Opinion issued March 17, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-01048-CR

GUADALUPE LOPEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case No. 1203802

MEMORANDUM OPINION

Appellant pleaded guilty without an agreed punishment recommendation to aggravated assault. *See* TEX. PENAL CODE ANN. §§ 22.01(a)(2), 22.02(a)(2) (West Supp. 2010). After a pre-sentence investigation ["PSI"] report was prepared, the

trial court assessed punishment at 18 years' confinement. In this appeal we consider whether the trial court erred by failing to hold a hearing on appellant's motion for new trial. We affirm.

BACKGROUND

At the PSI hearing, appellant testified that on February 16, 2009, someone drove by his house and fired several shots. According to appellant, his house had been shot at on multiple occasions, but the police had made no arrests. Appellant testified that "his anger took over" after the latest shooting, so he grabbed his gun and followed the car. Soon, he saw what he believed to be the car involved in the drive-by shooting parked in a driveway. Appellant pulled over, took his gun, got out of the car, and fired 20 rounds of ammunition into a car owned by Ramiro Hernandez. Hernandez, who was sitting in the car, was unhurt. Appellant later learned that Hernandez was not involved in the earlier drive-by shooting, but was a medical student on his way home from school.

The PSI report showed that appellant had completed probation for evading arrest, but had no other convictions. Although given the chance to make a statement in the report, appellant declined to do so. At the PSI hearing, appellant testified that he was ashamed of his actions and requested that he receive probation. The trial court assessed punishment at 18 years' confinement.

Appellant filed a motion for new trial alleging the following:

> [Appellant] urges the court to reconsider his sentence in light of his acceptance of responsibility for the offense, lack of prior criminal history, the fact that the victim was unharmed and the mitigating circumstances of [Appellant] and his family being attacked which led to the [Appellant] committing the offense. [Appellant] alleges his sentence is disproportionate in comparison to other similarly situated defendants.

Appellant supported his motion for new trial with his own affidavit, in which he stated, "I am asking the court to reconsider its punishment because I do not believe I was sentenced similar to others charged with the same offense."

The trial court denied appellant's motion for new trial without holding a hearing.

DENIAL OF NEW TRIAL HEARING

In his sole point of error, appellant contends the trial court erred in denying his motion without first holding an evidentiary hearing. Specifically, appellant claims that "[h]ow appellant's sentence compares to other similarly situated defendants is not something which can be determined from the record alone."

Standard of Review

When examining a trial court's denial of a hearing on a motion for new trial, we review for an abuse of discretion. *Gonzales v. State*, 304 S.W.3d 838, 842 (Tex. Crim. App. 2010) (citing *Smith v. State*, 286 S.W.3d 333, 339–40 (Tex. Crim. App. 2009)). In so doing, we reverse only when the trial judge's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree.

Id. Our review, however, is limited to the trial judge's determination of whether the defendant has raised grounds that are both undeterminable from the record and reasonable, meaning they could entitle the defendant to relief. *Id.* This is because the trial judge's discretion extends only to deciding whether these two requirements are satisfied. *Id.* If the trial judge finds that the defendant has met the criteria, he has no discretion to withhold a hearing. *Id.*

However, even if a defendant raises matters undeterminable from the record, he is not entitled to a hearing on his motion for new trial unless he establishes the existence of reasonable grounds showing that he could be entitled to relief. *Smith*, 286 S.W.3d at 339. Thus, as a prerequisite to a hearing when the grounds in the motion are based on matters not already in the record, the motion must be supported by an affidavit setting out the factual basis for the claim. *Id.* The affidavit need not establish a prima facie case for relief, but it cannot be conclusory in nature or unsupported by facts. *Id.*

Appellant claims that, even though his sentence falls within the prescribed range of punishment, it is disproportionate to the crime committed, and that a hearing was necessary to develop evidence comparing his sentence to others charged with the same offense. Appellant concedes that he is not raising an Eighth Amendment claim. Instead, he argues that, under *State v. Stewart*, 282 S.W.3d 729 (Tex. App.—Austin 2009, no pet.), his motion raised the issue of whether, because

of disproportionate sentencing by the trial court, he should have been granted a new trial "in the interest of justice."

