IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0163-17

COBY RAY HUDGINS, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE TWELFTH COURT OF APPEALS GREGG COUNTY

HERVEY, J., filed a concurring opinion in which RICHARDSON and NEWELL, JJ., joined.

O P I N I O N

I agree with the majority's final disposition of this case given the procedural posture. Hudgins cannot show that the trial court abused its discretion when it denied his motion for new trial given the trial court's findings and the state of the record. I believe, however, that the outcome of this case might have been different had we been squarely presented with the ineffective-assistance-of-counsel issue. I write separately to discuss a number of problems with this case and to explain why I think the majority's analysis is

incomplete.

I. FACTS

A. Hudgins's Mental Health History

Appellant, Coby Ray Hudgins, was sexually assaulted as a child by one of his cousins, Dustin Lay. Hudgins testified against Lay, and Lay was convicted and sentenced to a term of confinement. Through third parties, Lay indirectly communicated a number of threats to Hudgins, including that he was "going to come and pay [Hudgins] a visit and kill [him]" when he got out of prison. When Lay was about to be released from prison, Hudgins's mother was notified, and she told Hudgins. In response to Lay's impending release, Hudgins bought a handgun for protection because he had "no doubt" that his cousin was going to "come after him." According to Hudgins, he was afraid for his life.

B. French's Testimony

At the hearing on the motion for new trial, a forensic psychologist named Dr. Wade French testified on behalf of Hudgins. French testified that trauma can cause post-traumatic stress disorder (PTSD) and that trauma can come from any number of sources, including sexual abuse. According to him, there are two types of PTSD: the first happens close to the traumatic event, while the second is delayed. The delayed variety can manifest months and even years after the traumatic event. French testified that a person who suffers from PTSD may experience anxiety, depression, and an inability to maintain a job, and that when the trauma is sexual abuse, the person may also be unable to

maintain a romantic relationship. However, he also explained, such symptoms would not be present in a person who is afflicted with delayed PTSD.

According to French, he had presented such testimony for mitigation purposes in other cases, and he believed that the jury would have found his testimony helpful in accurately assessing Hudgins's moral blameworthiness.

II. Majority Mischaracterizes the Ground for Review

At the outset, I note my disagreement with the majority regarding the scope of our review. The majority declines to address the performance prong of *Strickland*, reasoning that we have not been asked to review it. Maj. Op. at 5 n.1. That belief may stem from a misunderstanding of the ground for review. According to the majority, the issue is "whether, in the absence of expert testimony specifying how [Hudgins]'s sexual assault experience actually affected him, he can establish that there is a reasonable probability that the jury would have assessed a lesser punishment . . . ." *Id.* at 2. However, the precise language of the ground for review is significantly broader. The ground that we actually granted asks, "[i]s it error to declare trial counsel ineffective for failing to investigate and present evidence when, at the motion for new trial hearing, Appellant presented no evidence demonstrating that the investigation and additional evidence would have been beneficial?" I understand the ground—as written—to embrace both the performance and prejudice prongs of *Strickland*.[1]

[1]The majority responds that it need not address the performance prong of *Strickland* when the claim can be resolved on prejudice grounds. Maj. Op. at 5 n.2. While I agree that is true most

III. Counsel's Failure to Investigate and Present Evidence

A. Failure to Investigate

Because the court of appeals exhaustively reviewed trial counsel's failure to investigate, I briefly address only what I consider to be the most egregious errors.

First, according to trial counsel, he wanted to argue the "Bernie Tiede" defense, but later changed course because the judge would not appoint the expert counsel wanted to support that defense.[2] The defense in *Tiede* was sudden passion,[3] but counsel seems to have believed that *Tiede* dealt with competency to stand trial and insanity based on his request that the court appoint an impartial expert to examine Hudgins's competency and

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of the time, in my opinion there are times the deficient conduct or omissions by trial counsel are so egregious that, regardless of prejudice to the defendant, a discussion is warranted about what went wrong and how it can be fixed. *See, e.g.*, *Ex parte LaHood*, 401 S.W.3d 45 (Tex. Crim. App. 2013). This is one of those cases.

[2]Trial counsel did not ask the trial judge to appoint a *defense* expert; he requested an *impartial* expert. The State is entitled to reports written by an independent expert, but not a defense expert. *See* TEX. CODE CRIM. PROC. art. 46B.025(d); *Ballew v. State*, 640 S.W.2d 237, 239–40 (Tex. Crim. App. [Panel Op.] 1980) (defense expert's notes and reports fall under attorney-client privilege because they are agents of the defendant whose services are necessary to properly prepare a defense). Based on this, it is difficult to believe that counsel made a reasonable strategic choice.

