Opinion filed July 13, 2017

In The

Eleventh Court of Appeals

No. 11-17-00016-CR

EX PARTE KAYLA ANN MEREDITH

On Appeal from the County Court

Haskell County, Texas

Trial Court Cause No. 18,411

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

This is an appeal from a postconviction writ of habeas corpus attacking the validity of a misdemeanor conviction resulting from a guilty plea. *See* TEX. CODE CRIM. PROC. ANN art. 11.09 (West 2015). Kayla Ann Meredith appeals the trial court's order denying the relief requested in her application for writ of habeas corpus. In three issues on appeal, Appellant contends that (1) the trial court abused its discretion when it denied her actual innocence claim, (2) there is no evidence to

support her guilty plea, and (3) her constitutional rights were violated because she was denied the right to counsel and did not voluntarily plead guilty. We affirm the trial court's order denying habeas relief.

Background Facts

The State filed a complaint and information on March 24, 2005, charging Appellant with making a terroristic threat against a family member, a Class A misdemeanor. *See* TEX. PENAL CODE ANN. § 22.07(a)(2), (c)(1) (West 2011). Appearing pro se, Appellant entered a plea of guilty to the charged offense on March 31, 2005. The trial court sentenced her to confinement for a term of seven days in the county jail. The judgment reflects that this sentence was essentially a "time-served" punishment in that Appellant already had jail time credit of seven days.

Appellant executed a guilty plea memorandum in connection with her guilty plea. In addition to waiving various rights, the guilty plea memorandum contained a "sworn judicial confession" wherein Appellant swore that she had read the charging instrument, that she understood everything that it contained, "that [she] committed each and every element alleged therein[,] and that [she is] guilty of all offenses charged therein."

In 2016, Appellant filed a writ of habeas corpus challenging her conviction. She alleged that her guilty plea was unlawfully coerced, was made without the assistance of counsel, and was not supported by evidence. The trial court conducted a hearing on the writ on December 19, 2016. Appellant testified at the habeas proceeding that she did not understand what she was signing when she entered her plea of guilty, and she denied engaging in the charged conduct. Appellant called her father, Bennie Meredith, as a witness at the hearing.[1] He was the victim of the

[1]We will refer to Appellant's father as "Meredith."

charged offense. Meredith denied that Appellant committed the charged offense. The trial court denied Appellant's requested relief at the end of the hearing.

Analysis

Appeals from the denial of relief sought in misdemeanor postconviction writs of habeas corpus are properly directed to the courts of appeals. *See Ex parte Jordan*, 659 S.W.2d 827, 828 (Tex. Crim. App. 1983); *Dahesh v. State*, 51 S.W.3d 300, 302 (Tex. App.— Houston [14th Dist.] 2000, pet. ref'd); *see also* TEX. R. APP. P. 31 (governing appeals from habeas corpus proceedings). When reviewing a trial court's ruling on a habeas corpus application, we view the evidence presented in the light most favorable to the trial court's ruling. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). We must uphold that ruling absent an abuse of discretion. *Id.* The trial court 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 the standard from *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)); *Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011) (same).

Evidence Presented at the Hearing on the Writ of Habeas Corpus

Appellant testified that the underlying conviction for terroristic threat prevented her from going to nursing school. On March 23, 2005, Appellant was seventeen years old and living in Haskell with Meredith. Appellant testified that she and Meredith argued because Appellant wanted to move out and live with her brother in Fort Worth. Appellant stated that she left the house and began walking down the street. Meredith called the police, and Officer Bill Glass responded. Meredith told the dispatcher that Appellant had been throwing things in the house and wanted to run away.

Officer Glass found Appellant walking down the road about two blocks from her house. Appellant testified that Officer Glass confronted her. Officer Glass did not testify at the habeas proceeding. However, according to his police report, Meredith told Officer Glass that Appellant had threatened him.

Appellant denied threatening Meredith. She stated that, after she was arrested, she spoke with someone regarding her guilty plea who read her some "documents." Appellant testified that she did not understand what was read to her. Appellant did not remember if anyone had told her that she had the right to an attorney. Her mother advised her that, if she pleaded guilty, she would get out of jail. On cross-examination, the prosecutor, reading from the police report, asked Appellant whether she had told Officer Glass, after he stopped her, that she was "going to, 'F-----g kill my parents. You will see. I'll stab their f-----g a--. You can't do nothing to me. I'm going to kill them. They're f-----g dead.'" Appellant denied ever making those statements.