In *Stewart*, the defendant pleaded guilty to aggravated robbery and true to an allegation regarding a previous conviction in another state. *Id.* at 732. After a PSI, the trial court assessed punishment at 25 years' confinement. *Id.* at 733. A week after the sentencing hearing, the trial judge sent an email to defense counsel stating that he had reviewed the case and concluded that the defendant's sentence was disproportionate to other sentences the trial judge had given in similar cases. *Id.* Thereafter, the defendant filed a motion for new trial and an amended motion for new trial contending that the sentence was contrary to the law and evidence, and that "in the interest of justice" a new trial should be granted because appellant's sentence was disproportionate to similarly situated defendants. *Id.* At the hearing on the motion for new trial, the trial judge stated that he mistakenly assessed punishment at 25 years' confinement based on an error in the PSI, and that had he had the correct information, he would have assessed punishment at 20 years' confinement. *Id.* Thereafter, the trial judge granted the motion for new trial and assessed punishment at 20 years' confinement. *Id.*

The State appealed, arguing that the trial court erred in granting the new trial because the defendant's motion did not state a legal ground for a new trial, i.e., there was no evidence of an Eighth Amendment violation because there was no

evidence in the record regarding punishments in similar cases. *Id.* at 736. The court of appeals agreed that the record did not show an Eighth Amendment violation, but concluded that, in this situation, appellant was moving for a new trial "in the interest of justice" and had the burden of proving "a serious flaw or error in the assessment of punishment that adversely affected his substantial right to a fair trial by causing a disproportionate punishment to be assessed." *Id.* Appellant met this burden by showing that the trial court's punishment decision was based on an error in the PSI. *Id.* at 738.

Appellant argues that he should have been allowed a hearing on his motion for new trial "in the interest of justice" so that he could develop evidence comparing his sentence to "similarly situated defendants sentenced by the trial court." The State responds that no hearing was required on appellant's motion for new trial because appellant's affidavit in support of his motion was conclusory in nature and does not set forth sufficient facts to show reasonable grounds demonstrating that appellant could prevail. *See Smith*, 286 S.W.3d at 339. Affidavits that are conclusory in nature and unsupported by facts do not provide the requisite notice of the basis for the relief claimed, thus the trial court does not abuse its discretion in refusing to hold a hearing in such a situation. *Id.*

This case is not like *Stewart* because here there is nothing in the record or appellant's affidavit to suggest that the trial court's assessment of punishment was

based on an error in the PSI or elsewhere. Appellant's affidavit provides details about the underlying offense and asks the trial court to reconsider his punishment. But, in regard to the claim that the punishment is disproportionate, it alleges only that appellant "[does] not believe that [he] was sentenced similar to others charged with the same offense." Other than appellant's conclusory belief that others were treated differently by the trial court, the affidavit alleges no facts to support his disproportionality claim. The affidavit does not allege any fact that raises an issue of "a serious flaw or error in the assessment of punishment that adversely affected his substantial right to a fair trial by causing a disproportionate punishment to be assessed." *See Stewart*, 282 S.W.2d at 736. As such, the trial court did not abuse its discretion in failing to hold a hearing. *See King v. State*, 29 S.W.3d 556, 569 (Tex. Crim. App. 2000) (trial court did not abuse its discretion in failing to hold a hearing on appellant's motion for new trial because the appellant's bare assertions did not establish facts which would entitle him to a new trial); *Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994) (holding that because affidavit was conclusory in nature and thus deficient, motion for new trial was not sufficient to put trial court on notice that reasonable grounds existed).

CONCLUSION

Because appellant's motion for new trial was supported by a conclusory affidavit, the trial court did not abuse its discretion in refusing to hold a hearing on appellant's motion for new trial. We overrule appellant's sole point of error.

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.

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