**Opinion filed May 11, 2017**


**In The**

# Eleventh Court of Appeals

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**No. 11-17-00004-CR**

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**EX PARTE ZACHARY BLAKE HERNANDEZ**

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**On Appeal from the 142nd District Court**
**Midland County, Texas**
**Trial Court Cause No. CR38343-A**

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

Zachary Blake Hernandez appeals from an order in which the trial court denied the relief requested in his application for writ of habeas corpus. *See* TEX. CODE CRIM. PROC. ANN. arts. 11.072, 11.09 (West 2015). In two issues on appeal, Hernandez contends that he is entitled to habeas corpus relief because he received ineffective assistance of counsel on appeal and because his convictions violate double jeopardy. We affirm the trial court's order denying habeas relief.

*Procedural Background*

In a two-count indictment, Hernandez was indicted for the offenses of intoxicated manslaughter and manslaughter. As to Count I, the jury acquitted Hernandez of intoxicated manslaughter but convicted him of the lesser included

offense of driving while intoxicated. As to Count II, the jury convicted Hernandez of the offense of manslaughter. The trial court sentenced Hernandez in accordance with the jury's verdicts at confinement for five years and a $10,000 fine for the manslaughter conviction and at confinement for 180 days and a $2,000 fine for the DWI conviction. This court affirmed both judgments in an appeal in which appellate counsel presented a single issue for our review: whether the evidence was sufficient to support the manslaughter conviction.[1] The Court of Criminal Appeals refused Hernandez's petition for discretionary review. The trial court subsequently granted Hernandez's request for shock probation, ordered that the five-year sentence for manslaughter be suspended, and placed Hernandez on community supervision for ten years.

*Writ of Habeas Corpus*

Hernandez thereafter filed an application for postconviction writ of habeas corpus. The trial court conducted a hearing on the application, made numerous findings of fact and conclusions of law, and denied the relief sought by Hernandez. In a habeas corpus proceeding under Article 11.072, the trial judge is the sole finder of fact, and the appellate court must afford almost total deference to a trial court's findings of fact when those findings are supported by the record. *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013) (applying standard from *Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997)); *Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011) (same).

*Effective Assistance of Appellate Counsel*

In his first issue on appeal, Hernandez contends that the trial court abused its discretion by failing to grant habeas corpus relief because appellate counsel was ineffective in five ways: (1) he presented a single, meritless issue in his brief; (2) he

[1]*See Hernandez v. State*, No. 11-12-00348-CR, 2014 WL 6755648, at *1 (Tex. App.—Eastland Nov. 26, 2014, pet. ref'd) (mem. op., not designated for publication).

failed to present an issue challenging the warrantless blood draw; (3) he failed to present an issue challenging the erroneous admission of the blood serum test results; (4) he failed to present an issue challenging the admission of expert testimony; and (5) he failed to present an issue raising double jeopardy.

A defendant has the right to effective assistance of counsel in a first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985). To obtain relief on a claim of ineffective assistance of appellate counsel, a habeas corpus applicant must show that appellate counsel's decision not to raise a particular issue was objectively unreasonable and that there is a reasonable probability that, but for appellate counsel's failure to raise that particular issue, the applicant would have prevailed on appeal. *Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012). "An attorney 'need not advance *every* argument, regardless of merit, urged by the appellant.'" *Id.* (quoting *Evitts*, 469 U.S. at 394). However, when "appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it.'" *Id.* (quoting *Ex parte Miller*, 330 S.W.3d 610, 624 (Tex. Crim. App. 2009)).

With respect to Hernandez's first ground under his claim of ineffective assistance of counsel, we cannot hold that appellate counsel's decision to present a single issue on direct appeal constitutes ineffective assistance. We also disagree with Hernandez's assertion that appellate counsel's brief "was little better than an *Anders* brief."[2] Appellate counsel presented an arguable issue in which he challenged the sufficiency of the evidence in support of Hernandez's manslaughter conviction.