Meredith also testified at the habeas proceeding. He stated that Appellant never threatened him. Meredith testified that Officer Glass "just made it up" with respect to the matters contained in his police report.

Appellant called the Honorable Shane Hadaway,[2] the county attorney that prosecuted her in 2005, as a witness at the hearing. Although Judge Hadaway could not remember Appellant's case, he testified that it was his common practice in misdemeanor cases to offer defendants a sentence of "time served" in exchange for a guilty plea. Judge Hadaway also testified that, in 2005, misdemeanor defendants would not be offered an attorney unless they asked for one. Judge Hadaway was also questioned about Officer Glass pleading *nolo contendere* in 2011 to fabricating

[2]Judge Shane Hadaway was the county attorney who prosecuted Appellant in 2005. He is now the district judge of the 39th District Court. Therefore, we will refer to him as Judge Hadaway.

physical evidence. Judge Hadaway testified that he had no indication that Officer Glass had fabricated any evidence prior to 2011.

At the conclusion of the hearing, the trial court denied Appellant's request for habeas relief, explaining:

> You know, I had -- I had then and I have no doubt now that Bill Glass was a credible officer in 2005. I do not know what happened in 2011. I do not know why he did that. It's not my choice. I was not a part of that. It's not my job to make decisions on somebody else's stuff.
>
> But as far as 2005, Bill Glass was a credible person. I knew him pretty well. I knew who he was and I had been around him for many years. And I feel -- I'm not going to go so far as to say that [Appellant and Meredith] lied today, but I feel like that their attitudes and their opinions changed from 2005 to today.

The trial court also based its decision on the fact that Appellant's mother was with her when she pleaded guilty.

Voluntariness of Guilty Plea and Right to Counsel

When a defendant who pleads guilty later challenges her conviction based on a claim of actual innocence, we must afford a knowing, intelligent, and voluntary guilty plea the "highest level of respect." *Ex parte Tuley*, 109 S.W.3d 388, 393 (Tex. Crim. App. 2002). Therefore, we will start by addressing Appellant's third issue. In her third issue, Appellant asserts that she did not make her guilty plea voluntarily and that she was denied her right to counsel.

Appellant first asserts that her guilty plea was not entered intelligently, knowingly, and voluntarily. An applicant seeking habeas corpus relief on the basis of an involuntary guilty plea must prove her claim by a preponderance of the evidence. *Kniatt*, 206 S.W.3d at 664. Delay in seeking habeas corpus relief may prejudice the credibility of the applicant's claim. *Id.* We review the record evidence

in the light most favorable to the trial court's ruling and must uphold that ruling absent an abuse of discretion. *Id.*

A guilty plea constitutes a waiver of three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the right not to incriminate oneself. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *Kniatt*, 206 S.W.3d at 664. Accordingly, a guilty plea, to be consistent with due process of law, must be entered knowingly, intelligently, and voluntarily. *Boykin*, 395 U.S. at 242; *Kniatt*, 206 S.W.3d at 664. To be "voluntary," a guilty plea must be the expression of the defendant's own free will and must not be induced by threats, misrepresentations, or improper promises. *Brady v. United States*, 397 U.S. 742, 755 (1970); *Kniatt*, 206 S.W.3d at 664. If the trial court properly admonished the defendant before a guilty plea was entered, there is a prima facie showing that the plea was both knowing and voluntary. *Martinez v. State*, 981 S.W.2d 195, 197 (Tex. Crim. App. 1998) (per curiam). "[A] plea is not rendered involuntary solely because it was induced as a result of a plea bargaining situation." *Schnautz v. Beto*, 416 F.2d 214, 216 (5th Cir. 1969); *Patterson v. State*, 487 S.W.2d 737, 738–39 (Tex. Crim. App. 1972).

We note at the outset that Appellant is challenging a guilty plea to a misdemeanor offense. We do not have a reporter's record from the original plea hearing. The absence of a record is understandable because the statutory admonishments set out in Article 26.13 of the Code of Criminal Procedure are not required in misdemeanor proceedings. *See* CRIM. PROC. art. 26.13 (West Supp. 2016); *Gutierrez v. State*, 108 S.W.3d 304, 309 (Tex. Crim. App. 2003) ("We consistently have held that article 26.13 does not apply to misdemeanor cases."); *Johnson v. State*, 614 S.W.2d 116, 120 n.1 (Tex. Crim. App. [Panel Op.] 1981) ("However commendable it may be for a trial judge to admonish one accused of a misdemeanor offense, as he must where a person is charged with a felony, . . . there

is no requirement in Texas law for a trial court to admonish an accused person of anything if the offense is classified as a misdemeanor.").

