Affirmed and Opinion filed April 5, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01112-CR

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CHARLES WAYNE RUSSELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 807,478

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

The parties are already familiar with the background of the case and the evidence adduced at trial, therefore, we limit recitation of the facts. We issue this memorandum opinion pursuant to Texas Rule of Appellate Procedure 47.1 because the law to be applied in the case is well settled.

Appellant was convicted by a jury of aggravated robbery. The jury assessed punishment of seven years confinement. Appellant brings five issues alleging ineffective assistance of counsel. We affirm.

Appellant alleges trial counsel was ineffective because (1) he failed to object to four instances of inadmissible hearsay and (2) he failed to prepare a trial witness to testify truthfully.

The standard of review for evaluating claims of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). It is the appellant's burden to prove ineffective assistance of counsel. *Strickland*, 466 U.S. 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 decisions in the exercise of reasonable professional judgment." *Id.* The court of criminal appeals has set an extremely high bar for proving ineffective assistance claims on direct appeal. *See Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999). In *Thompson*, the state doggedly attempted to introduce clearly inadmissible hearsay testimony implicating the defendant. Defense counsel objected to the testimony twice, the court sustaining the objection both times. However, the third time, the state was able to introduce the testimony because counsel inexplicably failed to object. The court of criminal appeals held that even under these facts, the record that the appellant brought on direct appeal nonetheless failed to rebut the presumption of reasonable counsel because it was possible, at that moment, counsel may have reasonably decided the testimony was not inadmissible and an objection was not appropriate. *Id.* at 814. The court explained:

> [A] substantial risk of failure accompanies an appellant's claim of ineffective assistance on direct appeal. Rarely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim involving such a serious allegation. In the majority of instances, the record on direct appeal is simply undeveloped and cannot adequately reflect the failings of trial counsel. Indeed in a case such as this, where the alleged derelictions primarily are errors of

> omission de hors the record rather than commission revealed in the trial record, collateral attack may be the vehicle by which a thorough and detailed examination of alleged ineffectiveness may be developed and spread upon a record.

Id. at 813-14 (citations and quotation marks omitted).

Here, since the record is silent as to the reasoning behind counsel's acts or omissions, appellant has failed to overcome the presumption that counsel acted competently, especially in light of *Thompson*. Further, although appellant filed a motion for new trial and even raised the ineffectiveness claim, he nonetheless neglected to develop a record that would have supported his claim. Thus, to find that trial counsel was ineffective based on appellant's asserted ground would call for speculation, which we will not do. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Without an adequate record, we find these alleged omissions by counsel could have been reasonable trial strategy. On the limited record before us, defense counsel seems to primarily rely on the alibi – he wasn't there so could not have committed the crime. Therefore, appellant's battle against the state's insistence on offering hearsay evidence would seemingly not be worth the effort. On the other hand, how the alibi evidence by appellant's grandmother could possibly have been perfected or bolstered to avoid any impeachment is more problematic. Such conjecture is beyond our ambient. We therefore overrule appellant's issues and affirm the judgment of the trial court.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed April 5, 2001.

Panel consists of Acting Chief Justice Fowler and Justices Yates and Wittig.

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