Affirmed and Opinion filed December 23, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01348-CR
NO. 14-97-01349-CR

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JOHN TERRY MATTHEWS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause Nos. 735,379 & 735,374

O P I N I O N

Appellant was charged in two indictments with the two separate offenses of aggravated sexual assault. Each indictment also alleged two prior felony convictions for enhancement purposes. Appellant pleaded guilty to the charged offenses and, pursuant to a plea bargain agreement, the trial court assessed punishment at 35 years confinement in the Texas Department of Criminal Justice--Institutional Division, to run concurrently in each case. As appellant's points of error are identical in each case, we will consider them jointly in this opinion. We affirm.

I. Procedural Summary

Trial cause no. 735,374 (appellate cause no. 14-97-1349-CR) was called for trial, voir dire was conducted, a jury was empaneled, the witnesses were sworn and the rule invoked, the indictment was presented, and appellant entered a plea of not guilty. Before any testimony was heard, a plea bargain agreement was reached, and appellant pled guilty to the offenses charged in cause nos. 735,374 and 735,379, and true to the enhancement allegations. In exchange for those pleas, the State dismissed the indictment in cause no. 735,381, and did not seek to have appellant serve the sentences concurrently. Punishment was assessed at two concurrent sentences of 35 years.

Appellant subsequently filed a pro se notice of appeal and counsel was appointed. Appellant later filed a motion for new trial alleging ineffective assistance of trial counsel. The trial court conducted a hearing and overruled that motion. Appellate counsel filed a second notice of appeal seeking permission to appeal under Texas Rule of Appellate Procedure 25.2(3)(C). The trial court granted permission to appeal on the basis of ineffective assistance of counsel.

II. Standard of Review

The standard by which we review the effectiveness of counsel at all stages of a criminal trial was articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). The Supreme Court in *Strickland* outlined a two-step analysis. First, the reviewing court must decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below the objective standard, the reviewing court must then determine whether there is a "reasonable probability" the result of the trial would have been different but for counsel's deficient performance. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Absent both showings, an appellate court cannot

conclude the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id.* at 687. *See also Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991).

A claim of ineffective assistance of counsel must be determined upon the particular facts and circumstances of each individual case. *See Jimenez v. State*, 804 S.W.2d 334, 338 (Tex. App.—San Antonio 1991, pet. ref'd). A strong presumption exists that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See Strickland*, 466 U.S. at 689; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). Stated another way, "competence is presumed and appellant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound trial strategy." *Stafford*, 813 S.W.2d at 506. To sustain this burden, the defendant has the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *See Riascos v. State*, 792 S.W.2d 754, 758 (Tex. App.—Houston [14th Dist] 1990, pet. ref'd). Allegations of ineffective assistance of counsel will be sustained only if they are firmly founded and affirmatively demonstrated in the record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119 (1997); *Jimenez*, 804 S.W.2d at 338.

III. The Record Evidence

A. Pretrial

On October 21, 1996, appellant demonstrated his indigence and Mark Metze was appointed as appellant's trial counsel. On April 2, 1997, appellant and Metze filed a joint Motion to Withdraw as Counsel claiming a conflict of interest. Metze was relieved of his duties and Alain Harvey was appointed as appellant's trial counsel. Harvey filed several motions on behalf of appellant.[1] On July 10, 1997, Harvey filed a motion to withdraw as

[1] These motions included: Motion to Require the State to Reveal Agreements Entered Into Between (continued...)

attorney of record. That motion was granted, and on July 14, 1997, Enid Williams was appointed as trial counsel for appellant. Williams filed several motions on behalf of appellant.[2] Voir dire began and was concluded on November 10, 1997.

The following day, outside the presence of the jury, several matters appear on the record. First, Williams stated that she wished to adopt the motions filed by previous counsel for appellant. Second, Williams stated that she and her investigator, Alan Steuart, had discussed the motion for appointment of a medical expert with the trial court and had been unable to secure funds greater than those furnished under the county fee schedule. Therefore, Williams and Steuart "were unable to find a medical expert who would testify for us at the county rate." That motion was denied. Third, appellant made a statement to the trial court expressing his belief that he was not being properly represented by Williams. Williams responded that she had met with appellant several times and had written him a six page letter outlining the status of these cases. Fourth, the parties ultimately entered into a plea bargain agreement.

B. Plea of Guilty

To accomplish the plea bargain agreement, appellant executed documents entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession." In these documents, appellant confessed that the facts alleged in the indictments were true. Appellant further 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 (sic)."

