TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00622-CR

Gregory Kelley, Appellant

v.

State of Texas, Appellee

FROM THE DISTRICT COURT OF WILLIAMSON COUNTY, 26TH JUDICIAL DISTRICT
NO. 13-1367-K26, HONORABLE LARRY GIST, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Appellant Gregory Kelley was found guilty of aggravated sexual assault of a child and sentenced to twenty-five years in prison. *See* Tex. Penal Code § 22.021(a), (f). Following the imposition of his sentence, Kelley filed a motion for new trial, followed by three amended motions for new trial and requests for a hearing. The trial court denied the motion for new trial and its associated amendments without conducting a hearing, and this appeal followed.

On appeal, Kelley contends that (1) he was denied due process and due course of law because the judge who presided over the trial proceedings recused himself from the case without ruling on Kelley's motion for new trial; (2) the trial court erred in denying him a hearing on his motion for new trial; and (3) the trial court erred in denying him a free reporter's record on appeal. We will affirm the trial court's judgment.

BACKGROUND

In the summer of 2013, police were called to the home of Shama McCarty in Leander, Texas, to investigate allegations that Kelley, who resided in the home, had abused one of the children that attended McCarty's in-home daycare. Kelley was eventually indicted and found guilty by a jury of two counts of aggravated sexual assault of a child. *See id*. Kelley then entered into a plea agreement for the minimum allowable sentence of twenty-five years' confinement in exchange for his waiver of certain appellate rights not at issue in this appeal. On July 16, 2014, the trial court sentenced Kelley in accordance with the agreement.

On August 13, 2014, Kelley filed a motion for new trial and, subsequently, a series of amended motions for new trial. In his original motion for new trial, Kelley raised various claims concerning the fairness of the underlying trial proceedings.[1] Two days later, before the trial court ruled on his motion for new trial, Kelley filed his first amended motion for new trial and requested a hearing on his motion. *See* Tex. R. App. P. 21.4(b) (providing that defendant may file amended motion for new trial "[w]ithin 30 days after the date when the trial court imposes or suspends sentence in open court"). In his amended motion, Kelley asserted for the first time that newly available evidence would establish his innocence. Kelley alleged that, given the opportunity at a hearing, he could present evidence that he was not present in the McCarty home, where the abuse was alleged to have occurred, at any time when the victim was also present in the home. Kelley

[1] For example, Kelley asserted that he did not receive a fair trial because, among other reasons, the State had failed to conduct "a thorough and careful investigation of the child's remarks and, if reliable, whether [Kelley] was a likely suspect." Further, Kelley asserted that a new trial was necessary because the jury had failed to reach a unanimous conviction as constitutionally required. *See* Tex. Const. art. V, § 13; Tex. Crim. Proc. art. 36.29.

urged the trial court to set a date for a hearing. The trial court, however, denied Kelley's motion for new trial, as amended, without conducting a hearing.

Kelley later filed a second amended motion for new trial and a third amended motion for new trial. In his second amended motion, Kelley reasserted his claim that he could establish actual innocence, explaining that witnesses could establish that Kelley "was nowhere near the household where the alleged abuse took place on the only dates and time it could have occurred." Kelley again requested the opportunity to present evidence to the trial court, but the trial court denied the second amended motion without a hearing. Kelley immediately filed a third amended motion for new trial, in which he explained that he had an expert witness concerning Kelley's cell phone records and "about eight other witnesses" who could "remove the Defendant from the household altogether and demonstrate in real-time what the Defendant was doing on each and every day." The trial court denied Kelley's third amended motion as untimely, and this appeal followed.

Recusal

In his first issue, Kelley asserts that he was denied due process and due course of law when the trial judge voluntarily recused himself from the post-trial proceedings.

