Opinion issued June 18, 2009

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00867-CV

FREDERICK DEWAYNNE WALKER, Appellant

V.

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, Appellee

On Appeal from the 314th District Court
Harris County, Texas
Trial Court Cause No. 2006-06952J

DISSENTING OPINION

In regard to the ineffective assistance of counsel issue of appellant, Frederick Dewaynne Walker, the majority misunderstands the crux of appellant's issue, applies

the wrong standard of review for ineffective assistance of counsel claims, and mischaracterizes appellant's conclusive evidence in support of his ineffective assistance claim as "discredit[ed]" and "impeach[ed]." Accordingly, I respectfully dissent.

Background

In his Supplemental Motion For New Trial, Walker argued that he was entitled to a new trial in the suit brought by appellee, the Texas Department of Family and Protective Services ("DFPS"), to terminate Walker's parental rights to his child because "there can be no legitimate strategy involved if [an] attorney never consults with [a] client prior to trial, never investigates, never does any discovery, never interviews the client or his witnesses, and never calls anyone as a witness on his behalf."

Walker attached to his motion his affidavit, in which he testified that the trial court had not appointed him counsel until January 9, 2007 and this first appointed attorney never met with him. On April 26, 2007, the trial court appointed a second attorney ("appointed trial counsel") to represent Walker, and Walker finally "met" this attorney on May 10, 2007. Walker explained:

> From May 10, 2007 until the trial of the case through August 30, 2007 I never had a conversation with [appointed trial counsel]. I called his office at least five (5) times and was told he was not in the office so I left messages. [Appointed trial counsel] did not appear to represent me at trial. His brother . . . actually appeared on his behalf for trial.

I had no office conferences and no telephone conferences with any of these lawyers. No witnesses were interviewed or called as witnesses in my behalf at trial. To the best of my knowledge, information and belief, no investigation of the case was done. If any investigation was done, I have never been told of the results.

I was not informed by anyone as to exactly what I had to do relative to any services on the Family Service Plan, except for rehabilitation at Houston Recovery Campus ("HRC"). I was never given any other referrals for services.

To the best of my knowledge, information and belief, neither of my attorneys engaged in any discovery about the case. I went to trial without ever having met and discussed my case with either of the lawyers who were supposed to be representing me during the case. [Appointed trial counsel's brother] knew nothing about me or my case.

He did not question the witnesses against me, based upon any information from me, and when those witnesses provided the court with information that was not true, he had no prior information from me, did not know to ask me and did not ask me any questions which would have brought out information and testimony that would have directly contradicted and refuted the evidence against me. I *respectfully assert that I was, in essence, not represented at trial*. The representative was ineffective. *There was no assistance of counsel*. No attempt was made to ascertain, develop or present testimony of all the times I unsuccessfully tried to get a hold of [my caseworkers], how poorly I was treated, how I was told I should relinquish my rights because I could not win.

. . . .

Since DFPS took custody, I have never been allowed to see my child. [My case worker] only made one attempt to make one (1) appointment for a visit to see my child. I took a bus to her office and waited for 1 ½ hours until I was told that there would be no visit because she was in court. No other visits were scheduled and to my knowledge none of the attorneys requested or insisted upon my rights as a father to see my child.

(Emphasis added). At the hearing on Walker's new trial motion, he repeated and elaborated on his affidavit testimony.

The majority concludes that it was not "unreasonable" for the trial court to "discredit" Walker's evidence that his appointed trial counsel had wholly failed to meet with him to discuss the case, failed to investigate the case, failed to interview witnesses and potential witnesses, failed to conduct discovery, and failed to prepare for trial.

However, contrary to the majority's conclusion, Walker's evidence was in no way discredited or impeached. In fact, the only attempt that DFPS made during its cross-examination of Walker to impeach his testimony concerned his status as an indigent. When the trial court stated "let's stick to the facts that warrant or don't warrant the motion for new trial not the indigency," and asked DFPS if it had "[a]nything else," DFPS responded, "No, Your Honor."

More importantly, when Walker's appointed trial counsel was asked on direct examination if he had any "evidence that [he] would like to offer to the court in term's of or in contradiction to [Walker's] affidavit," appointed trial counsel answered, "No." DFPS made no attempt at all to examine or rehabilitate Walker's appointed trial counsel at the hearing.

