Affirmed and Opinion filed October 12, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00594-CR

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VICTOR OMENI IGWE, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 759,423

O P I N I O N

Victor Omeni Igwe was charged by indictment with penetrating the mouth, anus and sex organ of a sixteen-year-old girl in his care at a Child Protective Services facility. Appellant pleaded guilty to sexual assault of a child and was sentenced to twenty years' confinement. In three points of error appellant contends he received ineffective assistance of counsel and argues his attorney's actions rendered his plea involuntary. We affirm.

In his first point of error appellant contends his trial counsel, "guaranteed" probation if he would enter a plea of guilty and so rendered ineffective assistance prior to trial. His second point of error argues this promise of probation for a guilty plea had the effect of rendering his plea involuntary. Because these points of error are interdependent, we will consider them together.

The Sixth Amendment guarantees effective assistance of counsel at the time the defendant enters a plea to the charging instrument. *Stephens v. State*, 15 S.W.2d 278, 279 (Tex. App.—Houston [14th Dist.] 2000, no pet. h.)(citing *McMann v. Richardson*, 397 U.S. 759, 770-771 (1970)). Texas measures ineffective assistance of counsel complaints by the standard set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, (1984). *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex. Crim. App.1986). The *Strickland* test focuses on reasonableness, measuring the assistance received against the prevailing norms of the legal profession. *Id*. at 690. Counsel is presumed to have rendered adequate assistance, and it is incumbent on the defendant to identify those acts or omissions which do not amount to reasonable professional judgment and are outside the "range of professionally competent assistance." *Id*. To show prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. Any allegation of ineffectiveness must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The key question becomes whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. See *Castoreno v. State*, 932 S.W.2d 597, 604 (Tex.App.—San Antonio 1996, pet. ref'd)(citing *Strickland*, 466 U.S. at 687).

Appellant's first point and second points center on his testimony that his attorney guaranteed him probation if he would plead guilty to a single count of aggravated sexual assault of a child. He contends that this "guarantee" both constituted ineffective assistance and rendered his plea involuntary.

It is well established that a guilty plea must be freely and voluntarily entered. *Flowers v. State*, 935 S.W.2d 131, 133 (Tex. Crim. App.1996). To determine if a plea is voluntary, we consider the record as a whole. *Williams v. State*, 522 S.W.2d at 483, 485 (Tex. Crim. App. 1975). If counsel conveys erroneous information to a defendant, a plea of guilty based on that misinformation is involuntary. *Ex parte Griffin*, 679 S.W.2d 15, 17 (Tex. Crim. App.1984); *McGuire v. State*, 617 S.W.2d 259, 261 (Tex. Crim. App.1981); *Rivera v. State*, 952 S.W.2d 34, 36 (Tex. App.—San Antonio 1997, no pet.). However, a defendant's claim that he was misinformed by counsel, standing alone, is not enough for us to hold his plea was involuntary; the record must support this contention. *See Fimberg v. State*, 922 S.W.2d 205, 207 (Tex.App.—Houston [1st Dist.] 1996, pet. ref'd) (citing cases). It is appellant's burden

to show that a plea was involuntary. *See Ex parte Williams*, 637 S.W.2d 943, 947 (Tex. Crim. App. 1982).

We first note that appellant signed off on a set of standard admonishments in which he acknowledged the range of punishment which the judge could impose. Although the plea hearing was not recorded, at his sentencing hearing appellant was again admonished by his attorney and the trial judge as to the consequences of his plea. The state argues that appellant's testimony does not show he was misinformed by Shepherd. We agree. Appellant testified at his motion for new trial as follows:

> Q. Please tell the Court your memory of the exact words that the attorney used in describing to you, okay, what was going to happen on the case?
>
> [APPELLANT]: Well, he said that my case was split into four different trials and that if I plead to one, then the Court would consider me for what is known as deferred adjudication probation, and that he would recommend that because he didn't want to take the chance of going through four separate trials. So – can I continue?
>
> Q. Let me ask you: Are you saying that he used the words, "The Judge will consider you for deferred adjudication?"
>
> [APPELLANT]: Yeah. He said the court will consider me for deferred adjudication probation.
>
> * * *
>
> Q. All right. So, in terms then of your plea of guilty, was it your understanding that your plea of guilty, that based on that, you were going to get probation?
>
> [APPELLANT]: Yes, sir. That's what he told me.
>
> Q. All right. And had you known that you were not going to get probation, would you have entered your plea of guilty?
>
> [APPELLANT]: No, sir.

His trial attorney denied that he had guaranteed probation if appellant would plead guilty, and said what he told appellant that deferred adjudication probation was part of the range of punishment which the trial court could consider.

We agree with the state that appellant's testimony does not show erroneous information which he relied upon to his detriment in deciding to plead guilty. Deferred adjudication probation was in fact an option which the trial court could consider under the facts of this case. Appellant has not carried his burden of showing ineffective assistance. Point of error one is overruled.

Furthermore, although one of appellant's character witnesses testified at the motion for new trial that he was told appellant was going to get probation, we find this is insufficient to firmly ground his complaint in the record. Appellant must show independent corroborating evidence in the record showing that he was misinformed. *See Fimberg*, 922 S.W.2d at 207. Absent this independent evidence, we decline to find that the trial court, which had the opportunity to observe the credibility and demeanor of the witnesses, abused its discretion in denying the motion for new trial on this ground. Appellant's second point of error is overruled.

In his third point of error appellant contends his attorney was ineffective for failing to call witnesses at his punishment hearing. In order to prevail on this ineffective assistance of counsel claim appellant must satisfy both prongs of the *Strickland* standard. *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999).

At the motion for new trial hearing, Appellants' trial attorney testified he had sought letters attesting to appellant's character from members of appellant's congregation, using the pastor of appellant's church as a contact person, well in advance of the actual plea. He said repeated phone calls to the pastor yielded no letters, so he declined to subpoena those witnesses to testify at the punishment hearing. He also said his experience had been that favorable character witnesses did not require subpoenas. Furthermore, at punishment he

argued for deferred adjudication from the trial court, noting that appellant was a family man and that he had never before been convicted of a felony.

Appellant argues controlling authority requires reversal on ineffective assistance grounds when defense counsel fails to put on mitigating or exculpatory evidence at the punishment phase of trial. *Butler v. State*, 716 S.W.2d 48 (Tex. Crim. App. 1986); *Milburn v. State*, 973 S.W.2d 337 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Moore v. State*, 983 S.W.2d 15 (Tex. App.—Houston [14th Dist.] 1998, no pet.). All these cases can be distinguished. *Butler* involved the guilt-innocence phase of trial. Both *Milburn* and *Moore* were decided under the *Duffy* standard, which did not require a showing of prejudice. *Cf. Hernandez*, 988 S.W.2d at 772-773. In *Moore*, trial counsel admitted on the stand to failing his client. In *Milburn*, trial counsel admitted he made no effort to pursue character witnesses for the punishment phase of trial. Here Shepherd sought out letters of recommendation to present to the trial

court at punishment. While we may fault the vigor with which he pursued these letters, that alone does not fall below the standard of effective assistance.

We find Shepherd's decision not to subpoena uncooperative character witnesses was a strategic one which falls within the ambit of effective assistance. Appellant's third point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed October 12, 2000.

Panel consists of Justices Robertson, Sears, and D. Camille Hutson-Dunn..*

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

* Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn sitting by assignment.