After Kelley had filed his original motion for new trial and first amended motion for new trial, Judge Stubblefield, who had presided over the trial proceedings, voluntarily moved to recuse himself for the remainder of the case, including any consideration of Kelley's pending motion for new trial. *See* Tex. Gov't Code § 24.002 (providing that district judge may recuse himself on own motion and request assignment of another judge). The Chief Justice of the Texas Supreme Court subsequently acknowledged Judge Stubblefield's recusal and on September 16, 2014, assigned the

case to Judge Gist, Senior Criminal District Judge, Jefferson County. *See id*. § 74.057 (providing that under certain circumstances, chief justice of supreme court may assign judge of one or more administrative regions for service in other administrative regions). On September 23, 2014, Judge Gist signed an order denying Kelley's request for a hearing and his motion for new trial.

Kelley asserts that Judge Stubblefield's recusal deprived him "of an essential judicial component of the due course of law—the oversight of the judge who presided at trial." According to Kelley, "Judge Stubblefield was available and the only judge in the state uniquely qualified to hear and decide the merits of the motion. Appellant's need for the presiding judge has even greater force where a motion for new trial hearing will plainly bear on the facts established at the trial he oversaw." In effect, Kelley asserts, without citing any direct authority, that a defendant has a constitutional right to have the judge who presided over his trial also rule on his motion for new trial.

Recusal in criminal cases is controlled by Rule 18a and Rule 18b of the Texas Rules of Civil Procedure. *Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (holding that Rule 18a "applies to criminal cases absent 'any explicit or implicit legislative intent indicating otherwise'"). Rule 18b provides that a judge must, under certain circumstances, recuse himself from proceedings. *See* Tex. R. Civ. P. 18b(b) (listing circumstances requiring recusal). Although often a party will file a motion for recusal when it discovers that grounds for recusal exist, *see* Tex. R. Civ. P. 18a(a), a judge may also enter a recusal order "on the judge's own motion that the judge should . . . recuse himself or herself." *See* Tex. Gov't Code § 24.002. Under Rule 18a, "an order denying a motion to recuse may be reviewed only for an abuse of discretion on appeal from the final judgment." Tex. R. Civ. P. 18a(j)(1)(A). However, "[a]n order granting a motion to recuse is final

and cannot be reviewed by appeal, mandamus, or otherwise." Tex. R. Civ. 18a(j)(1)(B). We see no reason why Rule 18a(j), prohibiting appellate review of an order granting a motion to recuse, would not apply equally when, as in this case, the judge is recused on his or her own motion. *See id.*; *see also Ritz v. State*, No. 11-12-00037-CR, 2014 WL 358358, at *3 (Tex. App.—Eastland Jan. 31, 2014, no pet.) (mem. op., not designated for publication) (noting that it was "unaware of any statute that authorizes an appeal from a trial judge's sua sponte recusal from a case" and holding that voluntary recusal was not appealable order). Because we conclude that Judge Stubblefield's recusal is not reviewable, we overrule Kelley's first issue on appeal.

Motion for new trial hearing

In his second issue on appeal, Kelley asserts that the trial court "erroneously denied" his request for a hearing on his motion for new trial.

Appellate courts review a trial court's denial of a request for a hearing regarding a motion for new trial under an abuse-of-discretion standard. *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009). A trial court abuses its discretion in failing to hold a hearing on a motion for new trial if the motion (1) raises matters which are not determinable from the record and (2) establishes reasonable grounds showing that the defendant could potentially be entitled to relief. *Id*. at 338-39. Here, Kelley contends that the trial court abused its discretion when it denied his request for a hearing because his motion for new trial, including its various amendments, established that reasonable grounds existed to support his claim of innocence and that this claim would potentially entitle him to relief.

In response, the State argues that Kelley's first amended motion for new trial fails to state sufficient grounds for relief with respect to his claim of innocence because the verified allegations and attached affidavit "provide no specificity with which the trial court could discern the merits of a hearing or determine whether or not the evidence would probably bring about a different result." In addition, the State asserts that Kelley could not have established reasonable grounds based on his second and third amended motions for new trial because they were untimely pursuant to Rule 21.4 of the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 21.4 (deadline for filing motions for new trial and amendments). Because it informs our analysis of the trial court's decision to deny Kelley a hearing on his motion for new trial, we first consider whether Kelley's second and third amended motions for new trial were before the trial court.

