NO. 12-11-00005-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST	***§***	***APPEAL FROM THE***
OF L.D.G.,	***§***	***COUNTY COURT AT LAW #2***
A CHILD	***§***	***ANGELINA COUNTY, TEXAS***

MEMORANDUM OPINION

J.Y. appeals the termination of her parental rights. In one issue, J.Y. challenges the order of termination. We affirm.

BACKGROUND

J.Y. is the mother of L.D.G., born August 1, 2009. T.G., Jr.[1] is the father of L.D.G., but is not a party to this appeal. When L.D.G. was approximately four months old, the Department of Family and Protective Services (the Department) filed an original petition for protection of L.D.G., for conservatorship, and for termination of J.Y.'s parental rights. The Department was appointed temporary managing conservator of L.D.G., and J.Y. was appointed temporary possessory conservator. At the conclusion of the trial on the merits, the trial court found, by clear and convincing evidence, that J.Y. had engaged in one or more of the acts or omissions necessary to support termination of her parental rights pursuant to Section 161.001(1) of the Texas Family Code. The trial court also terminated J.Y.'s parental rights based on four mental health grounds set forth in Section 161.003 of the Texas Family Code. Finally, the trial court determined that termination of the parent-child relationship between J.Y. and L.D.G. was in the child's best interest. Based on these findings, the trial court ordered that the parent-child relationship between J.Y. and L.D.G. be terminated. This appeal followed.

[1] On July 5, 2010, T.G., Jr. signed an unrevoked or irrevocable affidavit of voluntary relinquishment of parental rights to the Texas Department of Family and Protective Services. Accordingly, on April 11, 2011, the trial court ordered the termination of his parent-child relationship with L.D.G.

INEFFECTIVE ASSISTANCE OF COUNSEL

In her sole issue on appeal, J.Y. contends that her trial counsel did not provide meaningful assistance or effective assistance.

Standard of Review

In reviewing an ineffective assistance of counsel claim in a parental rights termination case, we apply the United States Supreme Court's two pronged test in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). ***In re M.S.***, 115 S.W.3d 534, 545 (Tex. 2003). Under the first prong of the ***Strickland*** test, an appellant must show that counsel's performance was "deficient." ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064; ***Tong v. State***, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064. To be successful, an appellant must "show that counsel's representation fell below an objective standard of reasonableness." ***Id.***, 466 U.S. at 688, 104 S. Ct. at 2064; ***Tong***, 25 S.W.3d at 712.

Under the second prong, an appellant must show that the "deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687, 104 S. Ct. at 2064; ***Tong***, 25 S.W.3d at 712. The appropriate standard for judging prejudice requires an appellant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068.

The review of trial counsel's representation is highly deferential. ***Tong***, 25 S.W.3d at 712. We indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065. It is the appellant's burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065; ***Tong***, 25 S.W.3d at 712. Moreover, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. ***Thompson v. State***, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Failure to make the required showing of either deficient

performance or sufficient prejudice defeats the ineffectiveness claim. ***Id.*** The appellant must prove both prongs of the ***Strickland*** test by a preponderance of the evidence in order to prevail. ***Tong***, 25 S.W.3d at 712.

Analysis

First, J.Y. argues that her trial counsel failed to provide meaningful representation in defending against termination of her parental rights based on four mental health grounds under Section 161.003(a)[2] of the Texas Family Code. Therefore, she contends, we should apply ***United States v. Cronic***, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), rather than ***Strickland*** in analyzing her complaint about her counsel. In ***Cronic***, the Court identified three situations implicating the right to counsel that involved circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." ***Bell v. Cone***, 535 U.S 685, 695, 122 S. Ct. 1843, 1850, 152 L. Ed. 2d 914 (2002) (quoting ***Cronic***, 466 U.S. at 658-59, 104 S. Ct. at 2046-47). These three situations occur when (1) the accused is denied the presence of counsel at a critical stage of her trial, (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, or (3) circumstances at trial are such that, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. ***Cronic***, 466 U.S. at 659-60, 104 S. Ct. at 2047.

