COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CHRISTOPHER JACK STEVENS,	§	No. 08-14-00042-CR
Appellant,	§	Appeal from the
v.	§	401st District Court
THE STATE OF TEXAS,	§	of Collin County, Texas
Appellee.	§	(TC#380-82267-10)
	§	

O P I N I O N

Appellant Christopher Jack Stevens was charged with possession of a controlled substance. Appellant pled guilty pursuant to a plea agreement. The trial court found Appellant guilty and placed him on post-conviction community supervision for four years with a suspended sentence of three years. The State subsequently moved to revoke the community supervision. The trial court revoked Appellant's community supervision, adjudicated Appellant guilty of possession of a controlled substance, and sentenced him to two years' imprisonment. Appellant appeals from the trial court's order denying his motion for new trial. We affirm.[1]

THE TRIAL COURT'S NUNC PRO TUNC ORDER

The trial court initially entered two new trial orders in this case—one order denying

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[1] This case was transferred from the Fifth Court of Appeals in Dallas, and we decide it in accordance with the precedent of that court to the extent required by TEX. R. APP. P. 41.3.

Appellant's motion for new trial and another granting new trial. We abated the appeal for the trial court to consider whether it should correct those orders. The trial court subsequently entered a nunc pro tunc order denying Appellant's motion for new trial. Before addressing Appellant's issue on appeal, we must first address the propriety of the trial court's nunc pro tunc order.

The trial court imposed sentence both in this case and in a companion case[2] in open court on November 20, 2013. Appellant filed a "Motion for New Trial and Motion in Arrest of Judgment" in both cases five days later on November 25, 2013. The trial court did not conduct a hearing on the motions for new trial. Rather, on December 19, 2013, the trial court signed an order denying Appellant's motion for new trial. The cause numbers for both this case and the companion case are listed at the top of the order, and the judge's signature is handwritten. That same day, however, an order was entered granting Appellant's motion for new trial. Again, both trial court cause numbers are listed at the top of the order, but on this order the judge's signature is affixed by stamp. Even though the orders list both cause numbers in the caption, the order denying the motion for new trial was filed in the trial court only in the present case, while the order granting the motion for new trial was filed only in the companion case.

Because an order granting the motion for new trial had been signed in this case, Appellant moved to dismiss his appeal. The State filed a response requesting that we hold in abeyance Appellant's motion to dismiss his appeal because the trial court had signed both an order denying the motion for new trial and another order granting new trial. In addressing the State's request, we noted that: "The only thing clear in this case is that it is unclear what the trial court intended by signing one order which granted a new trial and by signing a second order which denied the

[2] In the companion case (Cause No. 380-81232-08; Appeal No. 08-14-00041-CR), Appellant was charged with burglary of a habitation. The trial court revoked Appellant's deferred-adjudication probation in the companion case and sentenced Appellant to ten years' imprisonment.

same motion for new trial." We recognized that while an order granting a motion for new trial can be freely revisited and set aside within seventy-five days following the imposition of sentence in open court, in this case the seventy-five day period had already expired on February 3, 2014. We also recognized that after the seventy-five-day period has expired, an order granting a motion for new trial can be set aside only if it was inadvertently signed as a result of clerical error.[3] Given the unusual circumstances, we abated this appeal and directed the trial court to correct any clerical errors in the orders which granted and denied Appellant's motions for new trial.

Pursuant to our direction, the trial court conducted a hearing addressing the conflicting orders on March 7, 2014. During the hearing, the trial judge observed that the order denying Appellant's motions for new trial bore his original signature in blue ink, and declared that he had entered the order with the intent to deny the motions without a hearing. The trial court's coordinator testified that at the time, she had been attempting to create conforming copies of the trial court's original order denying the motions for new trial, but that she mistakenly looked at a different original order that granted a different motion, which was erroneously affixed to the copy she was attempting to conform. The coordinator explained that she had circled the term "granted," marked through the term "denied," and affixed the trial judge's stamped signature to the order. The trial judge explained that he, however, had circled the term "denied" and had marked through the term "granted" on the original order that he had signed in blue ink, and that the court had intended to deny Appellant's motions for new trial without hearing. The trial court determined that the non-conforming order granting Appellant's motions for new trial was the

