In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00376-CR

JEREME RAYMOND BARRERA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the Criminal District Court 1
Tarrant County, Texas
Trial Court No. 1439973D, Honorable Elizabeth H. Beach, Presiding

June 22, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Appellant Jereme Raymond Barrera appeals from his conviction by jury of the second-degree felony offense of sexual assault[1] and the resulting sentence of five years of imprisonment. In a single appellate issue, appellant contends his trial counsel was ineffective at the punishment stage of his trial. We will affirm.

[1] TEX. PENAL CODE ANN. § 22.011(a)(1) (West 2018).

Background

The events that led to appellant's prosecution occurred during a visit appellant and his wife made to his best friend, Kevin, and Kevin's girlfriend, Sarah. On one evening, the four went to several bars as part of his friend's job promoting the products of a beer company. They all drank heavily. The four returned to the apartment in the early morning hours. Appellant and his wife slept on an air mattress in the living room while Kevin and Sarah slept in their bedroom. As was her custom, Sarah slept nude. At some point during the night, Sarah woke up because she felt something make contact with her breast and then her vagina. She then felt her hand pulled to touch a penis. She testified that although the room was dark, she recognized the silhouette as that of appellant. Kevin was sound asleep next to her and she was able to awake him only with some effort. Appellant testified. He acknowledged the sexual contact occurred but told the jury Sarah initiated it.

After appellant was found guilty of sexually assaulting Sarah, his trial counsel presented several witnesses during the punishment phase. Counsel's strategy was to show appellant was a proper candidate for probation. The jury sentenced him to a term of imprisonment of five years. This appeal followed.

Analysis

During the punishment phase of trial, the State re-urged the evidence it presented during the guilt-innocence phase. It also re-called Sarah and a Tarrant County probation officer.

At the time of the offense, appellant was serving on active duty in the United States Air Force. During the guilt-innocence phase, appellant testified he was discharged from the Air Force before trial.

In the punishment phase, appellant's counsel presented the testimony of eight witnesses, including appellant's father, his mother, his grandmother, his grandfather and two of his friends. His complaint on appeal focuses on three of the witnesses, appellant's father and his two friends. While they all testified appellant was a good candidate for probation, the State elicited from them evidence that appellant contends led the jury to deny him probation. He contends his trial counsel was ineffective "by sponsoring witnesses who were highly damaging to his plea for probation."

To prevail on a claim of ineffective assistance of counsel, an appellant must meet the two-pronged test established by the U.S. Supreme Court in *Strickland*. *Lopez v. State*, 343 S.W.3d 137, 142-43 (Tex. Crim. App. 2011) (citing *Strickland v. Washington,* 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Hernandez v. State,* 726 S.W.2d 53, 57 (Tex. Crim. App. 1986)). Appellant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Lopez,* 343 S.W.3d at 142. Unless appellant can prove both prongs, an appellate court must not find counsel's representation to be ineffective. *Id.* (citation omitted). In order to satisfy the first prong, appellant must prove, by a preponderance of the evidence, that trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. *Id.* To prove prejudice, appellant must show that there is a reasonable probability, or a probability

sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different. *Id.* (citations omitted).

An appellate court must make a "strong presumption that counsel's performance fell within the wide range of reasonably professional assistance." *Lopez,* 343 S.W.3d at 142 (citation omitted). In order for an appellate court to find that counsel was ineffective, counsel's deficiency "must be affirmatively demonstrated in the trial record; the court must not engage in retrospective speculation." *Id.* (citation omitted). "It is not sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence. When such direct evidence is not available, we will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined." *Id.* at 143 (citations omitted). In assessing effective assistance of counsel, an appellate court must review the totality of the representation and the circumstances of each case without the benefit of hindsight. *Id.* (citation omitted).

Claims of ineffective assistance of counsel are generally not successful on direct appeal and are more appropriately argued in a hearing on an application for a writ of habeas corpus. *Id.* (citation omitted). On direct appeal, the record is usually inadequately developed and "cannot adequately reflect the failings of trial counsel" for an appellate court "to fairly evaluate the merits of such a serious allegation." *Id.* (citation omitted). Unlike other claims rejected on direct appeal, claims of ineffective assistance of counsel rejected due to lack of adequate information may be reconsidered on an application for a writ of habeas corpus. *Id.* (citations omitted).

