Opinion filed December 18, 2008

In The

Eleventh Court of Appeals

No. 11-07-00139-CR

MOISHE CURTIS TURNER, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 350th District Court

Taylor County, Texas

Trial Court Cause No. 7646D

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

Moishe Curtis Turner, appellant, was charged with the capital murder of Stewart Jason Wofford after having been certified to be tried as an adult. On the day of trial, appellant accepted a plea bargain and pleaded guilty to the lesser offense of murder. Pursuant to the plea bargain, the trial court assessed his punishment at confinement for thirty years. We affirm.

Background Facts

At the time of Wofford's murder, July 11, 2005, appellant was fifteen years old. The shooting occurred at Wofford's pickup near an elementary school. On October 19, 2005, the

juvenile court held a hearing on the State's petition for waiver of jurisdiction and discretionary transfer to an adult court.

David Varner, an investigator with the Abilene Police Department – juvenile division, testified at the hearing. Officer Varner stated that he had interviewed appellant the night of the shooting. Appellant first told him that there had been another black male, whom he only knew as Brian, in the pickup with appellant and Wofford and that appellant had not been the one who shot Wofford. Appellant later said that Brian and Wofford were in the pickup at different times, that a person named Tylee was with them at one point, that Wofford had pulled a gun on Brian, that there was gunfire between Wofford and Brian, and that Brian took the pickup. Officer Varner found no evidence to support appellant's story that "Brian" shot Wofford or that anyone other than appellant and Wofford's girlfriend were with Wofford at the time Wofford was killed. Officer Varner said that the only true part of appellant's statement was that Wofford had been shot.

Officer Varner then reviewed the statements that he had collected from various witnesses. There was a statement by Taran Dowell, Wofford's girlfriend, that the shooting occurred in connection with a sale of drugs by Wofford to appellant, that she was in Wofford's pickup when appellant shot Wofford, that appellant also pointed the gun at her but then let her go, that no one else was there when appellant shot Wofford, and that she saw appellant drive away in the pickup with Wofford's body. Dowell knew appellant from having seen him during previous marihuana sales to appellant. Two other witnesses, Jason Manry and Carol Dunn, were walking around the track at the school at the time. They had seen appellant walk over to the pickup to talk with Dowell and Wofford, and then they heard a shot. They saw Dowell get out of the pickup and ask for help. After hearing the shot and Dowell's request for help, they asked a resident in the area to call the police. Their description of appellant's clothing matched what appellant was wearing when he was picked up later that night by the police. Their description of appellant's clothing also matched the clothing description given by Dowell. Blood on appellant's shirt matched the victim's.

Derrick Wells, who was thirteen years old at the time, told Officer Varner that he had played basketball and smoked some marihuana with appellant at the school earlier that afternoon. Wells knew appellant because appellant dated Wells's sister and was the father of her expected child. Wells stated that appellant had called him at around 10:45 p.m. and told him that Wofford was going

to sell appellant "some weed." Appellant also told Wells that he was going to fight Wofford, that he had a gun, and that he was going to take Wofford's pickup. Later, Wells was taking out the trash, and he heard a gunshot. Appellant drove up in Wofford's red pickup. Wells knew the pickup because he had seen it before and knew it had a loud engine. Wells did not see anyone else in the pickup with appellant. When Wells refused to go close to the pickup, appellant jumped out and ran down the street. Wells then told his sister what he had heard and that he had seen appellant run down their street. The pickup was found in front of Wells's house as Wells had stated.

According to a fifth witness, Jeremy Bland, appellant had walked up to Bland that night and asked for a ride to some apartments. On the way to the apartments, appellant told Bland that he had gotten into a drug deal that went bad and that he shot someone. Bland stated that appellant showed him that appellant's shirt had blood on it. After Bland dropped appellant at the apartments, he saw two officers go over to appellant. Officer Varner stated that the police had taken appellant into custody and that appellant had some marihuana and ammunition on him. According to the Allied Forensics lab in the Metroplex, the ammunition was of the same caliber as the bullet that killed Wofford. The police also found the pistol that fired the fatal shot in Wofford's pickup. The police searched the elementary school for evidence of a shootout but found no evidence to support appellant's story.

The juvenile court found that there was evidence of premeditation, that appellant had been treated as an adult by his family for some time, and that neither appellant nor his family trusted the juvenile system enough to believe that it could be of any help to appellant. The juvenile court granted the State's motion to transfer appellant to an adult court.

On January 19, 2006, a grand jury indicted appellant for capital murder. On February 5, 2007, appellant accepted a plea bargain and pleaded guilty to the reduced offense of murder. Pursuant to the plea bargain, the trial court sentenced appellant to thirty years in the Texas Department of Corrections, Institutional Division. On March 7, 2007, a motion for new trial and a motion to withdraw plea were filed by an attorney who was not one of the attorneys of record. The State objected to the motion for new trial and the motion to withdraw the plea on the grounds that they were not timely filed by the attorneys of record and that they were not adequately supported by affidavits. On March 29, 2007, however, the trial court granted the new counsel's motion to

substitute counsel. On March 30, the trial court held a hearing and denied both the motion to withdraw the plea and the motion for a new trial.

