Affirmed and Opinion filed April 26, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00205-CR

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HUMBERTO LARA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 821151

O P I N I O N

Humberto Lara appeals a conviction for aggravated sexual assault of a child[1] on the ground that the trial court erred in denying his motion for new trial[2] because: (1) he received ineffective assistance of counsel; and (2) there was material newly discovered evidence. We affirm.

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[1] Appellant was found guilty by a jury and sentenced by the jury to thirty-five years confinement.

[2] A trial court's ruling on a motion for new trial is reviewed for abuse of discretion. *Rent v. State*, 982 S.W.2d 382, 384 (Tex. Crim. App. 1998).

Ineffective Assistance

Appellant contends that he was denied effective assistance of counsel because his trial counsel introduced punishment evidence that was unavailable to the State and severely prejudicial. In particular, appellant's trial counsel elicited testimony from Dr. Michael Cox that, based on his evaluation, appellant fit the profile of a sex offender, despite the fact that trial counsel had argued during the guilt/innocence phase that the complainant lied about appellant committing the sexual assault, *i.e.*, that appellant was innocent. Appellant contends that there was no objectively reasonable trial strategy for calling Cox as a witness because testimony that treatment would likely be successful could have been obtained without having to evaluate appellant if trial counsel had adequately investigated the case.

To prevail on a claim of ineffective assistance of counsel, an appellant must show, first, that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness, and, second, that the appellant was prejudiced in that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). In reviewing claims of ineffective assistance, scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Busby v. State*, 990 S.W.2d 263, 268 (Tex. Crim. App. 1999). A court must indulge, and a defendant must overcome, a strong presumption that the challenged action might be considered sound trial strategy under the circumstances. *Strickland*, 466 U.S. at 689. Also, the record of the case must affirmatively demonstrate the alleged ineffectiveness. *Thompson*, 9 S.W.3d at 813.[3] A fair assessment of attorney performance requires that

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[3] Ordinarily, the presumption that an attorney's actions were sound trial strategy cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 268-69 (Tex. Crim. App. 1999). In this case, appellant cites various other alleged deficiencies to discredit his trial representation as a whole, but failed to develop any evidence regarding trial counsel's reasons for those additional actions and omissions. Therefore, we do not address them.

every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Strategic choices made after a less than complete investigation of law and facts relevant to plausible options are reasonable only to the extent reasonable professional judgment supports the limitations on investigation. *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993).

In this case, the motion for new trial was supported by the affidavit of Mark Bennett, appellant's trial counsel, and Cynthia Henley, a Texas attorney. Bennett's affidavit stated that he knew Cox would testify that appellant fit the profile of a sex offender, but never considered having him or anyone else testify instead only as to available treatment programs. Henley's affidavit stated that calling Cox to testify was not reasonable trial strategy under any objective standard of reasonableness and that Bennett was ineffective for failing to investigate and consider having someone else testify to available treatment options. At the motion for new trial hearing, the State's direct examination of Bennett showed that Bennett conducted a pre-trial investigation, which included speaking to and developing information regarding expert witnesses. Further, Bennett testified that he called Cox in the hope of persuading the jury to grant appellant probation. According to Bennett, he thought Cox was very experienced in sex offender treatment and it was his intention to show the jury that appellant could be successfully treated for his characteristics as a sex offender. Thus, Bennett had questioned Cox at trial regarding his success rate in treating people that fit appellant's characteristics, and Cox responded that he had been very successful. In addition, Bennett stated that Cox answered negatively when asked if his examination of appellant meant that appellant had committed sexual assault.

Bennett's testimony was evidence that his decision to elicit the complained of testimony from Cox was not based on a less than complete investigation as appellant contends, but a reasonable strategic choice based on the information available at the time

of trial. *See Ex parte Kunkle*, 852 S.W.2d at 505. Contrary to appellant's position, we do not believe that counsel's duty to investigate requires conscious consideration of alternatives to every trial decision a defense lawyer is called upon to make where his initial inclination represents a plausible strategy to lessen the adverse consequences faced by his client. In light of Bennett's testimony, we thus conclude that it was within the trial court's discretion to deny appellant's motion for new trial. Accordingly, appellant's first point of error is overruled.

Newly Discovered Evidence

Appellant's second point of error contends that his motion for new trial should have been granted based on newly discovered evidence that the complainant's father was the individual who molested her, not the appellant.

An accused is entitled to a new trial where material evidence favorable to the accused has been discovered since trial. TEX. CODE CRIM. PROC. ANN. art. 40.001 (Vernon Supp. 2001). In order to prevail on a motion for new trial based on newly discovered evidence, the appellant must show that the: (1) the newly discovered evidence was unknown to the movant at the time of trial; (2) movant's failure to discover the evidence was not due to his want of diligence; (3) evidence was admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) evidence would probably bring about a different result in another trial. *Moore v. State*, 882 S.W.2d 844, 849 (Tex. Crim. App. 1994). As to the likelihood that new evidence would bring about a different result, the probable truth of such evidence is primarily a determination for the trial judge. *Eddlemon v. State*, 591 S.W.2d 847, 850 (Tex. Crim. App. 1979). Therefore, should it appear to a trial court that the credibility or weight of new evidence in a particular case is not such as would probably bring about a different result upon a new trial, it is within the trial court's discretion to deny the motion for new trial. *Jones v. State*, 711 S.W.2d 35, 36 (Tex. Crim. App. 1986).

In this case, Bennett's affidavit stated that he learned after the guilt/innocence verdict that appellant's eleven-year old daughter, Christina Lara, had told her mother that the complainant had told Christina that the complainant's father had been abusing the complainant. Bennett thereafter elicited this testimony from Christina at the punishment phase, but the State's objection to further questioning was sustained. Bennett then offered Christina's testimony in a bill of exception "as something in the nature of victim impact. The fact [the complainant had] been abused by someone else lessens the impact of [appellant]."

Despite appellant's claim that Christina's testimony shows that he did not sexually abuse the complainant, Christina's testimony does not bear on appellant's conduct, but only on whether, as Bennett stated in the bill of exception, someone else might also have abused the complainant. Although Christina testified in the bill of exception that she had disclosed this information to Bennett for the first time that day and had told her mother of it the preceding day, she was not asked why she had not mentioned it sooner. However, she testified before the jury that she knew the jury would decide at the punishment proceeding whether her father would receive probation or go to jail, and that she wanted him on probation so she could see him. Having heard Christina's testimony, the trial court was within its discretion to assess the weight and credibility of that testimony and conclude that it was not likely to bring about a different result in another trial. Accordingly, appellant's second point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed April 26, 2001.

Panel consists of Justices Edelman and Frost and Senior Chief Justice Murphy.[4]

Do not publish — TEX. R. APP. P. 47.3(b).

[4] Senior Chief Justice Paul C. Murphy sitting by assignment.