Opinion issued August 2, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00139-CR

EX PARTE OSCAR MINJARE SANCHEZ, JR.

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Case No. 1412036-A

DISSENTING OPINION

In this habeas appeal, our court, sitting en banc, originally reversed the trial court's denial of post-conviction habeas relief. The Court of Criminal Appeals, in turn, reversed us, holding we had erred in reviewing the trial court's denial of habeas relief de novo rather than for abuse of discretion. Now, on remand to us, the en banc

court affirms the trial court's denial of post-conviction habeas relief. Because the trial court abused its discretion in denying habeas relief, I respectfully dissent.

BACKGROUND

A jury found Oscar Minjare Sanchez, Jr. guilty of the felony offense of failure to stop and render aid after he rear-ended an unmarked police car engaged in a late-night high-speed pursuit, and we affirmed his conviction on appeal. *See Sanchez v. State*, No. 01-16-00293-CR, 2017 WL 1424949 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication).

In this post-conviction habeas proceeding, Sanchez contends he received ineffective assistance of counsel. At trial, the defense unsuccessfully maintained Sanchez did not stop and render aid because he was unaware of any collision. He now argues that his trial counsel was ineffective in failing to call three witnesses to testify: Bobby Joe Flores, Richard Grassi, and Sharleen Martin, all of whom were passengers in his truck when the collision took place.

The trial court denied Sanchez's application for post-conviction habeas relief, ruling that Sanchez had failed to show that Flores, Grassi, or Martin were available to testify at trial or that their testimony would have benefited his defense. Sanchez appeals from the trial court's ruling denying his application for habeas relief.

DISCUSSION

Introduction

Sanchez argues the trial court abused its discretion in denying his application for post-conviction habeas relief. The en banc court affirms. I would not.

The en banc court correctly holds that Sanchez has not shown his trial counsel provided ineffective assistance in failing to call Flores or Grassi as witnesses. As the en banc court says, Sanchez has not shown that either of these witnesses was available to testify, and this is fatal to Sanchez's ineffective-assistance claim with respect to them. *See Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007) (per curiam) (habeas applicant must show witness was available to testify at trial to show trial counsel was ineffective in failing to call witness).

But Martin is another matter. As the en banc court concedes, Sanchez has shown that Martin was available to testify. The en banc court nonetheless holds that Sanchez has not shown his trial counsel was ineffective in failing to call Martin as a witness because Sanchez has not shown Martin's testimony would have benefited the defense. *See id*. (habeas applicant must show uncalled witness's testimony would have benefited defense to show ineffective assistance). The en banc court reasons that Martin's testimony would not necessarily have benefited Sanchez because his counsel could have reasonably opted as a matter of trial strategy to argue that the State's failure to call Martin, as well as Flores and Grassi, showed their testimony

would not support the prosecution without subjecting any of these witnesses to cross-examination, which may have been detrimental to the defense.

In essence, the en banc court concludes Sanchez failed to show his counsel's performance was deficient because the record shows a plausible strategic reason counsel did not call Martin as a witness. *See Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002) (defendant must show by preponderance of evidence that there is no plausible professional reason for an act or omission to show deficiency). While I don't disagree with the principle the en banc court invokes, I disagree that it applies here. That is, I disagree that trial counsel could have reasonably opted in this instance to not call Martin as a witness and instead argue to the jury that this witness's absence showed her testimony would be unfavorable to the prosecution.

