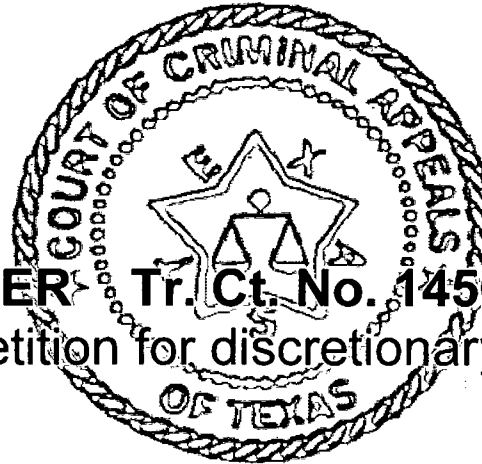


A P P E N D I X

A

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS. **FILE COPY**
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711



10/18/2017

WARD, MICHAEL ALEXANDER Tr. Ct. No. **1450385R**

COA No. 06-16-00136-CR

PD-0671-17

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

WILLIAM BIGGS
WILLIAM R. BIGGS, PLLC
115 W. 2ND ST, SUITE 202
FORT WORTH, TX 76102
* DELIVERED VIA E-MAIL *

A P P E N D I X

B



THE STATE OF TEXAS MANDATE

TO THE 297TH DISTRICT COURT OF TARRANT COUNTY, GREETINGS:

Before the Court of Appeals for the Sixth Court of Appeals District of Texas, on the 6th day of June, A.D. 2017, the cause upon appeal to revise or reverse your Judgment was determined; and therein our said Court made its order in these words:

Michael Alexander Ward, Appellant

No. 06-16-00136-CR

v.

Trial Court No. 1450385R

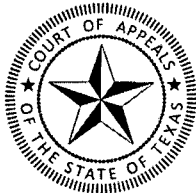
The State of Texas, Appellee

As stated in the Court's opinion of this date, we find no error in the judgment of the court below. We affirm the judgment of the trial court.

We note that the appellant, Michael Alexander Ward, has adequately indicated his inability to pay costs of appeal. Therefore, we waive payment of costs.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf, and in all things to have it duly recognized, obeyed, and executed.

WITNESS, the Hon. Josh R. Morriss, III, Chief Justice of our said Court of Appeals, with the seal thereof annexed, at the City of Texarkana, this the 7th day of December, A.D. 2017.



DEBRA K. AUTREY, Clerk

A handwritten signature in cursive script that reads "Debbie Autrey".

A P P E N D I X

C

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STATE OF TEXAS
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WARD, MICHAEL ALEXANDER - Tr. Ct. No. 1450385R

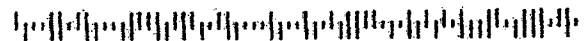
PD-0671-17

On this day, the Appellant's Pro Se motion for rehearing has been denied.

Deana Williamson, Clerk

4F 63
MICHAEL ALEXANDER WARD
ROBERTSON UNIT - TDC # 2073205
12071 FM 3522
ABILENE, TX 79601

KMIWNAB 79601



A P P E N D I X

D

**MICHAEL ALEXANDER WARD, Appellant v. THE STATE OF TEXAS, Appellee
COURT OF APPEALS OF TEXAS, SIXTH DISTRICT, TEXARKANA**

2017 Tex. App. LEXIS 5145

No. 06-16-00136-CR

May 17, 2017, Submitted

June 6, 2017, Decided

Notice:

PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

Editorial Information: Prior History

On Appeal from the 297th District Court, Tarrant County, Texas. Trial Court No. 1450385R.

Judges: Before Morriss, C.J., Moseley and Burgess, JJ. Memorandum Opinion by Justice Moseley.

CASE SUMMARY Conviction affirmed because, although defendant contended that his trial counsel rendered ineffective assistance at defendant's trial, defendant failed to rebut the presumption that trial counsel's decision was in some way-be it conceivable or not-reasonable.

OVERVIEW: **ISSUE:** Whether defendant's counsel rendered effective assistance at defendant's trial for continuous sexual abuse of a child or children under fourteen years of age. **HOLDINGS:** [1]-Although defendant contended that his counsel was ineffective because he failed to object to testimony that the child victims were telling the truth, object to the use of an investigator with Texas Department of Child Protective Services as an outcry witness, and object to police testimony that one child's outcry was consistent with the original report of abuse given to police by the child's mother, because there was no evidence showing counsel's reasons for not objecting as defendant concluded that he should have, defendant failed to rebut the presumption that trial counsel's decision was in some way-be it conceivable or not-reasonable.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Evidence > Procedural Considerations > Burdens of Proof > Allocation***

The right to counsel does not mean the right to errorless counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in the case law. The first prong requires a showing that counsel's performance fell below an objective standard of reasonableness. This requirement can be difficult to meet since there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. This measure of deference, however, must

not be watered down into a disguised form of acquiescence.

