Opinion issued May 3, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00472-CR

ALFREDO LARA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Case No. 1414552

MEMORANDUM OPINION

After appellant, Alfredo Lara, pleaded guilty to the first-degree felony offense of causing serious bodily injury to a child, the trial court found appellant guilty and

assessed his punishment at forty years' confinement.[1] In two issues, appellant contends that (1) this appeal should be abated for the trial court to hold a hearing on his motion for new trial because the original hearing on the motion was inadvertently scheduled for a date after the motion had been overruled by operation of law; and (2) he is entitled to a hearing on his motion for new trial, which alleged ineffective assistance of counsel based on his trial counsel's alleged failure to investigate and present mitigating evidence at his sentencing hearing.

We affirm.

Background

The State indicted appellant for the offense of causing serious bodily injury to a child, C.H., by pushing or throwing C.H. with his hand. The indictment contained two deadly weapon allegations; specifically, that appellant used or exhibited a deadly weapon, his hand and an unknown object, during the commission of the offense. Appellant pleaded guilty to the offense without an agreed recommendation as to punishment.

After the preparation of a pre-sentence investigation report, the trial court held a sentencing hearing. At the hearing, Amanda Hurt testified that she and appellant, her ex-boyfriend, had a son together, C.H., and that they shared custody of C.H. On June 2, 2012, C.H., who was six months old at the time, was in appellant's care.

[1] *See* TEX. PENAL CODE ANN. § 22.04(a)(1) (Vernon Supp. 2015).

Appellant called Hurt and informed her that C.H. had fallen out of bed and needed to go to the hospital. At the hospital, Hurt learned that, in addition to the head injuries that C.H. sustained on that date, he also had older injuries as well. C.H.'s doctors informed Hurt that his injuries were not consistent with what appellant said had happened to him.

C.H. suffered a few strokes while in the hospital, and he spent three and a half weeks there before being placed in the custody of Children's Protective Services ("CPS") while that agency conducted an investigation. CPS closed that investigation and returned C.H. to Hurt six weeks later. C.H. was nearly three years old at the time of the sentencing hearing, and Hurt testified that she has to take him to a doctor every six months to drain a shunt that was placed in his head, that C.H. has paralysis to part of his left side caused by the strokes he suffered, that he has weekly speech and physical therapy appointments, and that he is developmentally delayed. Hurt testified that she does not approve of appellant's actions and that she "can't stand him," but she requested that appellant be placed on probation so she could continue to receive child support payments from him to pay for C.H.'s daycare expenses.

Appellant testified on his own behalf. Appellant acknowledged that he initially fabricated a story about what happened to C.H., but he then eventually told the investigator what actually happened and admitted responsibility eight months after the incident. He testified that he became frustrated with C.H.'s crying and he

"threw him in his car seat." Appellant immediately recognized that C.H. was hurt, and he drove him to the hospital. Appellant acknowledged on cross-examination that he threw C.H. in the car seat "hard" "between four or five times." He also acknowledged that C.H. fell off the bed and sustained head injuries while in his care approximately a week or two before the incident resulting in C.H.'s hospital visit.

At the close of the sentencing hearing, the trial court assessed appellant's punishment at forty years' confinement. The trial court pronounced appellant's sentence in open court on October 29, 2014.

Appellant's appellate counsel timely filed a motion for new trial on December 1, 2014. In this motion, appellant argued that his trial counsel rendered constitutionally ineffective assistance because his counsel failed to (1) properly advise him of the consequences of his plea; (2) communicate any plea-bargain offers; and (3) properly investigate the case such that mitigating evidence could be presented at the sentencing hearing. Appellant also argued that his counsel never advised him to "retain a medical expert to review his child's medical records so that a prognosis could be presented to the Court." He further argued that, during the sentencing hearing, his trial counsel did not present evidence that he had completed a sixteen-week anger management class and a ten-week parenting course, nor did counsel present to the trial court the results of appellant's "extensive psychological evaluation" or the negative results of his "numerous drug and alcohol tests."

Appellant concluded by stating that he would present the motion to the trial court within ten days of filing and requesting that the trial court conduct a hearing on the motion no later than January 12, 2015, seventy-five days from the date the trial court imposed appellant's sentence.