Applicable Law

To obtain habeas relief based on ineffective assistance of counsel, Sanchez must make two showings by a preponderance of the evidence. *Ex parte Ramirez*, 280 S.W.3d at 852. First, Sanchez must show that his counsel's performance was so deficient it fell below an objective standard of reasonableness. *Id.* Second, Sanchez must show that his counsel's deficient performance prejudiced him. *Id.*

We ordinarily presume trial counsel's performance fell within the broad range of reasonable professional assistance, such that a defendant must overcome a presumption that his counsel's challenged conduct might be the result of sound trial

strategy. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). Thus, when the record is silent as to counsel's reasons for the challenged conduct, we usually will assume a strategic reason if one can possibly be imagined. *Id.* But this assumption does not apply when the record discloses trial counsel's reasons. *See Ex parte Saenz*, 491 S.W.3d 819, 828–29 (Tex. Crim. App. 2016) (concluding based on counsel's deposition that counsel's omission was not matter of trial strategy). Instead, we must evaluate whether counsel's performance was deficient in light of the ostensible trial strategy disclosed by record. *See Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011) (stating that appellate court assumes trial counsel's decision was strategic if any reasonably sound motivation can be imagined when direct evidence of trial counsel's reasoning is not available on appeal). If the record shows trial counsel did not choose a plausible option from the strategic choices available to him, then his performance was deficient. *See Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012) (strategic decisions from plausible options made after thorough investigation of law and facts are virtually unchallengeable); *Bone*, 77 S.W.3d at 836 (defendant must show there is no plausible professional reason for trial counsel's conduct to show his performance was deficient).

In evaluating prejudice, we focus on whether counsel's deficient performance undermined the adversarial process, which we count on to produce justice, to such an extent that the trial result is unreliable. *Miller v. State*, 548 S.W.3d 497, 499 (Tex.

Crim. App. 2018). If counsel's deficiency might have affected a guilty verdict, the question is whether there is a reasonable probability that a juror would have had a reasonable doubt about the defendant's guilt absent counsel's deficiency. *Id.*; *see also Ex parte Andrus*, 622 S.W.3d 892, 899 (Tex. Crim. App. 2021) (prejudice inquiry boiled down to whether there was reasonable probability that at least one juror would have struck different balance in answering mitigation issue in death-penalty prosecution had trial counsel's performance not been deficient). In short, if there is a reasonable probability the outcome would have been different but for counsel's deficient performance, there is prejudice. *Lopez*, 343 S.W.3d at 142.

Analysis

Martin signed an affidavit in support of Sanchez's habeas application. In her affidavit, Martin stated that she was seated behind Sanchez, who was driving. At one point while driving, Sanchez slammed on his brakes, honked his horn, and swerved away from another car. According to Martin, however, she did not observe a collision between Sanchez's truck and any car that night. In addition, she stated that she would have noticed a collision if they had been in one. Finally, Martin represented that she would have gladly testified if she had been asked to do so.

But Sanchez's trial counsel did not ask Martin to testify. At trial, the defense called no witnesses and rested without introducing any evidence whatsoever.

Instead, defense counsel established through cross-examination of one of the State's witnesses, a deputy sheriff, that Flores, Grassi, and Martin were passengers in Sanchez's truck on the night of the collision. The deputy testified that he interviewed them, and their stories were consistent with one another. The deputy did not testify about the contents of their witness statements, but he did say their statements were consistent with the deputy's theory of the case, apart from one aspect of it. During cross-examination of a second witness, another deputy, defense counsel established that Grassi gave a statement that was generally consistent with Sanchez's. In his statement, Sanchez denied he had hit the unmarked police car.

Then, during closing argument, defense counsel noted the State had failed to make good on its pledge to introduce all the available evidence. Defense counsel argued the jury could reasonably infer from the State's failure to call eyewitnesses to the collision that their testimony would not support the prosecution.

The en banc court concludes that defense counsel's decision to argue the State's failure to call Martin as a witness showed her testimony would not support the prosecution, instead of calling her as defense witness, was a plausible strategic choice. Hence, the en banc court holds Sanchez failed to show his counsel was deficient in not calling Martin as a witness. For three reasons, I do not agree.

First, we must evaluate the reasonableness of defense counsel's conduct in context and view it as of the time of counsel's conduct. *Andrews v. State*, 159 S.W.3d

98, 101 (Tex. Crim. App. 2005). Consideration of the trial record at the time defense counsel chose to rest without calling any witnesses, including Martin, shows his decision to forego Martin's testimony was not a plausible strategic choice.

