Henry v. State
Not Reported in S.W.3d, 2007 WL 79458
Tex.App.-Houston [1 Dist.],2007.
January 11, 2007 (Approx. 2 pages)

Counsel is ineffective when he fails to seek out, investigate, and interview available witnesses during the punishment phase. Milburn v. State, 15 S.W.3d 267, 270 (Tex.App.-Houston [14th Dist.] 2000, pet. ref'd). A criminal defense lawyer has the responsibility to conduct a legal and factual investigation and to seek out and interview potential witnesses. Rodd v. State, 886 S.W.2d 381, 384 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd). An appellant who complains about trial counsel's failure to call witnesses must show that the witnesses were available and that he would have benefitted from their testimony. King v. State, 649 S.W.2d 42, 44 (Tex.Crim.App.1983); Rodd, 886 S.W.2d at 384. The decision to call a witness is generally a matter of trial strategy. Rodd, 886 S.W.2d at 384. An attorney's decision not to present particular witnesses at the punishment stage may be a strategically sound decision if the attorney bases it on a determination that the testimony of the witnesses may be harmful, rather than helpful, to the defendant. See Weisinger v. State, 775 S.W.2d 424, 427 (Tex.App.-Houston [14th Dist.] 1989, pet. ref'd) (holding that it is trial counsel's prerogative, as a matter of trial strategy to decide which witnesses to call).

Here, appellant filed no motion for new trial. Without an adequate record of why defense counsel chose not to present character witnesses, we cannot determine that appellant received deficient representation. We will not speculate as to why appellant's defense counsel did not present any mitigating evidence. See Jackson v. State, 877 S.W.2d 768, 771 (Tex.Crim.App.1994) (appellate court will not speculate as to reasons for questioned actions or omissions of counsel to overcome strong presumption that counsel made trial decisions in exercise of reasonable professional judgment). Moreover, the record does not reflect whether the witnesses were available and willing to testify. See Lumpkin v. State, 129 S.W.3d 659, 665 (Tex.App.-Houston [1st Dist.] 2004, pet. ref'd) (refusing to speculate as to reasons that trial counsel did not call witnesses to testify at punishment stage, when nothing showed counsel's strategy or that witnesses would have presented beneficial testimony). Accordingly, we conclude that appellant has not overcome his burden of showing that his defense counsel's performance fell below the standards of professional norms.

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Milburn v. State
15 S.W.3d 267
Tex.App.-Houston [14 Dist.],2000.
March 16, 2000 (Approx. 7 pages)

[7] The sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus. See Vela, 708 F.2d at 965. In this case, appellant's trial counsel presented no evidence of mitigating factors for the jury to balance against the aggravating factors presented by the

State. Indeed, appellant's trial counsel performed no investigation into any possible mitigating factors and failed to contact even a single family member or friend, despite the availability of such mitigation evidence. As noted in our discussion of the first prong of Strickland in our previous opinion, there were no fewer than twenty witnesses available to testify on appellant's behalf. These witnesses would have testified that, inter alia, appellant was a good father to a child of special needs and that he was an *271 outstanding employee. See Milburn, 973 S.W.2d at 343. This evidence would have provided some counterweight to evidence of bad character which was in fact received by the jury See Blake v. Kemp, 758 F.2d 523, 535 (11 th Cir.1985), cert. denied, 474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985).

[8] We find it a close question in this case whether appellant was constructively denied any defense at all in the penalty phase of trial. See, e.g., id. Clearly, appellant would have been prejudiced if the trial court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the State's showing of aggravating circumstances. See id. "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." Strickland, 466 U.S. at 692, 104 S.Ct. at 2067. "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." Id., 104 S.Ct. at 1067.

In any event, we find that appellant has demonstrated prejudice in this case, even though it is sheer speculation that character witnesses in mitigation would have in fact favorably influenced the jury's assessment of punishment. See Pickens v. Lockhart, 714 F.2d 1455, 1467 (8 th Cir.1983). Counsel's lack of effort at the punishment phase of trial deprived appellant of the possibility of bringing out even a single mitigating factor. Mitigating evidence clearly would have been admissible. The jury would have considered it and possibly been influenced by it. See id.

We conclude that a reasonable probability exists that appellant's sentence would have been less severe had the jury balanced the aggravating and mitigating circumstances, particularly in light of the fact that the jury ultimately sentenced appellant to a term of imprisonment in excess of that requested by the State.FN1 Therefore, appellant has shown that he was actually and substantially prejudiced by his trial counsel's complete failure to search out and present any mitigating character evidence. See, e.g., Blake, 758 F.2d at 534-35; Ex parte Felton, 815 S.W.2d 733, 737 n. 4 (Tex.Crim.App.1991).

