AFFIRMED and Opinion Filed August 29, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00224-CR

No. 05-18-00225-CR

No. 05-18-00226-CR

EX PARTE IVAN VETCHER

On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. W401-81746-2013-HC,

W199-81478-2013-HC, W199-82614-2013-HC

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Bridges

Ivan Vetcher appeals the trial court's order denying relief on his post-conviction application for writ of habeas corpus. In five issues, appellant contends the trial court misapplied the *Strickland* test, failed to recognize the existence of viable defenses, acted unreasonably in relying upon trial counsel's affidavit as the basis for its fact findings, reached incorrect conclusions from its fact findings, and failed to find him actually innocent even though the mushrooms he alleges he possessed are not a controlled substance. Finding no abuse of discretion, we affirm.

BACKGROUND

In 2013, appellant was charged with three offenses of delivery of psilocybin/psilocin in amounts of four grams or more but less than 400 grams. Appellant entered open guilty pleas to the offenses and received concurrent sentences in each case of ten years' imprisonment, probated

for ten years. He did not appeal the convictions. Appellant is not a citizen of the United States. As a result of his convictions, he was detained by federal immigration authorities for removal from the United States.

In 2016, appellant filed applications for writs of habeas corpus alleging ineffective assistance of counsel and other complaints. The trial court denied relief. On appeal, this Court reversed and remanded the trial court's determination because appellant had mistakenly filed his writ applications under article 11.07 and the trial court had not followed the correct procedure in handling the applications. *See Ex parte Vetcher*, No. 05-17-00322-CR, 2017 WL 3498479 (Tex. App.—Dallas Aug. 16, 2017, no pet.) (not designated for publication).

In 2017, appellant filed his current application for writ of habeas corpus under article 11.072 of the code of criminal procedure contending he received ineffective assistance of counsel, his guilty pleas were involuntary, and challenging the statutory construction and constitutionality of those sections of the Texas Controlled Substances Act relating to psilocybin and psilocin.[1] In support of his writ application, appellant submitted his affidavit; trial counsel's affidavit from the prior habeas proceeding; the trial court's order designating issues from the prior habeas proceeding; a set of email transcripts of conversations among himself, his wife, trial counsel, and trial counsel's law partner; a copy of the trial court's docket sheet; a notice to appear from the Department of Homeland Security; copies of the trial court's judgments and various plea papers; copies of federal immigration statutes; and copies of provisions in the health and safety code related to his offenses.

In response to a request by the State, the trial court propounded a set of questions for trial counsel to answer in a new affidavit. The questions generally inquired about trial counsel's background and experience and asked her to respond to appellant's allegations about her

[1] We note that psilocin is spelled variously as "psilocin" or "psilocyn" under controlled substances statutes of vaious states.

performance. In her affidavit, trial counsel averred she had advised appellant that he would be deported if he pleaded guilty to the offenses. She stated she had explained the law related to consecutive sentences to him. She further averred she had explained the State's plea offer of five-years imprisonment, that the State "was not at all interested in [appellant's] deportation problems," and that the State would not budge on their five-year offer. Trial counsel restated her position that there was no valid defense to the charges because all of the transactions were captured on audio and video recordings. Trial counsel rejected appellant's contention that possession of the mushrooms was not possession of psilocybin/psilocin because "it is common knowledge what the mushrooms do to a person. The mushrooms contain psilocybin, which is prohibited in all states and under federal law, as well as most countries in the world. [Appellant] knew it was illegal, he believed it should not be." Trial counsel stated appellant did not ask for an appeal because he got the probation he had wanted.

The trial court again denied relief. Among its findings, the trial court found trial counsel's affidavit credible and appellant's affidavit not credible, that trial counsel advised appellant that he would be deported, that trial counsel believed appellant would be convicted if he went to trial with a possibility that the sentences would be stacked, that the offenses were captured on video, that appellant rejected the State's plea offer for a five-year sentence and entered an open plea because he wanted probation and did not want to go to prison, and that appellant did receive community supervision. Although labeled as findings, the trial court concluded trial counsel rendered effective assistance and appellant had failed to show he was prejudiced by trial counsel's actions and advice.

STANDARD OF REVIEW

An applicant for post-conviction habeas corpus relief bears the burden of proving his or her claim by a preponderance of the evidence. *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016). 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. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). When the underlying conviction results in community supervision, an ensuing post-conviction writ must be brought pursuant to article 11.072 of the code of criminal procedure, and the trial court is the sole finder of fact. *Torres*, 483 S.W.3d at 42. In reviewing the trial court's order denying habeas corpus relief, "we afford almost total deference to a trial court's factual findings when they are supported by the record, especially when those findings are based upon credibility and demeanor." *Id*. We apply the same deferential standard of review when the factual findings are based on affidavits rather than on live testimony. *Manzi v. State*, 88 S.W.3d 240, 244 (Tex. Crim. App. 2002). We defer to the trial court's ruling on mixed questions of law and fact, if the resolution of the ultimate questions turns on an evaluation of credibility and demeanor. *Ex parte Weinstein*, 421 S.W.3d 656, 664 (Tex. Crim. App. 2014). 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*. *Id.*; *State v. Ambrose*, 487 S.W.3d 587, 596–97 (Tex. Crim. App. 2016).

