses may be harmful, rather than helpful, to the defendant." *Id*. (citing *Weisinger v. State*, 775 S.W.2d 424, 427 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd)). "However, a failure to uncover and present mitigating evidence cannot be justified as a tactical decision when defense counsel has not conducted a thorough investigation of the defendant's background." *Id*. (citing *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.

Ct. 2527, 2535 (2003); *Rivera v. State*, 123 S.W.3d 21, 31 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd)).

There is nothing in the record that rebuts the presumption that trial counsel's decision not to present witnesses during the punishment stage was based on a sound and valid trial strategy. *See Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Thompson*, 9 S.W.3d at 813. No evidence shows that any additional witnesses would have been available to testify nor that their testimony would have benefitted appellant. Additionally, there is nothing in the record to indicate that trial counsel failed to conduct a thorough investigation prior to trial. *See Shanklin*, 190 S.W.3d at 164 (citing *Wiggins*, 539 U.S. at 521, 123 S. Ct. at 2535; *Rivera*, 123 S.W.3d at 31). We hold that appellant fails to establish that trial counsel's performance fell below an objectively reasonable standard. *See Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069; *Thompson*, 9 S.W.3d at 813; *Starz v. State*, 309 S.W.3d 110, 119–20 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (finding that counsel was not ineffective for failing to interview and call a witness because, although witness was available, record did not indicate what information he possessed or whether it would be helpful to defendant); *Henderson v. State*, 29 S.W.3d 616, 624 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (holding trial counsel was not ineffective when the record was silent as to trial counsel's reasons for declining to request additional instruction on concurrent causation).

We overrule appellant's first issue.

C. Initial Appellate Counsel's Failure to File a Motion for New Trial

In his second issue, appellant contends that his initial appellate counsel should have filed a motion for new trial discussing appellant's withdrawal of his guilty plea and presenting the mitigation evidence that the trial attorney failed to introduce at the trial. A defendant has a right to file a motion for a new trial within 30 days of sentencing. TEX. R. APP. P. 21.4(a). The courts of appeals have recognized that the 30-day period for filing a new trial motion is a critical stage of a criminal proceeding in which defendants are entitled to assistance of counsel. *Cooks v. State*, 190 S.W.3d 84, 87 (Tex. App.—Houston [1st Dist.] 2005), *aff'd*, 240 S.W.3d 906 (Tex. Crim. App. 2007). When a motion for a new trial is not filed, there is a rebuttable presumption that the defendant was adequately advised by counsel and that the defendant considered and rejected the motion for a new trial. *Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998).

Appellant contends that he rebutted this presumption through allegations made in his brief that appellate counsel never spoke with or informed appellant of his right to file a motion for new trial and that if counsel had file the motion, appellant would have been able to develop the record concerning his guilty plea and the mitigation evidence that his trial attorney failed to present. Nothing in the record supports these suggestions. *See Thompson*, 9 S.W.3d at 813. Nothing in

the record rebuts the presumption that appellant was adequately informed of his rights and effectively represented. *See id.* Here, within two days of his sentence, appellant was appointed his initial appellate counsel. Nothing in the record suggests that appellate counsel failed to advise appellant concerning the merits of a motion for new trial. *See Smith v. State*, 17 S.W.3d 660, 663 (Tex. Crim. App. 2000). We hold that appellant fails to establish that appellate counsel's performance fell below an objectively reasonable standard. *See Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069; *Thompson*, 9 S.W.3d at 813.

We overrule appellant's second issue.

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

Do not publish. *See* TEX. R. APP. P. 47.2(b).