Affirmed and Opinion filed October 19, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-01328-CR

STEVEN MCCONNELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 798,304

O P I N I O N

Appellant entered a plea of guilty to the felony offense of aggravated sexual assault without an agreed recommendation on punishment from the State. Following the return of a pre-sentence investigation (PSI) report, the court assessed punishment at confinement for forty years in the Institutional Division of the Texas Department of Criminal Justice.

Appellant's appointed counsel 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), by presenting a professional evaluation of the record demonstrating why there are no arguable grounds to be advanced. *See High v. State*, 573 S.W.2d 807 (Tex. Crim. App. 1978).

In his efforts to comply with the requirements of *Anders*, appellate counsel raises two arguable grounds of error alleging that appellant's trial counsel rendered ineffective assistance of counsel: (1) at the PSI hearing, by failing to advance the possibility of temporary insanity due to intoxication, in mitigation of appellant's punishment, and (2) by failing to object to evidence of unadjudicated extraneous offenses in the PSI report. We agree with appellate counsel that the record does not reflect ineffective assistance of counsel at trial.

Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). A substantial risk of failure accompanies an appellant's claim of ineffective assistance of counsel on direct appeal. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. *See id*. In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel. *See id*. at 813-814.

We do not judge the trial counsel's performance with the benefit of hindsight, and our review of counsel's representation is highly deferential. *See Thompson*, 9 S.W.3d at 813; *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). We indulge a strong presumption that trial counsel rendered effective assistance. Appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). When the record is silent as to counsel's reasons for his actions, an appeals court does not speculate on those reasons but merely concludes that the presumption of sound trial strategy has not been rebutted. *See Jackson*, 877 S.W.2d at 771.

In the present case, the record before us is not entirely silent on the issue of trial strategy. During a hearing on his motion for continuance on sentencing, trial counsel informed the court that he was developing a "very complicated defensive" strategy related to substance abuse and sexual dysfunction.

Although counsel did not explain this defensive strategy, his comment would suggest that he was mindful of the aspects of the case pertaining to intoxication and any extraneous offenses related to sexual dysfunction. Thus, the record as it stands fails to demonstrate ineffective assistance of counsel. Because the record fails to overcome the strong presumption that counsel acted within the wide range of reasonable professional assistance, no arguable grounds of error are presented for review.

A copy of counsel's brief was delivered to appellant. Appellant was advised of the right to examine the appellate record and to file a *pro se* response. As of this date, no *pro se* response has been filed.

We have carefully reviewed the record and counsel's brief and agree that the appeal is wholly frivolous and without merit. Further, we find no reversible error in the record.

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

PER CURIAM

Judgment rendered and Opinion filed October 19, 2000.
Panel consists of Justices Anderson, Fowler and Edelman.
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