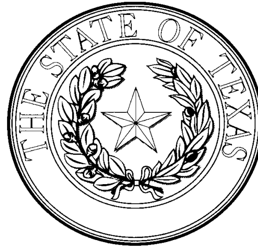
Opinion issued July 10, 2018



In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00236-CR

KARL WINKLER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Case No. 1389817

MEMORANDUM OPINION

Appellant Karl Winkler was indicted for the offense of indecency with a child. *See* TEX. PENAL CODE § 21.11. He pleaded guilty without an agreed punishment recommendation from the State. A presentence investigation report

was completed, and a sentencing hearing was conducted. The trial court found Winkler guilty, and it sentenced him to seven years in prison.

Winkler contends that he received ineffective assistance of counsel during the sentencing phase of trial proceedings because his attorney failed to offer mitigating evidence or evidence which supported his eligibility for deferred adjudication. On this record his counsel's performance was not shown to be constitutionally deficient. Accordingly, we affirm the judgment of the trial court.

Background

Appellant Karl Winkler was indicted for the offense of indecency with a child. He initially pleaded not guilty, and a jury trial commenced. Defense counsel filed a motion for community supervision, indicating that Winkler was eligible for community supervision and requesting that such punishment be recommended by the jury should he be found guilty. After the jury was selected, but before the presentation of any evidence, Winkler changed his plea to guilty.

The trial judge confirmed that Winkler wanted to change his plea, and she informed him that the offense of indecency with a child carried a possible penalty of 2 to 20 years in prison, and a fine not to exceed $10,000. Winkler stated that he understood the charge and the range of punishment, and he pleaded guilty without an agreed punishment recommendation from the State. The judge stated that she would consider any punishment ranging from deferred adjudication up to the

maximum punishment of 20 years in prison. Winkler confirmed he understood the entire range of punishment available for the court's consideration.

The trial judge ordered a presentence investigation, and she later conducted a sentencing hearing. At the hearing, the State offered testimony from the complainant and her mother. The complainant testified that Winkler sexually abused her multiple times over a period of several years. She believed that Winkler should serve time in prison instead of being sentenced to probation. The complainant's mother testified about ongoing anxiety and behavioral issues suffered by the complainant during and following the abuse.

Defense counsel cross-examined each witness, and he elicited testimony that the complainant enjoyed outdoor activities that she and Winkler did together. No witnesses were called to testify on behalf of Winkler. The trial judge confirmed that she had received a letter written by Winkler, in which he accepted responsibility for his actions. Defense counsel did not offer any additional evidence.

In his closing argument, defense counsel argued that Winkler had accepted full responsibility for his actions. He referred to conditions the court could impose that could help prevent Winkler from repeating the behavior in the future, and he contended that Winkler would be willing to submit to such conditions. Additionally, defense counsel asked the trial judge to consider Winkler's letter and

the "totality of the circumstances," and to do what she thought was "just and right." The State agreed that Winkler should receive credit for pleading guilty and appearing before the court for punishment. It argued that Winkler's behavior was not an isolated incident, and it noted the lasting impact of the abuse on the complainant. The State requested that the trial court impose a sentence of ten years in prison.

In making her sentencing decision, the trial judge explained that she had considered the totality of the circumstances, as counsel requested. She further explained that Winkler had preyed on a vulnerable child from an unstable home, and that because of his repeated abuse the child was left with "scars" and "difficulties." The court found Winkler guilty of indecency with a child and sentenced him to seven years in prison. He appeals.

Analysis

Winkler argues that he was denied effective assistance of counsel because his attorney failed to offer at the sentencing hearing mitigating evidence and other evidence supporting his eligibility for deferred adjudication. He asserts that there is a reasonable probability that his sentence would have been less severe if counsel had presented mitigating evidence. Additionally, he contends that the trial court was "effectively precluded from considering deferred adjudication" because his

counsel failed to prove his eligibility for it. The State contends that Winkler forfeited his appellate arguments by pleading guilty.