[3]At the punishment phase, Tiede wanted Dr. Frederick Gary Mears, a clinical psychologist and neuropsychologist, to testify about clinical disorders involving "dissociation." Mears was allowed to testify only in generalities; he did not testify about his examinations of, or opinions about, Tiede's mental state. He would have, however, testified about the issues of "sudden passion" and "adequate cause"; that the stress of Tiede's relationship with the decedent and demands she placed on him degraded or diminished his ability to cooly reflect; that Tiede would not pose a future danger to anyone in prison; and that during the offense, Tiede's behavior indicates that he experienced "certain dissociative episodes in which he mentally separated from the act of killing [the decedent]." *Tiede v. State*, 76 S.W.3d 13, 13–14 (Tex. Crim. App. 2002).

sanity.[4] This confused understanding of the *Tiede* case also apparently confused the trial

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[4]This is evident by trial counsel's Amended Motion Suggesting Incompetency and/or Insanity Request for Examination, which states that, "Due to the nature of the charge against [Hudgins], Counsel requests the court appoint Edward B. Gripon, M.D.P.A. [an expert from the *Tiede* case] of Beaumont, Texas for [Hudgins]'s evaluation." He also specifically asked that Gripon be appointed as a "disinterested expert:" and for a hearing on the motion,

> THE COURT: Well, it sounds -- but what you said -- first of all, does your -- do you believe your client has the sufficient present ability to consult with you with a reasonable degree of rational understanding?
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> [TRIAL COUNSEL]: I -- I would -- I would usually have said yes until I found out what these theories are and all on -- on children that are -- are sexually molested and what their problems are. Judge, I -- I'm just not sure of that anymore.
>
> As far as being able to talk to him, sure, I can talk to him. As far as what happened, that's kind of bleaky, too, because of the conditions that were in effect that night. I'm more wanting to be one who can testify as to why someone would be scared of somebody who had sexually molested him when he was a child and how that affects him --
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> THE COURT: That's different from competency.
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> [TRIAL COUNSEL]: It is -- well --
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> THE COURT: You're ask -- you have asked for a motion for incompetency or sanity evaluation, and -- but what you're telling me, the reasons for it is really more defensive issues.
>
> [TRIAL COUNSEL]: No, Judge, it's -- it's not. It's whether or not he was -- he -- his memory and the ideas he was going through at the time, whether he was competent at that time, because of what he went through and what -- what he was trying -- because at the time, the guy who he testified to and sent to prison had just got out of prison and had told him, when he went, he was going to get him. So was he competent at the time? I don't know what insanity is at that point.

At the close of the new-trial hearing, the judge said that,

> Now, at the hearing, [trial counsel] did make mention of the quote/unquote "Bernie Tiede-type defense" and why he specifically wanted Dr. Gripon. Again, for the issues that were presented to the Court in the motion for sanity and incompetency, as those motions were what was filed, Dr. Allen was the

court.[5] Failure to have a firm grasp of governing legal principles of a case not only constitutes deficient performance, *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990), it is also unethical.[6] Any law student knows that reading, interpreting, and applying caselaw are cornerstones of trial work; unfortunately, none of those principals were competently applied by trial counsel here.

Second, trial counsel decided that Hudgins did not suffer lasting effects from his childhood sexual abuse just because Hudgins told him that. The court of appeals, however, was correct when it stated that counsel must undertake an independent, thorough investigation of the defendant's background, *Wiggins v. Smith*, 539 U.S. 510, 522 (2003), and the touchstone of whether a mitigation case should have been presented is whether "the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant]'s background was itself reasonable." *Id.* at 522–23. In other words, without an independent investigation by trial counsel (as was the case here), he cannot have reasonably decided that presenting PTSD as a mitigating circumstance was not worthwhile. Had trial counsel performed his own, independent investigation, he

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> appropriate expert for those issues. But it was clear, very early on, that [trial counsel] was looking at that potential defense or mitigation issue.

[5] *See supra*, note 3.

[6] TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.01(a), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9; *see id.* R 1.01 cmt. 1 ("Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.").

would have discovered that people can suffer from PTSD as the result of trauma that happened years before, such as childhood sexual abuse,[7] and that when that is the case, the symptoms of PTSD would not manifest themselves until that person suffered a later trauma. Further, had trial counsel learned these things, he could have used the mitigating information to attempt to secure the appointment of a defense expert to testify about the relationship between Hudgins's childhood sexual abuse and his actions the night of the murder. Instead, Hudgins was deprived of the opportunity to present mitigating evidence because counsel did not even attempt to perform his own investigation.

