AFFIRMED and Opinion Filed October 30, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00685-CR

EX PARTE GUSTAVO SANTILLANO

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. WX17-90016-I

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Evans

Gustavo Santillano appeals the trial court's order denying relief on his pretrial application for writ of habeas corpus. In two issues, appellant contends he received ineffective assistance of counsel and the State's misconduct prevented counsel from rendering effective assistance. We affirm.

BACKGROUND

In March 2016, appellant was indicted for assault on a public servant. The indictment included two enhancement paragraphs, raising the punishment range for the offense to twenty-five to ninety-nine years or life in prison. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016).

On June 22, 2016, the State conveyed to appellant's appointed counsel ("original trial counsel" hereinafter) a plea bargain offer to allow appellant to plead guilty in exchange for a ten-year sentence. The State informed original trial counsel that the offer would remain open until

the next trial setting on June 30, 2016. Appellant neither accepted nor rejected the offer and it was deemed rejected at the next trial setting.

At the time of the State's offer, the record shows original trial counsel had received the indictment, offense report, a probable cause affidavit, and the arrest warrant. The offense report narrated that four officers were dispatched to the residence of appellant's family after a family member called police to report appellant had possibly ingested methamphetamine and was screaming and threatening to kill his parents. When the officers entered the house, they found appellant locked in his bedroom, yelling incoherently, rattling a chain, and beating on the wall. After an unsuccessful effort to reason with appellant, the officers forced their way into the bedroom and detained appellant after a struggle. During the struggle, appellant bit the complainant on the forearm for an extended period of time. The complainant reported that the bite mark left a permanent scar on his arm. Two other officers received minor injuries during the arrest. The record also shows the trial court had granted the complainant's motion to compel appellant to undergo testing for communicable diseases. An affidavit attached to the motion averred the bite caused the complainant "extreme physical pain, blood, swelling, and serious bodily injury. . . ."

On February 17, 2017, the State and appellant filed a joint motion for continuance offering as rationale that original trial counsel had a conflicting trial setting and:

> [t]he State has submitted requests to Dallas Police Department for body camera and photo evidence that the State believes are essential to the prosecution of this case. Further, the State is still in the process of obtaining the Complainant's medical records from both Dallas Fire Rescue and Baylor Medical Center. Given that there has been a recent shift in prosecutors, [the prosecutor] is now handling this case and is working diligently to obtain this pertinent evidence on this case.

Beginning on February 20, 2017, the State began uploading to its online portal, accessible to original trial counsel, additional evidence, including photographs of the complainant's injuries,

bodycam footage of the assault, a physical evidence report, and medical records. At some point thereafter, the State offered appellant a plea bargain for a thirty-year sentence.

On March 29, 2017, appellant filed a pro se motion to dismiss original trial counsel. Among the grounds appellant initialed on the pre-printed form for replacing original trial counsel was "[c]ounsel shows no interest in the case at hand and only seeks plea agreement." On April 21, 2017, appellant filed a second motion to dismiss original trial counsel making the same allegations. On April 27, 2017, appellant filed a motion to substitute counsel indicating his family had retained a new attorney ("second trial counsel" hereinafter) to replace original trial counsel.

On May 15, 2017, appellant filed a pretrial application for writ of habeas corpus asserting that because the bulk of the State's evidence was not provided to him until after the ten-year plea offer was withdrawn, his rejection of the offer was involuntary, and the State's withholding of the evidence rendered original trial counsel unable to provide effective assistance during the critical plea stage of the case in violation of "the letter and spirit" of the Michael Morton Act.

During the hearing on the writ application, appellant testified that he would have accepted the State's ten-year offer if he had been given all of the State's evidence to review in June 2016. Appellant admitted he understood the punishment range for his offense was twenty-five to ninety-nine years or life in prison and that the trial court had admonished him multiple times about the punishment range for the offense while original trial counsel represented him. Appellant alleged original trial counsel never brought the State's ten-year offer to his attention. Original trial counsel was not called to testify nor did she submit an affidavit.