This Appeal

When appellant accepted the plea bargain and pleaded guilty to murder instead of capital murder, the trial court explained to him that his right to appeal would be limited to his pretrial motions and that he was waiving all other matters. Appellant's first two issues are the only issues that deal with pretrial motions. Those first two issues contend that the trial court erred in denying the motions of his original trial counsel to withdraw and for a continuance. In appellant's third issue, he argues he was denied due process as follows: that he had ineffective assistance of counsel, that the State deprived him of exculpatory evidence, that the State "committed prosecutorial misconduct in the deliberate and hasty destruction of evidence," and that the trial court did not make sufficient inquiries concerning the voluntariness of appellant's plea. In appellant's fourth issue, he argues that his due process rights were denied at the certification hearing and by the discovery policy of the district attorney's office.

The trial court's certification of appellant's right of appeal reflects that this is a plea bargain case and that his appeal is limited to matters raised by written motion filed and ruled on before trial. The trial court did not give its permission for appellant to include other matters in his appeal. The limitations of TEX. R. APP. P. 25.2(a)(2) restrict the jurisdiction of appellate courts to consider issues raised by plea-bargaining defendants. Therefore, we can only address the motions to withdraw and for continuance. We have no jurisdiction to address appellant's claim that his plea was not voluntary. The Court of Criminal Appeals has held that a defendant in a plea-bargained, felony case may not raise the voluntariness of his plea on appeal. *Cooper v. State*, 45 S.W.3d 77 (Tex. Crim. App. 2001) (relying on former TEX. R. APP. P. 25.2(b)(3), now Rule 25.2(a)(2)).

In *Whitfield v. State*, 111 S.W.3d 786 (Tex. App.—Eastland 2003, pet. ref'd), this court dealt with some of the issues being raised in this case. Whitfield pleaded guilty to the offense of second degree robbery, and punishment was assessed for a term of fifteen years. Soon after he entered his guilty plea, Whitfield filed a motion for new trial that challenged the voluntariness of his guilty plea and the effectiveness of his trial counsel. The trial court denied the motion for new trial after conducting an evidentiary hearing. We dismissed the appeal based on *Cooper*. *Cooper* recognized

that a plea-bargaining defendant may pursue the remedy of withdrawing his plea by filing a motion for new trial in the trial court or habeas corpus, but we concluded that under the reasoning of *Cooper* the refusal of the trial court to set aside the plea cannot be appealed. *Whitfield*, 111 S.W.3d at 789-90. If the trial court refuses to set aside the plea, the only remedy for a plea-bargaining defendant is to seek a writ of habeas corpus.

Appellant's claim of ineffective assistance of counsel and other claims in his third and fourth issues referring to matters that occurred prior to his conviction are not cognizable under Rule 25.2(a)(2). *Woods v. State*, 108 S.W.3d 314 (Tex. Crim. App. 2003). We are limited to the pretrial motions.

The Motions to Withdraw and for Continuance

Appellant was represented by two qualified and experienced attorneys. One of the attorneys began representing him within one month after he was arrested. Both attorneys represented him at the certification hearing. Both had represented appellant for at least eighteen months when they filed their motion to withdraw. The motion was filed on the Friday before the trial was to begin on Monday, February 5, 2007.

At the hearing on the motion to withdraw, the attorneys stated that, within the two-to-three weeks prior to February 2, appellant and his family had refused to cooperate with them. The attorneys acknowledged that appellant and his family had cooperated and provided financial assistance prior to that time. The attorneys stated that they could not provide any reason for the lack of cooperation without violating the attorney-client privilege.

A motion by a defendant's attorney to withdraw is reviewed under an abuse of discretion standard. *Green v. State*, 840 S.W.2d 394, 408 (Tex. Crim. App. 1992). A defendant's right to counsel of choice is not absolute. *Gonzalez v. State*, 117 S.W.3d 831, 837 (Tex. Crim. App. 2003). This is particularly true where it appears that the defendant is trying to interfere with the administration of justice. A defendant may not manipulate his or her right to secure counsel of defendant's choice in a manner that obstructs the judicial process or interferes with the administration of justice. *King v. State*, 29 S.W.3d 556, 566 (Tex. Crim. App. 2000); *Rosales v. State*, 841 S.W.2d 368, 374 (Tex. Crim. App. 1992); *Brown v. State*, 630 S.W.2d 876, 879 (Tex. App.—Fort Worth 1982, no pet.). We review the record to determine whether the trial court could

have reasonably concluded that the fair and efficient administration of justice weighed more heavily in favor of denying the motion. *Greene v. State*, 124 S.W.3d 789, 794 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd).