B. Presentation of Evidence

After the trial judge declined to appoint the expert of counsel's choosing so that he could employ the "Bernie Tiede" defense, trial counsel told Hudgins's family that they would have to pay to hire an expert to assist the defense.[8] *See Ex parte Briggs*, 187

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[7]The majority focuses on the testimony that Hudgins was able to maintain a job and a romantic relationship but seems to ignore French's testimony that,

> It can be -- they can start -- or they can become symptomatic immediately after it happened, and then there are cases where they don't show any symptoms, and in six months, two years later, all of a sudden they start to deteriorate. That's one of the mysteries of this disorder.

[8]The following excerpt is revealing:

> [TRIAL COUNSEL]: I would like to learn what these theories are and how they approach it, personally. So that's the reason I'm asking for this -- this [expert], Judge.
>
> And if my client had the money and the resources -- he don't even have a job now -- I'm sure I could get him and his family to do it, if they had the money. But they don't have the money. His aunt and grandmother just had a wreck, and his aunt died last Saturday, a week ago, in a car wreck. And grandmother is still in

S.W.3d 458, 468 (Tex. Crim. App. 2005). We have held, however, that an attorney who fails to consult with experts until fees are paid has not made a strategic decision; he has made an impermissible economic one. *Id.* at 467. On this basis alone, trial counsel's performance was deficient. Apparently he did not know that even a defendant who retains counsel may nonetheless be entitled to the assistance of an expert under *Ake v. Oklahoma*, 470 U.S. 68 (1985), if that defendant becomes indigent.[9] *Briggs*, 187 S.W.3d at 468–69; *see Ake*, 470 U.S. at 68. In *Briggs*, we said exactly that, "the trial court undoubtedly would have permitted state-funded appointment of expert assistance under *Ake* had applicant's attorney put on proof of his client's present indigency" and that "[f]ailing that, applicant could have appealed on the basis of the trial court's failure to appoint expert assistance under *Ake*." *Id.* at 468–69. Trial counsel's ignorance of *Ake* and *Briggs* (like

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the hospital, I believe --

[9]In *Briggs*, we noted three courses of action competent counsel may consider if his client cannot "come up with" the necessary funds to pay his attorney's fee or for experts:

> 1. Subpoena all of the doctors who had treated [the victim] during the two months of his life to testify at trial. Introduce the medical records through the treating doctors and elicit their expert opinions;
>
> 2. If counsel was convinced that applicant could not pay for experts to assist him in preparation for trial or to provide expert testimony, withdraw from the case, explaining to the court that applicant was now indigent, prove that indigency (as was done in the writ proceeding), and request appointment of new counsel;
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> 3. Remain as counsel with the payment of a reduced fee, but request investigatory and expert witness fees from the trial court for a now-indigent client pursuant to *Ake v. Oklahoma*.

Briggs, 187 S.W.3d at 468 (footnotes omitted).

his ignorance of *Tiede*), clearly constitutes deficient performance.

III. Prejudice

A. The Trial Court

According to the trial court, trial counsel was not prejudiced because there was testimony that Hudgins had been sexually abused by Lay when he was eight- or nine-years old; that Lay had been imprisoned for that abuse; that while incarcerated, Lay had indirectly threatened Hudgins's life multiple times; and that around the time Lay was released, Hudgins bought a gun for protection because he was afraid of Lay. It is true that such testimony was elicited; however, this testimony revealed to the jury only that Hudgins was afraid of Lay because he was sexually abused by him and because he had threatened his life. None of that information can "make up" for the lack of testimony about the relationship between Hudgins's childhood sexual abuse, the impact of possible PTSD, and his actions the night of the murder.

I also do not understand why the trial court inexplicably credited parts of French's scientific testimony but not others. For example, while it is true that French testified that holding a job and having a hard time maintaining relationships are signs of a person suffering from PTSD, he also testified that, while some people experience effects caused by PTSD immediately after the trauma that caused it, others do not manifest signs until days, months, or even years later. The trial judge appears to have credited French's testimony about common symptoms of PTSD but completely disregarded French's

testimony about delayed PTSD.