Appellant first argues his counsel provided ineffective assistance of counsel in calling his father and two friends because their testimony on cross examination led the jury to deny probation in favor of sentencing him to five years of imprisonment. He points out his father's testimony, contrary to appellant's own motion in limine, revealed to the jury appellant's mental health issues, instances of insubordinate and disrespectful conduct with his military superiors, alleged extraneous offenses, and instances in which appellant incurred injuries under suspicious circumstances.

Appellant's two friends testified that appellant would be a good candidate for probation. Appellant complains on appeal, however, of their responses to one question asked both men on cross examination. In response to the question, both friends responded negatively when asked if they would ask the jury to place a man on probation if that man had sexually assaulted their wives. Appellant contends those responses also led the jury to sentence him to imprisonment rather than place him on probation.

In making his argument on appeal, appellant compares his situation to that presented in *Prine v. State,* 494 S.W.3d 909, 924 (Tex. App.—Houston [14th Dist.] 2016), *rev'd by* 537 S.W.3d 113 (Tex. Crim. App. 2017). The Court of Criminal Appeals reversed that decision after appellant filed his appellate brief. Prine sought a probated sentence but was sentenced to a term of imprisonment of twenty years and a fine of $8000. On appeal, Prine made the same contention appellant now presents: "his appointed trial counsel was ineffective during the punishment phase of trial because he opened the door to admission of an extraneous offense that resulted in a more severe punishment by the jury." *Prine,* 537 S.W.3d at 116. Witnesses Prine's counsel called testified he had a sexual relationship with a 15-year-old girl who babysat his children. *Id.* Their testimony

also showed Prine had a child with the babysitter. The court of appeals concluded trial counsel provided ineffective assistance because there was "no reasonable trial strategy [that] can account for these errors, and appointed counsel's actions fell outside the wide range of reasonable and professional assistance." *Prine,* 494 S.W.3d at 924 (citation omitted). The Court of Criminal Appeals disagreed, concluding the "defense attorney faced a dilemma in the punishment phase of this case." *Prine,* 537 S.W.3d at 118. The "facets of that dilemma" were "not fully revealed by the record" and it was therefore "impossible to say that [counsel's] decision to call these witnesses" and subject them to cross-examination "was so unreasonable that no other attorney would have made the same decision." *Id.* The Court found that without a more fully developed record, the court of appeals erred in holding the attorney was ineffective as a matter of law. *Id.*

We too are unable to find counsel ineffective as a matter of law on the record before us. Appellant concedes that "until the punishment phase of the case, trial counsel appeared to have an excellent command of the facts and the rules of evidence and procedure." But, he contends, counsel nevertheless provided ineffective assistance during the punishment stage. This Court and other Texas courts have recognized that counsel's "decision whether to present witnesses is largely a matter of trial strategy." *Gaston v. State,* 136 S.W.3d 315, 322 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd) (citation omitted); *see Beard v. State*, 243 S.W.3d 783, 785 (Tex. App.—Amarillo 2007, pet. ref'd) (citing *Gaston*).

Appellant was living with his parents at the time of trial. Appellant's father, who was a veteran of some twenty-six years of military service, testified to his opinion that his son would take the requirements of probation seriously. He testified to appellant's strong

work ethic, his performance of challenging and important service in the military, his rapid advancement while doing so, and his receipt of commendations including the Air Force Achievement Medal. He described the difficulties appellant and his wife faced before their separation caring for their quadruplets while meeting their other responsibilities. Appellant's father also told the jury that appellant was suffering from depression, post-traumatic stress disorder and anxiety, and said he and appellant's mother were committed to helping appellant rebuild his life. He supported his son by attending support groups with him.

