Affirmed and Opinion filed December 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-01308-CR

JOSE SORTO HERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 185th District Court
Harris County, Texas
Trial Court Cause No. 640,108

O P I N I O N

Jose Sorto Hernandez appeals his convictions for indecency with a child and aggravated sexual assault of a child[1] on the grounds that: (1) he was denied effective assistance of counsel; and (2) the trial court erred in finding that appellant was required to register under the sex offender registration statute because that provision amounts to an ex post facto law. We affirm.

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[1] In a single trial, a jury found appellant guilty of both offenses, and the court sentenced him to 20 and 50 years confinement for the two offenses, respectively.

Ineffective Assistance of Counsel

Appellant's first issue argues that the following actions and omissions of his attorney during trial denied him effective assistance of counsel: (1) opening the door to extraneous offense evidence of appellant's sexual assaults of the complainant's sister; (2) eliciting cross-examination testimony from the complainant's sister that she had intercourse with appellant; (3) allowing complainant's sister to testify, without objection, that appellant threatened to beat and harm her mother if she told about his sexual assaults; (4) failing to object to hearsay testimony of a sex crime investigator, describing the complainant's allegations regarding the sexual assault; (5) failing to object to hearsay testimony that appellant evaded arrest after charges were filed against him and then jumped bond; (6) failing to object to the State's recitation from the offense report that many efforts were required to serve appellant with a warrant and arrest him; (7) suggesting in closing argument that appellant's relationship with the complainant and her sister was a product of repugnant Hispanic culture; (8) failing to present any evidence at the punishment stage; (9) failing to take any steps to insure adequate consideration of probation, including the timely filing of an election on punishment, voir diring on the ability to consider this option, or filing a sworn motion for probation; (10) failing to argue that appellant's convictions for both aggravated sexual assault and the lesser included offense of indecency with a child were barred by double jeopardy; and (11) failing to timely withdraw as appellant's counsel so that an adequate record of ineffective assistance could be developed during the period in which a motion for new trial could be filed.

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); *Tong v. State*, 25 S.W.3d 707, 712 (Tex. Crim. App. 2000). To be sustained, an allegation of ineffective assistance of counsel must be affirmatively demonstrated in the record. *McFarland v. State,* 928 S.W.2d

482, 500 (Tex. Crim. App. 1996). In reviewing ineffectiveness claims, scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689; *Tong*, 25 S.W.3d at 712. 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; *Tong*, 25 S.W.3d at 712. A fair assessment of attorney performance requires that 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. Thus, the presumption that an attorney's actions were sound trial strategy ordinarily 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), *cert. denied*, 120 S. Ct. 803 (2000). In this case, with the exception of the alleged failure to raise double jeopardy, the foregoing contentions of ineffective assistance cannot be evaluated without a record of the reasons for counsel's actions and are overruled.

Appellant argues that double jeopardy does not allow him to be convicted of the greater offense of aggravated sexual assault of a child[2] *and* the lesser offense of indecency with a child[3] where both arose from acts occurring on the same day and there is nothing in the evidence to distinguish them or show that one occurred while the other did not. The Fifth Amendment guarantee against double jeopardy protects against multiple punishments for the same offense. *Illinois v. Vitale*, 447 U.S. 410, 415 (1980); *Cervantes v. State*, 815 S.W.2d 569, 572 (Tex. Crim. App. 1991).[4]

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[2] A person commits aggravated sexual assault of a child by penetrating the female sexual organ of a child by any means. TEX. PEN. CODE ANN. § 22.021(a)(1)(B)(i) (Vernon Supp. 2001).

[3] As it pertains to this case, a person commits indecency with a child if, with intent to arouse or gratify his sexual desire, he engages in sexual contact with the child by touching her genitals. TEX. PEN. CODE ANN. § 21.11(a) (Vernon Supp. 2001), § 21.01(2) (Vernon 1994).

[4] When the same act violates two different penal statutes, the two offenses are the same for double jeopardy purposes if one of the offenses contains all the elements of the other; but are not the same if each offense has a unique element. *Blockberger v. United States*, 284 U.S. 299, 304 (1932).