Although there is no reporter's record from the plea proceedings, the clerk's record contains a Guilty Plea Memorandum signed by Appellant, the prosecutor, and the presiding judge. This document contains numerous written waivers and stipulations individually signed by Appellant,[3] including a waiver of counsel, a waiver of jury, a waiver of rights, a waiver of presentence investigation, a waiver of ten days' preparation, a stipulation of evidence and waiver of confrontation, a sworn judicial confession, an admonishment on the applicable range of punishment, and a waiver of appeal. The Guilty Plea Memorandum also contained a "Voluntariness of Plea" provision signed by Appellant:

> The defendant herein states that the plea of guilty is freely and voluntarily made, and made only because the Defendant is guilty. The Defendant further confirms that Defendant completely understands all of the written waivers, stipulations, admonitions, this Guilty Plea Memorandum, motions filed in connection with the plea, and the consequences of this plea, and that each is done freely, voluntarily and that the Defendant is guilty as charged.

In addition to the Guilty Plea Memorandum, the trial court's judgment, which Appellant also signed, contained various recitals, including that:

> [T]he Defendant was duly admonished of the consequences of said plea, as directed by law. It also, plainly appeared to the Court that the Defendant was sane and uninfluenced, upon entering said plea, by any consideration of fear, and by any persuasion, and delusive hope of pardon, prompting the Defendant to enter the foregoing plea.
>
> It was further apparent to the Court that said Defendant clearly understood the nature and consequences of said plea, but persisted in continuing to make and enter said plea, after being duly admonished by the Court of the consequences thereof.

[3]Appellant signed the Guilty Plea Memorandum in ten places on the document.

Thus, the written judgment contains recitals to the effect that Appellant's guilty plea was entered intelligently, knowingly, and voluntarily. "When a person attacks the validity of his prior guilty plea as that plea is reflected in the written judgment, he bears the burden of defeating the normal presumption that recitals in the written judgment are correct." *Guerrero*, 400 S.W.3d at 583. "Those written recitals 'are binding in the absence of direct proof of their falsity.'" *Id.* (quoting *Breazeale v. State*, 683 S.W.2d 446, 450 (Tex. Crim. App. 1985)).

Appellant asserts that she did not understand the consequences of pleading guilty and that she felt coerced into signing the guilty plea. Appellant testified at the habeas hearing that she did not understand what she was signing. She also testified that she was intimidated by law enforcement and would have signed anything to get out of jail. When asked on cross-examination what actions law enforcement took to intimidate and coerce her, she stated that she was "nervous and just kind of scared of the situation."

The recitals contained in the documents Appellant signed at the time she entered her guilty plea indicate that she entered her plea intelligently, knowingly, and voluntarily. Other than her own testimony, there is no other evidence concerning Appellant's claims that her plea was involuntary or that she did not understand what she was doing when pleading guilty. Accordingly, her claims concerning the voluntariness of her guilty plea hinged solely upon the trial court's evaluation of her credibility. Under the applicable standard of review, we defer to the trial court's credibility determinations. *See Guerrero*, 400 S.W.3d at 583. The record does not show that the trial court clearly abused its discretion in determining that Appellant entered her guilty plea intelligently, knowingly, and voluntarily. As the trial court noted, Appellant's mother accompanied her when she entered her guilty plea. This

is a fact supporting the voluntariness of Appellant's plea and her knowledge of the proceedings.

Appellant next asserts that she did not intelligently, knowingly, and voluntarily waive her right to counsel. Because Appellant pleaded guilty and did not contest her guilt, the trial court was only required to determine whether Appellant's waiver of right to counsel was knowing, intelligent, and voluntary; it was not required to admonish her of the dangers and disadvantages of self-representation. *Hatten v. State*, 71 S.W.3d 332, 334 (Tex. Crim. App. 2002); *Johnson*, 614 S.W.2d at 119–20. Moreover, if a defendant in a misdemeanor case where guilt is not contested signs a written waiver of counsel in court and there is neither contradicting evidence nor any evidence that Appellant was coerced or intimidated, the record is sufficient to support a finding that Appellant's waiver of counsel was valid. *Hatten v. State*, 89 S.W.3d 160, 163 (Tex. App.—Texarkana 2002, no pet.).

