Affirmed and Memorandum Opinion filed July 18, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00494-CR

MARTIN ANGEL RUIZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1447488

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

Appellant Martin Angel Ruiz appeals his conviction for indecency with a child by engaging in sexual contact. *See* Tex. Penal Code Ann. § 21.11(a) (Vernon 2011). Appellant alleges that he was denied effective assistance of counsel because his trial counsel asked the trial court to grant him shock probation for which appellant was ineligible. Because we conclude that appellant has not established he was denied effective assistance of counsel, we affirm.

BACKGROUND

Appellant was indicted for the second degree felony offense of indecency with a child by engaging in sexual contact. He pleaded guilty to the charged offense on March 19, 2015, and the trial court placed appellant on deferred adjudication for five years.

The State filed a motion to adjudicate appellant's guilt on January 15, 2016, and an amended motion on April 6, 2016. The State alleged that appellant violated the terms and conditions of his community supervision by, among other things, committing offenses against the laws of the State of Texas, namely assault and driving while intoxicated; possessing a firearm; consuming alcohol; and coming into contact with minor children. The trial court held hearings on the State's motion on May 11, May 25, and June 3, 2016.

Appellant's girlfriend Evangelina Paniagua testified during the hearings that appellant went out in the morning on January 1, 2016 and returned home drunk around 3 a.m. on January 2, 2016. Paniagua tried to take appellant's truck keys away from him so he would not drive while intoxicated. Appellant and Paniagua started arguing. The argument turned physical and appellant dragged Paniagua by her hair, threw her against the wall, punched her in the head, forcefully removed her pajamas, and pulled her onto the floor by her feet, which caused her to hit her head on the wood floor and lose consciousness. She regained consciousness after appellant poured water on her. She escaped through a window and went to a neighbor's house for help.

Neighbor Socorro Villarreal confirmed that Paniagua sought refuge at Villarreal's house. Villarreal testified that Paniagua was scared for her life and was bleeding from an elbow and her feet when she arrived at Villarreal's house and asked to hide. Villarreal called the police and hid Paniagua in her car until

police arrived.

Paniagua's son, Francisco Cazares, also testified. He stated that on several occasions — Cazares's wedding, Cazares's niece's 15th birthday party, Thanksgiving, and New Year's Eve — he observed appellant consume alcohol, be near children, or drive while intoxicated. Cazares testified that nobody in his family knew appellant was a sex offender. Cazares also testified that appellant threatened Paniagua and "told her not to press charges against him with all this situation and that he was going to call immigration on, you know, some family members and that especially — the one thing he said, he was going to call CPS on my sister because he believed that my sister wasn't taking care of her kids."

Appellant testified in his defense. He denied hitting Paniagua or having anything beyond a verbal argument with her. Appellant claimed that Paniagua's account of what happened on January 2, 2016, was different from his account because Paniagua had developed animosity toward him after he refused to marry her. Appellant also testified regarding the events that led to his indictment for indecency with a child.

Appellant's mother, Mamie Ruiz, also testified for the defense. She denied that appellant and Paniagua had anything beyond a verbal argument on January 2, 2016.

After hearing the evidence and closing arguments, the trial court found that appellant violated the terms and conditions of his community supervision by assaulting Paniagua, consuming alcohol, possessing a firearm, coming into contact with children, and driving while intoxicated. The trial court adjudicated appellant guilty of the second degree felony offense of indecency with a child.

Before the trial court assessed appellant's punishment, appellant's trial counsel asked the court to give appellant "shock probation" or "something along those lines" because appellant did not "intend[] to do anything maliciously" and only exhibited poor judgment.

The court sentenced appellant to 20 years' imprisonment. Appellant filed a timely appeal.

ANALYSIS

In his sole issue, appellant argues that he was denied the right to effective assistance of counsel because his trial counsel asked the trial court to grant him shock probation. Appellant argues that his trial counsel's performance was deficient because his counsel requested shock probation when appellant was ineligible for it. According to appellant, his counsel's request was not motivated by reasonable trial strategy but was instead motivated by his trial counsel's lack of knowledge that appellant was ineligible for shock probation. Appellant also argues that he was harmed as a result of his trial counsel's deficient performance in asking for shock probation because the trial court was left to consider only the State's 20-year punishment recommendation "without any real recommendation by defense counsel." Appellant contends that the trial counsel "doomed appellant to the maximum sentence" of 20 years and did not leave any room for a more lenient punishment by pleading for shock probation.