The bottom line is that the trial court, acting as the fact-finder, had no discretion to disregard Walker's undisputed testimony that allows only one logical

inference. *See City of Keller v. Wilson*, 168 S.W.3d 802, 814–16 (Tex. 2005). Here, a reasonable fact-finder could only conclude that Walker was totally deprived of any meaningful assistance of counsel.[1]

The Issue Presented

In his sixth issue, Walker argues that he received ineffective assistance of counsel in DFPS's suit to terminate his parental rights to his child because his appointed trial counsel "should have met with [him] prior to trial, investigated the case, interviewed witnesses and potential witnesses, conducted discovery, and made some effort at preparation for trial." Not only did Walker conclusively prove that his appointed trial counsel did none of these things, he also conclusively proved that his appointed trial counsel did not even show up for Walker's trial. Rather, the appointed trial counsel sent his brother, who did not meet appellant until after DFPS had completed its case, to defend Walker in the trial below.

DFPS argues that Walker "fails to establish proof for an ineffectiveness claim because he does not establish that his attorney's performance was deficient or that his attorney's deficiency in any way prejudiced his defense."

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[1] In oral argument, when asked to direct this court to "any evidence in the record" showing that Walker had received "any meaningful assistance of counsel" below, appellate counsel for DFPS asserted that Walker had failed a drug test and implied that his appointed trial counsel could have therefore concluded that Walker was unworthy of any such legal representation.

The majority, in a single paragraph, dismisses Walker's main point, claiming that he has failed to "show that this substitution constituted a deficiency or that the outcome of the case would have been different had his appointed counsel actually appeared at trial."

However, the crux of Walker's issue is not that his trial counsel's performance was merely deficient as discussed by the majority. He is not complaining simply of trial counsel's errors, omissions, and strategic blunders. Rather, the crux of his argument is that he was, in effect, denied any meaningful assistance of counsel altogether. Walker's primary point is that he was effectively abandoned and received no defense at all.

Presumed Prejudice

The Texas Supreme Court has held that the statutory right to counsel in parental-rights termination cases "embodies the right to effective counsel." *In Re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003); *see* TEX. FAM. CODE ANN. § 107.013(a)(1) (Vernon 2008). Accordingly, the Texas Supreme Court further decided that the appropriate standard for determining whether counsel is effective in civil parental-rights termination cases is the same as that applied in criminal cases as set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). *In Re M.S.*, 115 S.W.3d at 544–45. Generally, a criminal defendant asserting a claim for ineffective assistance of counsel based on the errors

and omissions of his attorney must show that his attorney's performance was deficient and below an objective standard of reasonableness and that the deficient performance prejudiced his defense, i.e., but for the attorney's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

Specifically, however, the United States Supreme Court in *Strickland* expressly explained that in the context of certain ineffective assistance of counsel claims, "prejudice is presumed." *Id*. at 692, 104 S. Ct. at 2067. For example, "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Id*. As explained by the Supreme Court in *United States v. Cronic*,

> The [Sixth] Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." . . . If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.

466 U.S. at 654–55, 104 S. Ct. at 2044 (quoting *Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 322 (1940)).

Here, Walker's uncontradicted and unimpeached evidence conclusively establishes that although the trial court formally appointed an attorney to represent him, Walker, in fact, received no actual "assistance" at all for his "defense." Not only

did appointed trial counsel fail to discuss the case with Walker, he actually abandoned Walker and sent his brother, who had never met Walker, to trial in his stead. As pointed out by Walker in his brief to this court, there is no evidence in the record that any attempt was made by counsel to comply with Texas Rule of Civil Procedure 10 or that Walker in any way agreed to this substitution of trial counsel. Instead, appointed trial counsel's brother showed up on the trial date to represent Walker without ever having met him. In fact, the trial record itself establishes that the brother of Walker's appointed trial counsel did not even meet with Walker until DFPS had completed its case. The appointment of trial counsel in this case does not even rise to the level of being a "sham." When given the opportunity to directly contradict Walker's affidavit testimony at the new trial hearing, appointed trial counsel did not even offer a pretense of having provided any actual assistance to Walker.

It should come as no surprise at all that while Walker was mistakenly sitting in another courtroom waiting for his appointed trial counsel to show up, appointed trial counsel's brother allowed the trial against Walker to proceed without objection. After Walker made it to the correct courtroom after DFPS had presented its case, appointed trial counsel's brother placed Walker on the witness stand after a "short" recess.

