Affirmed and Memorandum Opinion filed February 18, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00082-CR
NO. 14-09-00083-CR
NO. 14-09-00084-CR

JORGE HUMBERTO FRANCO, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause Nos. 1139981, 1139982, and 1139983

MEMORANDUM OPINION

Appellant Jorge Humberto Franco pleaded guilty to sexual assault and two counts of indecency with a child and was sentenced to ten years' imprisonment for each offense with the sentences running concurrently. On appeal, he contends that his guilty plea and sentence were the result of ineffective assistance of counsel. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with two counts of indecency with a child and one count of sexual assault. The complainant in each charge was the fourteen-year-old half-sister of two of appellant's children. He was represented by attorneys Charles Portz and Craig Pena, who has an "of counsel" arrangement with Portz's firm. On September 25, 2008, appellant pleaded guilty to all of the charges without a recommendation from the prosecutor as to the appropriate punishment. Pena read the written waivers and admonishments to appellant, who indicated his understanding of the admonishments by initialing each one. The admonishments for each charge included warnings that (a) appellant could be sentenced to imprisonment for not more than twenty or less than two years; (b) punishment recommendations by the prosecuting attorney are not binding on the trial court; and (c) as a non-citizen, a guilty plea could result in appellant's deportation, his exclusion from admission to this country, or his denial of naturalization under federal law.

At the hearing following the trial court's receipt of the presentence investigation ("PSI") report, the complainant and her mother testified for the State, and appellant offered five witnesses, each of whom supported his request for probation. One of appellant's sisters testified that appellant's remaining sister and his brother-in-law also would have been present at the hearing "but for medical reasons." Appellant testified on his own behalf, stating, "I definitely have been very worried about what might - - where it might end up or whether I will or won't get probation and how my family . . . will make it through in the time that I might not be there . . . ." The trial court also considered a psychological evaluation prepared by an expert retained by appellant.

After the trial court sentenced appellant to ten years' imprisonment for each of the three offenses with the sentences to run concurrently, appellant moved for new trial based on the allegedly ineffective assistance of his trial counsel. After an evidentiary hearing, the trial court denied the motion.

II. ISSUE PRESENTED

In a single issue, appellant contends he received ineffective assistance of counsel.

III. STANDARD OF REVIEW

We review general claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which applies to claims arising under the state or federal constitution. *Hernandez v. State*, 726 S.W.2d 53, 56–57 (Tex. Crim. App. 1986) (en banc). Under the *Strickland* test, an appellant must prove not only that his trial counsel's representation was deficient, but also that the deficient performance was so serious that it deprived the appellant of a fair trial. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. To satisfy both requirements, an appellant must prove by a preponderance of the evidence that counsel's representation fell below the objective standard of prevailing professional norms, and there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *Id.*, 466 U.S. at 690–94, 104 S. Ct. 2066–68. Our review of defense counsel's performance is highly deferential. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc).

Appellant also contends his counsel had a conflict of interest. Where the claim of ineffective assistance is based on a conflict of interest, a different test applies. The defendant instead must show that (1) his counsel was burdened by an actual conflict of interest, and (2) the conflict had an adverse impact on specific instances of counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 349–50, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980); *Acosta v. State*, 233 S.W.3d 349, 352–53 (Tex. Crim. App. 2007). An actual conflict of interest exists only if counsel is required to choose between either advancing his client's interest in a fair trial or advancing other interests to his client's detriment. *Acosta*, 233 S.W.3d at 355; *Williams v. State*, 154 S.W.3d 800, 803 (Tex.

App.—Houston [14th Dist.] 2004, pet. ref'd). The mere possibility of a conflict of interest will not justify reversal. *Williams*, 154 S.W.3d at 804.

Here, appellant raised his claim of ineffective assistance of counsel in a motion for new trial, and in reviewing the trial court's denial of the motion, we apply the abuse-of-discretion standard. *See Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001). Using this standard, we ask whether the trial court's decision was clearly wrong and outside the zone of reasonable disagreement, i.e., whether the trial court acted arbitrarily, unreasonably, or without reference to guiding principles. *Alexander v. State*, 282 S.W.3d 701, 706 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). We do not substitute our judgment for that of the trial court. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004). Rather, we review the evidence in the light most favorable to the trial court's ruling and presume that all reasonable findings that could have been made against the losing party were so made. *Id.* At a hearing on a motion for new trial, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Melton v. State*, 987 S.W.2d 72, 75 (Tex. App.—Dallas 1998, no pet.). Only if no reasonable view of the record could support the trial court's ruling do we conclude that the trial court abused its discretion by denying the motion for new trial. *Charles*, 146 S.W.3d at 208.

IV. ANALYSIS

A. Conflict of Interest

On appeal, appellant first contends that his trial attorneys' law firm also represented appellant's employer, Buy Our Homes. He asserts that because he was paid primarily through commissions, his employer "had a strong incentive to see [a]ppellant incarcerated for a lengthy period of time so he could avoid paying those commissions." According to appellant, his trial attorneys committed various errors to please Paul Vasquez, the owner of

Buy Our Homes, because Vasquez "had the power to retain trial counsel for future corporate representation."

