In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-10-00065-CR

BILLY CARLON HATHORN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 159th Judicial District Court
Angelina County, Texas
Trial Court No. 28,904

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Having pled guilty to one count of aggravated sexual assault of a child and "no contest" to two counts of indecency with a child, Billy Carlon Hathorn stood before the trial court in Angelina County[1] for punishment to be assessed. After Hathorn's trial counsel objected to parts of the presentence investigation (PSI) report, the court sustained the objection and expressly stated it would not consider the objected-to portions of the report. The trial court sentenced Hathorn to thirty-five years' imprisonment for the aggravated sexual assault and to fifteen years for each count of indecency. The sentences for indecency were to be served concurrently as to each other, but consecutively as to the sentence for aggravated assault—effectively, fifty years' total confinement.

On appeal, Hathorn argues that the trial court erred in ordering the indecency sentences to be served consecutively to the aggravated-assault sentence and that his trial counsel was ineffective in failing to move to recuse the trial judge or to allow Hathorn to review the PSI report.

We affirm the trial court's judgment because: (1) Hathorn failed to preserve his objection to his sentencing, (2) trial counsel's decision not to seek recusal was not unreasonable, and (3) there is insufficient evidence that Hathorn failed to review the PSI report.

[1]Originally appealed to the Twelfth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (Vernon 2005). We are unaware of any conflict between precedent of the Twelfth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

(1) Hathorn Failed to Preserve His Objection to His Sentencing

Hathorn argues that the trial court's ordering the indecency sentences to be served consecutively after the aggravated assault sentence is excessive, cruel, and unusual punishment.

To preserve such complaint for appellate review, Smith must have presented to the trial court a timely request, objection, or motion that stated the specific grounds for the desired ruling, or the complaint must be apparent from the context. *See* TEX. R. APP. P. 33.1(a)(1); *Harrison v. State*, 187 S.W.3d 429, 433 (Tex. Crim. App. 2005); *Williams v. State*, 191 S.W.3d 242, 262 (Tex. App.—Austin 2006, no pet.) (claims of cruel and unusual punishment must be presented in timely manner); *Nicholas v. State*, 56 S.W.3d 760, 768 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (failure to complain to trial court that sentences were cruel and unusual waived claim of error for appellate review).

We have reviewed the records of the trial proceeding. No relevant request, objection, or motion was made. And, while this Court has held that a motion for new trial is an appropriate way to preserve this type of claim for review (*see Williamson v. State*, 175 S.W.3d 522, 523–24 (Tex. App.—Texarkana 2005, no pet.), and *Delacruz v. State*, 167 S.W.3d 904 (Tex. App.—Texarkana 2005, no pet.)), no motion for new trial was filed. Hathorn has not preserved this issue for appeal.

(2) Trial Counsel's Decision Not to Seek Recusal Was Not Unreasonable

Ineffective assistance of counsel claims are evaluated under the two-part test formulated by the United States Supreme Court in *Strickland v. Washington*, requiring a showing of both deficient performance and prejudice. 466 U.S. 668, 689 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *Fox v. State*, 175 S.W.3d 475, 485 (Tex. App.—Texarkana 2005, pet. ref'd). First, Hathorn must show that his counsel's representation fell below an objective standard of reasonableness.[2] *Fox*, 175 S.W.3d at 485 (citing *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000)). We indulge a strong presumption that counsel's conduct falls within the wide range of reasonable, professional assistance, and was motivated by sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). The second *Strickland* prong requires a showing that the deficient performance prejudiced the defense to the degree that there is a reasonable probability that, but for the attorney's deficiency, the result of the trial would have been different. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. Failure to satisfy either prong of the *Strickland* test is fatal. *Ex parte Martinez*, 195 S.W.3d 713, 730 (Tex. Crim. App. 2006).

[2]The presumptions and standards of proof of *Strickland* apply to the punishment phase as well as to the trial stage of criminal proceedings. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986).

A *Strickland* claim must be "firmly founded in the record" and "the record must affirmatively demonstrate" the meritorious nature of the claim.[3] *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005); *Thompson*, 9 S.W.3d at 813. Under this standard, a claimant must prove that counsel's representation so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686.

During the punishment hearing, Hathorn objected to attachments 6 and 7 and pages 2–4 of the PSI report on the grounds that they included unadjudicated and unproven extraneous offenses, that they included information in violation of the confrontation clause, and that they were improperly included without permission from the jurisdiction of the extraneous offenses. The State argued that the trial court could consider the extraneous unadjudicated offenses referenced in the PSI report for punishment purposes even though they amount to hearsay and no permission had been obtained.

The trial court pointed out that it had already read the PSI report and asked Hathorn's trial counsel whether he had any recusal concerns if the court were to sustain his objections. When deciding whether to move for recusal, trial counsel stated:

[3]Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision-making as to overcome the presumption that counsel's conduct was reasonable and professional. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001); *Fuller v. State*, 224 S.W.3d 823, 828–29 (Tex. App.—Texarkana 2007, no pet.). In addressing this reality, the Texas Court of Criminal Appeals has explained that appellate courts can rarely decide the issue of ineffective assistance of counsel because the record almost never speaks to the strategic reasons that trial counsel may have considered. The proper procedure for raising this claim is therefore almost always habeas corpus. *Freeman v. State*, 125 S.W.3d 505, 506 (Tex. Crim. App. 2003); *Aldrich v. State*, 104 S.W.3d 890, 896 (Tex. Crim. App. 2003).

> And the question is whether I -- I'm thinking out loud, to some extent. The question would be whether this is a matter of such gravity that it would be difficult, if not impossible, for the Court to not consider these matters in assessing punishment. And I don't know any way to answer that other than I think that there is always that potential danger. I know the Court. I've always found the Court to be extremely fair and able to consider matters, but I guess that would be the best way. I'm not moving to recuse the Court.

The court sustained Hathorn's objections, took judicial notice of those portions of the PSI report that were not objected to, and held that it would "not hear any more concerning whatever would be the subject matter of Attachment[s] 6 and 7, pages 2 through 4" of the report.

Here, we find trial counsel's belief in the fairness and integrity of the trial judge to be a reasonable and sound trial strategy. We review trial counsel's conduct with great deference, without the distorting effects of hindsight. *Thompson*, 9 S.W.3d at 813. Therefore, Hathorn has failed to prove deficient performance, as is required by the first prong of *Strickland*. Accordingly, we overrule this point of error.

(3) There Is Insufficient Evidence that Hathorn Failed to Review the PSI Report

Hathorn argues that his counsel was ineffective "by not allowing him to review the PSI."

Here, Hathorn points out that there is no evidence in the record indicating that he reviewed the PSI report. On the other hand, nothing in the record affirmatively demonstrates that Hathorn failed to review the report, let alone that his trial counsel prevented him from doing so. When facing a silent record, we will not speculate as to counsel's tactics or reasons for taking or not taking certain actions. *See Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007); *see also*

Thompson, 9 S.W.3d at 814 (if record is silent as to reasons for attorney's particular course of action, we are compelled to find that defendant did not rebut the presumption). When faced with such a silent record and in the lack of anything that would indicate such completely ineffective assistance as could be shown without such a record, we overrule the point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 15, 2010
Date Decided: July 30, 2010

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