Appellant testified that she did not remember the trial court explaining to her that she had a right to a court-appointed lawyer during her guilty plea. However, according to the written waiver, Appellant was duly admonished of her right to be represented by legal counsel and her right to have legal counsel appointed if she could not afford to employ counsel. The written waiver states that the trial court told Appellant of the disadvantages of representing herself and the advantages of having legal counsel.

At the habeas proceeding, Appellant admitted to signing "documents," but she stated that she did not understand what she was signing. However, according to the written waiver, Appellant averred that she understood her right to counsel but that she wished to waive that right. Furthermore, the judgment reflects that Appellant appeared in court, waived her right to counsel in open court, and then proceeded to

plead guilty. As we explained above, there is no evidence that Appellant was coerced by the State to sign the written waiver. We overrule Appellant's third issue.

Claim of Actual Innocence

In her first issue, Appellant asserts that the trial court abused its discretion in denying her actual innocence claim for three reasons: (1) the trial court disregarded Meredith's credible testimony that Appellant was actually innocent; (2) the trial court improperly relied on inadmissible evidence; and (3) the trial court improperly found that Officer Glass's police report was credible.

There are two types of actual innocence claims. *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex. Crim. App. 2002). The first is a *Herrera*-type claim, which is based solely on newly discovered evidence. *Id.* (citing *Herrera v. Collins*, 506 U.S. 390 (1993)). The second is a *Schlup*-type claim, which is "a procedural claim in which applicant's claim of innocence does not provide a basis for relief, but is tied to a showing of constitutional error at trial." *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 314 (1995)). A *Schlup*-type claim "is a procedural gateway through which a petitioner must pass to have his otherwise barred constitutional claim considered on the merits" by showing that the violation "probably resulted in the conviction of one who was actually innocent." *In re Allen*, 366 S.W.3d 696, 700 (Tex. 2012).

In her original brief, Appellant raises a *Herrera*-type claim based on newly discovered evidence. *See Herrera*, 506 U.S. at 396; *Ex parte Franklin*, 72 S.W.3d at 677. In addition, in her reply brief, Appellant raises two separate *Schlup*-type claims based on an alleged deficiency in the complaint and information, her alleged involuntary plea of guilty, and an alleged *Brady*[4] violation. We will address these newly raised, additional *Schlup*-type claims at the end of the opinion.

[4]*Brady v. Maryland*, 373 U.S. 83 (1963).

When asserting a *Herrera*-type claim, the evidence presented by the habeas applicant must constitute affirmative evidence of the applicant's innocence. *Ex parte Franklin*, 72 S.W.3d at 678. Establishing an actual innocence claim "is a Herculean task." *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). To succeed in a *Herrera*-type actual innocence claim, the habeas applicant must demonstrate by clear and convincing evidence that no reasonable juror would have found him guilty in light of the new evidence. *Ex parte Navarijo*, 433 S.W.3d 558, 560 (Tex. Crim. App. 2014); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

In making this determination, the trial court "must assess whether the 'new' evidence satisfactorily rebuts or nullifies all of the State's primary inculpatory evidence from the 'old' trial." *Ex parte Mello*, 355 S.W.3d 827, 840 (Tex. App.—Fort Worth 2011, pet. ref'd) (citing *Ex parte Thompson*, 153 S.W.3d 416, 428 (Tex. Crim. App. 2005)). A guilty plea "must be considered in weighing the old evidence against the new evidence." *Id.* at 831 (citing *Ex parte Tuley*, 109 S.W.3d at 392). We are to "give great respect to knowing, voluntary, and intelligent pleas of guilty." *Ex parte Tuley*, 109 S.W.3d at 391.

Here, the "old" inculpatory evidence is Appellant's guilty plea, along with the recitals contained in the documents that she signed, which included the sworn judicial confession quoted above. The evidence that Appellant claims is new is her self-serving testimony that she did not commit the charged offense, along with Meredith's testimony that Appellant never threatened him and that he never told Officer Glass that she did so.

"The term 'newly discovered evidence' refers to evidence that was not known to the applicant at the time of trial and could not be known to him even with the exercise of due diligence." *Ex parte Brown*, 205 S.W.3d at 545. As the Court of

Criminal Appeals explained: "The trial is 'the main event,' it is not a try-out on the road to a post-conviction writ of habeas corpus. A claim of actual innocence is not an open window through which an applicant may climb in and out of the courthouse to relitigate the same claim . . . ." *Id.* at 545–46 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)).