ANALYSIS

Ineffective Assistance of Counsel

Appellant's first four issues address his allegation that trial counsel provided ineffective assistance of counsel and the trial court erred in evaluating his ineffective assistance claim. Appellant bears the burden of proving counsel was ineffective by a preponderance of the evidence. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). To prevail on a claim of ineffective assistance of counsel, appellant must show that (1) trial counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v.*

Washington, 466 U.S. 668, 687–89, 694 (1984). Appellant must prove both prongs of the test. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Failure to prove either prong defeats a claim of ineffective assistance. *Perez v. State*, 310 S.W.3d 890, 893 (Tex. Crim. App. 2010). The deficient performance must be affirmatively demonstrated on the record and not require retrospective speculation. *Lopez*, 343 S.W.3d at 142. We strongly presume that trial counsel's assistance fell within the wide range of reasonable professional assistance and that the challenged acts or omissions might be considered sound trial strategy. *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012). A showing of ineffective assistance requires more than a showing that another attorney might have pursued a different tactic at trial. *Id*. We judge the totality of trial counsel's representation rather than focusing narrowly on isolated acts or omissions, and the performance must be evaluated from the viewpoint of trial counsel at the time of the representation and not with the benefit of hindsight. *Id*.

When an applicant waives a judicial proceeding allegedly because of deficient performance, the applicant's burden is to show a reasonable probability that the deficient performance caused the applicant to waive a judicial proceeding that he was otherwise entitled to have. *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018). The focus is on the applicant's decision making. *Id*. The applicant need not show the likelihood of a better outcome if he or she would have pursued the waived or forfeited proceeding. *Id*. at 500.

In his first issue, appellant contends the trial court misinterpreted and misapplied both prongs of the *Strickland* test for ineffective assistance of counsel. Regarding the first prong, appellant contends the trial court simply accepted trial counsel's explanation for her actions and did not analyze whether trial counsel's actions were reasonable under professional norms. Appellant alleges trial counsel offered him erroneous advice about the availability of a bond reduction and the punishment range; failed to object to "sentencing errors"; failed to conduct an

independent investigation into the facts and law; neglected to provide him with a necessary understanding of the law and facts regarding his plea decision; failed to investigate and present evidence during sentencing; and neglected to pursue an appeal.

None of appellant's assertions are backed with citations to evidence in the record. Moreover, the trial court determined that appellant's affidavit, making claims about trial counsel's deficient advice and investigation, was not credible, while trial counsel's affidavit, asserting generally that appellant was advised completely and the case was handled properly, was credible. The trial court's findings of fact appellant challenges are grounded in the representations in trial counsel's affidavit. Accordingly, we defer to the trial court's assessment of credibility and conclude appellant has not shown the trial court erred in accepting trial counsel's version of events. *Torres*, 483 S.W.3d at 42.

Appellant cites no authority requiring the trial court to explain in detail its analytical process in evaluating whether trial counsel's performance adhered to professional norms. Moreover, the trial court's findings methodically address appellant's complaints about trial counsel's performance, including making findings on the credibility of the evidence, trial counsel's plea advice including advice about the deportation consequences of his plea, why trial counsel did not seek a decrease in appellant's bond, counsel's investigation of appellant's possible defenses, trial counsel's advice about the possibility of stacked sentences, trial counsel's presence at the plea hearing, and why an appeal was not filed. We conclude appellant has not shown the trial court abused its discretion in applying the first *Strickland* prong. *See id*.

Regarding the prejudice prong, appellant contends the trial court imposed a greater probability threshold for a showing of prejudice than *Strickland* requires. In its findings, in disposing of various acts or omissions of trial counsel appellant questioned, the trial court repeatedly determined appellant had not shown by a preponderance of the evidence that the

outcome of his case would have been different. Appellant points out that *Strickland* requires him to show only a reasonable probability that the outcome would have been different. By omitting the "reasonable probability" language, coupled with the repeated use of the word "would," appellant contends the record shows the trial court held him to a higher standard than *Strickland* requires.

With regard to each of his complaints about trial counsel, the trial court determined that trial counsel did not deliver ineffective assistance. As we will show, *infra*, we agree with the trial court. Because we determine appellant has not met his burden under the first prong of *Strickland*, we need not consider whether the trial court erred in applying the second prong evaluating the showing of prejudice. *Lopez*, 343 S.W.3d at 144; *see also Perez*, 310 S.W.3d at 893. We overrule appellant's first issue.

