

Affirmed and Opinion filed March 23, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00607-CR

OSCAR WAYNE HEAVIN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 768,204**

O P I N I O N

Appellant, Oscar Wayne Heavin, pleaded guilty to aggravated sexual assault of a 14-year old child, and following a pre-sentence investigation and hearing, was sentenced to forty-years incarceration by the trial court. Under two issues on appeal, appellant complains he was denied effective assistance of counsel during his guilty plea, and that his plea was involuntary. We affirm.

Details of the facts underlying the offense are not material to disposition of this appeal; suffice it to say that the complainant testified that appellant followed her home from school, forced his way into her apartment and raped her. Appellant testified that he had consensual sex with her.

Following entry of his guilty plea but prior to sentencing, appellant retained new trial counsel who filed a motion to set aside the guilty plea. This motion was heard along with the sentencing hearing. At the hearing, appellant testified that he had an on-going relationship with the complainant, but that only after he refused to break up with his other girlfriend did complainant file charges against him. He admitted they had sexual relations once, but that she had consented. Although appellant told the court there were numerous witnesses who could vouch for him and prove up errors in the presentencing investigation report, only his father and an ex-girlfriend showed up. No witnesses, including appellant's previous attorney, had been subpoenaed to appear at the hearing.

Appellant further testified that his prior attorney had not explained the difference between sexual assault and aggravated sexual assault of a child, and that he should be allowed to withdraw his guilty plea because he was not guilty of aggravated sexual assault. The prior attorney had told him that in order to get probation, he would have to plead guilty. While the explanation offered by appellant at his hearing was difficult to follow, it appears he opted to plead guilty and requested a PSI in order to have more time to settle a car accident case and get money to hire his current counsel. Other attorneys, he said, told him that if he went to trial with his (prior) trial counsel, he had no chance. Someone, unnamed and unidentified by appellant, also told him that he could change his plea because of insufficient counsel and be granted a new trial because of his prior attorney not keeping him informed or calling witnesses. No where during the hearing did appellant testify that the only reason he pleaded guilty was because his attorney said it was the only way he could get probation. To the contrary, the hearing suggests he pleaded guilty in order to "buy time" to hire more competent counsel so he could set the guilty plea aside and start afresh in a jury trial.

To reverse a conviction based on ineffective assistance of counsel, the appellate court must find (1) that trial counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that but for counsel's error, the result of the proceedings would have been

different. *Strickland v. Washington*, 466 U.S. 668, 695 (1984). This two-prong standard applies to challenges of guilty pleas. *See Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997).

Appellant's claim that he was misinformed by counsel, standing alone, is not enough for this Court to hold his plea was involuntary. *Tabora v. State*, ___S.W.3d ___, 2000 WL 123769 (Tex. App. – Houston [14th Dist.] 2000). A claim for ineffectiveness of counsel must be affirmatively supported by the record, and the record as a whole must be examined. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998). It would fall below the objective standard of reasonableness for an attorney to inform his client that the trial court was authorized to grant probation under a guilty plea on aggravated sexual assault. *Tabora*, at *3.

Nevertheless, there has been no showing that appellant would not have pleaded guilty but for counsel's error, nor has appellant shown that his plea of guilty was actually induced by any such error. *Tabora, id.* Based upon appellant's testimony given at the hearing on his motion to set aside plea, we are unable to say with a reasonable probability that but for counsel's error, appellant would not have entered a plea of no contest, but would have insisted on going to trial. Appellant has not met the second prong of the *Strickland* test. We note that not until his affidavit filed with the trial court some four months after he filed his motion for new trial, did appellant finally allege the second prong of the *Strickland* test. This affidavit, and that of his wife, were untimely and are a nullity for purposes of this appeal. TEX. R. APP. P. 21.

Appellant's two issues are overruled, and the judgment below is affirmed.

Sam Robertson
Justice

Judgment rendered and Opinion filed March 23, 2000.

Panel consists of Justices Robertson, Sears, and Lee.*

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

* Senior Justices Sam Robertson, Ross A. Sears and Norman R. Lee sitting by assignment.