Appellant supported his motion for new trial with an affidavit. In this affidavit, he averred that his trial counsel rendered ineffective assistance in the following respects:

- My lawyer never explained the difference between regular community supervision and deferred adjudication;
- I was never told that the Court could not sentence me to regular community supervision because I had pleaded guilty to an offense involving the use of a deadly weapon;
- My lawyer never reviewed any of my child's medical records with me;
- I was not advised that I could hire a medical expert to review those medical records so that my child's prognosis could be established;
- Even though there was an extensive CPS investigation, my lawyer never reviewed any of the CPS records with me, and as far as I know, he never obtained the CPS records so that he could review them[;]
- During the PSI hearing, my lawyer never informed the Court that I had attended, and successfully completed (1) a sixteen-week anger management class; and (2) a ten-week parenting course[.] I also underwent an extensive psychological evaluation, the results of which were never presented to the Court. None of my numerous drug and alcohol tests, all of which were negative, were offered into evidence[;]

- My lawyer never communicated any plea-bargain offers from the State to me[; and]
- My lawyer never explained to me how an affirmative finding of a deadly weapon would adversely affect my parole eligibility.

Appellant presented his motion for new trial to the trial court coordinator, and the motion was set for hearing on January 20, 2015.

The motion for new trial was overruled by operation of law on January 12, 2015, seventy-five days after the trial court pronounced appellant's sentence in open court. On January 20, 2015, the scheduled date for the hearing on the motion for new trial, the trial court held an informal hearing on the record in which the court and appellant's appellate counsel discussed what had occurred involving the motion. Appellate counsel stated:

> I brought over a copy [of the new trial motion] to the coordinator and I believe the reset form will indicate when that date was, which was on [December 8, 2014]. It has to be presented, of course, to the Court. I left a courtesy copy with you. We discussed when we would have a date for a hearing. As to—I have—the hearing must be conducted within 75 days and I have in my motion January 12. When I was reading that, discussing the hearing, I was—I was a little bit dyslexic. I read 21st. So when I read on the 20th, I figured that would be okay because it was within 75 days. So that's why it was set for the 20th, today, but that is not the case. So the time has expired. It's been overruled as a matter of law, but I think the motion raises valid questions that, if found to be true, would result in either the granting of a new trial or a new punishment hearing.

Appellate counsel informed the trial court that he intended to file a notice of appeal and seek an abatement from this Court for the trial court to hold a hearing on the motion for new trial. This appeal followed.

Untimely Hearing on Motion for New Trial

In his first issue, appellant contends that this Court should abate the appeal to require the trial court to hold a hearing on his motion for new trial which, although timely filed, was overruled by operation of law before the scheduled hearing on the motion was held.

If a defendant chooses to file a motion for new trial following a conviction, he generally must present the motion to the trial court within ten days of filing it. TEX. R. APP. P. 21.6. The trial court must then rule on a motion for new trial by written order within seventy-five days after imposing sentence in open court or the motion is overruled by operation of law. TEX. R. APP. P. 21.8(a), (c); *State v. Moore*, 225 S.W.3d 556, 569 (Tex. Crim. App. 2007) ("[T]he trial court's authority to rule on a motion for new trial extends to the seventy-fifth day . . . after sentence is imposed or suspended in open court."); *Belcher v. State*, 93 S.W.3d 593, 595 (Tex. App.—Houston [14th Dist.] 2002, pet. dism'd). When a defendant presents a motion for new trial to the trial court, the burden rests upon the defendant, as the party presenting the motion, to ensure that the hearing on the motion is set for a date within the trial court's jurisdiction. *Crowell v. State*, 949 S.W.2d 37, 38 (Tex. App.—San

Antonio 1997, no pet.). If the trial court sets the hearing for a date outside its jurisdiction, the defendant must bring the issue to the trial court's attention, such as by objecting to the hearing date, or else the defendant waives error. *Id.*; *see also Baker v. State*, 956 S.W.2d 19, 24–25 (Tex. Crim. App. 1997) (holding, after trial court set new trial motion for hearing outside 75-day period, that "[b]y failing to object to the untimely setting, Appellant has failed to preserve his complaint that the trial judge should have held a timely hearing").