***Criminal Law & Procedure > Counsel > Effective Assistance > Tests
Evidence > Procedural Considerations > Burdens of Proof > Allocation***

The second prong of the test for ineffective assistance of counsel (to which reference is sometimes made as the prejudice prong) requires a showing that, but for counsel's unprofessional error, there is a reasonable probability that the result of a proceeding would have been different. A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome. Thus, to establish prejudice, an applicant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result was reliable. It is not sufficient for an applicant to show that the errors had some conceivable effect on the outcome of the proceeding. Rather, he or she must show that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

***Evidence > Procedural Considerations > Burdens of Proof > Allocation
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence
Criminal Law & Procedure > Counsel > Effective Assistance > Trials
Evidence > Inferences & Presumptions > Presumption of Regularity
Evidence > Inferences & Presumptions > Rebuttal of Presumptions***

The applicant has the burden to prove ineffective assistance of counsel by a preponderance of the evidence. Allegations of ineffectiveness must be based on the record, and the presumption of a sound trial strategy cannot be overcome absent evidence in the record of the attorney's reasons for his conduct. A reviewing court must look to the totality of the representation, and its decision must be based on the facts of a particular case, viewed at the time of counsel's conduct so as to eliminate hindsight bias. In all cases, the ultimate focus of inquiry must be on the fundamental fairness of a proceeding.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

A failure to make a showing under either prong of the test for ineffective assistance of counsel defeats a claim for ineffective assistance. Allegations of ineffectiveness must be firmly founded in the record. The test of necessity requires a case-by-case examination of the evidence.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials

Trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.

***Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Ineffective Assistance
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Records
Criminal Law & Procedure > Habeas Corpus > Review > Specific Claims > Ineffective Assistance***

Generally, in a case in which there is no record relative to counsel's decisions and actions, an appellant has a more appropriate remedy in seeking a writ of habeas corpus to allow him the opportunity to develop evidence to support his complaint.

Opinion

Opinion

Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

A Tarrant County¹ jury found Michael Alexander Ward guilty of continuous sexual abuse of a child or children under fourteen years of age. Ward was sentenced to forty-five years' incarceration.

On appeal, Ward argues that his counsel rendered ineffective assistance in failing to: (1) object to testimony that the child victims were telling the truth; (2) object to the use of an investigator with Child Protective Services as an outcry witness; and (3) object to police testimony that one child's outcry was consistent with the original report of abuse given to police by the child's mother.

Because Ward failed to overcome the presumption that his counsel's decisions were reasonable, we affirm the trial court's judgment.

I. Ward Failed to Rebut the Presumption that his Counsel's Decisions Were Reasonable

As many cases have noted, the right to counsel does not mean the right to errorless counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *Ex parte Imoudu*, 284 S.W.3d 866, 869 (Tex. Crim. App. 2009). The first *Strickland* prong requires a showing that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. This requirement can be difficult to meet since there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "This measure of deference, however, must not be watered down into a disguised form of acquiescence." *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987) (finding ineffective assistance where counsel failed to request medical records and relied on court-appointed competency examination when he knew client had escaped from mental institution).

The second *Strickland* prong (to which reference is sometimes made as "the prejudice prong") requires a showing that, but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.* Thus, in order to establish prejudice,

an applicant must show "that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result was reliable." [*Id.*] at 687, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674. It is not sufficient for Applicant to show "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S. Ct. 2052. Rather, [he] must show that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695, 104 S. Ct. 2052.

....

The applicant has the burden to prove ineffective assistance of counsel by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). Allegations of ineffectiveness must be based on the record, and the presumption of a sound trial strategy cannot

be overcome absent evidence in the record of the attorney's reasons for his conduct. *Busby v. State*, 990 S.W.2d 263, 269 (Tex. Crim. App. 1999). The reviewing court must look to the totality of the representation, and its decision must be based on the facts of the particular case, viewed at the time of counsel's conduct so as to eliminate hindsight bias. *Strickland*, 466 U.S. at 690, 104 S. Ct. 2052. In all cases, the "ultimate focus of inquiry must be on the fundamental fairness of the proceeding." *Id.* at 696, 104 S. Ct. 2052. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011).

A failure to make a showing under either prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003). Allegations of ineffectiveness "must be firmly founded in the record." *Bone v. State*, 77 S.W.3d 828, 833 n.13 (Tex. Crim. App. 2002) (quoting *Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999)). The *Strickland* test "of necessity requires a case-by-case examination of the evidence." *Williams v. Taylor*, 529 U.S. 362, 382, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)

(quoting *Wright v. West*, 505 U.S. 277, 308, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992) (Kennedy, J., concurring in judgment)). The Texas Court of Criminal Appeals has said, "Trial counsel 'should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.'" *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). Ward contends that his counsel was ineffective because he failed to: (1) object to testimony that the child victims were telling the truth; (2) object to the use of an investigator with Child Protective Services as an outcry witness; and (3) object to police testimony that one child's outcry was consistent with the original report of abuse given to police by the child's mother. However, because there is no evidence in the record showing counsel's reasons for not objecting as Ward concludes he should have, Ward has "failed to rebut the presumption that trial counsel's decision was in some way-be it conceivable or not-reasonable." *Mata v. State*, 226 S.W.3d 425, 431 (Tex. Crim. App. 2007); *Edwards v. State*, 280 S.W.3d 441, 444 (Tex. App.-Fort Worth 2009, pet. ref'd). Therefore, we overrule Ward's points of error.

We affirm the trial court's judgment.

Bailey C. Moseley

Justice

Date Submitted: May 17, 2017

Date Decided: June 6, 2017

Do Not Publish

Footnotes

1

Originally appealed to the Second Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. See Tex. Gov't Code Ann. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Second Court of Appeals and that of this Court on any relevant issue. See Tex. R. App. P. 41.3.

2

Generally, in a case such as this in which there is no record relative to counsel's decisions and actions, an appellant has a more appropriate remedy in seeking a writ of habeas corpus to allow him

the opportunity to develop evidence to support his complaint. See *Robinson v. State*, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000) (noting that a post-conviction writ proceeding is the preferred method for gathering the facts necessary to substantiate an ineffective assistance of counsel claim).