To prevail on a claim for ineffective assistance of counsel, an appellant must show by a preponderance of the evidence that (1) trial counsel's performance fell below the objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986).

To satisfy *Strickland*'s first prong, the appellant must identify acts or omissions of counsel that allegedly were not the result of reasonable judgment. *Strickland*, 466 U.S. at 690. Appellant must overcome the presumption that trial counsel's actions fell within the wide range of reasonable and professional assistance. *Garza v. State*, 213 S.W.3d 338, 348 (Tex. Crim. App. 2007). If the reasons for counsel's conduct at trial do not appear in the record and it is possible that the conduct could have been grounded in legitimate trial strategy, an appellate court will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal. *Id.*; *see also Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012). To warrant reversal when trial counsel has not been afforded an opportunity to explain his reasons, the challenged conduct must be "so outrageous that no competent attorney would have engaged in it." *Roberts v. State*, 220 S.W.3d 521, 533-34 (Tex. Crim. App. 2007).

To satisfy *Strickland*'s second prong, the appellant must establish a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland*, 466 U.S. at 694.

Failure to satisfy either prong defeats an ineffective assistance claim. *Id.* at 697. In determining whether counsel was ineffective, we consider the totality of the circumstances of the particular case. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

We now turn to appellant's argument that his trial counsel's performance was deficient because his counsel asked the trial court to grant appellant shock probation despite appellant's ineligibility for it.

A trial court can grant shock probation only if a defendant otherwise is eligible for community supervision. *See* Tex. Code Crim. Proc. Ann. art. 42.12 § 6(a) (Vernon Supp. 2016); *State v. Dunbar*, 297 S.W.3d 777, 780-81 (Tex. Crim.

App. 2009). Appellant was adjudged guilty of indecency with a child by engaging in sexual contact and therefore was ineligible for community supervision. *See* Tex. Code Crim. Proc. Ann. art. 42.12 §§ 3(a), 3g(a)(1)(C) (Vernon Supp. 2016); *Dunbar*, 297 S.W.3d at 780-81.

Although appellant was not eligible for shock probation, he nonetheless has failed to show that his trial counsel's actions were deficient.

During trial counsel's closing statement before sentencing, the following exchange occurred:

> [TRIAL COUNSEL]: [W]e ask the Court to put him again on some type of a shock probation; and we ask the Court to make whatever amendments to his —
>
> THE COURT: When you say — when you say "shock probation," you mean let him do six months in jail or something?
>
> [TRIAL COUNSEL]: Something along those lines.
>
> THE COURT: Okay. Thank you.
>
> [TRIAL COUNSEL]: And then whatever.
>
> THE COURT: I'm — I'm not sure I can give him true shock probation.
>
> [TRIAL COUNSEL]: Right. I understand. But something along those lines.
>
> THE COURT: Because I can't give him straight probation, for one thing.
>
> [TRIAL COUNSEL]: I know. And "shock probation" is the wrong term here, but something along those lines. And, again, make whatever changes you think are necessary to his current order.

Contrary to appellant's assertion, there is no support for his contention on appeal that his counsel's plea for shock probation could not have been reasonable trial strategy because his counsel did not know appellant was ineligible for shock probation.

The above exchange shows that appellant's counsel knew the trial court could not grant appellant shock probation; counsel acknowledged that the court could not grant "true shock probation" and that "shock probation" was the wrong term for what he was asking. Further, trial counsel requested "something along those lines" when the trial court asked if counsel suggested letting appellant "do six months in jail or something." Trial counsel's request appears to be a plea for leniency instead of a plea for shock probation. *See Gavin v. State*, 404 S.W.3d 597, 606 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

Gavin involved a defendant who was placed on deferred adjudication. *Id.* After the State moved to adjudicate the defendant's guilt, the trial court adjudicated him guilty of indecency with a child. *Id.* The defense counsel asked the trial court to grant the defendant probation, although the defendant was ineligible for probation after being adjudged guilty of the second degree felony. *Id.* The court of appeals concluded that defense counsel's request to place the defendant on probation despite his ineligibility was a mere plea for leniency and did not constitute deficient performance to satisfy *Strickland*'s first prong. *Id.* The same conclusion applies here.

Additionally, the appellate record in this case is silent regarding trial counsel's reasons or strategy for requesting the trial court to grant appellant "something along those lines" as shock probation or "six months in jail or something." This silent record does not rebut the strong presumption that the trial 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). Nor do we find that trial counsel's plea for more leniency was "so outrageous that no competent attorney would have engaged in it." *See Gavin*, 404 S.W.3d at 606.

