

Affirmed and Opinion filed January 18, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-00951-CR

JOSIAH SUTTON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 800,450**

O P I N I O N

Appellant was convicted of aggravated sexual assault. On this appeal we determine whether trial counsel's (1) failure to follow through with his suggestion of obtaining independent DNA testing; and (2) asking allegedly damaging questions on direct examination constituted ineffective assistance of counsel. We hold it does not, thus, we affirm.

Background

The complainant was abducted and sexually assaulted by several men,¹ one of whom she identified

¹ The record does not clearly indicate how many men were involved in the assault.

as appellant. At trial, appellant was convicted in large part on the results of a DNA test based on serological evidence taken from the complainant shortly after she was assaulted.

Appellant filed a motion for new trial asserting ineffective assistance of trial counsel. At the hearing on the motion, appellant's trial counsel, Charles Herbert, testified that before trial he suggested to appellant's family that they obtain independent DNA testing. He stated that he collected some \$600 to \$650² from them, but told them they would need to raise a total of \$1200 to \$1500 for the testing. Herbert essentially testified that he never obtained DNA testing because: (1) appellant's family did not come up with the additional money, and (2) he did not believe there were any unadulterated samples remaining for testing. Two of appellant's family members contradicted Herbert, testifying that he took their money to have the test done but never told them they would need to pay more. Also, a DNA lab technician appears to have contradicted Herbert's testimony by asserting there were indeed unadulterated samples remaining for testing. After hearing the evidence, the trial court denied appellant's motion for new trial.

Ineffective Assistance of Counsel

Appellant contends he was denied effective assistance of counsel because trial counsel (1) did not secure necessary independent DNA testing; (2) questioned appellant about a prior misdemeanor weapons possession conviction, opening the door for prosecutor to elicit more damaging evidence; and (3) questioned appellant about his having a sexually transmitted disease.

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prove ineffective assistance of counsel, a defendant must show by a preponderance of the evidence that (1) his counsel's representation was deficient, and (2) the deficient performance was so serious that it prejudiced his defense. *Id.* at 687. Scrutiny of counsel's performance must be highly deferential. *Id.* We must indulge a strong presumption that counsel's representation falls within the wide range of reasonable professional assistance; that is, counsel's actions (or inactions) might be considered "sound trial strategy." *See Young v. State*, 991 S.W.2d 835, 837 (Tex. Crim. App. 1999). We presume "that counsel is better positioned than the appellate court to judge the pragmatism of the particular case, and that counsel made all significant

² The record is disputed as to the exact amount counsel collected.

decisions in the exercise of reasonable professional judgment." *Id.* Further, we must evaluate the quality of the representation from counsel's perspective at trial, rather than counsel's isolated acts or omissions in hindsight. *Strickland*, 466 U.S. at 689.

We note that because appellant presented evidence on counsel's alleged ineffectiveness at a motion for new trial, we review the trial court's application of *Strickland* through the abuse of discretion standard. *See State v. Thomas*, 768 S.W.2d 335, 336 (Tex. App.-Houston [14th Dist.] 1989, no pet.); *State v. Gill*, 967 S.W.2d 540, 542 (Tex. App.—Austin 1998, pet. ref'd). When reviewing a trial court's denial of a motion for new trial, we do not substitute our judgment for that of the trial court. Rather, we consider whether the trial court's decision was arbitrary or unreasonable. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App.1995); *Rodriguez v. State*, 21 S.W.3d 562, 566 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Additionally, when a case presents a controverted issue to the trial court, the trial court acts exclusively as the factfinder, assessing the credibility of the witnesses and the weight to be accorded their testimony. *See Muniz v. State*, 851 S.W.2d 238, 252 (Tex. Crim. App.1993). If the trial court's resolution of a controverted issue is supported by the record, a reviewing court should not disturb the trial court's decision. *Id.* Thus, for purposes of the ineffective assistance issues before us, the trial court was free to disregard or discount appellant's witnesses and believe Herbert.³

Though his testimony was controverted, Herbert essentially did articulate two reasons for not obtaining independent DNA analysis that comport with reasonable trial strategy: (1) he informed appellant's family he would need more money for the analysis to be performed but they failed to pay it; and (2) there were no unadulterated samples left for independent analysis. The trial court, in finding Herbert was not ineffective, implicitly made these findings. *See Carmouche v. State*, 10 S.W.3d 323, 327-28 (Tex. Crim. App. 2000) (where a trial court makes no explicit findings of historical fact, we presume it made findings necessary to support its ruling as long as those implied findings are supported by the record). Thus, we hold appellant did not meet the first prong of *Strickland*.

We note, however, that even assuming for purposes of argument it was shown that trial counsel's

³ No doubt the witnesses' testimony of Herbert's actions raises questions about his handling of client funds. However, we agree with the State that, under our limited jurisdiction and standard of review, the proper forum for determining the propriety of Herbert's conduct would be through the State Bar grievance committee.

performance fell below an objective standard of reasonableness under prong one, there is no showing of prejudice to appellant under prong two. Appellant's counsel on appeal asserts the "independent DNA analysis in this case is very important to the entire case and the only viable defense available to defendant." But in arguing that the absence of independent DNA analysis prejudiced appellant's case under *Strickland*, appellate counsel does not produce any evidence of independent DNA analysis that would vindicate appellant or raise questions about his innocence. Nor does counsel explain why there was any impediment to obtaining such an analysis before the hearing on the motion for new trial. Likewise the State's DNA evidence which implicated appellant and led to the dismissal of charges against others accused, is not seriously challenged. In the absence of some showing from the record a negative effect upon the appellant, the second prong of *Strickland* was not met.

Appellant also asserts that trial counsel was deficient for having asked certain questions of him at trial. However, despite having trial counsel present to answer specific questions pertaining to trial strategy at the motion for new trial, appellant's counsel failed to broach these issues. When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court, which we will not do. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) We therefore find appellant has failed to demonstrate ineffective assistance of counsel under the dictates of *Strickland* and overrule his issues.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed January 18, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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