J.Y. contends that ***Cronic*** applies because her trial counsel did not provide any defense to the issue of her mental health, and entirely failed to subject the prosecution's case regarding Section 161.003(a) to meaningful adversarial testing. Thus, she argues, she does not need to prove prejudice. However, the differences in the ***Strickland*** and ***Cronic*** standards are not of degree, but of kind. ***Bell***, 535 U.S. at 697, 122 S. Ct. at 1851. In other words, the standards distinguish between shoddy representation and no defense at all. ***Childress v. Johnson***, 103 F.3d 1221, 1229

[2] Under Section 161.003(a), the court may order termination of the parent-child relationship in a suit filed by the Department of Protective and Regulatory Services if the court finds that (1) the parent has a mental or emotional illness or mental deficiency that renders the parent unable to provide for the physical, emotional, and mental needs of the child; (2) the illness or deficiency, in all reasonable probability, proved by clear and convincing evidence, will continue to render the parent unable to provide for the child's needs until the 18th birthday of the child; (3) the department has been the temporary or sole managing conservator of the child of the parent for at least six months preceding the date of the hearing on the termination held in accordance with Subsection (c); (4) the department has made reasonable efforts to return the child to the parent; and (5) the termination is in the best interest of the child. *See* TEX. FAM. CODE ANN. § 161.003(a) (West 2008).

(5th Cir. 1997). "[B]ad lawyering, regardless of *how* bad, does not support" applying the ***Cronic*** standard. *See* ***McInerney v. Puckett***, 919 F.2d 350, 353 (5th Cir. 1990). Accordingly, prejudice will be presumed only when the accused can establish that counsel was not merely incompetent but "inert." ***Childress***, 103 F.3d at 1228. Here, J.Y. does not complain that she was denied counsel at a critical stage of her trial or that her trial counsel was "inert," but that he was "inadequa[te]" in addressing her past, current, or future mental health issues with competent medical, psychological, or psychiatric records. Because J.Y. complains of her trial counsel's alleged errors, omissions, or strategic decisions in her defense, i.e., incompetence, we decline to apply the ***Cronic*** standard to this case.

Next, J.Y. argues that her trial counsel failed to provide effective representation because he (1) did not address her past, current, or future mental health issues with competent medical, psychological, or psychiatric records; (2) offered no recent photograph of J.Y.'s home to show that photographs provided to the court one month before trial were still representative of the home on the day of trial; (3) offered no evidence of J.Y.'s household budget and her ability to repair her home; and (4) did not "retrieve" a letter from J.Y.'s physician at the Burke Center to determine her ability to comply with the service plan.

It is J.Y.'s burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See* ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065; ***Tong***, 25 S.W.3d at 712. Moreover, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See* ***Thompson***, 9 S.W.3d at 813. But J.Y. did not file a motion for new trial and call her trial counsel as a witness to explain his reasoning. *See* ***Bone v. State***, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002) (stating that defense counsel should be given opportunity to explain actions before being condemned as unprofessional and incompetent); *see also* ***Anderson v. State***, 193 S.W.3d 34, 39-40 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding that because appellant did not call his trial counsel during motion for new trial hearing to give reasons for failure to investigate or present mitigating evidence, record does not support ineffective assistance claim). Because the record does not show deficient performance, we conclude that J.Y. has failed to meet the first prong of the ***Strickland*** test. *See* ***Thompson***, 9 S.W 3d at 813.

Even if J.Y. had met the first prong of the ***Strickland*** test, she has failed to show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. J. Y. does not explain in her brief how her trial counsel's alleged failures caused her harm. Instead, she requests that this court abate her appeal and order the trial court to conduct a hearing to determine whether trial counsel's actions or failures to present a defense are meritorious. We decline to do so. *See* ***In re V.V.***, 349 S.W.3d 548, 569-70 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (Keyes, J., concurring in part, and dissenting in part); ***Bone***, 77 S.W.3d at 836.

Because J.Y. failed to show that that the result of the proceeding would have been different if her trial counsel had requested medical, psychological, or psychiatric records, photographs of her home, or evidence of her ability to repair her home, she has failed to meet the second prong of the ***Strickland*** test. *See* ***Strickland***, 466 U.S. at 694, 104 S. Ct. at 2068; ***Tong***, 25 S.W.3d at 712. Therefore, even if she had met the first prong of ***Strickland***, she still could not prevail. *See* ***Ladd v. State***, 3 S.W.3d 547, 570 (Tex. Crim. App. 1999). J.Y.'s sole issue is overruled.

DISPOSITION

Having overruled J.Y.'s sole issue in this appeal, the judgment of the trial court is ***affirmed***.

JAMES T. WORTHEN
Chief Justice

Opinion delivered January 18, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JANUARY 18, 2012

NO. 12-11-00005-CV

IN THE INTERESTOF L.D.G., A CHILD

Appeal from the County Court at Law #2

of Angelina County, Texas. (Tr.Ct.No. CV-42792-09-12)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.