Affirmed and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00954-CR

SHAWN J. RICHARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 808,775

O P I N I O N

Appellant was charged by indictment with the felony offense of unauthorized use of a motor vehicle. A jury found appellant guilty as charged in the indictment. The trial court assessed punishment at confinement in a state jail facility for sixteen months.

Appellant's court-appointed attorney filed a motion to withdraw from representation of appellant along with a supporting brief in which he 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 for the following reasons: (1) counsel demonstrated a lack of interest in appellant's case, spent insufficient time consulting with appellant prior to trial, and failed to take a statement from a witness; (2) counsel failed to allow appellant to testify in his own defense, against the wishes of appellant; and (3) counsel elected to have the court assess punishment in spite of appellant's desire to have the jury assess punishment.

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). 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.). To demonstrate ineffectiveness, an appellant must show his counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability 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). A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. *See Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App. 1992).

Judicial scrutiny of counsel's performance must be highly deferential. *See Strickland*, 466 U.S. at 689. A reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *See id.* Counsel's performance must be judged by the totality of the representation. *See Chatham v. State*, 889 S.W.2d 345, 349 (Tex. App.–Houston [14th Dist.] 1994, pet. ref'd).

Under the *Strickland* test, the defendant bears the burden of proving ineffective assistance of counsel. *See Jackson*, 877 S.W.2d at 771. Contentions of ineffectiveness must be proved by the accused by a preponderance of the evidence on the record. *See Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993); *Weeks v. State*, 894 S.W.2d 390 (Tex. App.–Dallas 1994, no pet.). Following *Strickland*, we must determine, for each instance of ineffective assistance cited by appellant, whether defense counsel's performance was deficient before we reach the prejudice prong of the *Strickland* test. *See Jackson*, 877 S.W.2d at 771.

First, appellant complains that trial counsel "never showed any interest in the case," "took [the] case lightly because it was a state jail offense," "never came to see his client," and never took a statement from appellant or an unnamed witness or discussed trial strategy with appellant prior to trial. The record is silent as to how many times trial counsel consulted with appellant prior to trial. Appellant fails to show how further meetings with counsel would have benefitted his defense. *See Perrett v. State*, 871 S.W.2d 838, 841 (Tex. App.–Houston [1st Dist.] 1994, no pet.). We cannot assume that, because of the record's silence, appellant's attorney did not adequately consult with his client or otherwise properly prepare for trial.

Additionally, ineffective assistance of counsel is not demonstrated by the alleged failure of counsel to take a statement from a witness because the record contains no indication of who this witness was, whether appellant supplied the name of the witness to counsel prior to trial, whether the witness was willing or available to testify, or what testimony favorable to appellant he could have provided. *See Mallett v. State*, 9 S.W.3d 856, 866 (Tex. App.–Fort Worth 2000, no pet.); *Harling v. State*, 899 S.W.2d 9, 13 (Tex. App.–San Antonio 1995, pet. ref'd). Further, appellant cites nothing in the record to support his assertion that counsel failed to interview witnesses prior to trial. Failure to investigate or interview witnesses is a serious allegation. However, without any evidence in the record establishing the alleged failure to investigate or interview witnesses, it cannot be shown that trial counsel's performance was deficient. *See Johnson v. State*, 691 S.W.2d 619, 627 (Tex. Crim. App. 1984); *Melonson v. State* 942 S.W.2d 777, 781 (Tex. App.–Beaumont 1997, no pet.).

Appellant has not proffered any facts showing that counsel neglected appellant's case. Admittedly, this is often difficult to accomplish on direct appeal. Appellant is free to pursue his claim in a hearing on a petition for habeas corpus where the facts surrounding trial counsel's representation may be developed at an evidentiary hearing. *See Hernandez,* 726 S.W.2d at 57. Indeed, in a case such as this, where the alleged derelictions are errors not evident in the record rather than errors of commission revealed in the record, collateral attack is the method by which a thorough and detailed examination of alleged ineffectiveness may be developed and shown. *See Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999). Because appellant's complaints are unsubstantiated by affirmative facts preserved in the record, no arguable grounds of error are presented.

Appellant's claim that trial counsel was ineffective because of his failure to allow appellant to testify on his own behalf is also without merit. The record is silent regarding whether or not appellant agreed with counsel's decision not to call appellant to testify at trial. Therefore, appellant's allegation is not affirmatively demonstrated in the record and must fail. Further, trial counsel's decision to prevent appellant from testifying could very well have been trial strategy. *See De Los Santos v. State,* 918 S.W.2d 565, 572 (Tex. App.–San Antonio 1996, no pet.). When the record is silent as to counsel's reasons for his actions and a plausible explanation exists, an appellate court presumes that trial counsel made all significant decisions in the exercise of professional judgment and sound trial strategy. *See Valdes-Fuerte v. State,* 892 S.W.2d 103, 111 (Tex. App.–San Antonio 1994, no pet.). As there is no evidence in the instant case to rebut the presumption that counsel's decision was an exercise of trial strategy, no error is presented for review.

Finally, appellant's claim that he did not consent to trial counsel's decision to have the court assess punishment is not supported by the record. The reporter's record reflects that at the beginning of the punishment phase of the trial, trial counsel informed the court that "the defendant moves to change his punishment election to go to the Court for punishment." The court asked appellant, "Is that your wish, to take the case away from the jury and have the Court assess punishment?" Appellant answered in the affirmative. The trial judge then informed appellant about the range of punishment for the offense for which appellant had been found guilty by the jury and told appellant he was not making any promises or

commitments concerning what punishment he would assess. The judge again asked appellant if it was his wish to have the Court assess punishment and appellant again answered in the affirmative. Thus, the record does not support appellant's allegation that the punishment election was without his consent.

Further, appellant has not shown that counsel's advice to go to the judge for punishment was not valid trial strategy. *See Ortiz v. State*, 866 S.W.2d 312, 314 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd). Trial counsel's decision to have the court assess punishment, which was made after the jury found appellant guilty, is consistent with a professional judgment by counsel that the particular jury which was seated would deal more severely with appellant than would the judge, and does not demonstrate ineffective assistance of counsel at trial. *See Padilla v. State*, 889 S.W.2d 1, 2 (Tex. App.–Houston [1st Dist.] 1990, no pet.); *Turcio v. State*, 791 S.W.2d 188, 189 (Tex. App.–Houston [14th Dist.] 1990, pet. ref'd).

Because appellant's assertions concerning alleged ineffectiveness of trial counsel are unsubstantiated by the record, he has presented no arguable grounds for review. Accordingly, counsel's motion to withdraw is granted and the judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed May 18, 2000.
Panel consists of Justices Amidei, Anderson, and Frost.
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