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

No. 06-17-00119-CR

JOSHUA CLAYTON STREED, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 124th District Court
Gregg County, Texas
Trial Court No. 46019-B

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

MEMORANDUM OPINION

After Joshua Clayton Streed engaged in repeatedly placing unwanted telephone messages to a woman, posting intimate photographs of her on social media sites, and soliciting someone to attack or slay the woman (eventually driving the woman to engage in self-mutilation which was sufficiently serious to require her hospitalization), he was charged with stalking the woman.[1]

Streed agreed to enter an open guilty plea, and the trial court sentenced him to seven years' confinement.[2] Streed now contends on appeal that his trial counsel rendered ineffective assistance. If Streed's plea was entered as a result of ineffective assistance of counsel, it would render entry of the guilty plea involuntary. *See Ex parte Harris*, 596 S.W.2d 893, 894 (Tex. Crim. App. 1980) (orig. proceeding).[3] A defendant is "entitled to effective assistance of counsel during the plea bargaining process." *Hart v. State*, 314 S.W.3d 37, 40 (Tex. App.—Texarkana 2010, no pet.) (citing *Ex parte Battle*, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991) (orig. proceeding)). "A plea of guilty is not knowingly and voluntarily entered if it is made as a result of ineffective assistance of counsel." *Id.* (quoting *Ex parte Burns*, 601 S.W.2d 370, 372 (Tex. Crim. App. 1980) (orig. proceeding)).

However, because we find that the record does not support Streed's allegation of ineffective assistance of counsel, we affirm the trial court's judgment and sentence.

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[1]*See* TEX. PENAL CODE ANN. § 42.072(b) (West 2016).

[2]In sentencing Streed, the court pointed out that Streed evinced no concern for the victim in his testimony and opined, "The jury would have assessed [Streed's] punishment at ten years[']confinement."

[3]"No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary." TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (West Supp. 2017).

I. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient and (2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). These two factors are often called "the *Strickland* test." Failure to satisfy either prong of the *Strickland* test is fatal. *Ex parte Martinez*, 195 S.W.3d 713, 730 n.14 (Tex. Crim. App. 2006). Thus, we need not examine both *Strickland* prongs if one cannot be met. *Strickland*, 466 U.S. at 697.

In order to be successful, a claim of ineffective assistance of counsel must be firmly rooted in the record, with the record itself affirmatively demonstrating the alleged ineffectiveness. *Lopez v. State*, 343 S.W.3d 137, 142–43 (Tex. Crim. App. 2011).

We indulge a strong presumption that counsel's conduct falls within the wide range of reasonable, professional assistance and that it was motivated by sound trial strategy.[4]

When evaluating the voluntariness of a guilty plea, we consider the entire record. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (per curiam). "When the record shows that the defendant received an admonishment on punishment, it is a prima facie showing that the plea was knowing and voluntary." *Edwards v. State*, 921 S.W.2d 477, 479 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (citing *Ex parte Williams*, 704 S.W.2d 773, 775 (Tex. Crim. App. 1986) (orig. proceeding)). "Once a defendant has pled guilty and attested to the voluntary nature of his plea, he bears a heavy burden at a subsequent hearing to demonstrate a lack of

[4]*See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

voluntariness." *Ybarra v. State*, 93 S.W.3d 922, 925 (Tex. App.—Corpus Christi 2002, no pet.). "Ineffective assistance of counsel claims are not built on retrospective speculation; they must 'be firmly founded in the record.' That record must itself affirmatively demonstrate the alleged ineffectiveness." *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). An allegation of ineffective counsel will be sustained only if it is firmly founded and the record affirmatively demonstrates counsel's alleged ineffectiveness. *Ex parte McWilliams*, 634 S.W.2d 815, 819 (Tex. Crim. App. 1980) (citing *Harrison v. State*, 552 S.W.2d 151 (Tex. Crim. App. 1977), *overruled on other grounds by Hurley v. State*, 606 S.W.2d 887 (Tex. Crim. App. [Panel Op.] 1980)).