This is not a case where a victim that testified at the original trial in support of the conviction subsequently recanted many years later. *See Ex parte Navarijo*, 433 S.W.3d at 571; *Ex parte Elizondo*, 947 S.W.2d at 210. As Appellant notes in her reply brief, Meredith's testimony at the habeas hearing "is not a recantation, it is not a retraction of the previous statement to law enforcement, it is a sworn explanation of what actually happened." We conclude that neither Appellant's nor Meredith's "sworn explanation of what actually happened" constitutes newly discovered evidence that will support a *Herrera*-type claim of actual innocence. If true, their testimony at the habeas hearing was either known to Appellant at the time of the guilty plea or could have been known by the exercise of reasonable diligence. *See Ex parte Brown*, 205 S.W.3d at 545. It is not evidence that is "newly available or newly discovered." *Ex parte Spencer*, 337 S.W.3d 869, 878 (Tex. Crim. App. 2011) ("Applicant [presenting a *Herrera*-type claim] must show that the evidence he is presenting is newly available or newly discovered and that the new evidence unquestionably establishes his innocence. Only if this is shown are we called upon to compare the new evidence with the evidence at trial in order to determine whether Applicant has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."). Accordingly, we overrule Appellant's *Herrera*-type claim of actual innocence on this basis.

Moreover, Appellant's and Meredith's testimony at the habeas hearing was contradicted by Appellant's sworn judicial confession at the time of the guilty plea,

as well as the guilty plea itself. *See Ex parte Mello*, 355 S.W.3d at 831. Even if we were to consider their habeas testimony as newly discovered evidence, Appellant has not shown by clear and convincing evidence that no reasonable juror would have convicted her in light of the habeas testimony. *See Ex parte Spencer*, 337 S.W.3d at 878.

Appellant's and Meredith's habeas testimony was also contradicted by Judge Hadaway's testimony that, according to the police report, Meredith told Officer Glass that Appellant had threatened him. Appellant asserts in her original brief that the trial court improperly relied on this testimony because it is inadmissible hearsay.

Appellant also asserts that Officer Glass's 2011 conviction for fabricating physical evidence constitutes new evidence that Officer Glass lied in his police report. We will address each of these claims separately.

Meredith testified that he never told Officer Glass that Appellant threatened him and that Appellant is, in fact, actually innocent of making a terroristic threat. Appellant asserts that the trial court found Meredith's testimony credible and that, therefore, it was an abuse of discretion to deny Appellant's actual innocence claim. We disagree. While the trial court stated that it would not "go so far as to say that [Meredith and Appellant] lied today," it concluded that "their attitudes and their opinions changed from 2005 to today." Furthermore, Meredith conceded that he called the police on Appellant. Meredith further testified that, after Appellant was arrested, he did not tell law enforcement or the county attorney that Appellant was innocent of making a terroristic threat.

Appellant's evidentiary complaint involves Judge Hadaway's testimony referencing the contents of Officer Glass's report. Judge Hadaway testified that, according to the police report, Meredith told Officer Glass that Appellant had

threatened him. Appellant asserts that the trial court improperly relied on this testimony because it was inadmissible hearsay. However, Appellant has not raised an issue on appeal asserting that the trial court erred in making this evidentiary ruling. Furthermore, in her reply brief, Appellant relies on the purported contents of Officer Glass's police report to advance another argument.

Appellant's counsel asked Judge Hadaway why Appellant was charged with a Class A misdemeanor. Judge Hadaway asked to see the police report, and the prosecutor handed it to him to review. Appellant objected to the admissibility of the police report on hearsay grounds. The State responded that the police report was not being offered into evidence but was being used to refresh Judge Hadaway's memory about the case. The trial court responded, "I don't think its hearsay." After reviewing the police report, Judge Hadaway explained that Appellant was charged with a Class A misdemeanor because, "according to Bill Glass, the terroristic threat was made by the defendant against the victim; that's the statement that the victim made to Bill Glass." Judge Hadaway further explained that, since the victim was a member of Appellant's family, the State charged Appellant with a Class A misdemeanor. *See* PENAL § 22.07(a)(2), (c)(1).

Thus, the trial court did not admit the police report into evidence. Judge Hadaway's reference to the police report was in response to Appellant's question about the State's basis for charging her with a Class A terroristic threat.

Appellant also contends that Officer Glass lied in his police report. This contention serves as the basis of several arguments advanced by Appellant, including an allegation that the State used false evidence to convict Appellant, an attack on the sufficiency of the complaint and information, and an attack on the impartiality of the trial judge.