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[1] (...continued)
The State and Its Witnesses; Request for Notice of Intent to Offer Extraneous Conduct Under Rule 404(b) and Evidence of Conviction Under Rule 609(f) and Evidence of an Extraneous Crime or Bad Act Under Article 37.07; and, Motion for Discovery of Exculpatory and Mitigating Evidence.

[2] These motions included Defendant's Motion for the Appointment of an Investigator (granted August 4, 1997); Motion for Disclosure Pursuant to Rule 404 and Rule 609 of the Texas Rules of Criminal Evidence; Motion for Appointment of a Medical Expert; Motion in Limine; and Request for The State to Elect.

Documents entitled "Admonishments," were also executed by appellant. These documents contain the following statements by appellant:

> I fully understand the consequences of my plea herein, and after having fully consulted with my attorney, request that the trial court accept said plea;
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> * * * * *
>
> I am totally satisfied with the representation provided by my counsel and I received effective and competent representation. ... I have read the indictment and I committed each and every element alleged.

Finally, before the trial court, appellant stated his plea was voluntarily entered.

C. Motion for New Trial

Following his guilty pleas, appellant filed a *pro se* notice of appeal and requested the appointment of appellate counsel. The trial court subsequently appointed Sharon Levine as appellate counsel. Appellant also filed a motion for new trial alleging ineffective assistance of trial counsel. The trial court heard the motion on March 6, 1998.

Appellant's first witness, Larry Deon Mukes, testified that he was a former neighbor of appellant's. Mukes testified appellant was living with the complainant and her mother. Mukes stated that he helped appellant move. Mukes could not remember the precise date, but recalled that it was the complainant's birthday, and she was upset because she could not celebrate her birthday. On that day, Mukes arrived around 7:00 to 8:00 a.m. and ultimately stayed overnight. Mukes stated that, to his knowledge, there was no sexual contact between appellant and the complainant on that day. Mukes further stated that neither Williams, nor her investigator, Steuart, contacted him. Mukes was on probation for the offense of theft.

The second witness was Gilbert Bedford who testified that he also helped appellant move in June 1995. Bedford stated he arrived between 9:00 and 10:00 a.m. Bedford did not witness any sexual contact between appellant and the complainant. Moreover, Bedford had not been contacted by Williams regarding appellant's charges. Bedford had previously been

convicted of possession of cocaine and theft.

Appellant testified that he discussed the charges against him with Williams. Appellant stated that he gave Williams the names of seven witnesses who would have been helpful to the defense. Williams, however, never contacted those witnesses. Appellant stated that he spoke to Williams' investigator, Steuart, about these cases. Appellant stated that he gave Steuart the names of witnesses, but that Steuart did not contact the witnesses.

Appellant testified that the date alleged in cause no. 735,734, June 24, 1995, was the day Mukes and Bedford helped appellant move and that day was the complainant's birthday.

Appellant stated that Williams never discussed a trial strategy, nor had she subpoenaed any witnesses for trial. Appellant testified that on the day of trial, Williams said the only defense was to put appellant on the stand, but Williams had not previously discussed the possibility of appellant's testifying or the substance of his testimony. Williams informed appellant that he had zero percent chance of winning and that he should "cop out." Because of this statement, appellant informed the trial court that he (appellant) was not being adequately represented.

Appellant testified that he pleaded guilty because he felt like his back was against the wall and that he had no alternative. Appellant said his plea was not voluntary and that he signed the plea documents because Williams stated there would be an appeal, which she hoped would rectify the situation and result in appellant receiving another trial. Appellant stated Williams was to file a notice of appeal. Appellant stated he would not have pleaded guilty had his witnesses been subpoenaed and a medical expert secured.

On cross-examination, appellant stated he had been represented by a total of five lawyers as trial counsel, excluding Levine, who was appellate counsel. Appellant stated that his trial attorneys were lying about the circumstances surrounding appellant's cases, and those attorneys were lying and making misrepresentations to appellant. He testified that he spoke to Williams five times about the case; these discussions included Williams visiting appellant

in the jail on two occasions. Appellant stated that Steuart, the investigator, visited him in jail four to six times. Appellant stated that, on two separate occasions, he provided Steuart with a list of witnesses. Prior to trial, Williams later gave appellant a multi-page letter related to the case and the extraneous offenses the State would seek to offer at trial.