Second trial counsel asked the trial court to order the State to revive the ten-year plea offer. The trial court denied appellant's application. On June 12, 2017, appellant and the State reached a plea bargain agreement pursuant to which appellant agreed to plead guilty to the

offense and true to one enhancement paragraph in exchange for the State's agreement to strike one enhancement paragraph and recommend a fifteen-year sentence. The trial court followed the parties' agreement and assessed the agreed punishment. Appellant appealed the denial of relief on his pretrial habeas application, but he did not appeal the conviction.

STANDARD OF REVIEW

An applicant for habeas corpus relief must prove the applicant's claims by a preponderance of the evidence. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). In reviewing the trial court's order, we view the facts in the light most favorable to the trial court's ruling, and we uphold the ruling absent an abuse of discretion. *Id*. The trial court, as fact finder at the writ hearing, is the exclusive judge of witness credibility. *Ex parte Amezquita*, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006). We afford almost total deference to a trial court's factual findings when those findings are based upon credibility and demeanor. *Id*. If, however, the trial court's determinations are questions of law, or else are mixed questions of law and fact that do not turn on an evaluation of witnesses' credibility and demeanor, then we owe no deference to the trial court's determinations and review them *de novo*. *State v. Ambrose*, 487 S.W.3d 587, 596–97 (Tex. Crim. App. 2016).

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first issue, appellant contends the trial court abused its discretion in denying his writ application because his uncontroverted testimony established that his original trial counsel never informed him of the State's ten-year plea bargain offer and the remainder of the record is consistent with his testimony. As a result of original trial counsel's deficient performance, appellant contends he was prevented from accepting the ten-year offer prior to its expiration or to accept it in light of the discovery the State provided only after the offer expired.

Appellant did not raise his first issue in the trial court below. In his application for writ of habeas corpus, appellant contended his "effective rejection" of the plea was involuntary because the State's evidence was unavailable at the time he considered it. Alternatively, appellant contended the State's withholding of the evidence rendered original trial counsel unable to provide effective assistance. Appellant did not contend that original trial counsel had failed to disclose the plea offer to him. When he testified at the writ hearing, appellant did accuse original trial counsel of not disclosing the ten-year plea offer to him; however, second trial counsel expressly disavowed this issue during her final argument to the trial court:

> Judge, there's maybe one fact that is in dispute here and that is whether [appellant] was made aware of the ten-year offer. I don't believe that that is at all relevant to the basis of the writ. . . . I feel that he is entitled to a restoration of the ten-year offer regardless of whether [original trial counsel] conveyed the offer to him.

A habeas applicant may not raise new issues on appeal that he did not bring before the trial court in his writ application. *Ex parte Evans*, 410 S.W.3d 481, 485 (Tex. App.—Fort Worth 2013, pet. ref'd). Having failed to raise in his writ application original trial counsel's alleged failure to convey the plea offer, and having disclaimed it as an issue in final argument before the trial court, we conclude appellant may not raise the issue on appeal. *Id.* We overrule appellant's first issue.

WITHHOLDING EVIDENCE

In his second issue, appellant contends the State's conduct in failing to provide original trial counsel with sufficient discovery under the Michael Morton Act until after the ten-year plea offer had expired rendered original trial counsel unable to provide "a level of advice that was consistent with providing effective assistance of counsel."

In 2013, the Texas Legislature passed the Michael Morton Act amending article 39.14 of the code of criminal procedure to expand discovery in criminal cases. *See* Michael Morton Act,

83rd Leg., R.S., ch. 49, § 2, 2013 TEX. SESS. LAW SERV. 106, 106–08 (West) (codified at TEX. CODE CRIM. PROC. ANN. art. 39.14 (West Supp. 2016)). Article 39.14 requires the State to produce for the defense's inspection and copying, "as soon as practicable" after receiving the defendant's request: offense reports, designated documents, papers, defendant and witness statements, books, accounts, letters, photographs, objects, and tangible things that are not privileged and that "constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state." *See* TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West Supp. 2016). Furthermore, the State has an ongoing duty that extends before, during and after trial to disclose to the defense "any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged." *See id.* at art. 39.14(h), (k). Before a guilty plea may be accepted or a trial conducted, the parties must acknowledge in writing or in open court what documents, items, and information the defendant has received. *See id.* at art. 39.14(j).

