Affirmed and Opinion filed January 25, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01146-CR

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CHARLES JOHN THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 796,001

O P I N I O N

Appellant pled guilty to first degree murder pursuant to a plea agreement. In three points of error, appellant complains (1) the trial court failed to properly admonish him before accepting his guilty plea and (2) his attorney provided ineffective assistance of counsel. We affirm.

I. PROCEDURAL BACKGROUND[1]

Appellant was charged by indictment with the felony offense of murder. The indictment contained two enhancement paragraphs alleging prior felony convictions. Appellant waived trial by jury and entered a plea of guilty in accordance with a plea agreement. The trial court sentenced him to forty years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant did not file a motion for new trial.

II. ISSUES PRESENTED ON APPEAL

In three points of error, appellant complains (1) the trial court failed to properly admonish him prior to accepting his plea, and (2) he was denied effective assistance of counsel because his attorney misled him into entering the plea and failed to have the trial court proceedings recorded.

A. Alleged Misrepresentations Regarding Plea Bargain

In his first point of error, appellant contends he was denied effective assistance of counsel, "due to his attorney's misrepresentations and deceit," and that his guilty plea, therefore, was not "knowing and voluntary." Specifically, appellant asserts that his attorney (1) "pressured him to speedily sign the written admonishments so that the trial could commence;" (2) became "agitated" when appellant asked questions about sections of the admonishments; and (3) deceived him into entering the plea agreement by leading him to believe there would be an adversarial hearing before the court in which evidence would be presented concerning the illness suffered by appellant and the deceased, their relationship, and "the emotional factors involved." Appellant further claims his attorney never informed him of the possibility that the trial court could make a deadly weapon finding or that hands could be considered a deadly weapon under Texas law.[2] Appellant asserts that because he was not aware of the nature of the proceedings until they had

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[1] The facts underlying the offense have no relevance to the points appellant raises on appeal.

[2] The "Judgment on Plea of Guilty" contains a provision in which the court may make an affirmative finding regarding whether a deadly weapon was used to commit the crime. In this provision, the court may circle "yes," "no," or "N/A" (for not available or not applicable). Contrary to appellant's assertion, the court did *not* make an affirmative, deadly weapon finding; rather, the court circled "N/A" for this finding.

concluded, his guilty plea was not made knowingly and voluntarily, and is therefore void.

Both the United States and Texas Constitutions guarantee an accused the right to assistance of counsel. *See* U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). This right to counsel includes the right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). The right to counsel extends to the plea bargaining process. *Ex parte Battle*, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991). To prove a plea was involuntary due to ineffective assistance of counsel, appellant must show: (1) counsel's representation or advice fell below objective standards and (2) the deficient performance prejudiced the appellant by causing him to waive his right to a trial. *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Strickland*, 466 U.S. at 688–92; *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970)). An appellant must prove ineffective assistance of counsel by a preponderance of the evidence. *Id.*

Any case analyzing the effective assistance of counsel begins with the strong presumption that counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 772. Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* An appellant cannot meet this burden if the record does not specifically focus on the reasons for trial counsel's conduct. *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or through a motion for new trial. *Kemp*, 892 S.W.2d at 115; *see Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (reiterating that when counsel is allegedly ineffective because of errors of omission, collateral attack is the better vehicle for developing an ineffectiveness claim). When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would cause the court to engage in mere, and unnecessary, speculation. *McCoy v. State*, 996

S.W.2d 896, 900 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (citing *Jackson*, 877 S.W.2d at 771–72).

In this case, the record is silent as to the advice defense counsel gave appellant and counsel's rationale, if any, underlying that advice. Appellant did not file a motion for new trial or a habeas corpus petition and, therefore, failed to develop evidence of trial counsel's strategy. Moreover, appellant does not direct us to any portion of the appellate record from which we can decide "whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." Accordingly, we overrule appellant's first point of error.

B. Failure to Request Court Reporter

In his second point of error, appellant claims his attorney was ineffective for failing to ensure that his plea and the court's admonishments would be transcribed for the record. Specifically, appellant complains that his attorney failed to request that the "hearing and plea colloquy" be recorded by a court reporter. Appellant argues that this failure prevents him from challenging the court's admonishments and "the lack of a record of the proceedings" on appeal.

