

IN THE MUNICIPAL COURT OF APPEALS  
OF THE CITY OF EL PASO, TEXAS

JOSE A. GARCIA,

Appellant,

vs.

STATE OF TEXAS,

Appellee.

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No. 07-MCA-3146

OPINION

Appellant appeals his conviction in Municipal Court for failure to control speed causing an accident. A fine of \$75.00 was assessed.

Appellant contends that his 6<sup>th</sup> Amendment Rights to have effective representation of counsel were violated because the attorney he retained to represent him before the Trial Court did not advise Appellant that he should appear to present evidence in defense of the charge made against him, and that the attorney entered a plea of guilty, rather than a plea of not guilty as instructed by Appellant.

Texas law applies a two step analysis articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984) and adopted by Texas in Hernandez v. State, 772 S.W.2d 53, (Tex.Crim.App.1986) to review claims of ineffective assistance of counsel.

Under *Strickland*, the Appellant must first demonstrate Trial Counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, guaranteed by the 6<sup>th</sup> Amendment. Counsel's competence is presumed, and the Appellant must rebut this presumption by identifying the acts or omissions of counsel that are alleged as ineffective assistance, affirmatively proving that such acts and omissions fell below the professional norm of reasonableness. Then the reviewing Court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation.

Secondly, the Appellant must show that counsel's deficient performance prejudiced the defense, and that, but for such deficient performance, the result of the proceeding would have been different. Of utmost importance, the alleged deficiency of counsel must be supported by the record. Johnson v. State 691 S.W.2d , 619 (Tex.Crim.App. 1984).

It is Appellant's burden to prove ineffective assistance of counsel by a preponderance of the evidence. Any allegation of ineffectiveness must be firmly founded and demonstrated in the record to overcome this presumption. Thompson v. State, 9 S.W. 3d 813, Jackson v. State 877 S.W. 2d 771. That task is very difficult because the record on direct appeal is undeveloped and cannot abundantly reflect the failings of trial counsel. If trial counsel strategy is not discussed in the record, this Court will not speculate as to reasons for counsel specific actions.

In this case there has been no request of the Trial Court to conduct a hearing inquiring as to trial counsel's performance or the reasons therefore, or more importantly, to give trial counsel an opportunity to defend himself from these serious allegations of ineffectiveness. Further the record does not contain even an affidavit or other sworn statement from the Trial Counsel, supporting Appellant's claims. Thus the record is totally silent. Therefore, this Court is unable to uphold Appellant's claims of ineffectiveness.

Additionally, Appellant's claim on appeal is further contradicted because the Court's docket, which is the part of the record before this Court, clearly reflects that Appellant, by his attorney, entered a plea of not guilty, but was found guilty, and not as Appellant contends that his attorney violated his instructions by pleading him guilty.

This Court is beginning to see more and more cases where people are retaining attorneys to represent them on traffic tickets. There has been a proliferation of advertisement by those attorneys to the general public by way of billboards, buses, and other advertising outlets. Attorneys should be forewarned that if their clients are maintaining their innocence, and desire to contest the citation, that such attorney should handle those cases in accordance with law and their ethical obligations to their client. Clearly, at a

minimum, that would require that their client be present, and evidence be presented on their behalf, including their clients own testimony, if advisable, to give their client a fair trial, and avoid subsequent claims of ineffectiveness of counsel by an unhappy client after the fact.

Because of the reasons stated herein, this Court finds no reversible error, and affirms the judgment of the Trial Court.

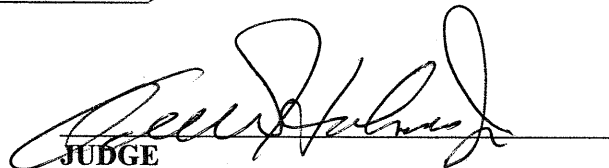
SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

  
JUDGE

**JUDGMENT**

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the case be affirmed

SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

  
JUDGE