Therefore, we conclude that appellant failed to satisfy *Strickland*'s first prong because he failed to carry his burden showing his trial counsel's performance was deficient.

Even assuming for the sake of argument that his counsel's performance was deficient, appellant has not established that he was harmed by his counsel's performance. Appellant contends he was prejudiced by his counsel's request for shock probation because the request gave the trial court no other valid recommendation regarding appellant's punishment and left the court to only consider the State's plea for a 20-year sentence.

Appellant acknowledges in his brief that his counsel "commented on Appellant's ability to obtain employment, . . . Appellant's mother's need for her son to help take care of her, and mitigating aspects of the alleged violations." He nonetheless claims that "his asking for a sentence that the trial court could not possibly give failed to give the trial court context and basis for which it could consider trial counsel's arguments for a more lenient punishment."

Appellant cites no authority to support his contention that the trial court could consider only the State's plea for a 20-year sentence despite his trial counsel's "arguments for a more lenient punishment." Further, we find appellant's argument unpersuasive. We see no reason why the trial court could not have considered the mitigating evidence his counsel presented in assessing appellant's sentence; nor do we see what other "context" the trial court would have needed to consider the "arguments for a more lenient punishment" appellant admits his counsel made. Trial counsel's plea for leniency did not prevent the trial court from assessing a lesser punishment for appellant than the State's 20-year recommendation if the trial court had found a lesser sentence appropriate considering the facts and circumstances of this case.

Here, in addition to the mitigating evidence appellant's trial counsel presented, the trial court could consider damaging evidence the State elicited during the hearings. The court heard detailed evidence that led to appellant being charged with indecency of a child. Appellant testified that he had sexually abused his eight-year-old granddaughter over a period of time. He admitted that he was caught when his "daughter came home and found [appellant] in a bed under the covers with [his] 8-year-old granddaughter, [his] hand on her vagina, she was clothed and [appellant] from the waist down had pulled [his] pants and [his] underwear to [his] ankles."

Appellant admitted that he first started touching his granddaughter's breasts over her clothing and then progressed to touching her under her clothing. Appellant admitted that, "after [he] got her accustomed to [his] touching under her shirt, that's when [he] moved down to her privates below her waist, touching her first outside her clothes" and then "touching her under her clothes." Appellant testified he made his granddaughter watch a pornographic movie. While watching the movie, appellant exposed his penis, made his granddaughter touch it, and masturbated in front of her. Appellant also taught her how to "tongue kiss" and she would kiss him. Appellant admitted to performing oral sex on his granddaughter. Appellant also admitted to telling his granddaughter to keep what he was doing a secret.

To assess appellant's punishment, the trial court also could consider that appellant violated numerous terms and conditions of his community supervision. The trial court heard evidence that, while on deferred adjudication, appellant (1) drove while intoxicated on several occasions; (2) assaulted his live-in girlfriend Paniagua in a violent manner and hit her in the head; (3) possessed a firearm; (4) consumed alcohol on several occasions; and (5) was near children on several

occasions at a time when the children's families did not know appellant was a sex offender.

Considering the evidence before the trial court, appellant's argument that his trial counsel's request for shock probation or "six months in jail or something . . . [a]nd then whatever" caused the trial court to sentence him to 20 years' imprisonment is no more than conjecture and speculation. *See Ex parte Cash*, 178 S.W.3d 816, 818 (Tex. Crim. App. 2005) (rejecting defendant's claim that the "sentencing jury would have recommended probation had the issue been submitted to it" as "pure conjecture and speculation;" defendant was not prejudiced by his trial counsel filing an unsworn pretrial motion for probation because defendant could not show that, but for his trial counsel's failure to file a sworn motion for probation, the jury would have recommended probation). Further, "[i]t is not enough to show that trial counsel's errors had some conceivable effect on the outcome of the punishment assessed;" a defendant must prove that there is a reasonable probability that, but for his counsel's alleged errors, the trial court would have assessed a more favorable sentence. *See Ex parte Rogers*, 369 S.W.3d 858, 863 (Tex. Crim. App. 2012).

Appellant has failed to show that the trial court would not have imposed the 20-year sentence had his counsel not asked for shock probation and leniency. We conclude that appellant has not established that, but for his counsel's alleged errors, his punishment would have been different. *See Gavin*, 404 S.W.3d at 606.

Accordingly, we overrule appellant's sole issue.

CONCLUSION

We affirm the trial court's judgment.

William J. Boyce
Justice

Panel consists of Justices Boyce, Busby and Wise.
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