Hernandez's second ground is that appellate counsel was ineffective for failing to raise an issue that the warrantless blood draw was illegal and that evidence thereof should have been suppressed. We note at the outset that the results of the

[2]*Anders v. California*, 386 U.S. 738 (1967).

blood draw obtained at the request of law enforcement was not the only alcohol concentration test results offered at trial. As set out below, blood serum test results that were obtained as a result of testing performed at the request of medical personnel were also admitted at trial.

Hernandez's argument concerning the warrantless blood draw results stems from *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), and a line of cases following *McNeely*. In *McNeely*, the Supreme Court held that the natural dissipation of alcohol in the bloodstream does not present a per se exigency justifying a warrantless blood draw and that exigency in this context must be determined on a case-by-case basis under general Fourth Amendment principles based on the totality of the circumstances. 133 S. Ct. at 1556. We note that appellate counsel's brief was filed almost four weeks before the Supreme Court rendered its decision in *McNeely*. We agree with the trial court's conclusion that, although the blood draw was performed without a warrant under the implied consent statute that was in effect at the time of the blood draw and at the time the brief was filed, appellate counsel was not ineffective for failing to raise the issue on appeal because the blood draw was supported by probable cause and exigent circumstances.

The blood draw was supported by exigent circumstances beyond the mere dissipation of alcohol. "An exigent circumstances analysis requires an objective evaluation of the facts reasonably available to the officer at the time of the search." *Cole v. State*, 490 S.W.3d 918, 923 (Tex. Crim. App. 2016). Hernandez's passenger was fatally injured while she was riding on a motorcycle with Hernandez. Hernandez smelled strongly of alcohol, was unconscious, had been transported to the hospital in Midland, and was about to be airlifted to a hospital in Lubbock. A police officer who was at the hospital in Midland requested that a nurse draw Hernandez's blood before Hernandez left the Midland hospital via the airlift. The trial court could have determined that, due to the impending airlift, there was no time

to secure a warrant. We cannot hold under these circumstances that appellate counsel's failure to challenge the blood draw was unreasonable. *See Schmerber v. California*, 384 U.S. 757, 770–72 (1966) (totality of circumstances, including lack of time to secure a warrant, supported finding of exigent circumstances); *Cole*, 490 S.W.3d at 925–27 (exigent circumstances justified warrantless blood draw); *cf. Weems v. State*, 493 S.W.3d 574, 578–82 (Tex. Crim. App. 2016) (distinguishing circumstances in *Weems*, where State failed to show lack of time to secure a warrant, from those in *Schmerber*). Hernandez, who admitted at trial that he was intoxicated at the time of the motorcycle accident, has not shown a reasonable probability that he would have prevailed on appeal if he had presented an issue complaining of the admission of the evidence derived from the warrantless blood draw.

In his third ground related to ineffective assistance, Hernandez contends that appellate counsel rendered ineffective assistance when counsel failed to raise an issue to complain that the admission of the blood serum test results, which were contained in Hernandez's medical records, violated his constitutional right of confrontation. *See Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009); *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The blood on which the blood serum test was performed was drawn by hospital personnel, and the hospital's lab performed the analysis. The results of the blood serum test were contained in the hospital's records and were accompanied by a business records affidavit. The witness who testified regarding the blood serum test was not the person who actually performed the lab test, but was the manager of the lab at the Midland hospital.

The trial court concluded that the blood was drawn for medical diagnosis and treatment of Hernandez and that the hospital's lab report was a business record and, as such, was nontestimonial in nature and did not violate Hernandez's right to confront the witnesses against him. We agree with the trial court's conclusions. The

Supreme Court pointed out in *Melendez-Diaz* that "medical reports created for treatment purposes . . . would not be testimonial under our decision today." 557 U.S. at 312 n.2. Records similar to those in this case have been held to be nontestimonial and admissible even in the absence of the testimony of the technician who performed the analysis. *See Sanders v. State*, No. 05-12-01186-CR, 2014 WL 1627320, at *4 (Tex. App.—Dallas Apr. 23, 2014, pet. ref'd) (not designated for publication). Accordingly, Hernandez has not shown that appellate counsel's decision not to brief this issue was objectively unreasonable or that there is a reasonable probability that Hernandez would have prevailed on appeal if counsel had done so.