When the defense rested, the State had already put on its case and the jury had heard legally sufficient evidence to support a finding that Sanchez knew or should have known an accident occurred. Among other things, the jury heard the following:

Lieutenant G. Goudeau, the driver of the unmarked police car, testified that she felt a "violent hit" and heard a sound like a "loud crash" at the moment of impact. *Sanchez*, 2017 WL 1424949, at *1. The impact caused Goudeau's car to spin and pushed it over a curb and into a parking lot. *Id.* As a result of the accident, Goudeau was taken to the hospital, where she remained for four days. *Id.* at *2. She had severe injuries, requiring three surgeries and months of rehabilitation. *Id.*

A second peace officer responding to the high-speed pursuit testified he saw Sanchez's truck hit Goudeau's police car. *Id.* at *2, *4. Sergeant K. Benoit stated that Sanchez came up behind Goudeau at a high rate of speed, tried to change lanes to avoid her, and hit the back end of her car. *Id.* at *1–2. Benoit said he saw the impact, which raised the back of Goudeau's car up into the air. *Id.* at *2. Goudeau's car was pushed rightward, jumping the curb and entering a parking lot. *Id.* When Benoit went to Goudeau's aid, she had obvious injuries from the accident. *Id.*

R. Musil, a deputy sheriff who investigated the accident scene, testified that there was extensive damage to Goudeau's car consistent with being hit by a large pick-up truck. *Id.* at *3. Another deputy testified that the data from the airbag control module in Goudeau's car confirmed that it had been hit from behind. *Id.*

A. Marines, another deputy sheriff who investigated, testified that he inspected Sanchez's truck, which matched the description of the one Benoit had given. *Id.* at *2. Marines saw the truck had damage to its right front bumper and left tow ring. *Id.* Plastic was embedded in one of the truck's tires, and there was a scuff mark on the undercarriage of the right side of the truck's bumper. *Id.* Marines testified that the bumper of Goudeau's car was dented, and the dent was similar in diameter to the tow ring on Sanchez's truck. *Id.* Marines also found gray paint matching the color of Goudeau's car on Sanchez's truck's tow ring. *Id.*

Marines sent samples of the paint found on the truck for forensic testing. *Id.* The forensic scientist testified that the paint was consistent with the paint from Goudeau's car but could have come from other vehicles with similar paint. *Id.*

Given this evidence, deciding not to call Martin as a witness was not a plausible strategic option. Martin's testimony was crucial to Sanchez's defense, which was that he was not aware there had been a collision and his lack of awareness was reasonable under the circumstances. Without Martin's testimony, the lone evidence to this effect consisted of Sanchez's written statement, made during the

investigation, in which he denied hitting Goudeau. Testimony from Martin, who was a passenger in Sanchez's truck, that she did not perceive a collision would have been more than merely cumulative. *See Ex parte Overton*, 444 S.W.3d 632, 637–41 (Tex. Crim. App. 2014) (failure to call witness whose testimony contradicted State's theory of case was ineffective assistance); *Everage v. State*, 893 S.W.2d 219, 222 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (failure to call witness who could have corroborated defense was ineffective assistance). The alternative opted for by defense counsel—arguing the State's failure to call Martin showed her testimony would not assist the prosecution—is not a substitute for evidence contradicting the prosecution's theory of the case when the State has put on legally sufficient evidence of guilt. While the State had the burden of proof, the State had already introduced sufficient evidence to support a guilty verdict. Defense counsel could not reasonably have hoped to persuade the jury of reasonable doubt by simply arguing in closing that the State had not presented all the available evidence to the jury.

