COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ALBERTO MONTELONGO,	§	No. 08-16-00001-CR
Appellant,	§	Appeal from the
v.	§	243rd District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20150D02224)

MEMORANDUM OPINION ON ORDER

This case arrives back to us on remand from the Texas Court of Criminal Appeals. In our initial decision, this Court held, *inter alia*, that Appellant Alberto Montelongo had waived his right to complain about the trial court's failure to hold a hearing on his motion for new trial because Appellant failed to either object to a trial court order cancelling a scheduled hearing on the motion or otherwise attempt to reset the hearing before the trial court's plenary period expired. The Texas Court of Criminal Appeals reversed us on this point, holding that Appellant had properly preserved this error by filing a motion for new trial requesting a hearing. The high court remanded the case to us so that we may consider the issue on the merits. *See Montelongo v. State*, No. PD-0202-19, 2021 WL 1936543 (Tex. May 12, 2021), *rev'g*, No. 08-16-00001-CR, 2018 WL 4178520 (Tex.App.—El Paso Aug. 31, 2018, pet. granted).

The question for us at this stage on remand is whether the trial court erred by failing to hold a hearing on Appellant's timely-filed motion for new trial under these circumstances. We find that it did. Consequently, we will abate this case and order the trial court to conduct a new trial hearing.

DISCUSSION

A motion for new trial is a prerequisite to presenting a point of error on appeal only when necessary to adduce facts not in the record. TEX.R.APP.P. 21.2. The purpose of a hearing on a motion for new trial is to allow a defendant to fully develop the issues raised in his motion for new trial. *Jordan v. State*, 883 S.W.2d 664, 665 (Tex.Crim.App. 1994). When an accused presents a motion for new trial raising matters not determinable from the record which could entitle him to relief, the trial judge abuses his discretion in failing to hold a hearing, provided that the motion is supported by an affidavit specifically showing the truth of the grounds of attack. *King v. State*, 29 S.W.3d 556, 569 (Tex.Crim.App. 2000). The affidavit need not reflect each and every component legally required to establish relief, but rather must merely reflect that reasonable grounds exist for holding that such relief could be granted. *Jordan*, 883 S.W.2d at 665.

This Court has previously recognized in the context of ineffective assistance of counsel claims that "[w]hile in some rare instances, harmful lapses on the part of trial counsel may be sufficiently shown in the trial record without subsequent evidentiary hearing, in the vast majority of cases a motion for new trial hearing will be required to provide an adequate evidentiary basis for appellate analysis under *Strickland*.[1] Otherwise, complaint on direct appeal will be fruitless . . . ." *Toney v. State*, 783 S.W.2d 740, 742 (Tex.App.—El Paso 1990, pet. ref'd). Such is the case here.

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

Appellant argued both in his motion for new trial and on appeal that his trial counsel provided ineffective assistance. The motion filed by appellate counsel was supported by an affidavit signed by trial counsel in which trial counsel states he did not zealously represent his client for fear of being held in contempt by the judge. The affidavit states, in relevant part:

> After jury selection was completed, Judge Aguilar was meeting with the remainder of the venire panel and explaining to them what happened regarding one of my objections. I was present and attempted to speak to clarify what had happened. At that point, Judge Aguilar began yelling 'shut up Cervantes, shut up.' He pointed his finger in my face and got within a few feet of me. He then said 'I'm warning you Mike, sit down and shut up. You're in contempt.' After the venire panel was excused, I tried to explain myself and he fined me $500. I told Judge Aguilar I thought his presentation to the jury panel after voir dire was like a pep talk and was not part of the process. I wanted to contribute to the discussion and I didn't mean to offend. He fined me $500 anyway and the next day he asked me if I had the money. He instructed me to pay the money which I did.
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> After this experience, I felt very intimidated. As the trial progressed I became more and more intimidated. I was very concerned about being held in contempt and I was fearful of being incarcerated. I am 65 years old and I am a diabetic. I have been a lawyer for 38 years and have never felt as intimidated as I was during this trial. I have never been ridiculed and made to look foolish in the manner that was done to me by Judge Aguilar.
>
> I was reluctant to make objections for fear of angering the judge. The objections I did make were generally overruled. I limited my cross examination so as to avoid being held in contempt by the judge. Throughout the trial, he threatened me with contempt about five times. Several other times, he did not directly threaten contempt but would say things like 'I'm warning you.' I took this to mean, he was warning me that he was thinking about holding me in contempt.
>
> Since I was fearful of being held in contempt and incarcerated, I did not zealously represent my client. I do not believe that I effectively conveyed our defensive theory to the jury. During my cross examination of one of the complaining witnesses I was attempting to establish our theory that she had grabbed the gun and it had discharged when she grabbed it. The State objected to my cross examination and the judge warned me that if I persisted with that line of questioning, he would hold me in contempt. Instead of continuing to try to elicit the information that I believed supported our theory, I abandoned this line of questioning, which I thought was proper, out of fear of being held in contempt. This is just one instance that I specifically recall holding back on but there were several others. In general, my cross examination was limited so as to avoid any possibility of being held in contempt. This is not the way I would normally practice but I did so in this case. I believe my fear of doing a thorough cross examination, negatively impacted my client's trial. I further believe that I was not effectively representing my client after the numerous threats of contempt piled up.

. . .