[3] The law has now changed. Our order abating the appeal was entered almost one year before the Court of Criminal Appeals overruled its prior decision in *Awadelkariem v. State*, 974 S.W.2d 721 (Tex.Crim.App. 1998), and held there is no specific time limit on the trial court's power to rescind an order granting new trial. *See Kirk v. State*, 454 S.W.3d 511, 515 (Tex.Crim.App. 2015).

consequence of a mere scrivener's error and an unintended mistake. To correct the clerical errors granting a new trial in both cases, the trial court entered a nunc pro tunc order denying Appellant's motion for new trial in both this case and in the companion case.

We conclude the trial court properly corrected its conflicting orders nunc pro tunc. The record is clear that the trial court's order granting new trial resulted from a clerical error. The record reflects that the trial court intended to deny the motions for new trial and that the trial court coordinator mistakenly marked as "granted" the conforming copy of the original order that was intended to reflect that the trial court had denied the motions. Because the "conforming" order erroneously granting the motions for new trial was not the product of judicial reasoning, the trial judge was authorized to correct it nunc pro tunc. *See English,* 592 S.W.2d 949, 955-56 (Tex.Crim.App. 1980) (trial court that inadvertently signed an order granting a motion for a new trial had the authority to correct its mistake nunc pro tunc). Even if the order granting new trial was not the result of a clerical mistake, a trial court may rescind an order granting new trial at any time. *Kirk v. State*, 454 S.W.3d 511, 511 (Tex.Crim.App. 2015) ("In a prior decision, we suggested that there was a time limit on the trial court's power to rescind the granting of a new trial. We now conclude that there is no specific time limit on the trial court's power to do so."). Thus, whether we consider it a nunc pro tunc order or an order rescinding the grant of new trial, the trial court had the power to enter, and did properly enter, its order denying new trial.

THE ISSUE ON APPEAL

In his sole issue on appeal, Appellant contends the trial court erred in failing to conduct a hearing on his motion for new trial with regard to his claim of ineffective assistance of counsel.

He also claims that the timing of the trial court's ruling denied him of his right to present evidence to support his claim of ineffective assistance.

Standard of Review and Defendant's Burden

Appellate courts review a trial court's denial of a hearing on a motion for new trial for an abuse of discretion. *Hobbs v. State*, 298 S.W.3d 193, 200 (Tex.Crim.App. 2009); *Smith v. State*, 286 S.W.3d 333, 339 (Tex.Crim.App. 2009). Such a hearing is not an absolute right. *Hobbs*, 298 S.W.3d at 199; *Smith*, 286 S.W.3d at 338. A trial judge abuses his discretion in failing to hold a hearing only if the motion and accompanying affidavits (1) raise matters which are not determinable from the record and (2) establish reasonable grounds showing that the defendant could potentially be entitled to relief. *Hobbs*, 298 S.W.3d at 199; *Smith*, 286 S.W.3d at 338-39. A new-trial motion must be supported by an affidavit specifically setting out the factual basis for the claim. *Hobbs*, 298 S.W.3d at 199; *Smith*, 286 S.W.3d at 339. A defendant must at least allege sufficient facts that show reasonable grounds to demonstrate that he could prevail. *Hobbs*, 298 S.W.3d at 199-200. If the affidavit is conclusory, is unsupported by facts, or fails to provide requisite notice of the basis for the relief claimed, no hearing is required. *Hobbs*, 298 S.W.3d at 199; *Smith*, 286 S.W.3d at 339.

Ineffective assistance of counsel may be raised in a motion for new trial. *Smith*, 286 S.W.3d at 340. Under *Strickland v. Washington,* a defendant seeking to challenge counsel's representation must establish that his counsel's performance (1) was deficient and (2) prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). To show deficient performance "the appellant must prove by a preponderance of the evidence that his counsel's representation objectively fell below the standard of professional

norms." *Smith*, 286 S.W.3d at 340 n.26 (quoting *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex.Crim.App. 2002)). To show prejudice, the appellant "must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Smith*, 286 S.W.3d at 340 n.27 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068).

