Affirmed and Opinion filed November 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00980-CR

FERNANDO JIMENEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 736,157

O P I N I O N

Appellant, Fernando Jimenez, was charged by indictment with aggravated robbery; he subsequently pled guilty to the court without the benefit of a plea bargain agreement. The trial court deferred a finding of guilt and placed appellant under the terms and conditions of community supervision. Three years later, the State filed a motion to adjudicate. The court found appellant guilty and assessed his punishment at confinement in the penitentiary for a term of eight years. On appeal, appellant contends: (1) the trial court erred in assessing punishment without conducting a punishment hearing; and (2) he received ineffective assistance of counsel. We affirm.

In points of error one and two, appellant contends he was denied due process of law and due course of law under the federal and state constitutions when the trial court assessed punishment immediately after adjudicating his guilt without conducting a punishment hearing. It is well established that appellant was entitled to present punishment evidence after the finding of guilt. *Borders v. State*, 846 S.W.2d 834, 836 (Tex. Crim. App. 1992). However, the issue has not been preserved for review. Appellant neither objected to the lack of a punishment hearing, nor raised the issue in a motion for new trial. Therefore, appellant failed to preserve his complaint for appellate review. *Pearson v. State*, 994 S.W.2d 176, 179 (Tex. Crim. App. 1999); *Gober v. State*, 917 S.W.2d 501, 502 (Tex. App.—Austin 1996, no pet.); *Christian v. State*, 870 S.W.2d 86, 88 (Tex. App.—Dallas 1993, no pet.).

In his third and fourth points of error, appellant claims his counsel was ineffective for failing to object to the lack of a punishment hearing. When determining whether a defendant received the effective assistance of counsel, we apply the two-prong test articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Court of Criminal Appeals in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). Initially, *Strickland* requires appellant to demonstrate that his counsel's performance was so deficient it fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687. If appellant satisfies the first prong, he must then establish that his counsel's deficient performance prejudiced his defense. *Id*. at 689. When reviewing an attorney's performance, we must indulge a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance. *Id*. at 689. Thus, to prevail on his ineffective assistance claim, appellant must rebut the presumption that the challenged actions are considered sound trial strategy. *Id*.

Here, the record demonstrates that appellant's counsel offered mitigating evidence prior to the adjudication of guilt. When the State's attorney objected, the court asked appellant's counsel if she wanted to consolidate the adjudication hearing and the punishment hearing into one proceeding. The attorneys for both sides then agreed to proceed with one

hearing. Thus, appellant's counsel did offer evidence in mitigation of punishment. Moreover, we cannot say from the record before us that counsel's conduct was unreasonable or that it prejudiced appellant. Accordingly, appellant's third and fourth points of error are overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed November 8, 2001.

Panel consists of Justices Anderson, Hudson, and Frost.

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