Here, the trial court imposed appellant's sentence in open court on October 29, 2014. The seventy-fifth day after sentence was imposed was January 12, 2015. Thus, the trial court had until January 12, 2015, to rule on appellant's motion for new trial by written order or else it would be overruled by operation of law. *See* TEX. R. APP. P. 21.8(a), (c). However, when appellant presented his motion for new trial to the trial court coordinator, the hearing on this motion was set for January 20, 2015, eight days after the trial court lost jurisdiction to rule on the motion. Appellant did not object to this hearing date, and there is no indication in the record that appellant brought to the trial court's attention the fact that this hearing date was beyond the trial court's 75-day deadline to rule on the motion for new trial. At an informal hearing before the trial court on January 20, 2015, appellate counsel stated:

> I brought over a copy [of the new trial motion] to the coordinator and I believe the reset form will indicate when that date was, which was on [December 8, 2014]. It has to be presented, of course, to the Court. I left a courtesy copy with you. We discussed when we would have a

> date for a hearing. As to—I have—the hearing must be conducted within 75 days and I have in my motion January 12. When I was reading that, discussing the hearing, I was—I was a little bit dyslexic. I read 21st. So when I read on the 20th, I figured that would be okay because it was within 75 days. So that's why it was set for the 20th, today, but that is not the case. So the time has expired. It's been overruled as a matter of law, but I think the motion raises valid questions that, if found to be true, would result in either the granting of a new trial or a new punishment hearing.

Appellant, therefore, did not bring this issue to the trial court's attention until after the trial court's time period for ruling on the motion had already expired and his motion was overruled by operation of law. *See* TEX. R. APP. P. 21.8(c); *Belcher*, 93 S.W.3d at 596.

Appellant cites to no law providing that counsel's mistake in setting the hearing date for a motion for new trial excuses his responsibility to ensure that the trial court hear and rule on the motion within seventy-five days after imposing sentence and thus entitles him to an abatement so that the trial court can hold a hearing on the motion. *See Crowell*, 949 S.W.2d at 38 (stating that burden is upon party presenting new trial motion to ensure that hearing is set for date within trial court's jurisdiction); *see also Baker*, 956 S.W.2d at 24–25 (holding that defendant fails to preserve complaint that trial court should have held timely new trial hearing if defendant fails to object to untimely setting). After receiving notice that the hearing on the new trial motion was set for a date outside the trial court's 75-day window to rule upon the motion, appellate counsel bore the burden to object to the

untimely hearing date. Because he did not so object or otherwise bring the error to the trial court's attention, appellant has waived any complaint concerning the trial court's failure to hold a hearing on the motion. *See Baker*, 956 S.W.2d at 24–25; *Bacey v. State*, 990 S.W.2d 319, 335 (Tex. App.—Texarkana 1999, pet. ref'd) ("Because Bacey did not call the trial court's attention to its failure to schedule a hearing within the seventy-five-day period, we hold that she waived her complaint); *Crowell*, 949 S.W.2d at 38.

We overrule appellant's first issue.[2]

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[2] Because we hold that appellant did not preserve his complaint concerning the timeliness of the new trial hearing, we need not address appellant's second issue concerning his entitlement to a hearing on the ineffective assistance arguments that he raised in his motion. The trial court retains authority to rule on a timely-filed motion for new trial for seventy-five days after imposing sentence. *State v. Moore*, 225 S.W.3d 556, 569 (Tex. Crim. App. 2007). After that point, the motion is overruled by operation of law and "[a]ny action on the motion by the trial court after this time expired would have constituted a nullity." *State ex rel. Cobb v. Godfrey*, 739 S.W.2d 47, 49 (Tex. Crim. App. 1987); *see also State v. Zavala*, 28 S.W.3d 658, 659 (Tex. App.—Corpus Christi 2000, pet. ref'd) (noting that appellate court may not utilize Rule of Appellate Procedure 2 to suspend 75-day time period). Even if appellant was otherwise entitled to a hearing on his new trial motion, by failing to bring the untimeliness of the hearing to the trial court's attention before it lost jurisdiction to rule upon the motion, the trial court lost the ability to rule on the merits of appellant's motion, and appellant waived his complaint concerning his entitlement to a hearing. *See Crowell v. State*, 949 S.W.2d 37, 38 n.1 (Tex. App.—San Antonio 1997, no pet.) (noting that defendant's failure to object to untimeliness of new-trial hearing "precludes further consideration by this court" of her complaint of ineffective assistance of counsel).

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Higley.

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