FN1. Several courts have reached the same result under similar circumstances. See Dobbs v. Turpin, 142 F.3d 1383, 1389-91 (11 th Cir.1998) (counsel's complete failure to investigate and present any mitigating evidence at the punishment phase was prejudicial where such evidence was available); Smith v. Stewart, 140 F.3d 1263, (9 th Cir.1998), cert. denied, 525 U.S. 929, 119 S.Ct. 336, 142 L.Ed.2d 277 (1998) (counsel's complete failure to investigate and present any mitigating evidence at the punishment phase was prejudicial where such evidence was available); Austin v. Bell, 126 F.3d 843, 848 (6 th Cir.1997), cert. denied, 523 U.S. 1079, 118 S.Ct. 1526, 140 L.Ed.2d 677 (1998) (failure to present mitigation evidence was prejudicial where several relatives, friends, death penalty experts, and a minister were available to testify was an abdication of advocacy);

Hall v. Washington, 106 F.3d 742, 749 (7 th Cir.1997), cert. denied, 522 U.S. 907, 118 S.Ct. 264, 139 L.Ed.2d 190 (1997) (holding defense counsel's performance ineffective and prejudicial at sentencing where he failed to make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors); Glenn v. Tate, 71 F.3d 1204, 1207 (6 th Cir.1995), cert. denied, 519 U.S. 910, 117 S.Ct. 273, 136 L.Ed.2d 196 (1996) (defendant's lawyers inadequate preparation for sentencing phase was prejudicial where they did not acquaint themselves with defendant's social history, never spoke to any of his numerous brothers and sisters, never examined his medical records, or talked to his probation officer); Tucker v. Day, 969 F.2d 155, 159 (5 th Cir.1992) (prejudicial impact where counsel failed to provide any assistance at a sentencing hearing, stating, "I'm just standing in for this one"); Kubat v. Thieret, 867 F.2d 351, 367 (7 th Cir.1989), cert. denied, 493 U.S. 874, 110 S.Ct. 206, 107 L.Ed.2d 159 (1989) (substandard argument and the presentation of no evidence was prejudicial where fifteen character witnesses were available to testify at the sentencing hearing; and it amounted to no representation at all).

We reverse the judgment of trial court and remand the case for a new punishment hearing pursuant to article 44.29(b) of the Texas Code of Criminal Procedure. See *272 Tex.Code Crim. Proc. Ann. art. 44.29(b) (Vernon Pamph.2000).

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Shanklin v. State
190 S.W.3d 154
Tex.App.-Houston [1 Dist.],2005.
December 29, 2005 (Approx. 28 pages)

However, a failure to uncover and present mitigating evidence cannot be justified as a tactical decision when defense counsel has not conducted a thorough investigation of the defendant's background. Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); Rivera v. State, 123 S.W.3d 21, 31 (Tex.App.-Houston [1st Dist.] 2003, pet. ref'd). The record here clearly shows that *165 defense counsel not only failed to call any other witnesses besides appellant, but also did not investigate punishment witnesses to determine whether they could provide meaningful testimony. We thus follow Wiggins, Rivera, and Milburn and agree that defense counsel's failure to investigate and call any punishment witnesses amounts to deficient performance. Accordingly, appellant has satisfied the first prong of Strickland.
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[18] The sentencing process consists of weighing mitigating and aggravating factors, and making adjustments in the severity of the sentence consistent with this calculus. See Vela v. Estelle, 708 F.2d 954, 966 (5th Cir.1983). In this case, defense counsel presented no evidence of mitigating factors for the jury to balance against the aggravating factors presented by the State. By his own admission, defense counsel did not investigate any possible mitigating factors and failed to contact even a single family member or friend, despite knowing that favorable witnesses were available to testify. As noted in our

discussion of the first prong of Strickland, there were no fewer than 20 witnesses available to testify on appellant's behalf. These witnesses would have testified that appellant took great care of his son, helped his friends and relatives, and worked hard. This evidence would have shown the jury that he also had good character traits.

We conclude that appellant has demonstrated prejudice in this case, even though we cannot say for certain that appellant's character witnesses would have favorably influenced the jury's assessment of punishment. See Milburn, 15 S.W.3d at 271. We have no doubt, however, that defense counsel's failure to interview or call a single witness, other than appellant, deprived him of the possibility of bringing out even *166 a single mitigating factor. See id. Mitigating evidence clearly would have been admissible. See Rivera, 123 S.W.3d at 30. The jury would have considered it and possibly have been influenced by it. See id.

We conclude that a reasonable probability exists that appellant's sentence would have been less severe had the jury balanced the aggravating and mitigating circumstances. Accordingly, appellant has shown that he was actually and substantially prejudiced by his defense counsel's complete failure to seek out and present any mitigating character evidence. See Milburn, 15 S.W.3d at 271; see, e.g., Blake v. Kemp, 758 F.2d 523, 534-35 (11th Cir.1985); Ex parte Felton, 815 S.W.2d 733, 737 n. 4 (Tex.Crim.App.1991).