In his second issue, appellant contends the trial court erred in concluding that, because the offenses were captured on video and audio recordings, he had no viable defenses. Appellant contends trial counsel rendered ineffective assistance by failing to conduct an independent investigation into the law and facts of his case to discover his defenses. Appellant contends trial counsel relied exclusively upon the video and audio evidence and neglected to identify and investigate four potential defenses: (1) a challenge to the controlled substance statute on both statutory construction and constitutional grounds; (2) a challenge to the spectroscopy test used to identify the substances appellant possessed as psilocybin or psilocin; (3) a challenge to the mens rea requirement as to whether psilocybin or psilocin was present in the particular mushrooms appellant possessed; and (4) a challenge to the charge of first-degree felonies based on the amount of drugs present and excessiveness of the sentences assessed.

The trial court's questions to trial counsel included questions regarding the defenses appellant contends were available. In her affidavit, trial counsel responded that "[t]here was no

valid defense since all of the offenses were caught on video and audio recordings." Trial counsel went on to answer the trial court's specific inquiries about the defenses. In response to a question regarding whether trial counsel could have argued that the statute does not provide notice the mushrooms are a controlled substance, trial counsel responded, "No, it is common knowledge what the mushrooms do to a person. The mushrooms contain psilocybin, which is prohibited in all states and under federal law, as well as most countries in the world. The applicant knew it was illegal, he believed it should not be." Trial counsel further averred that she could not question the validity of the testing done because "the science is well established." Based on trial counsel's affidavit, the trial court found trial counsel investigated possible defenses, but she was unable to utilize any defenses because the offenses were captured on video and audio recordings. The trial court further found that trial counsel could not use the defenses appellant alleges were available because they were either not a defense or not viable.

We agree with appellant that trial counsel has a duty to make reasonable investigations or to make a reasonable decision that further investigations were unnecessary. *See Strickland*, 466 U.S. at 691; *Ex parte Martinez*, 195 S.W.3d 713, 721 (Tex. Crim. App. 2006). Trial counsel's affidavit states that there were no valid defenses. It does not describe the investigation trial counsel conducted to determine that the defenses were not viable. In the absence of evidence to the contrary, we will not presume trial counsel conducted no investigation as appellant alleges. *See Lopez*, 343 S.W.3d at 142 (record must affirmatively demonstrate deficient performance). Moreover, no evidence the trial court found credible disputes trial counsel's assessment of the alleged defenses.

The record is not sufficiently developed for this Court to delve into the intricacies of how appellant delivered the psilocybin or psilocin at issue, what equipment was used to analyze the substances for psilocybin or psilocin, what evidence the State might have produced at trial to show

appellant's mens rea to possessing psilocybin or psilocin, or how much of the substance recovered constituted psilocybin or psilocin. Mere assertions in a brief, unsupported by evidence in the record, will not be considered on appeal. *Franklin v. State*, 693 S.W.2d 420, 431 (Tex. Crim. App. 1985). Appellant's guilty plea terminated the evidentiary process short of providing the evidence appellant would need to prove his claims, and appellant has not provided any additional evidence to back his assertions. The mere fact that appellant asserts in his brief he possessed mushrooms instead of pure psilocybin or psilocin, that certain machinery was used in a certain manner to test the material, that some psychedelic mushrooms do not contain any psilocybin or psilocin, and that the mushrooms he alleges he delivered contained only small amounts of psilocybin, does not constitute evidence. *See id*. Reserving for the moment, appellant's contentions regarding statutory construction and the constitutionality of the Texas Controlled Substances Act, on the record presented, we cannot conclude appellant has met his burden of proof to show he had viable defenses trial counsel failed to pursue. *See Lopez*, 343 S.W.3d at 142.

Turning to appellant's statutory construction and constitutionality argument, under the Texas Controlled Substances Act, psilocybin and psilocin are Schedule I controlled substances, designated as part of Penalty Group 2. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.032, Sched. I; 481.103(a)(5) (West 2017). Delivery of a controlled substance in Penalty Group 2 is a first-degree felony if the amount of the controlled substance, by aggregate weight, including adulterants or dilutants, is four grams or more but less than 400 grams. *See id*. at § 481.113(a), (d). Although the mushrooms that contain psilocybin and psilocin are not mentioned by name[2] as controlled substances, Schedule I does prohibit "a material, compound, mixture, or preparation that contains

[2] The mushrooms containing psilocin and psilocybin are psilocybe cubensis mushrooms. *State v. Routon*, 304 Wis.2d 480, 483 n.2, 736 N.W.2d 530, 531 n.2 (Wis. Ct. App. 2007).

any quantity" of scheduled "hallucinogenic substances" which include psilocybin and psilocin. *Id*. at § 481.032, Sched. I.