In the fourth ground related to his claim of ineffective assistance of appellate counsel, Hernandez asserts that appellate counsel failed to present an issue challenging the admission of the testimony of Officer Richard Moore regarding the cause of Hernandez's motorcycle accident. Officer Moore, an expert in accident investigation, testified over objection that, in his opinion, "this crash was caused either by speed and/or delayed reaction time." Hernandez complains that Officer Moore's testimony was speculative and points out that Officer Moore was not sure where the motorcycle left the road, could not determine its speed because there were no skid marks, and could not rule out the possibility that either another vehicle or Hernandez's passenger caused the accident. A trial court has discretion to admit or exclude evidence, and its ruling may not be disturbed on appeal absent an abuse of discretion. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). It was within the trial court's discretion to determine that Officer Moore's testimony was admissible. In its findings and conclusions on Hernandez's habeas corpus application, the trial court concluded that Officer Moore's opinion was admissible and that appellate counsel was not ineffective for failing to raise the issue on appeal. Hernandez has not shown that appellate counsel's decision not to raise this issue on appeal was objectively unreasonable or that there is a reasonable

probability that, but for appellate counsel's failure to raise the issue, Hernandez would have prevailed on appeal.

Hernandez's final ground with respect to his claim of ineffective assistance of appellate counsel is related to the claim of double jeopardy that he presents in his second issue in this appeal. Because, as we hold below, Hernandez's double jeopardy claim is without merit, his appellate counsel did not render ineffective assistance when he failed to raise that issue on direct appeal.

Based on our review of the record and the various grounds asserted by Hernandez, we cannot hold that the trial court abused its discretion in failing to find that Hernandez received ineffective assistance of counsel on appeal. The trial court did not err in refusing to grant habeas corpus relief in this case based upon the claim of ineffective assistance of appellate counsel. We overrule Hernandez's first issue.

*Double Jeopardy*

In his second issue, Hernandez argues that his convictions for DWI and manslaughter violate the Double Jeopardy Clause of the U.S. Constitution. Pursuant to the Double Jeopardy Clause, no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Double Jeopardy Clause protects criminal defendants from three things: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex. Crim. App. 2013) (citing *Brown v. Ohio*, 432 U.S. 161, 164–65 (1977)). Hernandez's convictions stem from a single indictment and a single trial, and his double jeopardy claim therefore involves the third category of the above-listed protections—the protection from multiple punishments for the same offense. This protection prevents a court from prescribing greater punishment than the legislature intended. *Ex parte Benson*, 459 S.W.3d 67, 71 (Tex. Crim. App. 2015).

The first step in this double jeopardy challenge is to determine whether DWI and manslaughter constitute the "same offense." *See Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008). When multiple punishments arise out of one trial, we begin our analysis with the *Blockburger* test. *Id.*; *see Blockburger v. United States*, 284 U.S. 299 (1932). Under this test, we ask "whether each provision requires proof of a fact which the other does not." *Benson*, 459 S.W.3d at 72 (quoting *Blockburger*, 284 U.S. at 304). If the offenses have different elements under the *Blockburger* test, we presume that the offenses are different for double jeopardy purposes. *Id.* The presumption may be rebutted by a showing that the legislature clearly intended only one punishment. *Id.*

To resolve a double jeopardy issue, we generally look at the elements alleged in the charging instrument. *Bigon*, 252 S.W.3d at 370. Under the cognate-pleadings approach adopted by the Court of Criminal Appeals, courts are to compare the elements of the greater offense as pleaded to the statutory elements of the lesser offense. *Benson*, 459 S.W.3d at 72. Hernandez was indicted in Count I with intoxication manslaughter and in Count II with manslaughter. The jury convicted Hernandez of manslaughter as charged in Count II, but it convicted him of the lesser included offense of DWI in Count I. Count II of the indictment alleged that Hernandez:

> [R]ecklessly cause[d] the death of an individual, Heidi Evans, while driving and operating a motor vehicle, to wit: a motorcycle, on a public highway while the said Heidi Evans was a passenger on the said motorcycle by failing to maintain the motorcycle on the roadway and by driving the said motorcycle off of the roadway and causing the said motorcycle to wreck and fall to the ground causing Heidi Evans to be ejected and thrown from the motorcycle thereby causing the death of the said Heidi Evans.