The trial transcript in this case is only sixty pages long. Of those sixty pages, only forty-one of the pages are devoted to any actual testimony. Of the forty-one pages of testimony, only five pages cover trial counsel's direct examination of Walker. Conservatively estimating forty-five seconds per page, Walker's parental rights were terminated in approximately forty-five minutes, less than four minutes of which were devoted to appointed trial counsel's brother's direct examination of Walker. In fact, the first thirteen pages of the trial transcript are taken up by trial counsels' stipulation of evidence, and appointed trial counsel's brother offered "no objection" to all thirteen exhibits, which contain hearsay evidence that is irrelevant to the actual allegations that DFPS made against Walker.[2] The cross-examination of witnesses made by appointed trial counsel's brother takes up only approximately four pages of the transcript or approximately three minutes. Thus, the "assistance" of counsel provided to Walker was not merely deficient, it was nonexistent.

The "assistance" of counsel provided to Walker in this case is far below that afforded to the criminal defendant in the infamous "sleeping-lawyer case." *See Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001). In *Burdine*, the court held that because defense counsel repeatedly slept in trial while evidence was being introduced against the defendant, the defendant was denied counsel. *Id*. at 338. Thus, it was

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[2] Although some of the information presented in these exhibits might possibly amount to more than a scintilla of evidence against Walker, the poor state of the trial record makes this extremely difficult to discern.

presumed that counsel's unconsciousness prejudiced the defendant. *Id*. The court emphasized,

> Unconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client. . . . When we have no basis for assuming that counsel exercised judgment on behalf of his client during critical stages of trial, we have insufficient basis for trusting the fairness of that trial and consequently must presume prejudice.

Id. at 349.

Although Burdine's lawyer slept through portions of the trial, it is at least possible that he actually prepared for trial. Here, the undisputed evidence reveals that Walker's appointed trial counsel never discussed the case with Walker and then abandoned Walker on the trial date. Appointed trial counsel's brother did not even meet Walker until after DFPS had presented its case against Walker. Neither attorney investigated the case, interviewed witnesses or potential witnesses, conducted discovery, or made any effort at preparation for trial. In short, appointed trial counsel's brother went into Walker's trial blind and could not possibly have exercised sound judgment on Walker's behalf.

The "assistance" of counsel provided to Walker is comparable to that provided to the defendant by the lawyer in the "potted plant" case. *See Childress v. Johnson*, 103 F.3d 1221 (5th Cir. 1997). In *Childress*, the defendant complained that his attorney, appointed by a district court "a minute or two" before his plea of guilty to help him execute a jury-trial waiver, provided "no meaningful assistance" of counsel.

Id. at 1222–23. The court agreed, noting that the appointed lawyer "never investigated the facts, never discussed the applicable law with Childress, and never advised him of the rights he would surrender by pleading guilty." *Id*. at 1223. The Court explained,

> That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.

Id. at 1228 (quoting *Strickland*, 466 U.S. at 685, 104 S. Ct. at 2063). The right to counsel "encompasses the right to have an advocate for one's cause." *Id*. Noting that the United States Supreme Court has "dispensed with the *Strickland* prejudice inquiry in cases of actual or constructive denial of counsel," the court explained that when a defendant can establish that counsel was not merely incompetent but inert, prejudice will be presumed. *Id*. The court held that although Childress's counsel at his plea in the 1940's was "more sentient than a potted plant," the lawyer "was not the advocate for the defense whose assistance is contemplated by the Sixth Amendment." *Id*. at 1231.

Here, likewise, appointed trial counsel and his brother, who merely appeared at the trial on behalf of appointed trial counsel, having never even discussed the case with Walker, did nothing to advocate Walker's cause. The cursory trial transcript

reflects nothing but the equivalent of a drawn-out guilty plea, entered by the brother of appointed trial counsel, to which Walker did not consent.

Conclusion

Walker, at the hearing on his Supplemental Motion for New Trial, conclusively established that he received no meaningful assistance of counsel in the trial court. Because Walker received no meaningful assistance of counsel in the trial court, prejudice is legally presumed. *See Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067; *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2046–47; *Burdine*, 262 F.3d at 349; *Childress*, 103 F.3d at 1228. Accordingly, I would hold that the trial court erred in denying Walker's motion for new trial. I would sustain his sixth issue and remand the case to the trial court for a new trial. The majority's holding to the contrary is a grave error. Like the "sleeping-lawyer" case, this case will stand as a significant embarrassment in the history of Texas jurisprudence.

Terry Jennings
Justice

Panel consists of Justices Jennings, Hanks, and Bland.

Justice Jennings, dissenting.