We sustain appellant's second point of error.

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Moore v. State
983 S.W.2d 15
Tex.App.-Houston [14 Dist.],1998.
August 27, 1998 (Approx. 15 pages)

The Court of Criminal Appeals has held counsel is not ineffective for failing to present mitigating evidence when counsel's decision is a strategic, deliberate decision made after a thorough investigation of the facts and the law. See Ex parte Kunkle, 852 S.W.2d 499, 506 (Tex.Crim.App.1993). Likewise, the United States Supreme Court has also held the failure to present mitigation evidence at punishment is not ineffective assistance when counsel made a reasonable decision to forego presentation of mitigating evidence after evaluating available testimony and determining that cross-examination would reveal matters prejudicial to the defendant, and opting instead to make a lesser culpability argument to the jury. See Burger v. Kemp, 483 U.S. 776, 794-95, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987); see also Strickland, 466 U.S. at 672-74, 104 S.Ct. 2052.

Unlike Burger and Ex parte Kunkle, in this case, defense counsel made no investigation into potential witnesses and failed to investigate appellant's background. Defense counsel also admitted in his affidavit that his failure to investigate was not based on any trial strategy. And, unlike Strickland, defense counsel failed to present a closing argument

which emphasized appellant's good character.FN2 Strickland, 466 U.S. at 672-74, 104 S.Ct. 2052.

FN2. Defense counsel's closing argument was approximately two minutes in length and failed to disclose any of appellant's good character traits. Defense counsel argued: Ladies and gentlemen, you have done the hard part, now comes the easy part. Now, Ms. Mullins, you get to exact out a pound of flesh of Mr. Moore. You get to decide how much of him you'd like to take. Back in June of '71, Mr. Moore was convicted of possession of marijuana and sentenced to two years in prison, approximately twenty-five years ago. That now allows you the opportunity to sentence him to prison for anywhere from fifteen years to life. Once again you have to look at the mirror in the morning, you have to think about what you feel like his part in this whole scenario was. I trust you, Mr. Moore trusts you that you will make a fair decision about what should happen to his life now that you've made the decision that he's guilty. Mr. Moore accepts your verdict, I accept your verdict. We trust, Ms Sherman, that you will decide fairly what should be the punishment for Mr. Moore for this particular offense. Thank you.

This court has recently held counsel is ineffective when he fails to seek out, investigate, and interview available witnesses during the punishment phase. See Milburn v. State, 973 S.W.2d 337 (Tex.App.-Houston [14th Dist.] 1998). Likewise, other courts have held trial counsel is ineffective when he fails to investigate and present available mitigating evidence at punishment. See, e.g., Austin v. Warden, 126 F.3d 843, 848 (6th Cir.1997) (the failure to present mitigation evidence when several relatives, friends, death penalty experts, and a minister were available to testify was an abdication of advocacy); Hall v. Washington, 106 F.3d at 749 (holding defense counsel was ineffective at sentencing when he failed to make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors); Glenn v. Tate, 71 F.3d 1204, 1207 (6th Cir.1995) (defendant's lawyers were inadequately prepared for sentencing phase when *24 they did not acquaint themselves with defendant's social history, never spoke to any of his numerous brothers and sisters, never examined his medical records, or talked to his probation officer); Tucker v. Day, 969 F.2d 155, 159 (5th Cir.1992) (counsel was ineffective when he failed to provide any assistance at a sentencing hearing, stating, “I'm just standing in for this one”); Kubat v. Thieret, 867 F.2d at 367 (substandard argument and the presentation of no evidence, despite the availability of fifteen character witnesses at sentencing, amounted to no representation at all); People v. Ruiz, 177 Ill.2d 368, 226 Ill.Dec. 791, 686 N.E.2d 574, 582 (Ill.1997) (counsel's failure to investigate and present mitigating evidence, which a research of defendant's background would have revealed, was representation which fell below objective standards of reasonableness under prevailing professional norms).

In sum, we believe trial counsel failed to render “reasonably effective assistance” because he did not investigate any possible mitigation evidence, and therefore, rendered the adversarial process presumptively unreliable at punishment. The jury had no character evidence before it which would have humanized appellant and offset the State's

recommendation of punishment. FN3 Accordingly, we sustain appellant's third and fourth points of error as to the punishment phase and remand the case for a new punishment hearing pursuant to Article 44.29(b) of the Texas Code of Criminal Procedure. See tex.Code Crim.Proc.Ann. art. 44.29(b) (Vernon 1997).

FN3. The jury assessed appellant's punishment at the maximum sentence of ninety-nine years confinement and a $10,000 fine.

The judgment of the trial court is affirmed in part and reversed and remanded in part.