II. Analysis

Indicted for the third degree felony of stalking, Streed faced a sentence of imprisonment for a period between two to ten years, and there was a possibility that his sentence could be suspended in favor of community supervision (hereafter called "probation" or a "probated sentence"). Before trial, Streed filed an application for a probated sentence. At the hearing on Streed's motion for new trial, Streed testified that his trial counsel, Steve Kattner, never told him that he faced the possibility of actual penitentiary time as the result of a conviction. According to Streed, the first time he ever heard any reference to his being sentenced to a term in the penitentiary was when the State asked for a seven-year sentence in its closing arguments. He also said Kattner never conveyed to him a plea bargain offer from the State.

Streed's parents echoed this view in their testimony. Streed's mother testified that she and her husband hired Kattner to represent their son. She said Kattner assured them that Streed would receive a probated sentence. She described a moment when she was "upset and crying" and

Kattner rubbed her arm and said, "Do not worry. Your baby boy is not going to the penitentiary." Mrs. Streed felt Kattner's approach to the case was "[v]ery casual" and "disinterested," and she did not believe he investigated the case sufficiently. Streed's father said that his son had complained, during the pendency of the case, that his attorney neither talked to him enough nor sufficiently investigated the case. The father said that he was "shocked" when, during a break in the plea hearing, Kattner informed the family that Streed could be sentenced to serve time in prison, because Kattner had assured him and his wife (almost to the point that they felt it was a guarantee), from the time they hired him, that their son would receive a probated sentence. Both parents testified that their son had "comprehension" difficulties, although he had never been diagnosed or treated for any cognitive limitation. Streed (who was a high school graduate) was twenty years old when he pled guilty.

Kattner contested Streed's view of events. Kattner testified that he had relayed to Streed the State's plea bargain offer of seven years' confinement but that Streed had rejected it. He also testified that he told Streed that "the State wanted him to go to the penitentiary." He did not, though, say when he made those statements to Streed. Kattner said he met with Streed on three separate occasions to discuss the case. Kattner knew of no comprehension problems on Streed's part. He did, though, have a "violence assessment" done by a Dr. French. Kattner said that examination "came out favorably in [Streed's] behalf" and that it was attached to the presentence investigation report reviewed by the trial court. Kattner said he thought Streed "got a raw deal." He felt there was "[n]o way" Streed should have been sentenced to prison time. Concerning his representation of Streed, he said, "In retrospect? No, I didn't do enough. I guess you could call a

hundred cases - - I made decisions and here we are. If I had to do it over, I would do it totally different." Kattner, however, did not articulate what he would have done differently. When asked if he believed he rendered effective assistance to Streed, Kattner answered, "With the result, no." He said he did not think he had done his "best." "You never do your - - I mean, there is no end to what you can do," Kattner said. The same prosecutor that represented the State at the plea hearing questioned Kattner at the new trial hearing. That prosecutor conceded that he and Kattner had gone "round and round" "many times" in the months before the plea hearing. Kattner described the plea negotiations with the State as "heated." Kattner estimated that he and the prosecutor discussed the case "six, eight . . . several times." Kattner even pressed his case to the prosecutor's supervisor.

At the hearing on Streed's motion for a new trial, he was confronted with the information he had provided the trial court when he entered his plea, affirming that he had represented to the trial court that he was, indeed, guilty and that he had entered a guilty plea for no reason other than his guilt. He also affirmed that he signed the plea documents (which included a recommendation by the State that he be sentenced to serve seven years' imprisonment) wherein he had requested that the trial court defer adjudication and place him on community supervision. He represented to the trial court that he had reviewed the available evidence with attorney Kattner and had been granted ample time to do so. The clerk's record contains a plea bargain agreement, dated May 19, 2017, the day of the open plea hearing.

