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## YEAR 2005 CASE SUMMARIES

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By  
**The Honorable Pat Garza**

Associate Judge  
386th District Court  
San Antonio, Texas

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### **No evidence that counsel's performance failed to constitute reasonably effective assistance of counsel. [Marthiljohi v. State](05-3-30B)**

**On August 4, 2005, the Corpus Christi Court of Appeals held that there was no evidence that counsel's performance failed to constitute reasonably effective assistance of counsel.**

05-3-30B. Marthiljohi v. State, MEMORANDUM, No. 13-03-687-CR, 2005 Tex.App.Lexis 6194 (Tex.App.— Corpus Christi, 8/4/05).

Facts: Appellant, James Phillip Martheljohi, II, a minor, was convicted of murder and now appeals from this conviction claiming ineffective assistance of counsel and violations of his rights under the *Fifth Amendment*, *Sixth Amendment*, and former *article 46.02, section 3(g) of the Texas Code of Criminal Procedure*.

Appellant was arrested for the September 23, 2002 murder of his stepmother. During a detention hearing, appellant's counsel raised the issue of mental illness. Both the State and defense counsel moved the juvenile court to order a Fitness to Proceed examination pursuant to *section 55.11 of the Texas Family Code*. The examining psychiatrist found appellant fit to proceed. Appellant was certified as an adult and tried for murder. During the trial, the examining psychiatrist testified that appellant had the capacity to commit murder and knew the wrongfulness of his action. A jury found appellant guilty and sentenced him to forty years' imprisonment.

Held: Affirmed

Memorandum Opinion: In his second issue, appellant claims ineffective assistance of counsel for failure to object to the examining psychiatrist's testimony relating to appellant's guilt or innocence. Appellant further complains of trial counsel's failure to attend the competency hearing or meet with the examining psychiatrist before the trial.

The *Sixth Amendment* guarantees the right to reasonably effective assistance by counsel. *U.S. CONST. amend. VI*. The *Sixth Amendment* applies to state criminal prosecutions. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). To prevail on a claim of ineffective assistance of counsel, appellant must establish that (1) counsel's performance failed to constitute reasonably effective assistance by falling below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). Allegations of ineffective assistance of counsel must be firmly founded in the record. *Ex parte Nailor*, 149 S.W.3d 125, 130 (Tex. Crim. App.

2004). Where the record is silent, we assume strategic motivation and sound trial strategy unless counsel's conduct is so outrageous that no competent attorney would have so acted. *Garcia*, 57 S.W.3d at 440. Appellant offers four incidents that he claims demonstrate ineffective assistance.

First, appellant contends that defense counsel provided ineffective assistance when he failed to object to the State's questions to the examining psychiatrist that related to appellant's innocence or guilt. When an appellant alleges that counsel was deficient in failing to object to the admission of evidence, the appellant must show, as part of his claim, that the evidence was inadmissible. *Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002). As discussed above, however, we find that appellant has not shown that the evidence was inadmissible.

Second, appellant claims the record implies that he did not have his counsel with him when he met with the psychiatrist. The courts have not held there is a constitutional right to have counsel present during a competency hearing. *See Estelle*, 451 U.S. at 471 n.14. To the contrary, the courts have noted that having an attorney present could prove disruptive to the examination process. *Id.*

Third, appellant claims defense counsel was ineffective because that he had not previously communicated with the examining psychiatrist about the case. Appellant, however, fails to state why this shows ineffective assistance. The record shows that defense counsel's office received a copy of the psychological evaluation on November 14, 2002, eleven months before the trial. The record also shows that defense counsel was aware of collateral sources used by the examining psychiatrist, including a psychological evaluation requested by the Juvenile Probation Department. Counsel possessed the information he needed, and appellant does not claim that counsel withheld any collateral sources from the psychiatrist that might have helped him during the evaluation.

Fourth, appellant claims the record implies trial counsel failed to direct appellant on how to handle himself during the competency hearing. As evidence, appellant cites the trial record where defense counsel asked the psychiatrist whether appellant had ever indicated during his interview that he had been advised or been counseled by an attorney on how to deal with the competency examination. The psychiatrist answered, "No, he didn't say that." The Supreme Court has noted the extreme strategic importance of a competency hearing and the need for effective counsel. *Estelle*, 451 U.S. at 471. Few would argue that for an attorney to send a client accused of murder into a mental examination without any guidance of counsel falls below an objective standard of reasonableness under the prevailing professional norms. *See TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 (b)* ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). In this case, however, there is no evidence in the record that the attorney failed to advise appellant. The record only states that appellant did not say during the examination whether he had received guidance.

Therefore, there is no evidence counsel's performance failed to constitute reasonably effective assistance under *Strickland*. *See Ex parte Nailor*, 149 S.W.3d at 130. Appellant's second issue is overruled.

Conclusion: We affirm the judgment of the trial court.