Before a defendant is entitled to a hearing on his motion for new trial alleging ineffective assistance of counsel, the defendant must allege sufficient facts from which a trial court could reasonably conclude both that counsel failed to act as a reasonably competent attorney and that, but for counsel's failure, there is a reasonable likelihood that the outcome of his trial would have been different. *Smith*, 286 S.W.3d at 340-41.

Analysis

The trial court did not abuse its discretion in refusing to hold a hearing on Appellant's motion for new trial, because Appellant failed to present facts to show reasonable grounds to demonstrate that he could prevail on his claim of ineffective assistance.

The relevant portion of Appellant's motion for new trial stated only the bare conclusion that "Defendant was not provided effective assistance of counsel." This conclusion is not supported by any affidavits specifically setting out the factual basis for Appellant's claim of ineffective assistance. Appellant did not present his own affidavit in support of his motion for new trial. And, while an affidavit of Appellant's counsel is attached to the motion for new trial, that affidavit does not aver to any facts, much less facts to support a conclusion that Appellant was not provided effective assistance of counsel.[4]

[4] Counsel's affidavit offered in support of the motion states in its entirety: "My name is Marc J. Fratter. I am the attorney for Christopher Jackard Stevens in this cause. I am over the age of 18 years, have never been convicted of a

Appellant acknowledges in his brief that his motion for new trial "did not contain any sworn factual affidavits upon which the Judge could decide the merits of the Motions." But, Appellant asserts that filing "a plethora of sworn affidavits or deposition testimony . . . is not required by any Texas rule, statute or law." Appellant is wrong. As noted above, a defendant raising ineffective assistance in a motion for new trial is not entitled to a hearing unless his motion sets out sworn facts that show reasonable grounds to demonstrate both the deficiency and prejudice prongs of the *Strickland* test. *See Smith*, 286 S.W.3d at 340 (defendant was not entitled to a hearing on his claim that trial counsel rendered ineffective assistance because he failed to establish reasonable grounds to demonstrate that he could meet the prejudice prong of the *Strickland* test). Because Appellant failed to meet his initial burden to raise reasonable grounds of ineffective assistance, the trial court was not required to hold a hearing on Appellant's motion for new trial, and accordingly did not abuse its discretion in refusing to hold a hearing.

Appellant also complains that, because of the timing of the trial court's rulings on his motion for new trial, he was deprived of the ability to formulate his new trial arguments complaining of ineffective assistance of counsel. Appellant's timing claims also fail.

Sentence was imposed in open court on November 20, 2013. Appellant therefore had thirty days—until December 20, 2013—to file a sufficient motion for new trial. TEX. R. APP. P. 21.4(a) ("The defendant may file a motion for new trial before, but no later than 30 days after, the date when the trial court imposes or suspends sentence in open court."). Appellant filed a timely, albeit deficient, motion for new trial on November 25. At that point, Appellant faced two possible deadlines to amend his motion for new trial to correct any deficiencies—he had until December 20, the original 30-day deadline to amend, or until the trial court overruled his prior

felony, and am competent to make this affidavit."

motion for new trial, whichever came earlier. TEX. R. APP. P. 21.4(b) (a defendant may file one or more amended motions for new trial "[w]ithin 30 days after the date when the trial court imposes or suspends sentence in open court but before the court overrules any preceding motion for new trial"); *see State v. Moore*, 225 S.W.3d 556, 558 (Tex.Crim.App. 2007) (the filing of an amended motion is not permitted more than 30 days after sentencing, even with leave of court). The trial court signed its orders on Appellant's motion for new trial on December 19, one day before the 30-day deadline expired.

