Affirmed and Memorandum Opinion filed May 18, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00027-CR

COREY DENNARD SHARP, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1434730

M E M O R A N D U M O P I N I O N

Appellant Corey Dennard Sharp pled guilty without a plea bargain to assault of a family member with bodily injury. After a pre-sentencing investigation ("PSI") hearing, the trial court sentenced appellant to prison for six years.[1] In a

[1] The indictment to which appellant pled guilty contained an enhancement allegation that appellant had been previously convicted of assault of a family member. Thus the range of punishment was enhanced to a second-degree felony, which is imprisonment for a term of not more than 20 years or less than 2 years, and a fine not to exceed $10,000. Tex. Penal Code § 12.33.

single issue, appellant claims he received ineffective assistance of counsel at his PSI hearing. We affirm.

To prove ineffective assistance of counsel, appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and (2) there is a reasonable probability that the result of the proceeding would have been different but for trial counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 688–92, 104 S.Ct. 2052, 2064–67, 80 L.Ed.2d 674 (1984). Moreover, appellant bears the burden of proving his claims by a preponderance of the evidence. *Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998).

In assessing appellant's claims, we apply a strong presumption that trial counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). When, as in this case, no proper evidentiary record is developed at a hearing on a motion for new trial, it is extremely difficult to show that trial counsel's performance was deficient. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). If there is no hearing or if counsel does not appear at the hearing, an affidavit from trial counsel becomes almost vital to the success of an ineffective-assistance claim. *Stults v. State*, 23 S.W.3d 198, 208–09 (Tex. App.–Houston [14th Dist.] 2000, pet. ref'd). The Court of Criminal Appeals has stated that it should be a rare case in which an appellate court finds ineffective assistance on a record that is silent as to counsel's trial strategy. *See Andrews v. State*, 159 S.W.3d 98, 103 (Tex. Crim. App. 2005). On such a silent record, we can find ineffective assistance of counsel only if the challenged conduct was " 'so

outrageous that no competent attorney would have engaged in it.' " *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)). In most cases, an appellant is unable to meet the first prong of the *Strickland* test because the record is underdeveloped and does not adequately reflect the alleged failings of trial counsel. *See Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007).

The first deficiency in trial counsel's representation alleged by appellant is the failure to present evidence of his medical history and physical health, specifically, his brain surgery and seizure disorder. The record reflects the following exchange occurred during appellant's testimony at the PSI hearing:

> [Defense Counsel]. I'd like to talk to you a few minutes about your medical history. The report says you've been unemployed for the past two months. Why have you been unemployed?
>
> A. I have seizures.
>
> [Defense Counsel]. Did you have surgery last year on your brain?
>
> A. Yes, sir.
>
> [Defense Counsel]. And since that surgery, has your -- have your seizures been better?
>
> A. Yes.

Appellant argues this testimony was insufficient to apprise the trial court of the extent or severity of his medical history and seizure disorder. Appellant contends trial counsel should have subpoenaed appellant's medical records, obtained a statement from appellant's treating physician, and/or subpoenaed healthcare providers from the Harris County Jail Clinic. Without this evidence, appellant argues, the trial court lacked sufficient information to make a reasonable assessment of the appropriate punishment in his case.

No motion for new trial was filed in this case and we have no record or affidavit regarding counsel's trial strategy. In the absence of a motion for new trial, no record was developed as to the existence of favorable evidence that was not admitted. The record does not reflect that additional evidence of appellant's brain surgery and seizure disorder would have been favorable. Nor does it establish that trial counsel could not have reasonably determined the risk of admitting unfavorable evidence outweighed any potential benefit. Accordingly, and because the record is silent as to trial counsel's strategy, appellant has failed to satisfy the first prong of *Strickland. See Thompson*, 9 S.W.3d at 813.

Appellant further claims that trial counsel should have called his parents or his wife to testify in mitigation of punishment, stating that his father was present. Appellant complains they could have testified as to the nature and extent of his medical history and seizure disorder. The record does not reflect that any mitigating evidence existed. Nor does the record show that if such evidence existed, trial counsel could not have reasonably determined that the potential benefit of such evidence outweighed the risk of unfavorable counter-testimony. The mere presence of appellant's father at trial does not establish otherwise. Because the record itself does not affirmatively demonstrate there was mitigating evidence that trial counsel failed to present, appellant has failed to satisfy the first prong of *Strickland. See Bone*, 77 S.W.3d at 834 .

Appellant also claims that his father and wife could have testified to the relationship that the appellant had with his children, his standing within the community, whether he does volunteer work and other favorable facts. Both his father and his wife wrote letters to the judge and Appellant testified that he was an active father in his children's lives. Beyond that evidence in the record, there is no indication as to what the father or wife would have testified to. Because the record

itself does not affirmatively demonstrate there was mitigating evidence that trial counsel failed to present, appellant has failed to satisfy the first prong of *Strickland*. *See Bone*, 77 S.W.3d at 834 .

Lastly, appellant complains of trial counsel's failure to request the opportunity to make a closing statement. However, the record reflects the State also did not make a closing statement. Given that fact, trial counsel's decision not to present a closing statement could have been a matter of trial strategy. *See Ransonette v. State,* 550 S.W.2d 36, 41 (Tex. Crim. App. 1976); *see also Cravin v. State*, 14-96-01060-CR, 1999 WL 351162, at *8 (Tex. App.—Houston [14th Dist.] June 3, 1999, pet. ref'd) (not designated for publication). Absent a record to the contrary, we do not find trial counsel's decision establishes the first prong of *Strickland.*

Having found appellant failed to establish the first prong of *Strickland,* it is unnecessary to address the second. Appellant's issue is overruled and the judgment of the trial court is affirmed.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.
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