Alleged Use of False Evidence

We note at the outset that Officer Glass's police report was not a part of the old evidence offered at the guilty plea in 2005. Additionally, the police report was not offered into evidence at the habeas hearing. Officer Glass's report was only referred to on two occasions at the habeas hearing: (1) Judge Hadaway's reference to it in response to questioning by Appellant's attorney and (2) the prosecutor's limited use of it in cross-examining Appellant. Because Officer Glass's police report was not offered into evidence at her guilty plea, we conclude that the police report, in and of itself, did not constitute the use of false evidence by the State.

Officer Glass executed the complaint that served as the basis for the information filed by the State. As set out below, Appellant challenges these documents based on an allegation of falsity emanating from Officer Glass's police report. In addition to Appellant's testimony and Meredith's testimony at the habeas hearing, Appellant relies on Officer Glass's conviction in 2011 for fabricating physical evidence.

Although presented as part of her actual innocence claim based on new evidence, Appellant's claim regarding Officer Glass's subsequent misconduct is essentially a claim that the State presented false evidence against her. *See Ex parte Coty*, 418 S.W.3d 597, 604 (Tex. Crim. App. 2014). In *Ex parte Coty*, the habeas applicant pleaded guilty to possession of a controlled substance after being found in possession of over four hundred grams of cocaine. *Id.* at 601–02. The laboratory technician who tested the drugs was later found to have committed "'professional misconduct' [by] using the evidence in one case to support the evidence in another case." *Id.* at 598 (alteration in original). The laboratory technician's misconduct was unrelated to the applicant's case. *Id.* In response, the Court of Criminal Appeals devised a two-part test, based on *Ex parte Chavez*, 371 S.W.3d 200 (Tex. Crim. App.

2012), for determining whether the laboratory technician's misconduct in an unrelated case created a due process violation in the applicant's case. *Ex parte Coty*, 418 S.W.3d at 604–06.

First, the Court of Criminal Appeals noted that the case was "analogous to asserting that the State used false evidence to convict him." *Id.* at 604. Then, the court explained that, under *Chavez*, in order to prove a due process violation based on false evidence, the applicant must show that (1) the evidence in his case was false and (2) the false evidence was material to his conviction or punishment. *Id.* at 604–05 (citing *Ex parte Chavez*, 371 S.W.3d at 207–10). Second, the court in *Coty* expanded on the two-part test in *Chavez* by holding that the evidence will be presumed to be false if the applicant can show that (1) the technician was a state actor, (2) the technician committed multiple instances of misconduct in other cases, (3) the technician who committed the misconduct is the same one who worked on the applicant's case, (4) the misconduct is the type of misconduct that would have affected the evidence in the applicant's case, and (5) the technician handled the applicant's case in roughly the same time period as the misconduct. *Id.* at 605.

Although this is a case involving the misconduct of a police officer, rather than a lab technician, we conclude that the analysis in *Coty* is applicable to the facts in this case. Here, Appellant has not shown that the information contained in Officer Glass's police report or the resulting complaint and information is presumed to be false. Appellant only showed that Officer Glass committed one act of misconduct, rather than the multiple acts required by *Coty*. Additionally, Officer Glass's misconduct occurred approximately six years after her offense, and it involved "plant[ing] some illegal substance . . . in somebody's car." Therefore, Appellant has failed to show that Officer Glass committed the same type of misconduct that would have affected her case within the same time period.

Attack on the Sufficiency of the Complaint and Information

A valid complaint is a prerequisite to a valid information. *Holland v. State*, 623 S.W.2d 651, 652 (Tex. Crim. App. 1981); *see* CRIM. PROC. art. 21.22 (West 2009). A complaint in support of an information serves only as the basis for a criminal prosecution. *Chapa v. State*, 420 S.W.2d 943, 944 (Tex. Crim. App. 1967) (citing *Cisco v. State*, 411 S.W.2d 547 (Tex. Crim. App. 1967)). Appellant is essentially challenging the sufficiency of the charging instrument, which in this case is the information, by alleging that Officer Glass lied about the charged offense in his police report and in his complaint. Appellant also contends that the complaint and information are insufficient to allege the commission of the charged offense. As set out below, these claims are not cognizable in a postconviction writ of habeas corpus.

Article 1.14(b) of the Texas Code of Criminal Procedure provides:

> If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding.