A defendant has a Sixth Amendment right to effective assistance of counsel during the plea bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984). The defendant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). In meeting this burden, the defendant must overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson*, 9 S.W.3d at 813. The ineffective assistance must be firmly

founded in the record and affirmatively demonstrated therein. *Id*. at 814. Where errors of omission are alleged, collateral attack is usually preferable to develop a record and conduct a thorough and detailed examination of the alleged ineffectiveness. *Id*. Before being adjudged ineffective, counsel should generally be given an opportunity to explain his or her actions. *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). When the defendant has met the first prong of the *Strickland* test by showing that counsel failed to convey a plea bargain offer to the defendant or the defendant rejected a plea bargain offer because of counsel's bad advice, the defendant establishes prejudice by showing (1) the defendant would have accepted the offer but for counsel's ineffective assistance; (2) the State would not have withdrawn the offer; and (3) the trial court would not have refused to accept the plea bargain. *Ex parte Argent*, 393 S.W.3d 781, 784 (Tex. Crim. App. 2013). Failure to prove either prong of the *Strickland* test defeats the ineffective assistance claim. *Strickland*, 466 U.S. at 697; *Rylander*, 101 S.W.3d at 110.

Appellant first contends that the State failed to provide the necessary discovery "as soon as practicable" as required by article 39.14 thus preventing original trial counsel from offering him informed advice about whether to accept the State's plea offer and the likelihood that he would receive a longer sentence at trial. Having the burden of proof on his writ application, appellant offered no evidence showing when original trial counsel requested the State provide evidence pursuant to article 39.14 nor did appellant show that the State did not deliver the evidence "as soon as practicable" within the meaning of the statute.

The record shows the parties filed a joint motion for continuance on February 17, 2017, reporting that the State was gathering evidence from police and medical sources. The production of evidence began on February 20, 2017 and continued through the beginning of April. The record does not show when these items entered the State's possession, custody, or control. From the joint motion for continuance, however, the trial court could have reasonably inferred the

State produced the items as it obtained them. In the absence of any evidence that the State possessed the medical records and additional evidence at the time it tendered the June 2016 plea offer, we cannot conclude appellant has shown the State failed to produce the evidence as soon as was practicable. *See id.* at art. 39.14(a); *see also Byrd v. State*, No. 02-15-00288-CR, 2017 WL 817147, at *4 (Tex. App.—Fort Worth Mar. 2, 2017, pet. ref'd) (not designated for publication) (by turning over cell phone records to defense on date it received them, State met article 39.14 requirement to provide discovery as soon as practicable).

Furthermore, the evidence available to original trial counsel on June 22, 2016 was sufficient for original trial counsel to render effective assistance regarding whether appellant should accept the State's plea bargain offer or proceed to trial. Original trial counsel had access to the indictment, offense report, probable cause affidavit, arrest warrant, and the motion seeking testing for communicable diseases. The available documents showed overwhelming evidence of appellant's guilt, that the complainant had suffered bodily injury and had a permanent scar, and the State's offer was fifteen years under the minimum sentence that appellant would receive if he was convicted at trial and the enhancement paragraphs were found true.

Because original trial counsel did not testify or provide an affidavit, the record does not show what investigation she conducted, the full extent of her knowledge, nor what advice she gave appellant about his plea and prospects at trial. From the record presented, however, we cannot conclude appellant has shown that the State's conduct prevented original trial counsel from being in a position to offer effective assistance of counsel in advising him about whether to accept the State's plea bargain offer. *See Rylander*, 101 S.W.3d at 111; *Thompson*, 9 S.W.3d at 813–14. *See also Ex parte Palmberg*, 491 S.W.3d 804, 809–10 (Tex. Crim. App. 2016) (guilty plea not involuntary and satisfies due process even though entered without full knowledge of strength of State's case).

Appellant next contends that because original trial counsel did not have access to the full range of the State's evidence and was unable to determine the likelihood of receiving a greater sentence at trial, even if she did convey the plea bargain offer to him, she would have been unable to assess whether his acceptance of the offer was knowing and voluntary. We disagree. As we have already observed, original trial counsel had sufficient information in June 2016 to advise appellant about the merits of the State's plea bargain offer, which was substantially below the minimum punishment for conviction of the offense with two enhancement paragraphs. Under the circumstances of this case, the fact that appellant did not have before him the complete extent of the State's evidence does not, in our judgment, impact the voluntariness of his decision about the State's offer. *See Palmberg*, 491 S.W.3d at 809–10.