However, according to Streed's testimony at the motion for new trial hearing, he had not been honest in answers to the trial court's admonishments when given to him during the plea

hearing, claiming not to have understood what was occurring at his plea hearing, saying that its only possible outcome was for him to receive a probated sentence. Streed acknowledged that the trial court had asked Streed at the plea hearing whether he had read the plea papers that he had signed, that he understood the potential length of the sentence and the fact that although the trial court was obligated to consider probation, it was not required to grant it. However, Streed told the trial court, at the new trial hearing, he had not been honest with the court at the plea hearing.

> Q. [By the court] Okay. I asked you a question if you had gone over the evidence with your lawyer and you said yes.
>
> A. [By Streed] No. No. I never went over the evidence with my lawyer.
>
> Q. So you were not honest with me at the hearing.
>
> A. Correct.

A few minutes later the court resumed his questioning of Streed.

> Q. [By the court] And what was your answer to me when I asked you if you went over the evidence contained in this document [the plea papers and stipulation of evidence] with your attorney?
>
> A. [By Streed] At the time, I said yes.
>
> Q. So that was not the truth? According to you now that is not the truth?
>
> A. Correct. I was involuntary and into it. I mean - -
>
> Q. Okay. Well, let's go to that.
>
> A. Okay.
>
> Q. Do you recall the Court telling you that I didn't want you to plead guilty if you weren't guilty?

A. Correct.

Q. I told you that probably on several occasions, didn't I?

A. Correct.

Q. I also explained to you what the range of punishment was, did I not?

A. Yes, sir, you did.

Q. And I told you that I could sentence you from anywhere from two years up to ten years?

A. Yes, Your Honor.

Q. Further, that I was bound to consider probation but I did not have to grant probation.

A. Yes, Your Honor.

Q. And I asked you if you understood that?

A. Yes, Your Honor.

Q. You never told me that you had any concerns about that, did you?

A. No.

The trial court was left to sort out whether Streed had been truthful at the plea hearing, whether he was being truthful at the new trial hearing, or whether there was some truth and some fiction in Streed's testimony in each. The trial court (being in a position to determine Streed's demeanor at both hearings) was in a good position to weigh the evidence and make such a determination. The trial court apparently believed that Streed had been candid and truthful at the plea hearing and that his recantation was prompted more by the stark reality of his impending imprisonment than by an independent revelation of overwhelming belief in the truth.

Notwithstanding Kattner's own self-criticisms, we find no evidence of deficient performance on his part in his representation of Streed. It is apparent that Kattner spoke several times with the prosecutor's office, including the supervisor of the State's trial counsel. From the characterization of those talks as "heated" and going "round and round," we find that Kattner apparently was zealously advocating for his client. The extent of Kattner's belief that Streed's case warranted community supervision, or his relation of that opinion to Streed and his family, does not reflect a diminution of the effectiveness of his efforts. The credibility of all the witnesses and their varying descriptions of what Kattner said or did were for the court to reconcile. *See Joseph v. State*, 897 S.W.2d 374, 376 (Tex. Crim. App. 1995) ("The trial judge, when sitting as the sole trier of facts, is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony.").

In this case, we need not presume a viable trial strategy. Kattner explained the strategy he employed (or at least his efforts to convince the State of what sentence his client's conduct merited). It is uncontroverted that Katter met at least three times in person with Streed. Based on Streed's answers at the plea hearing, Kattner had explained the case to Streed, including the State's evidence and the range of punishment which Streed could face. Streed's appellate attorney criticized Kattner's failure to present testimony at the plea hearing from an Officer Glen Derr. We fail to see that Kattner's decision not to call Derr as a witness at the plea hearing would equate to deficient representation.[5]

[5]Derr's only relevant testimony was that he had known Streed from 2005 to 2009 and that the conduct described in Streed's 2016 stalking offense was "out of character" with what Derr had known of Streed.

Failure of the first *Strickland* prong defeats a claim of ineffective assistance of counsel. Because Streed received effective assistance of counsel, his plea of guilty to the trial court was voluntary. We overrule Streed's point of error.

We affirm the trial court's judgment and sentence.

Bailey C. Moseley
Justice

Date Submitted: April 12, 2018
Date Decided: May 1, 2018

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