Appellant argues in his primary brief that after filing his motion for new trial, his counsel had 75 days to urge the motion by requesting a hearing, but that counsel did not set a hearing because the trial court initially appeared to have granted the motion, rendering the need for a hearing moot. Appellant argues that once the court coordinator's "error" in entering a mistaken order granting the motion was discovered, the 75-day period "had already lapsed making it impossible to even request a hearing on the Motion for New Trial." Appellant bases this argument on Rule 21.8, which provides that the trial court must rule on a motion for new trial within 75 days after imposing sentence in open court or the motion is deemed denied. TEX. R. APP. P. 21.8(a, c). Appellant fails to consider, however, that he was never entitled to a hearing because he never met his initial burden to file a motion for new trial supported by affidavits showing reasonable grounds to demonstrate the required deficiency and prejudice prongs of the *Strickland* test.

Appellant also points out that raising and establishing an ineffective assistance of counsel claim, in the relatively short deadlines imposed by the rules governing motions for new trial, presents unique difficulties in timely obtaining the necessary proof. In his reply brief, Appellant

appears to argue that because of these difficulties, a trial court should never rule on a motion for new trial before the 30-day deadline to amend expires, and that his right to amend was shortened by one day when the trial court ruled on his motion on December 19. Rule 21.4(b), however, makes no exceptions for motions raising ineffective assistance claims, but rather specifically states that the time to amend all motions for new trial ends when "the court overrules any preceding motion for new trial[.]" TEX. R. APP. P. 21.4(b). Appellant fails to cite to any authority, and we know of none, holding that there is, or should be, an "ineffective assistance" exception to Rule 21.4(b).[5]

Appellant also argues that by apparently granting his motion for new trial on December 19, the trial court rendered moot any decision whether counsel might have made to amend his motion on the last day. Appellant contends he lost his valuable right to request a hearing or to amend because "one-day too soon the Trial Court apparently circled the wrong word[.]" Appellant, however, does not explain on appeal what evidence or facts he would have presented for the trial court's consideration if he had been given one more day to amend, or if a hearing had been granted and held on his ineffective assistance claim. The only "proof" in the record on appeal, counsel's affidavit, fails to allege any facts from which the trial court or this Court could reasonably conclude that counsel had failed to act as a reasonably competent attorney at trial and that but for that failure, there is a reasonable likelihood that the outcome of Appellant's trial would have been different. *Smith*, 286 S.W.3d at 340-41.

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[5] Appellant faced the possibility that a ruling by the trial court could cut short the amendment period, because he filed his motion for new trial five days after the trial court imposed sentence in open court. The solution to avoiding this possibility was to wait to file the motion until on or near the 30-day deadline, and to use that extra time to marshal the necessary proof.

Appellant did not present facts in his motion or in the supporting affidavit showing that reasonable grounds exist to believe Appellant could prove ineffective assistance of counsel at an evidentiary hearing. Nor does Appellant explain on appeal what facts would have been submitted if he had taken advantage of one extra day to amend. Therefore, even if the trial court's order denying Appellant's new trial motion had been properly entered on December 19, 2013, Appellant was not entitled to a new trial hearing, and we are unable to conclude that he has suffered any harm from the trial court's denial of his motion. Under these circumstances, the trial court did not abuse its discretion in refusing to hold to a hearing on Appellant's motion for new trial. Accordingly, we overrule Appellant's sole issue on appeal.

CONCLUSION

We affirm both the trial court's order denying Appellant's motion for new trial and the trial court's judgment. The trial court certified Appellant's right to appeal in this case, but the certification does not bear Appellant's signature indicating that he was informed of his rights to appeal and to file a pro se petition for discretionary review with the Texas Court of Criminal Appeals. *See* TEX. R. APP. P. 25.2(d). The certification is defective, and has not been corrected by Appellant's attorney or the trial court. To remedy this defect, this Court ORDERS Appellant's attorney, pursuant to Rule 48.4, to send Appellant a copy of this opinion and this Court's judgment, to notify Appellant of his right to file a pro se petition for discretionary review, and to inform Appellant of the applicable deadlines. *See* TEX. R. APP. P. 48.4, 68. Appellant's attorney is further ORDERED to comply with all of the requirements of Rule 48.4.

STEVEN L. HUGHES, Justice

June 29, 2016

Before McClure, C.J., Rodriguez, and Hughes, JJ.

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