Appellant contends the Texas Controlled Substances Act criminalizes possession of psilocybin and psilocin but it does not criminalize possession of psychedelic mushrooms containing psilocybin or psilocin. According to appellant, a mushroom is a plant and does not qualify as a "drug," "adulterant," "dilutant," or as a "mixture, solution, or other substance" to fit within the definition of a "controlled substance" under the Act. *See id*. at § 481.002(5) defining "controlled substance." Appellant points out that the Act does, in some instances, address particular plants as controlled substances and assigns possession of the actual plant to a penalty group. *See id*. at § 481.104(6) (addressing peyote); § 481.002(26) (addressing "marihuana"); § 481.002(29)(D)(ii) (addressing coca leaves); § 481.102(3) (addressing opium poppies and poppy straw). Without citing authority, appellant contends an "other substance" in the definition of "controlled substance" cannot mean "a plan[t], an animal or a fungi [where] the controlled substance occurs in the natural state." Appellant notes that in providing for civil forfeitures in drug cases, the Legislature created the concept of a "controlled substance plant" and he argues we should find significant the absence of such definition from the definition of "controlled substance" in the criminal punishment portion of the statute. *See id*. at § 481.151(2) (defining "controlled substance plant" as "species of plant from which a controlled substance listed in Schedule I or II may be derived."). Appellant contends that peyote and marihuana were subjected to analysis for inclusion on controlled substance schedules under section 481.035, but no similar analysis has been done on mushrooms. Lastly, appellant contends that the listing of certain plants in the schedules implies that unlisted plants containing controlled substances were not intended to be scheduled. Appellant points out that many plants contain at least some controlled substances including ornamental cactuses and morning glory seeds. Alternatively, appellant contends that

even if a plain reading of the statute might include psychedelic mushrooms as "a material, compound, mixture, or preparation that contains any quantity" of psilocin or psilocybin, the statute is too vague to satisfy the requirements of due process.

We note initially that the scant case authority in Texas uniformly makes little distinction between possession of psilocybin and psilocin and possession of the mushrooms containing psilocybin and psilocin. *See, e.g.*, *Rivas v. State*, 446 S.W.3d 575, 577–80 (Tex. App.—Fort Worth 2014, no pet.) (detailing defendant's convictions for possession with intent to deliver psilocin and psilocybin contained in mushrooms); *Romo v. State*, 315 S.W.3d 565, 570 (Tex. App.—Fort Worth 2010, pet. ref'd) (noting the defendant was charged with possessing "psilocin (a mushroom)"); *see also Pennington v. State*, No. 05-11-00926-CR, 2013 WL 312384, at *1 (Tex. App.—Dallas Jan. 28, 2013, no pet.) (not designated for publication) (defendant was convicted of possession with intent to deliver "psilocybin mushrooms"); *Barnett v. State*, No. 05-96-01654-CR, 1998 WL 255081, at *1 (Tex. App.—Dallas May 21, 1998, no pet.) (not designated for publication) (noting in footnote that "Psilocybin is commonly referred to as 'mushrooms'"); *Gentry v. State*, No. 11-08-00325-CR, 2010 WL 2112715, at *1 (Tex. App.—Eastland, May 27, 2010, pet. ref'd) (not designated for publication) (defendant convicted of possession with intent to deliver psilocin contained in dried mushrooms).

Neither appellant nor the State has pointed us to any Texas authority that addresses the precise arguments appellant is making. However, other state and federal courts analyzing analogous controlled substance statutes have considered similar arguments and have almost uniformly rejected them.

In *United States v. Hussein*, the First Circuit Court of Appeals rejected a challenge to the federal controlled substances act from a defendant who had been convicted of knowingly possessing with intent to distribute khat, a plant that naturally contains the chemical stimulant

Cathinone. *United States v. Hussein*, 351 F.3d 9, 11 (1st Circuit 2003). Under federal law, cathinone, but not the khat plant itself, has been scheduled as a controlled substance. *Id*. at 12–13. The First Circuit rejected the concept that khat containing cathinone is not a controlled substance noting that "DEA regulations provide, however, that 'any material, compound, mixture, or preparation which contains' cathinone is itself a Schedule I controlled substance and is subject to the same prohibitions as the chemical itself." *Id*. at 13. In rejecting the idea that the statute might be subject to a vagueness challenge, the First Circuit goes on to describe this scheduling as an unambiguous regulation prohibiting any material containing cathinone. *Id*. at 15. As a protection against prosecution of unwitting defendants who are unaware that khat contains a controlled substance, the First Circuit notes that scienter is required for a conviction. *Id*. at 14–15.

The First Circuit also rejected the defendant's argument, echoed by appellant in our case, that by scheduling certain plants along with their active ingredients, such as cocaine and coca leaves, opiates and poppy straw, mescaline and peyote cactus, but omitting to schedule khat in addition to cathinone, the Controlled Substances Act must have been intended not to criminalize the possession of khat containing cathinone. *Id*. at 16. In rejecting the argument, the First Circuit opined:

> We find this construct unpersuasive. The alleged pattern is, at best, irregular. For instance, Schedule I prohibits possession of psilocybin and psilocin but not their plant hosts (magic mushrooms). It is simply too much of a stretch to assume, on the basis of this limited pattern, that a person of ordinary intelligence would jump to the conclusion that, despite the clear prohibition on 'material containing cathinone,' khat containing cathinone is excluded from coverage. This conclusion tracks the thinking of a clear majority of the state courts that have been confronted with similar problems. *See, e.g.*, *State v. Atley*, 564 N.W.2d 817, 831 (Iowa 1997) (holding that a state controlled substances statute proscribing knowing possession of psilocybin provides constitutional fair warning that possession of psilocybe mushrooms is illegal); *State v. Justice*, 10 Kan. App. 2d 569, 704 P.2d 1012, 1018 (Kan.Ct.App. 1985) (same); *People v. Dunlap*, 110 Ill.App. 3d 738, 66 Ill.Dec. 466, 442 N.E.2d 1379, 1385 (Ill.App.Ct. 1982) (same, re psilocyn). *But see Fiske v. State*, 366 So.2d 423, 424 (Fla. 1978).