Appellant's indictment and jury charge referred to each offense as having occurred on or about June 19, 1992. However, when an indictment alleges that a crime occurred "on or about" a certain date, the State can rely upon an offense with a date other than the one specifically alleged so long as the date is anterior to the presentment of the indictment and within the statutory limitation period and the offense relied upon otherwise meets the description of the offense contained in the indictment. *Yzaguirre v. State*, 957 S.W.2d 38, 39 (Tex. Crim. App. 1997). Thus, it is allowable for the State to proceed on events that occurred before June 19, 1992, even though the indictment alleged that the offenses occurred "on or about June 19, 1992." *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997).

In this case, the following testimony shows that incidents supporting each of appellant's two convictions happened on various occasions:

[Prosecutor]: When was the first time that he touched you?

[Complainant]: It was when I was 12 when he touched me.

[Prosecutor]: What did – what part of your body did he touch?

[Complainant]: Everything.

[Prosecutor]: Did he touch your breasts?

[Complainant]: Yes, he did.

[Prosecutor]: Did he touch your genitals?

[Complainant]: Yes, he did.

[Prosecutor]: When would he do this?

[Complainant]: When my mom wasn't there or when it was at night, in the middle of the night, when everybody was sleeping.

[Prosecutor]: Would you know he was coming or would he wake you up.

[Complainant]: At first I didn't, but then he used to wake me up, like touching me all over. And I told him not to touch me and then he said to be quiet or he was going to kill me or hit me.

[Prosecutor]: When was the first time that he tried to have sex with you?

[Complainant]: He used to tell me every time he touched me to get undressed, but I was scared of him. So, I did.

[Prosecutor]: When he tried to penetrate you, did it hurt?

[Complainant]: Yes, I told him to stop.

[Prosecutor]: Was he able to get ... put his penis all the way inside you?

[Complainant]: No. I told him to stop because he hurt it so much and he told me it would just going to take five minutes. But I told him that was too much, that it hurted me so much.

[Prosecutor]: When he penetrated you and you told him it hurt, would he stop then or would he keep trying?

[Complainant]: No, he [kept] trying; but I used to push him away.

[Prosecutor]: How many times did the defendant try to have sex with you?

[Complainant]: I think it was about eight, ten times. ...

Because there were multiple instances of the conduct for which appellant was convicted,[5] there was no double jeopardy bar to appellant being convicted for two of the offenses he committed among those instances. Accordingly, his attorney's failure to assert double jeopardy was not ineffective assistance of counsel, and his first issue is overruled.

Sex Offender Registration

Appellant's second issue contends that the trial court erroneously required him to register as a sex offender pursuant to Chapter 62 of the Code of Criminal Procedure because the application of Chapter 62 to appellant violates the ex post facto clause of the United States Constitution.[6] However, because the sex offender registration requirement is remedial

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5 The evidence of penetration satisfies the elements for both the indecency and assault convictions. *See Ochoa v. State*, 982 S.W.2d 904, 907 (Tex. Crim. App. 1998).

6 *See* U.S. CONST. art. I, § 10, cl. 1 ("[n]o state shall ... pass any ... ex post facto Law"). An ex post facto law: (1) punishes as a crime an act previously committed which was innocent when done; (2) changes the punishment and inflicts a greater punishment than the law attached to a criminal offense when committed; (3) deprives a person charged with a crime any defense available at the time the act was committed; or (4) alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense in order to convict the offender.

in nature, *i.e.*, a statute enacted for the advancement of the public welfare or conducive to the public good, it has been held not to impose "punishment" for constitutional purposes and is thus not an ex post facto law.[7] Accordingly, appellant's second issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 20, 2001.

Panel consists of Justices Yates, Edelman, and Draughn.[8]

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

Carmell v. Texas, 529 U.S. 513, 513 (2000); *Ex Parte Davis*, 947 S.W.2d 216, 219-20 (Tex. Crim. App. 1996).

[7] *See Rodriguez v. State*, 45 S.W.3d 685, 689 (Tex. App.—Fort Worth 2001, pet. granted); *Saldana v. State*, 33 S.W.3d 70, 71 (Tex. App.–Corpus Christi 2000, pet. ref'd); *White v. State*, 988 S.W.2d 277, 279 (Tex. App.–Texarkana 1999, no pet.).

[8] Senior Justice Joe L. Draughn sitting by assignment.