CRIM. PROC. art. 1.14(b) (West 2005). A claim that a charging instrument is defective is only cognizable in a postconviction proceeding if the claim alleges that the instrument is so fundamentally deficient that it fails to vest the trial court with jurisdiction. *Ex parte Reedy*, 282 S.W.3d 492, 502 (Tex. Crim. App. 2009). A charging instrument is sufficient to confer jurisdiction on the trial court if it alleges an offense to the extent that it is clear enough that one can identify the offense alleged. *Teal v. State*, 230 S.W.3d 172, 180 (Tex. Crim. App. 2007).

The information in this case provided as follows:

> [O]n or about the **23rd day of March, 2005**, in the County of Haskell, State of Texas, **KAYLA ANN MEREDITH**, in the County and State

> aforesaid, did then and there threaten to commit an offense involving violence to a person, namely, Murder, with intent to place **BENNIE MEREDITH** in fear of imminent serious bodily injury, and the said **BENNIE MEREDITH** was then and there a member of the defendant's family.

The information was sufficient to allege the Class A offense of terroristic threat under Section 22.07(a)(2) and (c)(1) of the Texas Penal Code. Accordingly, the information was sufficient to confer jurisdiction on the trial court for the alleged offense, and Appellant is precluded by Article 1.14(b) of the Texas Code of Criminal Procedure from raising any other complaint about the sufficiency of the charging instrument in this postconviction habeas proceeding.

Attack on the Impartiality of the Trial Judge

Judge Hadaway and the trial judge noted their relationships with Officer Glass in 2005 and their confidence in his work during that period. Appellant asserts that she was deprived of her right to an impartial judge because the trial judge, in making his ruling, relied on his personal relationship with Officer Glass. We note in this regard that the trial judge that presided over the habeas hearing was the same trial judge that received Appellant's guilty plea in 2005.

Appellant did not object to the trial judge's comments at the habeas proceeding. Furthermore, Appellant did not file a posttrial motion seeking a new judge based on a claim of impartiality. However, the right to an impartial judge is a fundamental right that cannot be waived. *See Whitehead v. State*, 273 S.W.3d 285, 286 n.3 (Tex. Crim. App. 2008); *Hernandez v. State*, 268 S.W.3d 176, 184 (Tex. App.—Corpus Christi 2008, no pet.). A defendant has an absolute right to an impartial judge. *Hernandez*, 268 S.W.3d at 184; *Jaenicke v. State*, 109 S.W.3d 793, 796 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd). In the absence of a clear showing to the contrary, we will presume that the trial court was neutral, detached, and unbiased. *Brumit v. State*, 206 S.W.3d 639, 645 (Tex. Crim. App. 2006).

Partiality or bias must stem from an extrajudicial source and result "in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Kemp v. State*, 846 S.W.2d 289, 305–06 (Tex. Crim. App. 1992); *Roman v. State*, 145 S.W.3d 316, 321 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). Partiality or bias may only be a ground for recusal when it is of such a nature and extent as to deny movant due process of law. *Roman*, 145 S.W.3d at 321. "[O]pinions formed . . . on the basis of facts . . . or events occurring in the course of the current proceedings, or of prior proceedings," are not based on extrajudicial sources. *Id.* at 321–22 (alterations in original) (quoting *Andrade v. Chojnacki*, 338 F.3d 448, 462 (5th Cir. 2003)).

At the conclusion of the habeas proceeding, the trial judge stated, "You know, I had -- I had then and I have no doubt now that Bill Glass was a credible officer in 2005 . . . . Bill Glass was a credible person. I knew him pretty well. I knew who he was and I had been around him for many years." Appellant contends that the trial judge's comments indicate that Appellant was deprived of due process because the judge's ruling was based on his personal relationship with Officer Glass in 2005. We disagree.

The issues before the trial court at the habeas hearing were whether or not Appellant could show that she was actually innocent because of newly discovered evidence and whether her guilty plea was the result of false evidence. We have already determined that her actual innocence claim fails because the "new evidence" upon which Appellant relies is not newly discovered evidence. Her false evidence claim also fails because Officer Glass did not testify, either in the original plea proceeding or in the habeas proceeding. Additionally, the only "old" evidence in this case from Officer Glass is the complaint that he executed that served as the basis

for the information. As we have already explained, Appellant cannot challenge the sufficiency of Officer Glass's complaint or the information upon which it was based. We conclude that these legal impediments to the habeas relief sought by Appellant render the trial judge's credibility determinations concerning Officer Glass immaterial to Appellant's claims for habeas relief.

