In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00155-CR

EX PARTE GABRIEL LEE BACA

On Appeal from the 251st District Court
Randall County, Texas
Trial Court No. 26,003-C, Honorable Ana Estevez, Presiding

October 21, 2021

MEMORANDUM OPINION

Before QUINN, C.J., PARKER and DOSS, JJ.

Gabriel Lee Baca, appellant, appeals from an order denying his application for a writ of habeas corpus. Through it, he sought to challenge two judgments deferring the adjudication of his guilt for sexually assaulting a minor. He originally pled guilty to the offenses and received community supervision. Now, appellant complains that his defense counsel provided ineffective assistance by 1) pursuing a defense based upon jury nullification and 2) failing to investigate and assert that § 22.011(a)(2) of the Texas Penal Code was unconstitutional as applied to him. The trial court denied his petition as frivolous. That purportedly was error. Appellant contends that the trial court also erred in dismissing his petition without filing findings of fact and conclusions of law. We affirm.

Ineffective Assistance

To obtain habeas relief for a purported rendition of ineffective assistance, the appellant must show both deficient performance and a reasonable probability of prejudice. *Ex parte Amezquita*, 223 S.W.3d 363, 366 (Tex. Crim. App. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We apply that standard here.

Unconstitutionality

A person commits an offense if "regardless of whether the person knows the age of the child at the time of the offense, the person intentionally or knowingly . . . causes the penetration of the anus or sexual organ of a child by any means [or] . . . causes the penetration of the mouth of a child by the sexual organ of the actor . . . ." TEX. PENAL CODE ANN. § 22.011(a)(2)(A) & (B). Those were the two accusations to which appellant pled guilty. Underlying his complaint here is the language in the statute rendering irrelevant knowledge about the victim's age. According to appellant, the circumstances underlying his commission of the offenses purportedly established the defense known as mistake of fact. That is, his victim purportedly told him that he (the victim) was an adult, and appellant supposedly believed the representation. Yet, the defense was unavailable because the statutory verbiage about knowledge of the victim's age being irrelevant. That, in appellant's estimation, rendered the statute constitutionally infirm as a denial of due process. More importantly, defense counsel should have urged as much to the trial court before appellant decided to plead guilty to the charges levied, so says appellant. Because counsel did not, his assistance allegedly was ineffective. We disagree.

Providing one's client the effective assistance of counsel does not obligate a defense attorney to pursue futile motions and arguments. *Mooney v. State,* 817 S.W.2d 693, 698 (Tex. Crim. App. 1991); *Ex parte Jones*, 473 S.W.3d 850, 854 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). Given this rule, *Fleming v. State*, 455 S.W.3d 577 (Tex. Crim. App. 2014) becomes quite instructive.

It dealt with the question of "whether Penal Code Section 22.021 is unconstitutional under the Due Process Clause of the Fourteenth Amendment and the Due Course of Law provision of the Texas Constitution because it . . . fails to recognize an affirmative defense based on the defendant's reasonable belief that the alleged victim was 17 years of age or older." *Id.* at 578. Apparently, the female minor with whom Fleming had sex told him she was 22 years old; she actually was 13. *Id.* In answering that question, our Court of Criminal Appeals stated:

> While both the sexual assault and the murder statutes specify a more severe punishment based on the age of the victim, neither offense contains a provision that allows for a mistake-of-fact defense as to the age of the victim. Under Penal Code Section 8.02(a), "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact *if his mistaken belief negated the kind of culpability required for the commission of the offense."* [Emphasis in original]. ***Because Section 22.021 requires no culpability as to the age of the victim, there is nothing for the defendant's mistaken belief to negate, and his mistake cannot be a defense to prosecution.***

Id. at 582 (emphasis added). Thus, the court continued, "Texas Penal Code Section 22.021 is not unconstitutional under the Due Process Clause of the Fourteenth Amendment or the Due Course of Law provision of the Texas Constitution for . . . fail[ing] to recognize an affirmative defense based on the defendant's belief that the victim was

17 years of age or older." *Id.*; *accord Campos v. State*, No. 03-18-00788-CR, 2020 Tex. App. LEXIS 9126, at *8–9 (Tex. App.—Austin Nov. 20, 2020, pet. ref'd) (mem. op., not designated for publication) (abiding by *Fleming* and concluding that the trial court had not erred by refusing to give the appellant's requested jury instruction for mistake of fact regarding the victim's age); *Arias v. State*, 503 S.W.3d 523, 530–31 (Tex. App.—San Antonio 2016, pet. ref'd) (following *Fleming* and holding that "section 22.011(a)(2)(C) is not unconstitutional for failing to require the State to prove the defendant had a culpable mental state regarding the victim's age or for failing to contain a mistake-of-fact defense as to the age of the victim); *Ford v. State*, 488 S.W.3d 350, 352–53 (Tex. App—Beaumont 2016, no pet.) (declining "'to revisit the issues addressed by the Court of Criminal Appeals in Fleming'" and holding that section 22.011(a)(2) "'is not unconstitutional—under either the Due Process Clause of the Fourteenth Amendment or the due course of law provision of the Texas Constitution—for failing to require the State to prove the defendant had a culpable mental state regarding the victim's age, or for failing to contain or recognize a mistake-of-fact defense as to the age of the victim'").

In view of *Fleming* and its progeny, appellant now castigates his defense counsel for allegedly neglecting to pursue a claim that lacked legal basis. But, again, defense counsel need not pursue baseless theories to be effective. Consequently, we hold that the trial court did not err in 1) following the law espoused in *Fleming,* and 2) refusing to hold that defense counsel was obligated to investigate and pursue an argument made frivolous by *Fleming* and other authorities.

Jury Nullification

Appellant also asserted that defense counsel's mentioning the topic of jury nullification evinced ineffective assistance. Assuming *arguendo* that trial counsel did as appellant suggests, we note authority holding that raising the purported defense of jury nullification does not render counsel ineffective. *See Harris v. State*, No. 04-14-00888-CR, 2015 Tex. App. LEXIS 12099, at *13 (Tex. App.—San Antonio Nov. 25, 2015, pet. ref'd) (mem. op., not designated for publication) (determining that trial counsel was not ineffective by pursuing a strategy "akin to jury nullification"); *see also Hall v. State*, No. 12-07-00478-CR, 2009 Tex. App. LEXIS 4954, at *16–17 (Tex. App.—Tyler June 30, 2009, no pet.) (mem. op., not designated for publication) (finding that trial counsel did not provide ineffective assistance by pursuing a jury-nullification defense). This is especially so when the defense appellant believed counsel should have raised (mistake of fact) was and is not a defense to the crimes with which he was charged.

Findings of Fact and Conclusions of Law

Appellant also believes that the trial court erred when it denied his petition without issuing findings of fact and conclusions of law. Yet, a trial court is not required to enter findings and conclusions if it finds that the application for habeas relief to be frivolous. *See* TEX. CODE CRIM. PROC. art. 11.072, § 7(a) (stating that "[i]f the court determines from the face of an application or documents attached to the application that the applicant is manifestly entitled to no relief, the court shall enter a written order denying the application as frivolous. In any other case, the court shall enter a written order including findings of fact and conclusions of law."). Appellant's application was frivolous, as explained earlier. Thus, the trial court did not err by first concluding that he was "manifestly entitled to no

relief" and then denying the application as "frivolous" without additional findings and conclusions.

We overrule appellant's issues and affirm the order of the trial court.

Brian Quinn
Chief Justice

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