Rule 21.4 states that "[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, a defendant may, without leave of court, file one or more amended motions for new trial." *See* Tex. R. App. P. 21.4(b). Here, Kelley filed his second amended motion for new trial on September 23, 2015, well beyond the thirty-day deadline and after the trial court had already ruled on his preceding motion for new trial. The State objected to Kelley's second amended motion as untimely under Rule 21.4, and the trial court signed an order on September 26, 2014, expressly denying Kelley's second amended motion for new trial, in part, on this basis. That same day, Kelley filed a third amended motion for new trial, and the trial court promptly denied the motion, citing Rule 21.4.

On appeal, Kelley does not contend that the trial court erred in denying his second and third amended motions for new trial as untimely under Rule 21.4. Nevertheless, Kelley asserts

that this Court should consider his second and third amended motions in determining whether his motion for new trial establishes reasonable grounds showing that he could potentially be entitled to relief. *See Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009) (explaining that hearing is required if motion and accompanying affidavits (1) raise matters which are not determinable from record and (2) establish reasonable grounds showing that the defendant could potentially be entitled to relief). Kelley asserts that the State cannot now complain about the untimely amendments because the State failed to object to the third amended motion for new trial and because the third amended motion incorporated by reference the second amended motion. We conclude that Kelley's argument is misplaced.

In *State v. Moore*, the Texas Court of Criminal Appeals held that Rule 21.4 does not operate as a limitation on the trial court's jurisdiction or authority to rule on an amendment to a timely filed motion for new trial, even when untimely filed. 225 S.W.3d 556, 568-69 (Tex. Crim. App. 2007). Consequently, absent an objection from the State, the trial court may rule on an untimely amended motion within the seventy-five-day period within which the original motion for new trial must be ruled upon. *Id*. at 569. However, when the State objects to the timeliness of the amendment under Rule 21.4, the trial court should limit its ruling to the original motion, and the granting of a new trial based upon matters first raised in an untimely amendment constitutes reversible error. *Id*. at 570. Conversely, if the State fails to object to the timeliness of the amendment before the trial court, it may not complain on appeal that the trial court erred in granting a new trial based on grounds raised in an untimely amendment. *Id*.; *see also* Tex. R. App. P. 33.1(a)(1) (to preserve complaint for appellate review, "the record must show that the complaint was made to the trial court").

The issues presented in this case do not implicate the State's ability to complain on appeal that Kelley's second and third amended motions were untimely. Unlike in *Moore*, the State does not complain that the trial court granted a new trial based upon matters raised for the first time in an untimely amended motion. *See Moore*, 225 S.W.3d at 570. In this case, the trial court did not grant a motion for new trial, but instead denied Kelley's motion for new trial and expressly denied his second and third amended motions as untimely pursuant to Rule 21.4. Certainly, under *Moore*, the trial court could have, in the absence of an objection by the State after a reasonable opportunity for objection, entertained the merits of Kelley's untimely amended motions for new trial. *See id*. However, contrary to Kelley's argument, nothing in the rules of procedure or in the court's holding in *Moore* suggests that a trial court is *obligated* to consider the merits of an untimely amended motion as a result of any failure to object by the State. The trial court determined that Kelley's second and third amended motions for new trial were untimely under Rule 24.1 and thus were not properly before it. Kelley has not challenged this determination on appeal, and whether the State did or did not object to the timeliness of the motions is irrelevant to Kelley's issues in this appeal.

Having concluded that the merits of Kelley's second and third amended motions for new trial were not before the trial court, we now consider whether the trial court abused its discretion in denying Kelley's request for a hearing based on the grounds presented in his first amended motion for new trial.[2] While the opportunity to prepare a record for appellate review makes a hearing on a

[2] In his original motion for new trial, Kelley did not request a hearing on his motion and did not claim that he had newly discovered evidence establishing actual innocence, the only claim that Kelley now asserts entitled him to a hearing. As a result, our analysis focuses solely on Kelley's first amended motion for new trial.

motion for new trial a critical stage, such hearing is not an absolute right. *Smith*, 286 S.W.3d at 340 (citing *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993)). Instead, under an abuse-of-discretion standard, we reverse only when the decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Gonzales v. State*, 304 S.W.3d 838, 842 (Tex. Crim. App. 2010).