Id.

We note that the outlying Florida case cited in *Hussein* involved unusual facts that would appear to be distinguishable from appellant's case. In that case, Fiske was arrested as he emerged from a field carrying a bag of wild mushrooms. *Fiske v. State*, 366 So. 2d 423, 424 (Fla. 1978). After chemical analysis determined that the mushrooms contained psilocybin, Fiske was placed on deferred adjudication for violating Florida's controlled substances act. *Id*. Like the Texas act, Florida's controlled substances act criminalizes possession of psilocybin but does not mention the mushrooms. *See id*. The Florida Supreme Court determined the statute was not vague on its face because it "explicitly controls any material which contains psilocybin and makes possession of the material a felony." Nevertheless, Fiske's conviction was reversed because the Florida statute did not require knowing possession, thus did not give fair warning as applied to Fiske that the mushrooms he was gathering contained psilocybin, and there was insufficient evidence to show Fiske knew the mushrooms contained psilocybin. *Id*. The Texas statute does contain a requirement that the possession of a controlled substance be done knowingly, and appellant has not contended nor presented any evidence that he was unaware the mushrooms he delivered contained psilocybin or psilocin. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.113(a). Thus, *Fiske* is distinguishable.

In a footnote, appellant cites a Canadian case holding that Canadian law prohibits possessing extracted psilocin and psilocybin but does not criminalize possessing mushrooms containing those substances in its natural state. *See Regina v. Parnell* (1979), 51 Can. Crim. Cas. 2d 413. *Regina* and other Canadian authorities, however, are grounded in the Canadian Food and Drugs Act which, at least at the time *Regina* was decided, prohibited the possession of "restricted drugs," a term that cannot be extended reasonably to mushrooms. *See People v. Dunlap*, 110 Ill. App. 3d 738, 741–42, 66 Ill. Dec. 466, 468–69, 442 N.E.2d 1379, 1381–82 (Ill. App. Ct. 1982) (explaining and distinguishing *Regina* and other Canadian authorities). Because the Canadian

statute applies only to "restricted drugs," it is distinguishable on its face from American controlled substances acts like those of Illinois and Texas that apply to a broader class of substances including materials containing psilocybin or psilocin. *See id.*; *see also* TEX. HEALTH & SAFETY CODE ANN. § 481.032, Sched. I.

Hussein and the other cases cited therein are all persuasive authority that appellant's alleged defense based on statutory construction and constitutional infirmity is not viable. Appellant's contention that the mushrooms at issue do not constitute "a material, compound, mixture, or preparation that contains any quantity" of psilocin and psilocybin violates the plain wording of the controlled substance act and is frivolous. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.032, Sched. I; *see also State v. Atley*, 564 N.W.2d 817, 831 (Iowa 1997) ("Certainly a psilocybe mushroom is a 'material containing psilocybin,' under the ordinary and reasonable use of these words."); *State v. Justice*, 10 Kan. App. 569, 576, 704 P.2d 1012, 1018 (Kan. Ct. App. 1985) ("the use of the phrase 'any material . . . which contains' psilocybin, provides ample notice that *mushrooms* containing psilocybin are controlled.") (emphasis in original); *Dunlap*, 110 Ill. App. 3d at 743, 66 Ill. Dec. at 470, 442 N.E.2d at 1383 ("It is our opinion that the meaning of Section 204(d) of the Controlled Substances Act is expressed without ambiguity. The words 'any material *** which contains any quantity of *** psilocyn' means exactly that—any such material is a Schedule I substance, and thus mushrooms which, in their natural state, contain psilocyn, are included in Schedule I."). *Accord Bemis v. State*, 652 N.E.2d 89, 90–93 (Ind. Ct. App. 1995) (concluding Indiana Controlled Substances Act prohibiting any "material, compound, mixture, or preparation which contains any quantity of" psilocybin or psilocyn, but which does not mention mushrooms, is "sufficiently explicit so as to inform individuals of the proscribed conduct" and consistent with due process as applied to defendant convicted of possessing dried mushrooms containing psilocyn); *State v. Patterson*, 37 Wash. App. 275, 281–82, 679 P.2d 416, 421 (Wash.

Ct. App. 1984) (rejecting challenge to Washington controlled substance statute on ground that prohibition of "any material…which contains any quantity of…Psilocybin" includes substances in their natural state such as psilocybin mushrooms.).

