Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-00882-CR

———————————

MITCHELL BYRD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 812022

O P I N I O N

Mitchell Byrd (Appellant) pleaded *nolo contendere* to the felony offense of indecency with a child. The trial court deferred Appellant's adjudication, assessed a $500 fine, placed him on probation for a period of five years, required him to complete 240 hours of community service and sex offender counseling, and required that he have no contact with the complaining witness. In his application for writ of habeas corpus, he contends that he was denied effective assistance of trial counsel. We affirm.

STANDARD OF REVIEW

The burden of persuasion in a writ of habeas corpus action is on the applicant to prove his allegations by a preponderance of the evidence. *Ex parte Lafon*, 977 S.W.2d 865, 867 (Tex.App.–Dallas 1998, no pet.). In reviewing the trial court's habeas corpus judgment, we view the evidence in the light most favorable to the ruling and accord great deference to the trial court's findings and conclusions. *Id.* Absent a clear abuse of discretion, we accept the trial court's decision whether to grant the relief requested in a habeas corpus application. *Id.*

DISCUSSION

In his application for writ of habeas corpus, Appellant contends that his plea of *nolo contendere* was not given knowingly and voluntarily because he received ineffective assistance of trial counsel.

No plea of guilty or no contest may be accepted by a trial court unless it is freely and voluntarily given. *Ex parte Lafon*, 977 S.W.2d at 867; TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon 1989). Moreover, an accused is entitled to effective assistance of counsel during the plea bargaining process. *Id.*; *see also Ex parte Battle*, 817 S.W.2d 81, 83 (Tex.Crim.App. 1991). A defendant's plea of guilty or no contest is not voluntary or knowing when it is based upon the erroneous advice of counsel. *Id.*; *see also Ex parte Battle*, 817 S.W.2d at 83; *see also Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). As a general rule, we determine the voluntariness of an appellant's plea based upon the "totality of the circumstances" surrounding the plea. *Id.*; *see also Griffin v. State*, 703 S.W.2d 193, 196 (Tex.Crim.App. 1986).

In evaluating a claim of ineffective assistance of counsel arising out of the plea process, we must apply the *Strickland* test. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 369-70, 88 L.Ed.2d 203, 209 (1985); *Hernandez v. State*, 726 S.W.2d 53, 56 (Tex.Crim.App. 1986). The test requires that the defendant demonstrate that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Strickland v. Washington, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2064-65, 2068, 80 L.Ed.2d 674, 693, 697-98 (1984). In the context of a plea of guilty or of *nolo contendere*, the latter prong requires the defendant to show a reasonable probability that "but for defense counsel's errors," the defendant "would not have pleaded guilty and would have insisted on going to trial." *Kober v. State*, 988 S.W.2d 230, 232 (Tex.Crim.App. 1999). These two prongs must be established by a preponderance of the evidence. *Moore v. State*, 694 S.W.2d 528, 531 (Tex.Crim.App. 1985). Furthermore, we must indulge in a strong presumption that the counsel's conduct was reasonable. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

As a court of review, we are bound by the record, and matters not present in the record provide no basis upon which an appellate court may make a decision. *Powers v. State*, 727 S.W.2d 313, 316 (Tex.App.–Houston [1st Dist.] 1987, pet. ref'd). Allegations of the existence of facts may not be considered. *Shepherd v. State*, 673 S.W.2d 263, 267 (Tex.App.–Houston [1st Dist.] 1984, no pet.). A claim of ineffective assistance of counsel can only be sustained if it is firmly grounded in the record. *Johnson v. State*, 614 S.W.2d 148, 151 (Tex.Crim.App. 1981); *Davis v. State*, 830 S.W.2d 762, 765 (Tex.App.–Houston [1st Dist.] 1992, pet. ref'd).

Appellant did not provide this Court with the record of his plea proceedings. We have been presented only the record of Appellant's writ of habeas corpus hearing. At the habeas corpus hearing, Appellant testified that he entered his plea of *nolo contendere* under duress. He testified that he desired to proceed to trial to prove his innocence but that his trial counsel, the district attorney and the trial judge persuaded him otherwise. Appellant testified that the factors that most influenced his plea were the trial judge's remarks during the plea proceedings that if he insisted on going to trial, his bond would be revoked and he would be sentenced to ninety-nine years in prison if found guilty. Appellant's cousin testified and corroborated this assertion. These allegations of fact, however, may not be considered because they are not supported by the record. *See Powers*, 727 S.W.2d at 316; *Shepherd*, 673 S.W.2d at 267. As noted, we were not provided the record of Appellant's plea proceedings.

Appellant also testified that he would have insisted on going to trial and would not have agreed to the plea bargain if he would have understood that he was required to serve the full term of his five-year probation term and would have to regularly attend sex offender counseling during the full term of his probation. He testified that he believed his probation term and sex offender counseling would terminate before the expiration of five years. However, there is nothing in the record to support Appellant's contention that his trial counsel promised him anything less than he received.[1] Indeed, Appellant acknowledged during cross-examination that he was not *promised* that his probation would be terminated early but only that he may be *eligible* for early termination. Appellant's belief concerning the early termination of his probation and sex offender counseling was based upon no more than speculation. Such speculation on early termination of probation conditions discounts its legal importance on the question of the voluntariness of Appellant's plea. *See Ex parte Evans*, 690 S.W.2d 274, 279 (Tex.Crim.App. 1985).

Appellant has not demonstrated that the outcome would have been different but for his trial counsel's advice. Further, based upon the evidence presented, Appellant failed to demonstrate that his plea of *nolo contendere* was unknowingly or involuntarily made because of ineffective assistance of trial counsel. *See Valle v. State*, 963 S.W.2d 904, 910 (Tex.App.–Texarkana 1998, pet. ref'd); *Campos v. State*, 927 S.W.2d 232, 238 (Tex.App.–Waco 1996, no pet.). Accordingly, we discern no abuse of trial court discretion in denying Appellant's requested relief.

The trial court's habeas corpus judgment is affirmed.

---

[1] During the habeas corpus hearing, Appellant offered no oral testimony nor affidavit testimony from his trial counsel to support his assertion. *See Campos v. State*, 927 S.W.2d 232, 238 (Tex.App.–Waco 1996, no pet.).

PER CURIAM

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).