This argument lacks factual and legal support. There is no evidence that appellant's trial counsel actively represented appellant's employer during the relevant time. Portz testified that he represented Buy Our Homes during the three or four years that he had known appellant—and had represented appellant in other matters during that time as well—but there is no evidence that Portz or his firm represented the company at the time of appellant's plea or punishment hearing. There also is no evidence that Pena was affiliated with Portz's law firm at the time Portz himself represented Buy Our Homes, or that Pena represented Buy Our Homes at any time.

In addition, there is no evidence that the interests of appellant and his employer conflicted. To the contrary, Vasquez testified on appellant's behalf in seeking probation, explaining that appellant had worked for Buy Our Homes for six years and was a good employee "who's doing all of the purchasing and all of the plans and pretty much he's running the company."[1] Vasquez additionally testified that the company would continue to employ appellant if the trial court placed appellant on probation, and that a half-dozen projects were already planned for the coming year. There is no evidence of the basis on which appellant was paid or that any compensation owed to him was unpaid. Finally, appellant offers no legal or factual support for the assertion that his employer could avoid paying him if appellant were incarcerated or deported.

In sum, there is no evidence that either of appellant's trial attorneys actively represented appellant and his employer at the same time, or that the interests of appellant and his employer conflicted. Inasmuch as appellant has not shown that an actual conflict

[1] Indeed, there is no evidence that it was Vasquez and not appellant himself who previously retained Portz to represent Buy Our Homes.

existed, we need not address the specific instances of the attorneys' conduct that appellant contends were influenced by the alleged conflict.

B. General Ineffectiveness

Aside from the conduct that he attributes to a conflict of interest, appellant identifies four alleged errors by his counsel that he contends constitute ineffective assistance of counsel. The arguments concerning two of the alleged errors were waived, and the remaining errors were not prejudicial.

First, he asserts that his attorneys failed "to formulate a legally sufficient and sound trial strategy." This conclusory statement does not inform us of the legal or factual basis of appellant's complaint and is unsupported by citation to authority or to the record; hence, this argument is waived. *See* TEX. R. APP. P. 38.1(i). Second, he complains that at the start of the sentencing hearing, trial counsel said he had no objection to the presentence investigation report. Appellant does not, however, identify any legal objection that should have been raised. *Cf. Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002) (en banc) ("When an ineffective assistance claim alleges that counsel was deficient in failing to object to the admission of evidence, the defendant must show, as part of his claim, that the evidence was inadmissible.").[2] Thus, this argument also is waived.

Appellant next points out that he and attorney Pena initially signed certifications that incorrectly identified this as a plea-bargain case in which appellant had no right to appeal. But a defendant is not entitled to perfect or error-free representation and ineffective assistance of counsel cannot be established by isolating one portion of defense

[2] Although the PSI report is not part of the record before us, its inclusion was neither requested nor required. *See* TEX. R. APP. P. 34.5(a); *Jackson v. State*, 69 S.W.3d 657, 660 (Tex. App.—Texarkana 2002, no pet.). It is not clear that the report was entered into evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 9(j) (Vernon Supp. 2009) (addressing confidential nature of PSI reports). In any event, we need not consider the contents of the report to address the arguments presented in this appeal. *See Jackson*, 69 S.W.3d at 660.

counsel's performance for examination. *Hawkins v. State*, 283 S.W.3d 429, 436 (Tex. App.—Eastland 2009, pet. ref'd). Appellant does not explain how these errors, which ultimately were corrected, rendered his counsel ineffective. More importantly, he concedes that these mistakes caused him no prejudice.

Finally, appellant testified that after he was sentenced, Portz incorrectly advised him that the trial court imposed a ten-year sentence to "scare" him but was likely to give him "shock probation" after he began serving his sentence.[3] On appeal, he states that his trial counsel failed to follow through on this option. But a defendant found guilty of sexual assault or indecency with a child is statutorily barred from receiving shock probation,[4] and under the applicable standard of review, we must presume that the trial court was not persuaded that Portz suggested otherwise. In any event, the conversation described by appellant allegedly occurred after appellant was sentenced and long after he entered his guilty plea, and therefore could not have affected the outcome of proceedings that were concluded before the conversation began.

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[3] During the first 180 days after sentencing a defendant to imprisonment for an offense other than a state jail felony, the trial court retains jurisdiction to suspend further execution of the sentence and place the defendant on community supervision. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 6. This is known as "shock probation."

[4] *See id.* art. 42.12, §§ 3g(a)(1)(C), 3g(a)(1)(H), and 6(a)(1).

V. CONCLUSION

We overrule the sole issue presented on appeal and we affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

Do Not Publish — TEX. R. APP. P. 47.2(b).