Williams also testified at the hearing. She began by reading into the record the six page letter she had given to appellant. The letter details the allegations in each case, the evidence available to the State to prove those allegations, the extraneous offenses the State would attempt to introduce during the guilt phase of trial, and the prior convictions the State would offer during the punishment phase of trial. The letter ends as follows:

> It worried me the other day when you asked me to tell the prosecutor not to use the words "sexual assault" and "indecency" during the trial because you have potential customers either observing the trial or sitting on the jury panel. It makes me think that you imagine this upcoming trial as something much "lighter" than it will be.
>
> I want you to understand that the State will be trying to get a life sentence from the jury. They will try to make you look as horrible as they probably can at this trial and they will use even more harsh words than the ones mentioned above. You need to prepare yourself mentally for possibly the worst experience of your life, whether they come back with a guilty or not guilty.
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> Their offer to you remains at 25 years.

Williams testified that she discussed with appellant the possibility of him testifying. Williams viewed the video tapes of the complainant's interviews with Child Protective Services (CPS). Williams stated that appellant had changed his version of the events several times. Williams stated that she hired an investigator, Alan Steuart, to assist with the investigation of the case, that Williams and Steuart both investigated the case, that Steuart provided written reports of his investigation, and that Williams and Steuart had many consultations regarding appellant's cases. Williams stated she spoke to appellant's sister who was a possible witness. Williams further stated that appellant provided her with a list of witnesses, but most of them were unfavorable. Williams stated that Mukes and Bedford were

not named on the witness list. Williams stated she discussed strategy with appellant "many, many times."

Regarding the motion for a medical expert, Williams stated she discussed the motion with the trial court six weeks prior to trial and the judge insisted Williams hire an expert at the county rate. Williams explained:

> We were trying to get an expert who would say what [appellant] wanted him to say; and that was that the [complainant] could have gotten gonorrhea from a towel or something. So, we were trying to find a medical expert who would get up here and testify convincingly to a jury that the 4-year-old child could have gotten gonorrhea from maybe a towel or something. We had great difficulty finding an expert who would even consider it.
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> * * * * *
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> We could not find anybody who would testify that this child could have gotten gonorrhea from a towel, for no amount of money.

Williams explained that appellant made the decision to plead guilty. Williams stated that she never told appellant that his situation could be rectified on appeal. Williams testified that appellant desired to voluntarily waive his rights and plead guilty for a sentence of thirty-five years. Williams did not file a notice of appeal on behalf of appellant.

Alan Steuart testified he interviewed four witnesses in following up on his conversations with appellant and developing his defense. Steuart provided Williams with the information from these interviews. Steuart did not recall receiving Mukes' name to interview. Steuart was given Bedford's name, but was unable to locate him with the information provided by appellant. Together, Williams and Steuart viewed the video tapes of the complainant's interviews with Child Protective Services (CPS).

Steuart concluded his testimony with the following statement:

> I do know that [Williams] spent a lot of hours preparing for her trial. And in my view of everything that I had given her, with the exception of some of the witnesses that we couldn't find, I felt like she was prepared to go to trial.

Following the arguments of counsel, the trial court overruled the motion for new trial.[3]

IV. Points of Error

In each case, appellant raises five identical points of error contending trial counsel was ineffective, which led to appellant's pleas of guilty being involuntary. We will address these points seriatim.

A. Point of Error One

The first point of error contends appellant's guilty plea was induced by erroneous and misleading advice on the part of trial counsel that a new trial would be granted on appeal. There is a clear conflict in the testimony regarding the appeal of these cases. Appellant testified at the motion for new trial hearing that his plea was based upon the representations of Williams that a new trial would be ordered on appeal. However, Williams testified that she made no such representations to appellant.

Where the evidence is of equal weight, we cannot say a defendant has carried his burden of proof by a preponderance of the evidence. *See Barton v. Tharp*, 27 S.W.2d 885, 889 (Tex. Civ. App.—Texarkana 1930, no writ) (citing *Clark v. Hiles*, 67 Tex. 141, 2 S.W. 356, 360-61 (Tex. 1886) (holding that "[W]hen the evidence is evenly balanced the party having the burden must lose.")). *See also Azores v. Sampson*, 434 S.W.2d 401, 404 (Tex. App.—Dallas 1968, no writ) (holding that party bearing burden of proof must produce evidence that existence of a fact is more probable than its non-existence; where existence is equally probable with non-existence, party has failed to carry its burden of proof); *Bartsch v. Ruby*, 229 S.W.2d 105, 106 (Tex. Civ. App.—San Antonio 1950, orig. proceeding [leave denied]) (holding that "When the testimony bearing upon an issue is equally susceptible to two interpretations, the onus of proof

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[3] The trial court made a lengthy statement when overruling the motion for new trial. The State offers part of that statement in support of its argument for affirmance. However, Texas Rule of Appellate Procedure 21.8(b) provides, "[i]n ruling on a motion for new trial, the court must not summarize, discuss, or comment on evidence." Therefore, we will not consider the statement of the trial judge nor that portion of the State's brief in resolving these points of error.

is decisive."); *Chanowsky v. Friedman*, 205 S.W.2d 641, 644-45 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) (holding that a party has not carried forth his burden of proof as long as the circumstances proven are equally consistent with the non-existence of the ultimate fact required to be proved).