> Additionally, my voir dire was severely limited because of the judge's repeated threats to take voir dire away from me if I did not conform my questions as instructed. Typically, if l am not allowed to ask a question that I think is appropriate, I will rephrase the question. Given my fear of being held in contempt and my fear of not being allowed to voir dire at all, I did not do this. I also believe there were areas of law that I did not cover during voir dire because of my fear that I would be held in contempt.

Trial counsel's affidavit also details his failure to investigate Montelongo's mental health history or call witnesses for mitigation purposes:

> I did not consider the possibility of having the Defendant examined for purposes of presenting mitigating evidence because I did not believe Mr. Montelongo was incompetent or insane at the time of the offense. However, given the fact that Mr. Montelongo was suicidal, appeared depressed and had engaged in launching missiles at enemy targets while in the military, I should have had him evaluated by a mental health expert. Such evidence would have been useful mitigating evidence for the punishment stage of trial and may have also been useful at the guilt-innocence stage of trial regarding defensive issues.
>
> With respect to the number of witnesses I called on Mr. Montelongo's behalf, I believe I should have called more witnesses. I was aware that Mr. Montelongo's parents and siblings were present at court along with several other family members and friends but I did not call them to testify or even interview them to possibly testify. I should have presented additional mitigating evidence and character evidence at punishment but I did not do so because of the difficulties I was having presenting the few witnesses that I did call.

In our previous opinion, we declined to consider the attached affidavit for its substance, holding that it was "merely a pleading that authorizes the introduction of supporting evidence and is not evidence itself" until it is introduced as evidence at the motion hearing. *See Montelongo*, 2018 WL 4178520, at *5 [Internal quotation marks omitted]. Since there was never a hearing at which the affidavit could have been admitted, and since we could not reach the issue of whether the trial court erred by never holding an evidentiary hearing because we held that issue was waived by counsel's failure to press hard enough for such a hearing, we defaulted to considering only the trial record on appeal. *Id*. at *5-*6. And since the reporter's record transcripts from trial did not

contain comments from trial counsel explaining his motives for his actions, nor did the record show that counsel engaged in conduct that was so outrageous no competent lawyer would have engaged in it, we applied the presumption that trial counsel's actions were strategic and affirmed Montelongo's conviction. *Id*. at *6.

However, given that the Texas Court of Criminal Appeals has confirmed that the issue of whether the trial court should have held a hearing is properly before this Court, we find that this affidavit creates a substantial fact question justifying the need for a new trial hearing, and that the trial court erred by failing to hold a hearing. *See Reyes v. State*, 82 S.W.3d 351, 353–54 (Tex.App.—Houston [1st Dist.] 2001, op. on order)(abating appeal for new trial hearing where trial counsel's affidavit raised ineffective assistance of counsel issues not determinable from the trial record).

The only question remaining for us is the remedy for this error. Appellant previously urged us to abate this appeal for a new trial hearing. We agree this is the proper course of action. This Court must not affirm or reverse a judgment or dismiss an appeal if the trial court's erroneous action or failure or refusal to act prevents the proper presentation of a case to the court of appeals. TEX.R.APP.P. 44.4(a). If these circumstances exist, the court of appeals must direct the trial court to correct the error and then proceed as if the erroneous action or failure to act had not occurred. TEX.R.APP.P. 44.4(b). Where, as here, an appellant in a criminal case demonstrates that the trial court erred by failing to hold a hearing on a motion for new trial, a court of appeals should remedy the error by abating the appeal, invoking its Rule 44.4(a) authority, ordering the trial court to conduct a hearing on the motion for new trial, and thereafter continuing appellate proceedings—up to and including issuing a merits decision if necessary—after the trial court has held the new trial hearing. *See Reyes*, 82 S.W.3d at 353–54; *Crosson v. State*, 36 S.W.3d 642, 648-49

(Tex.App.—Houston [1st Dist.] 2000, op. on order); *see also* TEX.R.APP.P. 43.6 (allowing court of appeals to make miscellaneous appropriate orders that the law and nature of the case require).

Because the trial court erred by not having a hearing, and because extra-record evidence adduced at a new trial hearing could bear on our determination of the ineffective assistance of counsel points that Appellant raised in Issues Two and Three of his appeal, we find that the trial court's error in failing to hold a new trial hearing has prevented the proper presentation of this case on appeal. TEX.R.APP.P. 44.4(a). And because the trial court's authority to entertain a motion for new trial directly has long since expired, we find it necessary to invoke our authority under Rule 44.4(a) and order the trial court to conduct an evidentiary hearing on Appellant's original motion for new trial to allow for the proper presentation of this appeal, and to make any findings of fact germane to the grounds presented in the original motion for new trial upon the conclusion of the hearing. Such findings should include findings with respect to the credibility and demeanor of witnesses.

O R D E R

Therefore, for the aforementioned reasons, we ABATE this appeal and ORDER the trial court to hold a new trial hearing within 45 DAYS, and to make findings of fact within 15 DAYS.

We further ORDER the District Clerk to forward a supplemental clerk's record containing the trial court's findings of fact and any other pleadings filed in connection with the new trial hearing within 10 DAYS after the trial court files its findings of fact. We further ORDER the Court Reporter for the 243rd District Court to create a supplemental reporter's record containing transcripts of the new trial hearing(s) and to file that supplemental reporter's record with this Court within 10 DAYS after the trial court files its findings of fact.

This Court will issue further orders and instructions to the parties as necessary upon the

receipt of the record from the new trial hearing.

IT IS SO ORDERED.

July 9, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.

(Publish)