Second, the two alternatives defense counsel ostensibly chose between were not mutually exclusive and therefore did not present the strategic dilemma the en banc court imagines. Sanchez's counsel could have called Martin as a witness and argued in closing that the defense had to do so after the State did not precisely because the State did not think its case would benefit if the jury heard her testimony. In addition, even if the defense had called Martin as a witness, it could have drawn

attention to the fact that she was not the lone passenger in Sanchez's truck and emphasized in closing that the State failed to call Flores and Grassi because their testimony would not be favorable to the prosecution. If anything, this approach would have strengthened the defense's closing argument by providing the jury with an example as to what Flores and Grassi would have said via Martin's testimony.

Third, to the extent the en banc court suggests otherwise, the record does not disclose any reason to think Martin's testimony could have been harmful. Certainly, the en banc court does not identify any particular risk Martin posed as a witness.

Defense counsel can reasonably decide not to call a witness after determining the risk of unfavorable testimony outweighs the favorable testimony she can give. *See Bone*, 77 S.W.3d at 835 (counsel can reasonably decide potential benefit of witness's testimony is outweighed by risk of unfavorable counter-testimony). And appellate courts frequently hold that defense counsel's performance was not deficient in failing to call a particular witness based on this possibility. But appellate courts do so only in two instances, neither of which is applicable in this case.

The first instance ordinarily involves direct appeals, when there usually is no evidence as to the counsel's strategic choices. In that context, it is entirely proper for an appellate court to summarily hold that defense counsel's failure to call a witness may have been based on counsel's risk-benefit assessment of the witness's testimony. This is appropriate because an ineffective-assistance claim cannot be

built on speculation; the record must affirmatively show counsel was ineffective. *Id.* In the absence of evidence about the contours of a would-be witness's testimony and counsel's assessment of that testimony, the appellate court must presume counsel made a strategic choice not to call the witness because her testimony could be harmful in whole or part. *See id.* at 833 (record on direct appeal seldom well-developed enough to overcome presumption that counsel rendered reasonable and professional assistance); *Garcia*, 57 S.W.3d at 440 (appellate court commonly assumes counsel had strategic motivation for choices he made at trial if any can possibly be imagined when evidence of counsel's reasons is absent from record).

The second instance, which is more likely to arise in habeas proceedings than on direct appeal, occurs when the record contains evidence affirmatively showing a witness's testimony would be a double-edged sword. *E.g.*, *Ex parte McFarland*, 163 S.W.3d 743, 757–58 (Tex. Crim. App. 2005) (counsel not deficient in failing to call mitigation witness who would have testified defendant was peaceable, given that witness would have been subject to cross-examination about prior violent robbery committed by defendant that resembled crime for which he was being tried); *Ex parte White*, 160 S.W.3d 46, 52–53 (Tex. Crim. App. 2004) (counsel not deficient in failing to locate witness as defense would not have benefited from his testimony, given that witness's affidavit showed his testimony would have been of little value in impeaching State's evidence and contradicted defendant's testimony).

This case does not fall into either of the preceding categories. Martin's affidavit as to her proposed testimony is in the record, and defense counsel's trial strategy is apparent from his closing argument. Under these circumstances, we should not assume Martin's testimony posed risks not divulged by the record. It's often possible to speculate on both sides of an ineffective-assistance claim. *Scheanette v. State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004). If the appellate imagination is not cabined by the evidence when the record is sufficiently developed, then no applicant could ever obtain habeas relief on the ground that his trial lawyer was ineffective in failing to call a witness because it will always be possible to suppose a witness could have given some unspecified unfavorable testimony.

Here, the only possible adverse testimony suggested by the record is that Martin would testify Sanchez was the designated driver for the evening, driving Martin and his other passengers to and from two different bars. But this information, and that Sanchez drank two beers at the second bar, was already before the jury at trial. *Sanchez*, 2017 WL 1424949, at *5. In addition, Benoit testified that but for the high-speed pursuit, he might have stopped Sanchez for drunk driving, given the late hour, Sanchez's rate of speed, and proximity to a nearby bar. *Id.* at *1, *5. On this record, trial counsel could not have reasonably opted not to call Martin on the basis that doing so would subject her to cross-examination about the possibility that Sanchez was drunk driving, given that the evidence already raised this issue.