A motion for new trial must be supported by an affidavit of the defendant or someone else, specifically setting out the factual basis for the claim upon which the motion for new trial is based. *Smith*, 286 S.W.3d at 339. The affidavit need not establish a prima facie case or reflect every component legally required to establish relief. *Id*. However, the defendant's motion "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 in nature, is unsupported by facts, or fails to provide the requisite notice of the basis for the relief claimed, no hearing is required. *Id*. at 199 (citing *Smith*, 286 S.W.3d at 339). Our appellate review is limited to "the trial judge's determination of whether the defendant has raised grounds that are both undeterminable from the record and reasonable, meaning they could entitle the defendant to relief." *Smith*, 286 S.W.3d at 340.

In arguing that the trial court was obligated to conduct a hearing, Kelley points to allegations made in his first amended motion for new trial, verified by new trial counsel, and to an affidavit attached to the first amended motion. In the first amended motion, Kelley's counsel verified the following:

> The child was in the McCarty home beginning December 3, 2012. Greg Kelley left the McCarty home on June 11, 2013. The number of days that Greg Kelley's stay at the home coincides with the child's appearance at daycare is exactly 192 days.

> Counsel can establish that Greg Kelley could not have molested any child on any afternoon for at least 183 of those days. Greg Kelley's whereabouts can be definitely established on the vast majority of dates and activities can be readily identified during the relevant time-frame when, under the prosecution's theory, abuse occurred. By the time of the hearing date, it may even be possible to account for every day. Counsel cannot demonstrate Greg Kelley's innocence without a hearing.

In effect, Kelley's counsel alleged that he now has, or soon will have, evidence establishing that Kelley was not present at the scene of the alleged abuse during the relevant time period. However, aside from Davis's affidavit, Kelley's counsel did not attach any evidence in support of this claim, did not specify what evidence he planned to present, and did not explain or demonstrate why such evidence was newly discovered and not available at trial. As a result, the verified allegations of Kelley's counsel fail to present any factual basis from which the trial court could have evaluated the reasonableness of Kelley's claim of innocence based on newly discovered evidence.

Similarly, we conclude that Barbara Davis's affidavit, attached to Kelley's first amended motion, fails to "allege sufficient facts that show reasonable grounds to demonstrate that he could prevail." *Hobbs*, 298 S.W.3d at 199-200. In her affidavit, Davis testified that (1) her two children attended McCarty's daycare from 2008 to July 2013; (2) she had never met, seen, or otherwise come in contact with Kelley at the McCarty home; (3) her children told her, upon questioning, that they had never seen Kelley and they were unable to identify him from a photo; and (4) she had never been contacted by the State. Taken as a whole, Davis's testimony suggests that neither she nor her children encountered Kelley in the McCarty home. However, these factual allegations, if taken as true, do not establish Kelley's whereabouts and fall short of demonstrating that Kelley was, in fact, not present at the McCarty home at the time of the alleged abuse. Based

on the limited factual allegations before it, the trial court could have reasonably concluded that Kelley failed to show reasonable grounds demonstrating that he could prevail on his claim of newly discovered evidence of actual innocence. *See id.* Consequently, we cannot conclude that the trial court abused its discretion by failing to grant Kelley a hearing on his motion for new trial. We overrule Kelley's second issue on appeal.

In his third issue on appeal, Kelley contends that the trial court erred in denying his request for a reporter's record. Kelley contends that the record may be needed to help this Court in determining whether Judge Stubblefield's recusal was appropriate and whether Kelley's motion for new trial raised matters which are not determinable from the record. We have concluded that Kelley has no right to appeal Judge Stubblefield's recusal and that the trial court did not abuse its discretion in denying his request for a hearing. Accordingly, we do not reach Kelley's third issue on appeal.

CONCLUSION

Having overruled Kelley's issues on appeal, we affirm the judgment of conviction.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

Filed: February 11, 2016

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