Motion for Rehearing Overruled, Opinion of July 15, 1999, Withdrawn, and Corrected Opinion filed September 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00195-CR

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PEDRO VAZQUEZ ALCANTAR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 752,652

C O R R E C T E D O P I N I O N

Appellant was charged by indictment with the offense of sexual assault of a child. Appellant pled guilty to the charged offense. Sentencing was rescheduled pending the preparation of a presentence investigation report ("PSI"). The trial court subsequently received the PSI and assessed punishment at ten years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises two points of error alleging ineffective assistance of counsel. In his first point of error, appellant contends his trial counsel was

ineffective in failing to object to the conduct and content of the PSI. In his second point, appellant contends his trial counsel was ineffective in failing to accurately advise appellant of the consequences of his guilty plea. We affirm.

I. The Record Evidence

On November 7, 1997, appellant executed two form documents, which are executed by virtually every defendant in Harris County who enters a plea of guilty. Both documents were signed and sworn to by appellant prior to entering his plea. The first document is entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession" and states: "I am satisfied that the attorney representing me today in court has properly represented me and I have fully discussed this case with him." That document has a section where the parties state the terms of their plea bargain agreement. In this case, that section states that the parties were not able to agree on a punishment recommendation and that a PSI would be ordered.

The second document is entitled "Admonishments." Within this is a section entitled "Statements and Waivers of Defendant." In this section, appellant waived the right to have a court reporter record the plea and appellant initialed the following language:

> (6) I understand that before sentence may be imposed, the Court must order preparation of a Presentence Investigation Report by the probation officer pursuant to Article 42.12, Sec. 9, V.A.C.C.P. I have thoroughly discussed this matter with my attorney and believe that for the Court to compel me to participate in the preparation of such a report would abridge the protection provided me by the Constitution of the United States and the Constitution and laws of the State of Texas and could result in further prejudice to me. Therefore, I hereby in writing respectfully decline to participate in the preparation of a Presentence Investigation Report and request that said report not be made prior to the imposition of sentence herein. I further knowingly, voluntarily, and intelligently waive any right which I may have to the preparation of said report either under Article 42.12, Sec. 9, V.A.C.C.P. or under Article 42.09, Sec. 8, V.A.C.C.P.

Shortly thereafter, the following language is found: "Joined by my counsel, I state that I understand the foregoing admonishments and I am aware of the consequences of my plea. ... I am totally satisfied with the representation provided by my counsel and I received effective and competent representation. ... I waive and give up my right of confidentiality to the pre-sentence report filed in the case and agree that the report may be publicly filed."

On November 10, 1997, appellant returned to court and entered his plea of guilty. The docket sheet reflects that the plea was without an agreed punishment recommendation, that the trial court withheld a finding of guilt, and recessed the hearing "in order that a pre-sentencing investigation may be conducted." In the section of the judgment for the terms of the plea bargain the following is written: "Without an agreed recommendation PSI." The record also contains an "agreed setting" form which rescheduled the case for "PSIH" at 9:00 a.m. on January 30, 1998, the date appellant was sentenced.[1]

II. Standard of Appellate Review

The standard by which we review the effectiveness of counsel at all stages of a criminal trial was articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). The Supreme Court in *Strickland* outlined a two-step analysis. First, the reviewing court must decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below the objective standard, the reviewing court then must determine whether there is a "reasonable probability" the result of the trial would have been different but for counsel's deficient performance. A reasonable probability is a "probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. Absent both showings, an appellate court cannot

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[1] The PSI is not found in the appellate record. However, a copy of same is attached as an exhibit to appellant's brief. We also note that while a motion for new trial was filed, it was neither presented to the trial court nor was a hearing conducted on the motion

conclude the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id.* at 687. *See also Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991).

A claim of ineffective assistance of counsel must be determined upon the particular facts and circumstances of each individual case. *See Jimenez v. State*, 804 S.W.2d 334, 338 (Tex. App.--San Antonio 1991, pet. ref'd). A strong presumption exists that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See Strickland*, 466 U.S. at 689; *Stafford v. State*, 813 S.W.2d 503, 506 (Tex. Crim. App. 1991). Stated another way, "competence is presumed and the party asserting ineffective assistance must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound trial strategy." *Id.* To sustain this burden, the defendant has the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *See Riascos v. State*, 792 S.W.2d 754, 758 (Tex. App.--Houston [14th Dist] 1990, pet. ref'd). Allegations of ineffective assistance of counsel will be sustained only if they are firmly founded. *See Jimenez*, 804 S.W.2d at 338.

III. Application to Facts

In connection with the first point of error, we note that the instant conviction was pursuant to a plea of guilty without an agreed recommendation as to punishment. Apparently, the State wanted appellant to receive some term of confinement and appellant sought some form of deferred adjudication probation or community supervision. The ultimate decision as to the appropriate punishment was left to the trial court. There was, however, no information before the court with which to make that determination. Therefore, a PSI was ordered. It is clear to us that the parties fully understood that a PSI would be prepared and presented to the court. Our understanding of this comes from reading the document entitled "Waiver of Constitutional Rights, Agreement to Stipulate, and Judicial Confession," the docket sheet, the

agreed setting form, and the judgement of the court. The only thing to refute this is the language quoted above in the document entitled "Admonishments" where appellant stated he did not wish to have a PSI prepared. This presents a conflict. On this record, however, we resolve that conflict against appellant and conclude he executed that portion of the "Admonishments" document inadvertently. This conclusion is bolstered by the fact that the "Admonishments" document also contains the following language: "I waive and give up my right of confidentiality to the pre-sentence report filed in the case and agree that the report may be publicly filed."

In connection with the second point of error, there is simply nothing in the record to suggest that trial counsel failed to accurately advise appellant of the consequences of his plea. Indeed, the aforementioned documents refute this allegation.

In sum, when the particular facts and circumstances of the instant case are examined, we find the presumption of counsel's competence has not been rebutted. *See Jimenez*, 804 S.W.2d at 338. Consequently, we hold appellant has not carried his burden of proving by a preponderance of the evidence, *see Riascos*, 792 S.W.2d at 758, that trial counsel's representation of appellant fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 694. We overrule appellant's first and second points of error.[2]

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[2] This narrow holding resolves only these points of error. Specifically, we are not addressing appellant's assertions that he gave trial counsel a letter from the complainant, and medical records which establish that the alleged offense did not occur. Therefore, this opinion is not intended to preclude appellant from pursuing those matters in a subsequent application for writ of habeas corpus as the State advises.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed September 16, 1999.

Panel consists of Justices Anderson, Hudson, and Baird.[3]

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[3] Former Justice Charles F. Baird sitting by assignment.