Both the United States and Texas Constitutions guarantee a criminal defendant the right to assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. This right includes an accused's right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). Ineffective-assistance claims are governed by a two-part test: (1) whether counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and if so, (2) whether the deficient representation prejudiced the defense, i.e., is there a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687–88, 694 104 S. Ct. at 2064–65, 2068. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S. Ct. at 2068. An appellant claiming ineffective assistance of counsel has the burden of proving his claim by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

In reviewing an ineffective-assistance claim, we look to the "totality of the representation and the particular circumstances of each case . . . ." *Id.* at 813. There is a strong presumption that a trial counsel's conduct falls "within the wide range

of reasonable professional assistance," and that counsel's decisions were motivated by sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. A successful challenge of ineffectiveness must be firmly founded in the record, which "must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 813. When the appellant fails to file a motion for new trial asserting his ineffective assistance claim and the record is silent as to counsel's reasoning or strategy, an appellate court will not speculate to find trial counsel ineffective. *Weaver v. State*, 265 S.W.3d 523, 538 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). In the absence of an explanation for his actions, we presume that counsel had a plausible reason for them. *Id.* at 538–39.

"It is a rare case in which the trial record will by itself be sufficient to demonstrate an ineffective-assistance claim." *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013). "If trial counsel has not been afforded the opportunity to explain the reasons for his conduct, we will not find him to be deficient unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Id*. (quoting *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012)).

Winkler argues that his trial counsel's failure to introduce mitigating evidence at the sentencing hearing constituted ineffective assistance, and that there is a reasonable probability that his sentence would have been less severe if counsel

had offered some mitigating evidence. He contends that his trial counsel failed to present mitigating evidence about his "work history, family history, medical issues (if any), mental health issues (if any), charitable activities, and so forth," leaving the trial court to consider only evidence of his repeated sexual abuse of the complainant. The record does not demonstrate affirmatively that counsel failed to investigate potential mitigating evidence. Further, as Winkler acknowledges, the record on appeal fails to establish what mitigating evidence was available or might have been available, or whether any such evidence would have been admissible during the sentencing hearing. Although counsel did not call any witnesses at sentencing, the decision of whether to present witnesses is generally a matter of trial strategy. *See Shanklin v. State*, 190 S.W.3d 154, 164 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd). An attorney reasonably may decide not to present certain witnesses at the punishment stage based on a determination that the evidence could be harmful, rather than beneficial to the defendant. *Id.*

Because the record is silent as to whether trial counsel investigated potential witnesses, and the record fails to reflect that any mitigating evidence existed, we cannot conclude that trial counsel's failure to present such evidence fell below an objective standard of reasonableness under prevailing professional norms. Further, without a record of what mitigating evidence could have been presented, Winkler

cannot demonstrate that there is a reasonable probability that the presentation of such evidence would have resulted in a lesser sentence.

Winkler also argues that his trial counsel was ineffective because he failed to offer evidence supporting his eligibility for deferred adjudication. Before the trial court may place a defendant who has pleaded guilty to the offense of indecency with a child on deferred-adjudication community supervision, it must make a finding in open court that "placing the defendant on deferred adjudication community supervision is in the best interest of the victim." TEX. CODE CRIM. PROC. art. 42A.102(a). The record does not reflect that trial counsel introduced evidence to support a finding that community supervision would have been in the best interest of the complainant, and Winkler has failed to demonstrate any evidence existed that would have supported such a finding by the trial court, particularly in light of the complainant's testimony that he should go to prison. Even if the record established that some evidence might have supported the imposition of community supervision in this case, without an explanation from counsel as to his reasoning, we presume he had some strategic basis for failing to offer such evidence.

We cannot speculate as to counsel's reasoning for his decisions in representing Winkler at the punishment hearing, and in the absence of a record in which counsel had an opportunity to explain his decisions, we cannot conclude that

no reasonable attorney would have done the same thing. Even if we could conclude that trial counsel's representation was deficient, Winkler has failed to show that there is a reasonable probability that he would have received a less severe punishment but for counsel's defective performance. Accordingly, we overrule Winkler's sole issue on appeal.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Bland, and Massengale.

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