Trial counsel has no duty to pursue frivolous arguments or undertake unreasonable courses of action. *See Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005). Accordingly, we cannot agree with appellant that the trial court erred and abused its discretion in concluding trial counsel did not render ineffective assistance by failing to pursue arguments alleging that the controlled substances act is vague regarding the status of hallucinogenic mushrooms or that the statute should not be interpreted to prohibit the delivery of mushrooms appellant knows contain psilocin or psilocybin. We overrule appellant's second issue.

In his third issue, appellant contends the trial court erred in evaluating his ineffective assistance claim by ignoring inconsistencies between trial counsel's affidavit and other parts of the record, failing to request a transcript or hold a hearing to resolve a factual dispute, and denying him due process by allowing only the State to elicit answers from trial counsel.

The State responds that appellant's third issue is multifarious and should be overruled on that ground. We agree with the State that the issue is multifarious. *See Prihoda v. State*, 352 S.W.3d 796, 801 (Tex. App.—San Antonio 2011, pet. ref'd). Moreover, each element of the issue is without merit.

In an article 11.072 proceeding, the trial court is the sole judge of the credibility of contested evidence when the trial court's facts are supported by the record. *See Torres*, 483 S.W.3d at 42. The trial court's determination to accept trial counsel's affidavit as credible in the face of conflicting evidence does not show an abuse of discretion on the trial court's part. *See id.*

Article 11.072 gives the trial court the option to "order affidavits, depositions, interrogatories, or a hearing, and may rely on the court's personal recollection." TEX. CODE CRIM.

PROC. ANN. art. 11.072 §6(b) (West 2015). The trial court need not conduct a hearing when evaluating a claim that trial counsel rendered ineffective assistance. *See Ex parte Cummins*, 169 S.W.3d 752, 757 (Tex. App.—Fort Worth 2005, no pet.). Moreover, it is not clear the trial court would have the ability to obtain appellant's presence at such a hearing given that he is in federal custody. In this case, the trial court's procedure to solicit an affidavit from trial counsel answering a series of questions that track appellant's allegations satisfies article 11.072. *See id*.

The record shows that on December 15, 2018, the State requested that the trial court solicit an affidavit from trial counsel and propounded a proposed set of question for trial counsel to answer. The trial court granted the State's request and issued a December 15, 2018 order to that effect. Trial counsel filed her affidavit on January 5, 2018. After trial counsel filed her affidavit, appellant filed a January 19, 2018 request for supplemental questions. The trial court granted appellant's request initially and issued an order for trial counsel to file another affidavit. The State filed its response on January 23, 2018. Both trial counsel and the State objected to appellant's list of questions. Trial counsel pointed out she had already answered some of the questions in her prior affidavits, some questions were irrelevant, and some questions, such as questions about her income, were an invasion of privacy. The State objected on the grounds most of the questions had been answered previously and the others were irrelevant to the proceeding. The trial court rescinded its order. The record supports the contentions of trial counsel and the State regarding appellant's supplemental questions.

Although appellant complains the trial court should have ordered a reporter's record of his plea proceedings, having forgone a direct appeal when such a record would have been provided, he has no right to such a record now. *See U.S. v. MacCollom*, 426 U.S. 317, 323–24 (1976) (no constitutional right to free record to pursue collateral appeal); *In re Coronado*, 980 S.W.2d 691, 693 (Tex. App.—San Antonio 1998, no pet.) (indigent applicant not entitled to obtain free

statement of facts to assist preparation of habeas application absent showing habeas not frivolous and applicant had specific need for trial records).

The record shows on December 1, 2017, appellant filed two lengthy motions requesting an evidentiary hearing and a copy of the reporter's record of "transcribed appearances in court made by [trial counsel] with or without defendant." In his motion seeking a record, appellant asserts a record will show trial counsel failed to inform him of the certainty of deportation, to attempt to secure a plea deal that would avoid deportation, to investigate the facts and law, and "[p]erform other reasonable defense function, such as but not limited to, filing for discovery and explaining the law as applies to the facts." Appellant recites his memory that during the punishment hearing, he engaged in the following exchange with the trial court:

> [Appellant]: Am I going to get deported?
>
> [Trial Court]: Did you ask your attorney?
>
> [Appellant]: She does not know.
>
> [Trial Court]: Did you consult an immigration attorney?
>
> [Appellant]: I could not afford one.
>
> [Trial Court]: We are going to proceed.

Appellant then argues that the reporter's record should be reviewed during an evidentiary hearing.

There is no indication on the record that appellant's motions were presented to the trial court or that the trial court ever ruled on them. Without a showing that the motions were brought to the trial court's attention and a ruling was obtained, appellant has not preserved error for appeal. *See* TEX. R. APP. P. 33.1(a)(2); *Guevara v. State*, 985 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (movant must call judge's attention to motion and request ruling to preserve a complaint for appeal).