We therefore hold that appellant has failed to demonstrate by a preponderance of the evidence that his plea of guilty was induced by the erroneous and misleading advice of counsel. Appellant's first point of error is overruled.

B. Point of Error Two

The second point of error contends appellant's guilty plea was due to trial counsel failing to adequately question the venire. Specifically, appellant argues that Williams asked only three questions on voir dire and that she neglected to cover other essential areas such as whether any venire member had been a victim of sexual assault, the credibility of the defendant should he elect to testify, and the range of punishment.

This matter was not developed during the motion for new trial hearing. Therefore, the record is bare as to whether Williams' voir dire was based on sound trial strategy or if her voir dire had any effect on appellant's decision to plead guilty. Consequently, this claim is not firmly founded and affirmatively demonstrated in the record as required by *McFarland*, 928 S.W.2d at 500, and *Jimenez*, 804 S.W.2d at 338.[4] Appellant's second point of error is overruled.

C. Point of Error Three

The third point of error contends appellant's guilty plea was due to trial counsel failing

[4] The State relies on *Williams v. State*, 970 S.W.2d 182 (Tex. App.–Houston [14th Dist] 1998, pet. ref'd), where defense counsel asked no questions of the venire and this court failed to uphold a claim of ineffective assistance of counsel. However, we find that case distinguishable because in *Williams*, a jury trial on the issue of guilt followed the voir dire. Whereas in the instant case, appellant pleaded guilty following voir dire.

to request a medical expert until the day of trial. Appellant argues: "A medical expert could have provided crucial and beneficial testimony or at least pertinent information to the defense indicating whether the Complainant was actually sexually assaulted."

We find this argument is not factually supported by the record. The record demonstrates that Williams met with the trial court and discussed the possibility of receiving funds beyond the normal rate for a medical expert. Even though that request was denied, Williams continued to search for a medical expert that would testify that the complainant contracted gonorrhea from an inanimate object rather than sexual contact by appellant. Williams was unable to find any such expert regardless of the amount of money she was permitted to expend for said testimony. We shall not fault trial counsel for failing to locate a witness to testify to an unprovable theory of defense. We are not persuaded to do otherwise by the fact that trial counsel did not file or receive a formal ruling on the motion until the day of trial. Appellant's third point of error is overruled.

D. Points of Error Four and Five

As the fourth and fifth points of error raise a common complaint, they will be addressed jointly. These points contend appellant's guilty plea was due to Williams failure to conduct a factual investigation and to subpoena witnesses.

Again, we find this argument is belied by the record. From the record, we discern that Williams met with appellant on several occasions. She viewed the video tape interviews between CPS and the complainant. Williams stated that she personally conducted an investigation in this case and even hired an investigator, Steuart, to assist in that investigation. This investigation included attempting to find a doctor to testify to support appellant's defensive theory. Much of this investigation was detailed to appellant in a lengthy letter, which Williams read into the record. We find that appellant has not proved by a preponderance of the evidence that Williams failed to conduct a proper investigation in these cases, and that the lack of such an investigation caused appellant to plead guilty.

We reach the same conclusion with appellant's argument that Williams failed to subpoena Mukes and Bedford as witnesses. Williams stated that she did not recall having either name before trial. Therefore, it would have been impossible for Williams to have issued subpoenas to secure their presence. Similarly, Steuart did not recall having Mukes' name prior to trial. However, Steuart did recall attempting to locate Bedford but was unable to find him at the address provided by appellant. Additionally, we note that while Bedford and Mukes testified that they helped appellant move on the date of one offense, they offered no testimony relevant to the date of the other offense. Moreover, there was no evidence that appellant could not have committed the alleged offense prior to the arrival of Mukes. Finally, Williams stated that she interviewed several witnesses whose names had been provided by appellant. However, following those interviews, Williams concluded their testimony would not be favorable to appellant. We shall not fault Williams for failing to subpoena witnesses who would be unhelpful to appellant.

When the allegations raised in these points of error are viewed in light of the record evidence, we hold appellant has failed to prove by a preponderance of the evidence that he received ineffective assistance of counsel from Williams. *See Riascos*, 792 S.W.2d at 758. Appellant's fourth and fifth points of error are overruled.

The judgment of the trial court in each case is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed December 23, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Baird.[5]

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

[5] Former Judge Charles F. Baird sitting by assignment.