Affirmed and Opinion filed April 13, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00945-CR

GILBERT WAYNE BEDFORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 814,138

O P I N I O N

Appellant was charged by information with the felony offense of sexual assault of a child. Appellant waived indictment, waived trial by jury, and entered a plea of guilty with an agreed recommendation as to punishment from the State. The court sentenced appellant according to the plea bargain agreement at confinement in the Institutional Division of the Texas Department of Criminal Justice for eight years.

Appellant's court-appointed attorney has filed a motion to withdraw from representation of appellant along with a supporting brief in which she concludes that the

appeal is wholly frivolous and without merit. The brief meets the requirements of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The brief presents a professional evaluation of the record demonstrating why there are no arguable points of error to be advanced. *See High v. State*, 573 S.W.2d 807, 811 (Tex. Crim. App. 1978).

A copy of counsel's brief was delivered to appellant. Appellant was advised of his right to examine the appellate record and to file a *pro se* response. Appellant has filed a *pro se* response to the *Anders* brief. In a single point of error, appellant claims that his trial counsel was ineffective because he failed to inform appellant that he was charged with a second degree felony and was being sentenced within the range of punishment for a second degree felony. Appellant contends that he was under the false impression that the offense to which he pled was a felony of the first degree and that he was misled due to trial counsel's failure to correct this misunderstanding.

Texas has adopted the *Strickland* standard in evaluating ineffective assistance of counsel claims. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hernandez v. State*, 726 S.W.2d 53 (Tex. Crim. App. 1986). To demonstrate ineffectiveness, an appellant must show his counsel's representation fell below an objective standard of reasonableness and that it was reasonably probable that a different outcome would have resulted had counsel not committed professional error. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). An appellant must show that his counsel was ineffective by a preponderance of evidence on the record. *See Weeks v. State*, 894 S.W.2d 390 (Tex. App.–Dallas 1994, no pet.). An appellant must overcome a strong presumption that trial counsel's performance was effective. *See Moffat v. State*, 930 S.W.2d 823, 826 (Tex. App.–Corpus Christi 1996, no pet.).

When a defendant challenges a guilty plea based on ineffective assistance of counsel, he must prove that (1) counsel's advice was not within the range of competence demanded of attorneys in criminal cases, and (2) but for counsel's errors, he would not have pled guilty

and would have insisted on going to trial. *See Ex parte Pool*, 738 S.W.2d 285, 286 (Tex. Crim. App. 1987). "[The] essential requisite in attacking a plea of guilty on the ground of ineffective assistance of counsel is showing that the plea of guilty was unknowingly and involuntarily entered." *See Ex parte Adams*, 707 S.W.2d 646, 648 (Tex. Crim. App. 1986).

The Texas Code of Criminal Procedure provides that a person commits the offense of sexual assault if the person intentionally or knowingly causes the penetration of the anus or female sexual organ of a child by any means. *See* TEX. PEN. CODE ANN. § 22.011(a)(2)(A) (Vernon Supp. 2000). An offense under this section is a felony of the second degree. *See id.* § 22.011(f). The range of punishment for a second degree felony is imprisonment for two to twenty years and a fine not to exceed $10,000. *See id.* §12.33 (Vernon 1994).

The record does not support appellant's allegation that he was unaware of the proper range of punishment for sexual assault of a child. Appellant waived his right to have a court reporter record his plea. The Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession executed by appellant indicates that appellant fully discussed his case with trial counsel and was satisfied with counsel's representation. The written admonishments in the record contain appellant's handwritten initials indicating his understanding that the range of punishment for the offense of sexual assault of a child is imprisonment for two to twenty years and a fine not to exceed $10,000. Appellant's receipt of the statutory admonishments is *prima facie* evidence that his plea was knowing and voluntary. *See Harrison v. State*, 688 S.W.2d 497, 499 (Tex. Crim. App. 1985). There is no evidence in the record that rebuts the presumption that appellant's plea was voluntary. Additionally, the record does not support appellant's contention that his trial counsel misled him about the range of punishment.

Appellant's claim that he was misinformed by counsel, standing alone, is not enough for us to hold his plea involuntary. *See Fimberg v. State*, 922 S.W.2d 205, 208 (Tex.

App.—Houston [1st Dist.] 1996, pet. ref'd). A claim of ineffective assistance of counsel can be sustained only if it is affirmatively supported by the record. *See Shepherd v. State*, 673 S.W.2d 263, 267 (Tex. App.—Houston [1st Dist.] 1984, no pet.). Such a record is best developed in the context of an evidentiary hearing on application for writ of habeas corpus or motion for new trial. *See Kemp v. State,* 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet, ref'd). Matters not presented in the record provide no basis upon which an appellate court may act. The record before us is devoid of any evidence that the appellant was misled by his trial counsel. There was no motion for new trial and there is no evidence before us showing either that appellant's attorney misinformed him regarding the range of punishment, or that the misinformation, if any, affected appellant's decision to plead guilty. *See Powers v. State,* 727 S.W.2d 313, 316 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd); *Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). To find that trial counsel was ineffective based on these circumstances would call for us to speculate, which we will not do. *See Jackson v. State,* 877 S.W.2d at 771; *Gamble v. State,* 916 S.W.2d at 93; *Davis v. State*, 930 S.W.2d 765, 769 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd). Appellant has not shown that his plea was unknowing and involuntary, nor has he shown that trial counsel's performance fell below an objective standard of reasonableness. We overrule appellant's *pro se* point of error.

Accordingly, the judgment of the trial court is affirmed and the motion to withdraw is granted.

PER CURIAM

Judgment rendered and Opinion filed April 13, 2000.
Panel consists of Justices Amidei, Anderson, and Frost.
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