Juvenile Law Case Summaries

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Defense counsel was not ineffective in aggravated sexual assault trial [In re J.M.B.] (01-1-22).

On February 22, 2001, the Houston First District Court of Appeals held that defense counsel was not ineffective in her representation of the respondent in an aggravated sexual assault trial.

¶ 01-1-22. In the Matter of J.M.B., UNPUBLISHED, No. 01-99-01362-CV, 2001 WL 170977, 2001 Tex.App.Lexis ___ (Tex.App.--Houston [1 Dist.] 2/22/01)[Texas Juvenile Law (5th Edition 2000)].

Facts: A jury found appellant had engaged in delinquent conduct by committing the offense of aggravated sexual assault of a child. At disposition before the trial court, appellant agreed to be placed on juvenile probation, with treatment at the Burnett-Bayland facility and lifetime registration as a sex offender. The trial court denied appellant's motion for new trial. On appeal, appellant claims he was denied effective assistance of counsel, and the trial court erred by excluding the testimony of a expert.

In late September of 1998, a four-year-old girl, K.S., went to her mother and told her that her cousin, J.M.B., had touched her bottom with his "tee-tee." After school that day, the mother took K.S. to a therapist. The therapist instructed the mother to contact Child Protective Services (CPS), which she did. One to two weeks after K.S. told her mother, a child sexual abuse specialist interviewed K.S. on video and a nurse practitioner performed a physical exam.

The physical exam revealed abnormalities consistent with vaginal penetration. The exam also revealed K.S. exhibited signs of a hormonal disorder, which masculinizes the external genitalia of females. This may include an enlargement of the clitoris, which K.S. exhibited during the exam.

Held: Affirmed.

Opinion Text: In appellant's first point of error, he claims his trial counsel did not provide him with effective assistance because she did not present testimony from a medical doctor, did not provide the jury with appellant's background information, and allowed the State to introduce the complainant's videotaped statement by opening the door.

We look at the totality of the representation and the particular circumstances of the case. Thompson v. State, 9 S.W.3d 808, 813 (Tex.Crim.App.1999). We follow the standard for ineffective assistance of counsel from Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2066-68 (1984).

First, appellant must demonstrate counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Id.; McFarland v. State, 928 S.W.2d 482, 500 (Tex.Crim.App.1996). We indulge a strong presumption, which appellant must overcome, that counsel's conduct falls within the range of reasonable, professional assistance. Jackson v. State, 877 S.W.2d 768, 771 (Tex.Crim.App.1994). Appellant cannot demonstrate ineffective assistance by isolating a portion of counsel's representation. Strickland, 466 U.S. at 688, 104 S.Ct. at 2065.

Second, appellant must establish counsel's performance was so prejudicial that it deprived appellant of a fair trial. Id. 466 U.S. at 691, 104 S.Ct. at 2066. Thus, appellant must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. 466 U.S. at 694, 104

S.Ct. at 2068. "Reasonable probability" means a probability sufficient to undermine confidence in the outcome. Id.

Appellant first points to trial counsel's failure to have a medical doctor testify at trial due to a failure to investigate the available medical evidence. Appellant's argument on this point encompasses two omissions--a failure to investigate and a failure to call a witness. At the hearing on appellant's motion for new trial, trial counsel testified she had spoken with several doctors preparing for trial who recommended she find a medical doctor. Trial counsel also stated if she had known masculinization could have caused some of the nurse's findings, she would have called a medical doctor to rebut the nurse's testimony. But trial counsel stated she did not have time to find a medical doctor to testify before the trial began.

A thorough factual investigation is the foundation for effective assistance of counsel. Ex parte Ybarra, 629 S.W.2d 943, 946 (Tex.Crim.App.1982). Trial counsel's failure to call a medical doctor to testify cannot be attributed to trial strategy because trial counsel failed to investigate the claim, which would have allowed her to make a decision regarding trial strategy. Milburn v. State, 15 S.W.3d 267, 269-70 (Tex.App.--Houston [14th Dist.] 2000, pet. ref'd). However, a claim of ineffective assistance of counsel may not be based upon the failure to call witnesses unless appellant shows that witnesses were available. Rangel v. State, 972 S.W.2d 827, 935-36 (Tex.App.--Corpus Christi 1998, pet. ref'd) citing King v. State, 649 S.W.2d 42, 44 (Tex.Crim.App.1983); see also Milburn, 15 S.W.3d at 269-70 (testimony of available witnesses proven at hearing on motion for new trial).

Testimony elicited from trial counsel at the hearing on the motion for new trial reveals an investigation was conducted, including interviewing several experts. While trial counsel stated she did not have time to find a medical doctor, there is nothing in the record to indicate a request or a denial by the trial court for more time to conduct an investigation. Further, appellant has not shown that a medical doctor was available to testify at the time of trial. Even if we were to decide appellant had met the first prong of Strickland, appellant has not presented any evidence regarding how a medical doctor's testimony would have benefited appellant, which is necessary to overcome the second prong of Strickland. Appellant's argument contains only the allegation that a medical doctor would have rebutted the nurse's testimony that the physical exam revealed abnormalities caused by sexual abuse, without providing any evidence to undermine confidence in the outcome of the trial.

Next, appellant points to trial counsel's failure to present testimony about appellant's background. While appellant was on the stand, trial counsel did not ask him about his extra-curricular involvement, service activities, or other activities reflected in the probation report. However, there is no evidence in the record regarding trial counsel's decision not to elicit this testimony to rebut the presumption that trial counsel's conduct falls within the range of reasonable, professional assistance. We cannot speculate regarding the trial strategy or reasoning behind the actions of trial counsel. Jackson, 877 S.W.2d at 771. Appellant has not met the first prong of Strickland.

Next, appellant contends that trial counsel erred by opening the door to allow a videotaped statement by the complainant to a sexual abuse therapist to be admitted into evidence. Again, there is no evidence in the record regarding trial counsel's decision to open the door to rebut the presumption that trial counsel's conduct falls within the range of reasonable, professional assistance. We cannot speculate regarding the trial strategy or reasoning behind the actions of trial counsel. Id. Further, opening the door, by itself, is not ineffective assistance of counsel. Gonzales v. State, 626 S.W.2d 888, 893 (Tex.App.--San Antonio, 1981 pet. ref'd). Appellant has not met the first prong of Strickland.

Looking at the totality of the representation and the particular circumstances of the case, we overrule point of error one.

In his second point of error, appellant contends the trial court abused its discretion by refusing to allow a defense expert to testify regarding appellant's psychological profile and a comparison of appellant's profile to a sex offender profile. Appellant waived this error by failing to make an offer of proof or bill of exceptions to show what testimony he would have elicited from the expert. Tex.R.App. P. 52(b); Tex.R. Evid. 103(a)(2); see also Stewart v. State, 686 S.W.2d 118, 122 (Tex.Crim.App.1984).
