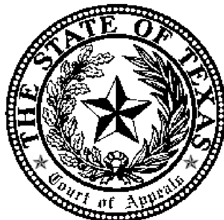
Affirmed and Opinion filed November 8, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-01309-CR
NO. 14-00-01310-CR

JOSHUA BARNARD DAVISON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause Nos. 826,153 & 827,292

O P I N I O N

Appellant entered a plea of guilty to two counts of aggravated robbery. The plea was entered without an agreed recommendation on punishment. After entry of the plea, the trial court ordered a presentence investigation (PSI) report. Following receipt of the report, the trial court assessed punishment at thirty-five years in prison and a $10,000 fine. In two points of error, appellant claims (1) the trial court erred in relying on the PSI report because it contained irrelevant information; and (2) he received ineffective assistance of counsel because his counsel failed to object to the PSI report. We affirm.

In his first point of error, appellant claims the trial court erred in relying on the PSI report because the report contained a victim impact statement from Charles Whitley, the owner of the stolen vehicle used by appellant and his co-defendant during the commission of the two robberies. In the statement, Whitley stated that his vehicle was returned undamaged and that nothing was missing. He asked the court to assess the maximum punishment possible for the offense. Appellant claims that because the stolen vehicle case had been dismissed, the inclusion of Whitley's statement in the PSI report violated article 42.12 §9 of the Texas Code of Criminal Procedure.

Because appellant waived the services of a court reporter at the punishment hearing, he has failed to provide a sufficient record for appellate review. When a defendant waives a court reporter, the burden is nonetheless on the defendant to present a sufficient record to show error. *Lopez v. State,* 25 S.W.3d 926, 928-29 (Tex. App.—Houston [1st Dist.] 2000, no pet.). Because the record does not show whether appellant objected to the contents of the PSI report, appellant has waived error.

Further, article 42.12 § 9 does not preclude the inclusion of a victim impact statement from the PSI report. *See Fryer v. State,* 993 S.W.2d 385, 389 (Tex. App.—Fort Worth 1999, pet. granted). Therefore, had appellant objected to the PSI, the objection would have been overruled. Appellant's first point of error is overruled.

In his second point of error, appellant claims he received ineffective assistance of counsel because his counsel failed to object to the contents of the PSI report. To review a claim of ineffective assistance of counsel, the reviewing court must first decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland v. Washington,* 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If counsel's performance fell below this standard, the reviewing court must decide 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 confidence in the outcome." *Strickland*, 466 U.S. at 694. A

defendant is entitled to reasonably effective counsel, not perfect counsel judged by hindsight; therefore, more than isolated errors and omissions will be needed to demonstrate ineffective assistance of counsel. *See Lanum v. State*, 952 S.W.2d 36, 40 (Tex. App.—San Antonio 1997, no pet.).

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App.1999). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). The appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *Id*. The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *Stults v. State*, 23 S.W.3d 198, 208 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or a motion for new trial. *See Jackson*, 973 S.W.2d at 957.

When the record is silent as to counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.). An appellate court will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused relying on an ineffective assistance of counsel claim to make the necessary record in the trial court. *Thompson,* 9 S.W.3d at 814.

Here, no motion for new trial was filed, nor was a record made of the punishment hearing. The record is silent as to whether appellant's trial counsel objected to the PSI report, and, if he failed to object, whether counsel had a sound trial strategy for his failure to object. Therefore, appellant has failed to rebut the presumption that trial counsel's actions resulted from a reasonable decision. Counsel's allegedly improper actions do not amount to an error sufficiently egregious to satisfy the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed November 8, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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