B. The Majority

The majority faults Hudgins because French never definitively testified that Hudgins suffers from PTSD. I agree that such testimony would be ideal, but I do not believe that the absence of that testimony makes it impossible for Hudgins to prove that he was prejudiced. French's testimony would have been sufficient to equip the jury to consider whether Hudgins suffered from PTSD, a mitigating circumstance that was not presented to the jury. Hudgins need only establish a reasonable probability that the jury would have assessed a lesser sentence had it been privy to French's testimony, not an absolute certainty, and the United States Supreme Court has noted that even a small increase in a defendant's sentence can be prejudicial. *Glover v. United States*, 531 U.S. 198, 200, 202 (2001).

Here, the mitigating evidence presented at the new-trial hearing is greater and more qualitative than what was presented by trial counsel. French's testimony provided a critical link that was not explored at trial: was Hudgins less morally blameworthy for committing the crime than the jury believed because he suffered from PTSD, which affected his behavior the night of the shooting?[10] While I recognize that the posture of

[10]The majority claims that Hudgins's "proposed mitigating evidence would have added only minimally incremental mitigating value and would have done next to nothing to assist the jury, beyond what was already available to it, in determining moral blameworthiness." Maj. Op. at 10. I cannot agree. Even evidence of incremental mitigating value is important because it could tip the scales in favor of a lesser sentence; nonetheless, while the jury did hear from a couple of family members that Hudgins had been sexually abused by a cousin as a child, it heard nothing

this case is that of reviewing a trial court's decision to deny a new trial, which is a difficult hurdle to surmount, if squarely presented with the issue, I believe there is a reasonable probability that the jury would have assessed a lesser sentence had this mitigating evidence been discovered and presented at trial.[11]

C. Prejudice Factors

In *Lampkin v. State*, 470 S.W.3d 876 (Tex. App.—Texarkana 2015, pet. ref'd), the Texarkana Court of Appeals identified six factors that guided its analysis of whether a failure to investigate and to introduce mitigating evidence in a non-capital case was prejudicial, and the court of appeals here used those same factors. The majority also includes them in the body of the opinion but explains that, "[e]ven if we assume that these are indeed legitimate 'factors' that are relevant to the determination of *Strickland* prejudice in this context—a question we need not decide today—we do not think their application to the facts presented here cuts in favor of holding that the trial court abused its discretion." Maj. Op. at 9. It continues in a footnote, stating that it takes no position of

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about the clinical diagnosis of PTSD or how it might have influenced Hudgins's actions the night of the murder. I do not believe that scientific evidence about PTSD and its effects would have been of only incremental mitigating value. I also do not believe that French's testimony would have done "next to nothing to assist the jury" beyond what had already been presented to it because no other evidence about PTSD was presented to the jury.

[11]In light of the majority's disposition of this case, if Hudgins wants to continue to seek relief, he must file a post-conviction application for a writ of habeas corpus. Through that procedural process Hudgins can develop a writ record without the time constraints associated with a new-trial motion. He also has a higher chance of success because the issue will be only whether his attorney was ineffective, not whether the trial court abused its discretion when it denied a motion for new trial claiming ineffective assistance of counsel.

the relevancy of the factors because it already concluded that the trial court did not abuse its discretion and that its point "is simply to illustrate that, even if we accepted for the sake o[f] argument that the *Lampkin* factors are appropriate, their application here would not change our assessment." *Id.* at 9 n.9.

Color me confused. If the majority already concluded that the trial court did not abuse its discretion, why does it even discuss the factors, much less explain that Hudgins cannot prove prejudice under them? After all, the dispositive issue has already been resolved. If that is the case, as the majority claims, then it appears that the discussion of the *Lampkin* factors is mere dicta. Staying abreast of this Court's jurisprudence can be difficult to do at times, and we should not make the task more onerous by including dicta in our decisions.

But instead, I would take another course. Because the court of appeals relied on the *Lampkin* factors (and other courts do as well), we should review them and determine if they are relevant to the prejudice inquiry. *See e.g.*, *Burks v. State*, No. PD-0992-15, 2016 WL 6519139 (Tex. Crim. App. Nov. 2, 2016), *rev'd by* 2017 WL 3443982 (Yeary, J., dissenting); *Benavidez v. State*, 323 S.W.3d 179, 183 & n.20 (Tex. Crim. App. 2010). By doing so, we can give clear guidance to the bench and bar about how to prove prejudice in this context. However, because the majority dodges the issue, and in the process, misses out on an opportunity to clarify the law, I cannot join its opinion.

IV. CONCLUSION

For these reasons, I concur in only the result reached by the Court.

Filed: January 24, 2018

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