Citing Texas Supreme Court precedents dealing with family law issues, appellant next contends that ineffective assistance of counsel can implicate a defendant's due process rights. Because we do not conclude appellant received ineffective assistance of counsel, we need not determine whether ineffective assistance of counsel implicates due process in criminal cases in some manner that would extend beyond the *Strickland* analysis.

Finally, appellant contends he should receive another opportunity to take the ten-year offer because his testimony "was in no way controverted or contradicted" that he would have taken the offer if it had been offered to him and if he had been given full discovery. Without trial counsel's testimony about what transpired between appellant and herself, appellant's "uncontroverted" testimony is incomplete and insufficient to show he received ineffective assistance. *See Rylander*, 101 S.W.3d at 111; *Thompson*, 9 S.W.3d at 813–14.

Moreover, we agree with the State that requiring it to investigate and fully disclose the State's evidence before a plea bargain may be offered would undermine the State's ability to

offer defendants generous early-stage plea bargains like the one extended to appellant and harm future defendants who might wish to take advantage of such offers.

In *United States v. Ruiz*, the Supreme Court expressly rejected appellant's contention for federal courts. *See United States v. Ruiz*, 536 U.S. 622 (2002). In *Ruiz*, under a "fast track" plea program, Ruiz was offered a downward departure from federal sentencing guidelines in exchange for her waiving indictment, trial, appeal, and access to evidence useful for impeachment and assertion of affirmative defenses. *See Ruiz*, 536 U.S. at 625. The government withdrew the offer when Ruiz balked at the terms. *Id*. Subsequently, Ruiz pleaded guilty without a plea agreement. *Id*. At her sentencing, Ruiz asked the trial court to grant her the same departure from the sentencing guidelines the government had offered her under the fast track program. *Id*. at 626. The trial court refused Ruiz's request and sentenced her within the sentencing guidelines.

On ultimate appeal, the Supreme Court rejected the notion that the Constitution requires a plea bargaining defendant "have complete knowledge of the relevant circumstances" of the plea. *Id*. at 630. The Supreme Court opined "a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *Id*. Continuing on, the Court decried the inefficiency Ruiz's position would entail:

> [i]t could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases.

Id. at 632.

In *Palmberg*, while acknowledging that cases involving ineffective assistance of counsel might have a different result, the court of criminal appeals cited *Ruiz* in concluding that a defendant was not entitled to relief on his claim that his guilty plea was involuntary because he entered it without knowing that the State could not prove a critical element of its case. *See Palmberg*, 491 S.W.3d at 807–16. Like the Supreme Court in *Ruiz*, the court of criminal appeals also emphasized the deleterious effects on the State of requiring full disclosure of evidence before the State could offer a plea bargain to a defendant: "a requirement that a defendant be completely informed about every fact relevant to his prosecution at the time of his plea (even facts that no one directly involved in the plea process—*including the prosecutor*—could possibly yet know) would impose an untenable and undesirable burden on the institution of plea bargaining." *Palmberg*, 491 S.W.3d at 809–10. The court concluded, "[d]ue process considerations mandate neither a comprehensive development of the State's case for trial nor a completion of the pre-trial discovery process before either party can enjoy the benefits of a mutually beneficial plea bargain agreement. *Id*. at 810.

Appellant cites to no authority interpreting article 39.14 as imposing a duty on the State to furnish appellant with full disclosure of the State's evidence before offering a plea bargain. Given the express endorsement of early-stage plea bargaining by the United States Supreme Court and the Texas Court of Criminal Appeals, we cannot conclude the trial court abused its discretion by not requiring full disclosure in appellant's case. We overrule appellant's second issue.

Finding no abuse of discretion, we affirm the trial court's order denying relief on appellant's pretrial application for writ of habeas corpus.

/David W. Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE GUSTAVO SANTILLANO

No. 05-17-00685-CR

On Appeal from the Criminal District Court No. 2, Dallas County, Texas
Trial Court Cause No. WX17-90016-I.
Opinion delivered by Justice Evans. Justices Lang and Schenck participating.

Based on the Court's opinion of this date, the order of the trial court denying relief on appellant's pretrial application for writ of habeas corpus is **AFFIRMED**.

Judgment entered this 30th day of October, 2017.