The en banc court's contrary analysis and conclusion is premised in part on an inaccurate characterization of the record. According to the en banc court, "the record here is silent on trial counsel's reasoning." Therefore, the en banc court reasons, we must "assume a strategic motivation if any can be imagined" by us.

If the record were silent, I would agree with the en banc court. When the record is silent, we give trial counsel the benefit of the doubt and assume he acted strategically if any reasonably sound strategic motive is imaginable. *Johnson v. State*, 624 S.W.3d 579, 586 (Tex. Crim. App. 2021). So, when the record is silent, the presumption that trial counsel's challenged conduct might result from sound trial strategy ordinarily remains unrebutted and thus defeats an ineffective-assistance claim. *E.g.*, *Thompson v. State*, 9 S.W.3d 808, 813–14 (Tex. Crim. App. 1999).

But the record is not silent as to trial counsel's reasoning. Trial counsel's strategy is apparent from the face of the record. As the en banc court says, the defense's closing argument "shows a unifying strategy on the part of trial counsel."

Though the en banc court does not explicitly say so, its analysis implies that the record is effectively silent for purposes of ineffective-assistance claims whenever, as here, the record lacks testimony from trial counsel about his strategic motives. To the extent this premise informs the en banc court's analysis, the en banc court overstates the law. Testimony from trial counsel as to his motives is often

necessary, but this is true only "in the absence of anything in the record to show the tactics or strategic reasoning of counsel." *Johnson*, 624 S.W.3d at 587.

Here, the face of the record shows trial counsel's strategy as well as the uncalled witness's willingness to testify and the content of her proposed testimony. On this record, the en banc court's exercise of its imagination to conjure other possible reasons counsel might not have called her, rather than confining itself to the strategic reason shown by the record, is a misapplication of the law to the facts.

Finally, because the en banc court concludes Sanchez has not shown his trial counsel's performance was deficient, the court does not address prejudice. But the en banc court's opinion tacitly acknowledges Martin would have played a pivotal role at trial had she taken the stand, given that Sanchez put on no defense whatsoever and Goudeau could not recall the details of the collision. As the en banc court says, the jury did not hear from multiple witnesses, including Martin, who were involved in the collision and thus had the best opportunity to perceive it, if it was perceptible. Martin's testimony would have directly contradicted the State's theory of the case.

Moreover, while the evidence is legally sufficient to support the jury's guilty verdict, the evidence is not overwhelming. In addition to Goudeau's limited recall, Benoit's testimony about the collision was not beyond question. He testified that he saw the collision in his rearview mirror while driving 100 miles per hour away from the scene during a high-speed police pursuit. The physical evidence is similarly

questionable. While Sanchez's truck was damaged, the damage was not extensive. As the forensic evidence concerning the gray paint found on Sanchez's truck was inconclusive, the evidence did not rule out the possibility that the damage to his truck could have been caused by something other than the collision at issue.

On this record, Martin's testimony that she did not perceive a collision was critical. A reasonable probability exists that a juror would have had reasonable doubt about Sanchez's guilt if the defense had introduced Martin's testimony at trial.

CONCLUSION

Sanchez has shown Martin was available to testify at trial and her testimony would have benefited his defense. Because trial counsel's failure to call Martin as a witness prejudiced Sanchez's defense, the trial court abused its discretion in denying Sanchez's application for post-conviction habeas relief. I respectfully dissent.

Gordon Goodman
Justice

The en banc court consists of Chief Justice Radack and Justices Kelly, Goodman, Landau, Hightower, Countiss, Rivas-Molloy, Guerra, and Farris.

Justice Goodman, dissenting.

Publish. TEX. R. APP. P. 47.2(b).