Affirmed and Opinion filed November 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00778-CR

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ISMAEL TOBIAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 797,010

O P I N I O N

Appellant was charged by indictment with the felony offense of aggravated kidnaping, enhanced with one prior felony conviction. After the State reduced the charge to aggravated assault with a deadly weapon, appellant entered a plea of guilty pursuant to a plea bargain agreement. The court found the allegation in the enhancement paragraph true and assessed punishment at confinement in the Institutional Division of the Texas Department of Criminal Justice for five years.

Appellant's appointed counsel filed a motion to withdraw from representation of appellant along with a supporting brief in which she 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).

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. Appellant has filed a *pro se* response to the *Anders* brief alleging his plea was involuntary because of ineffective assistance of retained counsel.

Both the federal and state constitutions guarantee the accused the right to have the assistance of counsel. *See* U.S. CONST. Amend. VI; TEX. CONST. ART. I, § 10; TEX. CODE CRIM. PROC. art. 1.05 (Vernon 1977). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). This right extends to the plea bargaining process. *See Ex parte Lafon*, 977 S.W.2d 865, 867 (Tex. App.—Dallas 1998, no pet.).

To prove a plea was involuntary because of ineffective assistance of counsel, the appellant must show (1) counsel's representation/advice fell below an objective standard and (2) this deficient performance prejudiced the defense by causing appellant to give up his right to a trial. *See Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997), *cert. denied*, 525 U.S. 810, 119 S.Ct. 40, 142 L.Ed.2d 31 (1998); *Strickland*, 466 U.S. at 688-92, 104 S.Ct. 2052. The appellant must prove ineffective assistance of counsel by a preponderance of the evidence. *See McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Crim. App. 1992), *rev'd on other grounds*, 915 S.W.2d 9 (Tex. Crim. App. 1994).

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson* v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999); *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *See Osorio v. State*, 994

S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or a motion for new trial. *See Kemp*, 892 S.W.2d at 115; *see also Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (stating that when counsel is allegedly ineffective because of errors of omission, collateral attack is the better vehicle for developing an ineffectiveness claim). When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would cause the court to engage in mere speculation, a practice we will not indulge. *See McCoy v. State*, 996 S.W.2d 896, 900 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd).

In this case, appellant waived the right to have a court reporter record his guilty plea and did not file a motion for new trial or habeas corpus petition. At the time of his guilty plea, appellant executed a document entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession." In this document, appellant stated: "I am satisfied that the attorney representing me today in court has properly represented me and I have fully discussed this case with him." In another portion of that document, trial counsel stated: "I represent [appellant] in this case and I believe that this document was executed by him knowingly and voluntarily and after I fully discussed it and its consequences with him." Further, the written admonishments also show appellant was aware of the consequences of pleading guilty. Appellant points to nothing in the record to contradict these assertions.

Appellant's allegation of ineffective assistance is neither firmly founded, nor affirmatively demonstrated in the record. *See McFarland*, 928 S.W.2d at 500; *Stephens v. State*, 15 S.W.3d 278, 280 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Without evidence in the record, we are unable to conclude that defense counsel's performance fell below the objective range of competence. *See Tackett v. State*, 989 S.W.2d 855, 857 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). Therefore, we cannot conclude that appellant's guilty plea was involuntary. *See Kegler v. State*, 16 S.W.3d 908, 912 (Tex. App.—Houston [14th Dist.] 2000, no pet.). 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.

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

PER CURIAM

Judgment rendered and Opinion filed November 2, 2000.

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

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