We have already concluded that Appellant's guilty plea was given knowingly, voluntarily, and intelligently. The trial court, therefore, was required to give Appellant's guilty plea "great respect." *Ex parte Tuley*, 109 S.W.3d at 391. The evidence cited by Appellant as new evidence in support of her innocence was inherently dependent on the trial court's evaluation of Appellant's credibility and her father's credibility. Lastly, Officer Glass's subsequent conviction for fabricating evidence was an isolated incident that occurred six years after Appellant's conviction. We conclude that the trial court did not abuse its discretion in rejecting Appellant's claim of actual innocence. We overrule Appellant's first issue.

Evidence Supporting Conviction

In her second issue, Appellant asserts that there is no evidence to support her conviction. A claim of insufficient evidence cannot be raised in postconviction habeas proceedings. *Ex parte Knight*, 401 S.W.3d 60, 64 (Tex. Crim. App. 2013). However, a claim of no evidence is cognizable in a habeas proceeding. *Id.* If there is any evidence to support Appellant's conviction, we must deny relief. *Id.*

Appellant argues that, at most, she could have been convicted under Section 22.07(a)(1) of the Texas Penal Code, a Class B misdemeanor. This is a challenge to the sufficiency of the charging instrument. As we already held, Appellant cannot present this challenge in a postconviction habeas challenge.

In a misdemeanor case, when a defendant enters a plea of guilty before the court, he admits every element of the offense. *Ex parte Williams*, 703 S.W.2d 674,

678 (Tex. Crim. App. 1986); *Brown v. State*, 507 S.W.2d 235 (Tex. Crim. App. 1974); *Dodds v. State*, 801 S.W.2d 210, 211–12 (Tex. App.—San Antonio 1990, no pet.). Texas law does not require that the State introduce evidence to support a finding of guilt when the defendant pleads guilty to a misdemeanor charge. CRIM. PROC. art 27.14(a); *Ex parte Martin*, 747 S.W.2d 789, 792 (Tex. Crim. App. 1988).

In the complaint, Officer Glass alleged that Appellant "threaten[ed] to commit an offense involving violence to a person, namely, Murder, with intent to place **BENNIE MEREDITH** in fear of imminent serious bodily injury, and the said **BENNIE MEREDITH** was then and there a member of the defendant's family." Based on Officer Glass's complaint, the State charged Appellant with making a terroristic threat against a family member, a Class A misdemeanor. Appellant signed a sworn judicial confession "that [she] committed each and every element alleged [in the information]; and that [she is] guilty of all offenses charged therein." Furthermore, we have determined that Appellant knowingly, voluntarily, and intelligently pleaded guilty to that offense. Appellant's guilty plea alone is enough to support her conviction. *See Ex parte Williams*, 703 S.W.2d at 678. Thus, there is some evidence supporting her conviction. We overrule Appellant's second issue.

Schlup-Type Claims

In her reply brief, Appellant raises two *Schlup*-type claims based on an alleged deficiency in the complaint and information and her alleged involuntary plea of guilty, and an alleged *Brady* violation. Because these additional *Schlup*-type claims were raised for the first time in Appellant's reply brief, it would be appropriate to decline them as being waived. *See* TEX. R. APP. P. 38.3; *Houston v. State*, 286 S.W.3d 604, 612 (Tex. App.—Beaumont 2009, pet. ref'd).

Appellant's first *Schlup*-type claim concerns the alleged deficiency in the complaint and information. This is the same challenge we have previously

determined cannot be raised under Article 1.14(b) in a postconviction habeas proceeding. Additionally, Appellant premises this claim in her reply brief by quoting extensively from what purports to be Officer Glass's police report. However, this police report is a not a part of the appellate record. Reviewing courts can assess only the evidence that is actually in the appellate record. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007).

With respect to Appellant's second *Schlup*-type claim, we have also already rejected Appellant's claim that her guilty plea was involuntary. Appellant premises her alleged *Brady* violation on the State's purported failure to convey to her that there were conflicts between Officer Glass's police report, his complaint, and the resulting information. While couched as a *Brady* violation, this complaint is essentially a complaint about the sufficiency of the charging instrument—a complaint that is not cognizable in a postconviction writ of habeas corpus. For these reasons, we overrule Appellant's *Schlup*-type claims.

This Court's Ruling

We affirm the order of the trial court.

JOHN M. BAILEY
JUSTICE

July 13, 2017

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

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