

Affirmed and Opinion filed August 10, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00091-CR

JOSUÉ BAEZ MATA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 787,455**

OPINION

Appellant, Josué Baez Mata, pled guilty to a charge of sexual assault and was sentenced to three years imprisonment. On appeal, he argues that he was denied effective assistance of counsel and that the ineffective assistance caused both his plea and his waiver of the right to trial by jury to be involuntary. We affirm.

To be successful in a claim for ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ramirez v. State*, 987 S.W.2d 938, 942-43 (Tex. App.—Austin 1999,

no pet. h.). In determining whether an appellant has satisfied the first element of the test, we must decide whether the record establishes that counsel made errors so serious that he was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *See Strickland* at 687.

When analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was effective. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994) (en banc). We must presume counsel’s actions and decisions were reasonably professional and were motivated by sound trial strategy. *See id.* Appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* The appellant must demonstrate that counsel’s performance was unreasonable under the prevailing professional norms and that the challenged action was not sound trial strategy. *See id.* at 688, 104 S.Ct. 2052; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App.1991). We do not evaluate the effectiveness of counsel in hindsight, but from counsel’s perspective at trial. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App.1993); *Stafford*, 813 S.W.2d at 506. Further, we assess the totality of counsel’s representation, rather than his isolated acts or omissions. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2052; *Ramirez*, 987 S.W.2d at 943.

The appellant cannot meet his burden if the record does not affirmatively support the claim. *See Jackson v. State*, 973 S.W.2d 954, 955 (Tex. Crim. App. 1998); *Beck v. State*, 976 S.W.2d 265, 266 (Tex. App.–Amarillo 1998, pet. ref’d); *Phetvongkham v. State*, 841 S.W.2d 928, 932 (Tex. App.–Corpus Christi 1992, pet. ref’d, untimely filed). Generally, a record that specifically focuses on the conduct of trial counsel is necessary for a proper evaluation of an ineffectiveness claim. *See Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.–Houston [1st Dist.] 1994, pet. ref’d).

In the present case, the record is silent as to the reasons appellant’s trial counsel chose the course he did. Appellant did not file a motion for a new trial and, therefore, failed to develop any evidence of trial counsel’s strategy. *See Kemp*, 892 S.W.2d at 115. He did file

a motion for leave to file an out-of-time motion for new trial, but it was denied. The only evidence appellant brings forward is an affidavit he attached to his motion for new trial. Because leave to file the motion was denied, the motion itself was not considered by the trial court and, thus, we may not consider the attached affidavits. *See Rangel v. State*, 972 S.W.2d 827,838 (Tex. App.—Corpus Christi 1998); *Waller v. State*, 931 S.W.2d 640, 644(Tex. App.—Dallas 1996).

Due to the lack of evidence in the record concerning trial counsel’s reasons for these alleged acts of ineffectiveness, we are unable to conclude that appellant’s trial counsel’s performance was deficient. The first element of *Strickland* is not met; appellant’s points of error are overruled and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed August 10, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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