Affirmed and Opinion filed February 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01537-CR

ROBERT EVE HOWARD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 686,895

M E M O R A N D U M O P I N I O N

Following a trial to the court, Appellant Robert Eve Howard was found guilty of the aggravated sexual assault of his minor son and sentenced to sixty years' imprisonment. No notice of appeal was filed. Appellant brought a post-conviction writ of habeas corpus arguing his retained trial counsel failed to perfect his appeal, and the Court of Criminal Appeals granted this out-of-time appeal. We affirm the conviction. Because all dispositive issues are clearly settled in law, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.1.

The facts of the alleged assault are known to the parties, so we do not recite them here. In his sole point of error, appellant argues his counsel was ineffective because she (1) was ignorant of the law applicable to his case,[1] (2) failed to object to expert and hearsay testimony against him, (3) offered evidence about his prior conviction for aggravated sexual assault of his minor step-daughter, and (4) did not discover until the State's cross-examination that appellant's sister would offer evidence tending to exculpate him by testifying she was in the room at the time the alleged assault occurred.

When a defendant asserts ineffective assistance of counsel, "only in rare cases will the record on direct appeal be sufficient for an appellate court to fairly evaluate the claim." *Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000). In this case, appellant did not file a motion for new trial and there is no evidence in the record as to why counsel acted as she did. In such circumstances, our duty is clear–we must presume counsel made all significant decisions in the exercise of reasonable professional judgment. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). The Court of Criminal Appeals has repeatedly held that without record evidence, appellant has not carried his burden to overcome this presumption, and we cannot conclude that his counsel was ineffective. *Id.; Tong v. State*, 25 S.W.3d 707, 714 (Tex. Crim. App. 2000), *cert. denied*, 121 S. Ct. 2196 (2001) (holding that "without some explanation as to why counsel acted as he did, we presume that his actions were the product of an overall strategic design"); *Thompson v. State*, 9 S.W.3d 808, 814 (Tex. Crim. App. 1999).

The State argues that many of appellant's complaints about his counsel misstate the law and the facts. But without an adequate record, we are reduced to speculation. The bar

---

[1] Appellant points out that counsel raised an exception to the substance of the indictment after trial had begun (even though any such exception was waived because not raised pre-trial); argued the indictment failed to allege lack of consent as an element of aggravated sexual assault of a child; filed a motion for probation even though appellant would have been ineligible; and requested a ten-year sentence even though the statutory minimum for a felony repeat offender was fifteen years. *See* TEX. CODE CRIM. PROC. ANN. art. 1.14(b), art. 42.12 § 3g (a)(1)(E) (Vernon Supp. 1995); TEX. PEN. CODE ANN. § 12.42 (c) (Vernon Supp. 1995).

on subsequent applications for writ of habeas corpus will not prevent appellant from raising these issues again with a developed record. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 § 4; *Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000) (holding initial habeas application for out-of-time appeal does not constitute a challenge to conviction so as to bar subsequent writs). Thus, we hold that he must pursue his complaints by that remedy.

We overrule the appellant's sole point of error and affirm the judgment of the trial court.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed February 14, 2002.
Panel consists of Chief Justice Brister and Justices Anderson and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).