The record at the time the trial court denied the motion to withdraw reflects only the statements of the attorney that appellant and his family would not communicate with them.[1] Personality conflicts and disagreements concerning trial strategy are not valid grounds to prevent a trial court from exercising its discretion to determine whether counsel should be allowed to withdraw. *King*, 29 S.W.3d at 566. The trial court observed that the motion appeared to be an attempt by appellant to delay the trial because it was filed on Friday, February 2, and the trial was to begin on the following Monday. The trial court did not abuse its discretion in denying the motion to withdraw.

The same is true of the trial court's denial of the motion for continuance. There is nothing in the record at that time to indicate that appellant had retained other counsel prior to his request for a continuance. Appellant and his family had eighteen months to secure other counsel if he was unhappy with the two attorneys representing him. No new attorney appeared with appellant on that Friday to inform the trial court or trial counsel of his or her willingness to serve as counsel in this case. Furthermore, appellant did not provide the court with any information as to the time he needed to retain two new attorneys or the time that two new attorneys would need in order to prepare for appellant's capital murder trial.

The trial attorneys also argued that the motion for continuance was needed because the State had furnished appellant on January 31, 2007, supplemental responses to appellant's discovery requests. The State's supplemental filing had revealed the following:

> During an interview on January 31, 2007, Chad Calhoon, a friend of Defendant, revealed he saw Defendant driving a red truck away from Allie Ward shortly after hearing a shot. He then drove back by Chad Calhoon and his friend as he was driving in the direction of Carrie Ann. Chad further stated the Defendant always carried a gun wherever he went unless it was an activity such as swimming.

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[1] Statements by appellant and his mother, Debra Johnson, that were made in connection with appellant's motion for new trial cannot be considered in determining whether the trial court abused its discretion in denying the pretrial motion of counsel to withdraw. The record reflects that the trial court declared a short recess during the hearing on the pretrial motion to allow the initial attorneys an opportunity to attempt to talk with appellant; however, the record does not indicate that the attorneys were able to provide the court with any additional information.

> He stated the Defendant sold and used Marijuana and Hydrocodone. Defendant's mom has repeatedly approached Chad and Chase Calhoon's mother to convince her sons not to testify.

The attorneys argued that they needed time to investigate these matters. The State, however, had filed on January 22 a notice of intent to introduce evidence of extraneous acts that included the following:

> [A]ttached is a statement from Chad Calhoon. In it he states he met Defendant in approximately May 2005. From May 2005 to July 2005, Defendant would buy and sell marijuana and hydrocodone. Mr. Calhoon also observed four or five handguns hanging on the wall of Defendant's bedroom during this time. This occurred in Taylor County, Texas.

In addition to that earlier statement of Chad Calhoon, the trial court also observed that Calhoon had been on the witness list furnished to appellant for some time. It is apparent that the trial court was of the opinion that appellant had been provided ample opportunity to interview Calhoon. As to the statement concerning appellant's mother, Debra Johnson, and her attempts to persuade Chad and Chase Calhoon's mother to convince her sons not to testify, the State said it would only be used for impeachment. The trial court ruled that it was not going to allow the mother's alleged conduct to come in as part of the State's case. The court also observed that it should be easy for the attorneys to ask the mother about her conduct.

We also review a trial court's ruling on a motion for continuance for abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007); *Janecka v. State*, 937 S.W.2d 456, 468 (Tex. Crim. App. 1996). To establish an abuse of discretion, there must be a showing that the defendant was actually prejudiced by the denial of his motion. *Gallo*, 239 S.W.3d at 764; *Janecka*, 937 S.W.2d at 468. A bare assertion that counsel did not have adequate time to prepare for trial is not proof of prejudice. *See Renteria v. State*, 206 S.W.3d 689, 702 (Tex. Crim. App. 2006); *Heiselbetz v. State*, 906 S.W.2d 500, 512 (Tex. Crim. App. 1995). The record does not show that the trial court in this case abused its discretion in denying appellant's motion for a continuance that was filed just a few days before his trial was to start on Monday, February 5.

Appellant also argues that the trial court erred when it did not ask appellant if he wanted to proceed pro se rather than continue with his trial attorneys, if appellant could or would obtain private

counsel to replace the attorneys, and if appellant was at that time indigent. Appellant has cited no authority to support his arguments, and they are waived. TEX. R. APP. P. 38.1(h); *Nanez v. State*, 179 S.W.3d 149, 151 (Tex. App.—Amarillo 2005, no pet.); *Jackson v. State*, 50 S.W.3d 579, 591 n.1 (Tex. App.—Fort Worth 2001, pet. ref'd). Appellant's first two issues are overruled.

We do not have jurisdiction to address appellant's remaining issues. They may be addressed in a habeas proceeding.

This Court's Ruling

The judgment of the trial court is affirmed.

TERRY McCALL
JUSTICE

December 18, 2008

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Wright, C.J.,
McCall, J., and Strange, J.