Because the record is devoid of any reference to why appellant's trial counsel failed to request that a court reporter record the plea proceedings, appellant has failed to rebut the presumption that counsel was effective. *See Jackson*, 877 S.W.2d at 771. Therefore, we find appellant has failed to meet the first prong of *Strickland* by demonstrating counsel was deficient for failure to request a court reporter. Appellant's second point of error is overruled.

C. Admonishments

In his third point of error, appellant argues the court committed reversible error in failing to properly admonish him before accepting his guilty plea. Specifically, appellant argues the "court allowed the lawyer of the Appellant to conduct the admonishment of the Appellant outside of the presence of the court." Appellant argues his attorney's review of the written admonishments with him not only circumvented the rule requiring the trial court to give the admonishments but also gave rise to a conflict of interest in his

attorney's representation of him. We presume, although it is unclear from appellant's brief, the argument is that this purported conflict of interest rendered his attorney's assistance ineffective.

While acknowledging that the record reflects his receipt of written admonishments, appellant argues that because there is no transcription of the proceedings, there is no evidence that the trial court gave him any admonishments. Appellant also asserts the "trial court made no inquiry into the existence of a plea bargain agreement or any other matters that would have made the Appellant clearly aware that his attorney and the state had already reached an agreement that he was not aware of."

Before accepting a plea of guilty, a trial court must admonish the defendant in accordance with article 26.13 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 26.13 (Vernon 1989 & Supp. 2000). The purpose of article 26.13 is to assure that a defendant who pleads guilty understands the charges against him and the consequences of his plea. *Basham v. State*, 608 S.W.2d 677, 678 (Tex. Crim. App. 1980); *see* art. 26.13. The trial court may make the admonishments required by article 26.13 either orally or in writing. Art. 26.13(d). If the trial court admonishes a defendant in writing, rather than orally, the court must receive a statement signed by the defendant and his attorney attesting that appellant understands the admonishments and is aware of the consequences of his plea. *Id*.

Appellant signed a document entitled "Admonishments, Statements, and Waivers" which provided, among other things that appellant: (1) waived the right to have the court orally admonish him; (2) appellant had read and understood the written admonishments set out therein; (3) appellant understood the nature of the charge against him and the consequences of his plea and, (4) after consulting with his attorney, requested that the court accept his plea; (5) appellant signed these statements freely, knowingly, and voluntarily; and (6) appellant understood that the possible range of punishment as a habitual offender for the offense charged was "not more than 99 years or less than 25 years in the Institutional Division of the Texas Department of Criminal Justice."

On this record, we find the trial court made the statutorily required admonishments in writing before accepting appellant's guilty plea; that the court received a statement signed by appellant and his attorney

stating that appellant had read and understood the admonishments and was aware of the consequences of his plea; and that appellant waived his right to have the court orally admonish him. Finally, because article 26.13 requires that defense counsel sign a statement attesting that a defendant understands the admonishments and is aware of the consequences of his plea, it was not an "active representation of conflicting interests"[3] for appellant's attorney to discuss with, or even present to, appellant the court's written admonitions. *See Ex parte Morrow*, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997) (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)); art. 26.13(d). Accordingly, appellant's third and final point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 25, 2001.
Panel consists of Justices Yates, Wittig, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Ineffective assistance of counsel may result from an attorney's conflict of interest. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). "An 'actual conflict of interest' exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps his own) to the detriment of his client's interest." *Ex parte Morrow*, 952 S.W.2d 530, 538 (Tex. Crim. App. 1997) (citing *James v. State*, 763 S.W.2d 776, 779 (Tex. Crim. App. 1989)). To demonstrate a violation of his right to the reasonably effective assistance of counsel based on a conflict of interest, appellant must show "(1) that defense counsel was actively representing conflicting interests, and (2) that the conflict had an adverse effect on specific instances of counsel's performance." *Morrow*, 952 S.W.2d at 538 (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)).