As noted, however, on cross examination, the father was asked about actions that cast doubt on appellant's willingness to abide by restrictions, and emphasized his sometimes-insubordinate and aggressive conduct. The cross examination also suggested appellant had been less than forthcoming regarding an incident in which appellant claimed he was stabbed by an intruder, and another in which appellant was shot with his service weapon after allegedly fighting with a home intruder. Appellant argues his trial counsel was ineffective for calling his father to testify on his behalf because by doing so, the jury heard testimony that cast him in a negative light.

Appellant's father's testimony may have painted appellant in a poor light to the jury in some respects, but, especially coming from a person with his background and his demonstrated willingness to help his son, the father's opinion appellant nonetheless was a good candidate for probation also had the potential to impress the jury. Appellant's friends also provided positive testimony for appellant. And, while the jury decided not to place appellant on probation, it sentenced appellant to five years of imprisonment, a term at the low end of the statutory range. *See* TEX. PENAL CODE ANN. § 12.33 (applicable

punishment range is a term of imprisonment for not less than two years or more than twenty years and a fine not to exceed $10,000).

Here, like in *Prine,* the record does not illustrate counsel's reasons for calling these particular witnesses. *Prine,* 537 S.W.3d at 118. Appellant's claims of ineffective assistance of counsel thus are not firmly founded in the record. *Lopez*, 343 S.W.3d at 143. Consequently, appellant has failed to satisfy the first prong of the *Strickland* analysis.

Appellant contends also trial counsel was ineffective because he failed to thoroughly interview all the witnesses before calling them to testify at trial. Appellant makes the assumption that his counsel did not interview the witnesses on the basis that if counsel had done so, he would not have put appellant's father and his two friends on the stand.

Trial counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Hamilton v. State,* No. 14-02-00072-CR, 2003 Tex. App. LEXIS 7055, at * 8 (Tex. App.—Houston [14th Dist.] August 19, 2003, pet. ref'd) (mem. op., not designated for publication) (citation omitted). Although appellant assumes his counsel did not interview the witnesses prior to calling them to testify, there is no indication in the record that counsel did not do so. Counsel clearly knew enough about these witnesses to know each had knowledge of appellant with the potential to influence the jury toward a favorable sentencing decision. The fact they also knew information that could cast him in a negative light is not sufficient to presume counsel did not thoroughly interview them prior to trial and is certainly not

sufficient to overcome the presumption that counsel made a strategic decision to call them. Counsel could have concluded that the positive impact of the witnesses outweighed the negative and outweighed the detriment of not calling them at all. The "fact that counsel's decision, viewed in hindsight, may not have been the best strategy is of no consequence." *Davis v. State,* Nos. 01-11-00216-CR, 01-11-00217-CR, 01-11-00218-CR, 01-11-00219-CR, 2013 Tex. App. LEXIS 1452, at *29 (Tex. App.—Houston [1st Dist.] Feb. 14, 2013, pet. ref'd) (mem. op., not designated for publication) (citation omitted).

Lastly, appellant argues counsel was ineffective because he failed to object to the prosecutor's questions that led to damaging responses and the admission of inadmissible hearsay. The State responds by pointing to instances in which counsel did raise objections. We agree the record can be seen to reflect counsel's strategic decisions when to object and when to refrain from objecting. In the absence of evidence explaining trial counsel's actions, a court should find counsel ineffective only if his conduct was "so outrageous that no competent attorney would have engaged in it." *Prine*, 537 S.W.3d at 117 (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). Courts have noted a permissible strategy of presenting a defendant as "open and forthright" and "not attempting to conceal any evidence from the jury." *Andrews v. State,* No. 06-07-00044-CR, 2007 Tex. App. LEXIS 7217, at *17-18 (Tex. App.—Texarkana Sept. 5, 2007, no pet.) (mem. op., not designated for publication). Because the record is silent as to counsel's reasons for allowing the testimony, appellant has failed to overcome the presumption that counsel was following a reasonable strategy. We will not find counsel ineffective on that basis on this record. *Thompson v. State,* 9 S.W.3d 808, 813-14 (Tex.

Crim. App. 1999) (“any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness”).

Appellant has failed to satisfy his burden under *Strickland.* We overrule his sole issue on appeal.

Conclusion

Having resolved appellant’s appellate issue against him, we affirm the judgment of the trial court.

James T. Campbell
Justice

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