Moreover, one would not expect a reporter's record of plea and punishment hearings to contain any detailed information about trial counsel's advice, plea negotiations, investigation, discovery, and explanations to his or her client about the law. Thus, the absence of such material on the record would not prove that trial counsel failed to perform her duties as required. Finally, with regard to appellant's recollection of his exchange with the trial court, appellant's affidavit recounted his recollection of the punishment hearing colloquy with the trial court and the trial court concluded appellant's affidavit was not credible. We note the same trial judge presided over appellant's plea hearings and the habeas proceedings. We will defer to the trial court's assessment of the credibility of appellant's representation. *See Torres*, 483 S.W.3d at 42. Appellant has not shown the trial court abused its discretion. We overrule appellant's third issue.

In his fourth issue, appellant attacks various trial court findings and contends the trial court should have concluded trial counsel rendered ineffective assistance. Appellant first contends the trial court erred in not finding trial counsel gave him improper advice regarding sentencing. Appellant contends trial counsel persuaded him to enter a guilty plea by misadvising him that his sentences could be stacked to run consecutively. Appellant contends that health and safety code section 481.132(d) prohibits the stacking of his sentences because the sentences arose out of the same criminal episode. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.132(d) (West 2017) (requiring concurrent sentencing for offenses arising out of the same criminal episode prosecuted in a single criminal action). The State responds that section 481.132(d) would only require concurrent sentencing if the State tried the offenses together. Because the possibility existed at the time trial counsel was advising appellant about his plea that the State could try the offenses separately, the State contends trial counsel's advice was accurate. We agree with the State.

Section 481.132(d) becomes relevant if the State tries the offenses together. *See id.*; *see also Williams v. State*, 253 S.W.3d 673, 674–75 (Tex. Crim. App. 2008) (holding sentences must

be served concurrently on three identical drug offenses prosecuted together on State's motion to consolidate). Appellant does not point to any evidence in the record showing the State had decided to try his cases together. In the absence of such evidence, we cannot conclude the trial court erred in not finding trial counsel ineffective for advising appellant that his cases could be stacked.

Appellant next contends the trial court should have concluded trial counsel rendered ineffective assistance because she failed to advise him that he would be confined by federal immigration authorities during his deportation proceeding. Appellant cites three authorities for the proposition that trial counsel has a duty to inform him that he would be subject to mandatory ICE detention if he entered a guilty plea. *See Glover v. United States*, 531 U.S. 198 (2001); *Ex parte Moussazadeh*, 361 S.W.3d 684 (Tex. Crim. App. 2012); *Ex parte Moody*, 991 S.W.2d 856 (Tex. Crim. App. 1999). None of the authorities appellant cites imposes a duty on trial counsel to advise him about the intricacies of the deportation process or to advise him that he faces a lengthy confinement if he chooses to fight his deportation. Trial counsel averred in her affidavit, and the trial court included in its findings, that trial counsel did advise appellant he would be deported. In response to a question regarding whether trial counsel told appellant that he would be taken into custody if he chose to challenge his deportation, trial counsel responded "[t]he specific question never arose. It was explained to him that he could be taken into custody by the federal authorities." Thus, the record supports the trial court's finding that appellant was advised that he would be taken into custody by federal authorities and he did not inquire about his confinement. Given the advice that was given and the absence of any authorities imposing a legal duty on counsel to offer more detailed advice about the prospects for confinement by federal authorities pending deportation, we are unpersuaded that the trial court erred in not finding trial counsel ineffective for not providing more extensive advice about ICE detention.

Appellant next contends the trial court erred in not finding trial counsel ineffective for not pursuing an appeal. The trial court found, based on trial counsel's affidavit, that appellant did not request an appeal and no appeal was necessary because appellant received a probated sentence which was what he wanted. Because the trial court's findings are supported by the record, we defer to the trial court's determination that trial counsel was not ineffective for not filing an appeal. *See Torres*, 483 S.W.3d at 42.

Appellant next contends trial counsel was ineffective for "prolonging his pretrial release." From the context of appellant's argument, it appears he intended to argue that trial counsel should have requested a bond reduction at an earlier time. Appellant contends he remained in custody for 210 days before his family could post bond, but his bond should have been reduced after ninety days pursuant to code of criminal procedure article 17.151. Had he been timely released, appellant contends, he would have had more time to discover trial defenses and to discover that he would be deported. Appellant contends knowing he had defenses and that he faced deportation would have redirected him toward trial rather than entering a guilty plea.

A defendant detained in jail on a felony charge "must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial" within ninety days of the date the detention began. *See* TEX. CODE CRIM. PROC. ANN. art. 17.151, § 1(1) (West 2015).

In its findings, the trial court found that appellant was released on pretrial bond. The trial court relied upon trial counsel's affidavit in finding trial counsel did not request a reduction in bond because revisiting the bond amount would likely have resulted in an increase in the bond given that appellant was charged with three felonies and members of his family were involved in illegal activity. Appellant cites to no evidence showing the facts of his detention, whether his trial was postponed beyond ninety days because the State was not prepared for trial, and the facts

surrounding his eventual release on bond. Emails appellant attached as exhibits to his writ application show he was out on bond for some period before entering his plea.

