Affirmed and Opinion filed February 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01216-CR

CRAIG JACKSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 850,876

O P I N I O N

A jury convicted appellant of burglary of a habitation and assessed punishment at thirty-three years in the Texas Department of Criminal Justice, Institutional Division. In four points of error, appellant complains that he was denied effective assistance of counsel under both the United States and Texas Constitutions. We disagree and affirm the judgment of the trial court.

FACTUAL BACKGROUND

Appellant was approached by a police officer who was investigating a fire burning in a ditch on the side of the road. The officer asked appellant and his companion whether they knew anything about the fire, and the two men claimed that they did not. The officer then attempted to conduct a pat-down search, but appellant fled. While in flight, appellant entered a nearby residence where he encountered a seventeen year-old girl and her newborn baby sitting in their living room. Appellant told the girl that he was running from police, and if she did not cooperate, he would kill her and her baby. Appellant then went to the back of the house and telephoned his mother while the girl called out the front door to the pursuing officer, "He's in here!" Thereafter, appellant came out of the house and surrendered to the officer.

Although appellant's appointed counsel made several pretrial appearances on behalf of appellant, appellant filed several pretrial motions pro se. He then retained new counsel, Ron Mock, who represented appellant throughout the trial. At a pre-trial hearing, Mock questioned appellant about his refusal to take several plea bargains. The following transpired in open court:

Mock:	Haven't I talked to you and talked to you and talked to you and explained the State's position on your case? I have talked to you about your two prior convictions, which would make it a 25 minimum. You were offered ten years, which is 15 years below the minimum punishment that the State could automatically get, weren't you?
Appellant:	I tried to sign one time.
Mock:	Well, you tried to sign it, but, according to you, under some misbelief [sic] some other attorney told you that you would get less time; is that true?
Appellant:	Yes, sir.

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Mock: And even after you declined the 10, on many occasions the State offered you 15; isn't that right?

Appellant: I take 10 years, sir.

Mock: Yes, sir. But isn't that right, you declined the 15?

Appellant: When you say . . .

Mock: You didn't want 15?

Appellant: No, sir.

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Mock: The State did not reduce their offer, they went up. And you understand, now that you're in trial, if the enhancements are proven to be true, the minimum punishment range is 25 years to 99 years or life; you understand that?

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Appellant: Yeah.

Mock: And after you rejected all the offers at this juncture they're sill offering you the minimum of 25, and it's your position that you are not going to take it?

Appellant: Can I sign for ten years now?

Prosecutor: Nope.

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After conviction, Mock gave notice of appeal in open court. Appellant then filed three timely pro se motions: a notice of appeal, a motion for new trial, and a request for counsel. The record does not reflect a withdrawal by Mock as counsel.

STANDARD OF REVIEW

For counsel to be found ineffective at trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed.2d 674 (1984), and adopted by Texas in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To meet this standard, appellant must show that his counsel's representation fell below an objective standard of reasonableness, and but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hernandez*, 726 S.W.2d at 55.

Appellant carries the burden to prove, by a preponderance of the evidence, the ineffectiveness of his trial counsel. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Counsel's conduct is strongly presumed to fall within the wide range of reasonable professional assistance, and appellant must overcome the presumption that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 688-89, 104 S.Ct. at 2065; *Thompson*, 9 S.W.3d at 813. To overcome this presumption, a claim for ineffective assistance of counsel must be firmly founded and affirmatively demonstrated in the record. *Id*. at 813-14. The record is best developed by a collateral attack, such as an application for a writ of habeas corpus or a motion for new trial. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998); *Kemp v. State*, 892 S.W.2d 112, 115 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

DISCUSSION AND HOLDINGS

In appellant's first and second issues on appeal, he complains that he received ineffective assistance of counsel under federal and state law during a critical stage in the proceedings–the time frame in which a motion for new trial could have been filed by Mock. Specifically, he contends, Mock's failure to represent him is evidenced by the filing of several post-judgment pro se motions.

Appellant's claim, however, is not firmly founded in the record. *Burnett v. State*, 959 S.W.2d 652, 660 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (citing *Harrison v. State*,

552 S.W.2d 151, 152 (Tex. Crim. App. 1977)). That is, there is nothing to demonstrate that Mock failed to advise appellant during the time complained of, or that he failed to advise him of his rights and the applicable rules. Moreover, despite appellant's voluminous pro se post-judgment filings, he has failed to rebut the presumption that Mock counseled him on the merits of a motion for new trial. When a motion for new trial is not filed in a case, there is a rebuttable presumption that counsel discussed the merits of the motion with the appellant, it was considered by the appellant, and it was rejected. *Oldham v. State*, 977 S.W.2d 354, 363 (Tex. Crim. App. 1998). And furthermore, appellant has the burden to show that the outcome of his trial or his appeal would have been different but for trial counsel's failure to file a motion for new trial. *Dewberry v. State*, 4 S.W.3d 735, 757 (Tex. Crim. App. 1999). Appellant has not met this burden. Accordingly, we overrule appellant's first and second issues on appeal.

In appellant's third issue on appeal, he complains that counsel was ineffective because Mock advised him to reject several plea bargains with the State. The record clearly reflects the contrary. Mock requested a hearing during which appellant admitted that he refused the plea agreements despite Mock's advice to accept them. We overrule this complaint.

Lastly, appellant argues that counsel was ineffective because he failed to conduct an independent investigation of the facts. Again, appellant's claim is not firmly founded and affirmatively demonstrated in the record. *Thompson*, 9 S.W.3d at 813-14. There was nothing developed below to rebut the presumption that counsel failed to investigate mitigating facts. Moreover, on appeal, appellant does not detail the mitigating facts, so there is no showing of harm. *See McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App.

1996); *Garret v. State*, 998 S.W.2d 307, 314 (Tex. App.—Texarkana 1999, pet. ref'd). Therefore, we overrule this complaint and affirm the trial court in all respects.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed February 14, 2002.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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