The allegations in Count I and Count II were essentially identical except for the allegations of intoxication that were added in Count I and the omission of the term

"recklessly" from Count I. The jury acquitted Hernandez of intoxication manslaughter when it found him guilty of the lesser included offense of DWI. As noted in the trial court's findings, the jury did not believe beyond a reasonable doubt that Hernandez "by reason of intoxication" caused the death of his passenger but did believe that Hernandez "was reckless on grounds other than intoxication and thereby caused the death" of his passenger.

The elements of DWI and manslaughter are not similar. To obtain a conviction for manslaughter, the State had to prove that Hernandez recklessly caused the death of his passenger by driving the motorcycle off the roadway. On the other hand, to obtain a conviction for DWI, the State had to prove that Hernandez drove his motorcycle in a public place while he was intoxicated. Under the *Blockburger* test, the two offenses have differing elements and, therefore, are not the same offense. However, the *Blockburger* test is a rule of statutory construction and is not the exclusive test to determine whether the two offenses are the same. *Bigon*, 252 S.W.3d at 370.

The Court of Criminal Appeals has provided a nonexclusive list of factors to facilitate the analysis of a double jeopardy multiple-punishment claim. *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014); *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). Those factors include the following: whether the offenses are contained within the same statutory section, whether the offenses are phrased in the alternative, whether the offenses are similarly named, whether the offenses have common punishment ranges, whether the offenses have a common focus or gravamen, whether that common focus tends to indicate a single instance of conduct, whether the elements that differ between the offenses can be considered the same under *Blockburger*, and whether there is legislative history that contains an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes. *Ervin*, 991 S.W.2d at 814. The ultimate question is whether the

legislature intended to allow the same conduct to be punished under both of the offenses. *Bigon*, 252 S.W.3d at 371.

Applying these factors, we observe that DWI and manslaughter are not contained within the same statutory section. The statute providing for the offense of DWI is Section 49.04 of the Penal Code, which is located in the chapter related to intoxication and alcoholic beverages. TEX. PENAL CODE ANN. § 49.04 (West Supp. 2016). Manslaughter is provided for in Section 19.04 of the Penal Code in the chapter related to criminal homicides. *Id.* § 19.04 (West 2011). The offenses of DWI and manslaughter are not phrased in the alternative and are not similarly named. DWI, as relevant here, is a class B misdemeanor. *Id.* § 49.04(b). Manslaughter is a second-degree felony. *Id.* § 19.04(b). The gravamen of the offense of manslaughter, a result-oriented offense, is the death of an individual. *See Ervin*, 991 S.W.2d at 817 (providing that the gravamen of intoxication manslaughter is the death of an individual); *see also Bigon*, 252 S.W.3d at 371. To the contrary, the gravamen of the offense of DWI, a conduct-oriented offense, is the operation of a motor vehicle while intoxicated. The differing elements of DWI and manslaughter cannot be considered the same under *Blockburger*, and we find no legislative history that indicates an intent to treat DWI and manslaughter as the same offense. Additionally, the allowable units of prosecution are not the same. The allowable unit of prosecution for DWI is each incident of driving. *See State v. Bara*, 500 S.W.3d 582, 586 (Tex. App.—Eastland 2016, no pet.). For manslaughter, the allowable unit of prosecution is each victim. *See Bigon*, 252 S.W.3d at 372. Because Hernandez was not punished twice for the same offense, his conviction of and punishment for both DWI and manslaughter do not violate the Double Jeopardy Clause. Accordingly, we overrule his second issue.

*This Court's Ruling*

We affirm the order of the trial court.

JOHN M. BAILEY

JUSTICE

May 11, 2017

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

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.