Appellant's release on bond rendered the issue of his pretrial detention moot. *Ex parte Guerrero*, 99 S.W.3d 852, 853 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (per curiam) (appeal from denial of pretrial writ of habeas corpus seeking bond reduction rendered moot when trial court reduced bond and applicant posted reduced bond and was released). Trial counsel averred that she had advised appellant that he would be deported and that he had no viable defenses in light of the offenses being captured on audio and video recordings. As we have previously discussed, appellant has not shown he had any viable defenses to discover had he been released earlier on bond. Thus, even if we assume appellant was detained for an excessive period of time, he has not shown he suffered any prejudice from his allegedly excessive detention. We cannot conclude on the record presented that trial counsel's judgment and advice about appellant's prospects for a bond reduction or her alleged failure to seek a bond reduction amounted to ineffective assistance.

Finally, appellant contends trial counsel was ineffective for failing to argue for a downward departure during sentencing and for not correcting the trial court's erroneous interpretation of the law. Appellant contends trial counsel failed to discover mitigating evidence, failed to request back time credit, and failed to correct the trial court's misunderstanding that there is no "mandatory minimum" sentence under federal sentencing guidelines.

The reporter's record of the punishment hearing is not before this Court and, therefore, the record is insufficient to review what trial counsel said or did at the punishment hearing. *See Diaz-Galvan v. State*, 942 S.W.2d 185, 186 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (appellant bears the burden of bringing adequate record on appeal). Additionally, appellant does not set forth what mitigating evidence he contends trial counsel overlooked beyond stating that he "sought to

submit letters of character evidence." Without knowing what type of mitigating evidence, if any, was available, appellant has not carried his burden to show that such evidence would have impacted the punishment assessed to such a degree that the failure to obtain character references constituted ineffective assistance of counsel. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) failure to call witnesses irrelevant to evaluating ineffective assistance claim absent showing witnesses were available and defendant would benefit from their testimony).

Finally, we note that the federal sentencing guidelines and the processes for departures from them have no application in state court punishment proceedings. *See Harper v. State*, 930 S.W.2d 625, 632 (Tex. App.—Houston [1st Dist.] 1996, no pet.). We conclude the trial court did not err in not finding trial counsel ineffective for failing to request a downward departure on punishment. We overrule appellant's fourth issue.

Actual Innocence

In his fifth issue, appellant contends he is actually innocent of the offenses because, under a plain reading of the health and safety code, mushrooms containing psilocybin are not a controlled substance. To be cognizable on a post-conviction writ application, a claim of actual innocence must present new affirmative evidence of the applicant's innocence. *Ex parte Fournier*, 473 S.W.3d 789, 793 (Tex. Crim. App. 2015); *see also Ex parte Spencer*, 337 S.W.3d 869, 877–78 (Tex. Crim. App. 2011) (authorizing two types of "actual innocence" habeas appeals based on newly discovered evidence). Appellant does not bring any newly discovered evidence to prove his innocence—rather he delivers a statutory construction argument that could have been raised on direct appeal.

Furthermore, appellant entered three guilty pleas to delivering psilocybin/psilocin in amounts of four grams or more but less than 400 grams. Although appellant asserts he only delivered mushrooms and the mushrooms in question contained only miniscule amounts of

psilocybin and psilocin, he provides no evidence that would contradict his guilty pleas to possessing the controlled substances in the amounts reflected in the trial court's judgments. Moreover, we have already explained in connection with appellant's second issue that mushrooms containing psilocin and psilocybin clearly constitute a material that contains psilocin and psilocybin in violation of the controlled substances act. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.032, Sched. I. We conclude the trial court did not err in rejecting appellant's claim that he is actually innocent of the offenses. We overrule appellant's fifth issue.

Conclusion

Having overruled appellant's issues, we conclude appellant has not shown the trial court abused its discretion in denying relief on his application for writ of habeas corpus. *See Torres*, 483 S.W.3d at 43; *Kniatt*, 206 S.W.3d at 664.

We affirm the trial court's order denying relief.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
180224F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE IVAN VETCHER

No. 05-18-00224-CR

On Appeal from the 199th Judicial District Court, Collin County, Texas
Trial Court Cause No. W401-81746-2013-HC.
Opinion delivered by Justice Bridges.
Justices Brown and Boatright participating.

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

Judgment entered August 29, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE IVAN VETCHER

No. 05-18-00225-CR

On Appeal from the 199th Judicial District Court, Collin County, Texas
Trial Court Cause No. W199-81478-2013-HC.
Opinion delivered by Justice Bridges.
Justices Brown and Boatright participating.

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

Judgment entered August 29, 2018.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE IVAN VETCHER

No. 05-18-00226-CR

On Appeal from the 199th Judicial District Court, Collin County, Texas
Trial Court Cause No. W199-82614-2013-HC.
Opinion delivered by Justice Bridges.
Justices Brown and Boatright participating.

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

Judgment entered August 29, 2018.