Opinion issued December 20, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00139-CR

EX PARTE OSCAR MINJARE SANCHEZ, JR., Appellant

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 1412036-A

MEMORANDUM OPINION

Appellant, Oscar Minjare Sanchez, Jr., appeals from the denial of his post-conviction application for a writ of habeas corpus filed under Texas Code of Criminal Procedure art. 11.072.[1] Sanchez, in his sole issue, contends that his trial

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[1] *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 2(b) (West 2015).

counsel rendered ineffective assistance by failing to call necessary exculpatory witnesses during the guilt/innocence phase of his trial. We affirm.

BACKGROUND

On August 11, 2013, Sanchez was the designated driver for his four passengers on a night out celebrating a friend's birthday at two bars. Sanchez drank two beers at the bars before he started to drive his four passengers home in his Ford F-250 pickup truck in Harris County. He was driving in the right-hand lane of Highway 249 when a police chase was in front of him and an unmarked police car, a Chevy Impala driven by Harris County Sheriff's Office Lieutenant Gaisile Goudeau, moved in front of him, causing him to swerve left to try to get out of the way. The front of Sanchez's truck collided with the back of Lt. Goudeau's Impala, which caused the back of the Impala to go up in the air before it struck the curb and spun into a nearby parking lot. Sanchez did not stop and he continued home. After Lt. Goudeau radioed for help, Sergeant K. Benoit, who was following the chase vehicles and had seen the accident, returned to the scene and saw that Lt. Goudeau had obvious injuries from the crash. Sgt. Benoit waited with Lt. Goudeau until she was transported to the hospital, where she stayed for four days after suffering severe injuries requiring three surgeries and months of rehab. *See Sanchez v. State*, No. 01-16-00293-CR, 2017 WL 1424949, at *1–2 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication).

After Sanchez was charged with the third-degree felony offense of failure to stop and render aid for hitting the Impala and running away, he was convicted following a jury trial in 2016. *See id.* at *1. The trial court assessed Sanchez's punishment at ten years' confinement, but probated this sentence by placing him on community supervision for a period of ten years under trial court cause number 1412036. *See id.* This Court affirmed Sanchez's conviction in 2017, in which he raised two issues, that the trial court erred in submitting a voluntary-intoxication charge to the jury and that the evidence was insufficient because it failed to show that he had knowledge of the accident. *See id.* The Court of Criminal Appeals refused Sanchez's petition for discretionary review and this Court's mandate issued on October 20, 2017.

On December 12, 2017, Sanchez filed an application for a writ of habeas corpus under Texas Code of Criminal Procedure article 11.072 through his habeas counsel, Clay S. Conrad and Michael A. Lamson. In his application, Sanchez alleged only that his trial counsel, Thomas B. Dupont II, had provided ineffective assistance by failing to call necessary exculpatory witnesses. Sanchez claimed that his trial counsel should have called three of the four passengers in his truck, Captain Richard Grassi, Sharleen Martin, and Bobby Joe Flores, to testify. These three witnesses provided affidavits, attached to Sanchez's application, stating that they were passengers in his truck, they saw him swerve around the car that darted out in

front of them, and they were not aware of a collision. Captain Grassi's and Flores's affidavits were dated in August 2017 while Martin's affidavit was dated in December 2017. Sanchez did not file a motion for new trial and none of these affidavits or witnesses were presented during Sanchez's 2016 trial.

On January 11, 2018, the habeas court signed an order denying Sanchez's habeas application without an evidentiary hearing. Sanchez timely filed a notice of appeal on January 25, 2018, and the habeas court certified that Sanchez had a right of appeal. Because the habeas court's order neither denied Sanchez's habeas application as frivolous nor did the clerk's record include the required findings of fact or conclusions of law, this Court abated this appeal. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 7(a) (West 2015).

The Habeas Court's Findings of Fact and Conclusions of Law

On April 10, 2018, a supplemental clerk's record was filed, which included the habeas court's April 6, 2018 findings of fact and conclusions of law. The pertinent findings and conclusions are, as follows:

FINDINGS OF FACT

. . . .

5. The applicant claims trial counsel failed to present evidence from Captain Richard Grassi, Sharleen Martin, and Bobby Joe Flores during the applicant's trial. *Applicant's Writ* at 8-9.

6. The applicant claims that these witnesses would have testified that they were passengers in the applicant's vehicle and that they were not aware of the applicant's vehicle colliding with the complainant's vehicle. *Applicant's Writ* at 8-9.

7. The trial court finds that trial counsel did not call any witnesses in his case-in-chief during the guilt[/]innocence phase of the applicant's trial.

8. The trial court finds, based on the reporter's record, that trial counsel's cross[-]examination of Deputy Ryan Musil elicited testimony that Grassi, Martin, and Flores all made consistent statements to law enforcement about what happened. . . .

. . . .

11. The trial court finds that the applicant fails to show that trial counsel was deficient.

12. The trial court finds that the applicant fails to establish a reasonable probability that the result of the proceeding would have been different had these witnesses been called to testify at the applicant's trial.

CONCLUSIONS OF LAW

. . . .

3. The applicant fails to show that Grassi, Martin, and Flores were available and that their testimony would have benefited the defense. *See King v. State*, 649 S.W.2d 42 (Tex. Crim. App. 1983); *[E]x parte Flores*, 387 S.W.3d 626, 638 (Tex. Crim. App.. 2012) (the applicant must still show that "some benefit" establishes a reasonable probability that the result of the proceeding would have been different, i.e., one sufficient to undermine confidence in the outcome).

. . . .

5. In all things, the applicant has failed to demonstrate that he was denied the effective assistance of counsel.

Accordingly, the instant application is **DENIED.**

After this Court reinstated the case and requested briefing, both Sanchez and the State filed briefs and Sanchez filed a reply. *See* TEX. R. APP. P. 31.1.

DISCUSSION

A. Standard of Review

Article 11.072 states that, "[a]t the time the application is filed, the applicant must be, or have been, on community supervision, and the application must challenge the legal validity of: (1) the conviction for which or order in which community supervision was imposed; or (2) the conditions of community supervision." TEX. CODE CRIM. PROC. ANN. art. 11.072, § 2(b) (West 2015). Because Sanchez challenges the validity of the conviction which placed him on community supervision for a ten-year period, we have jurisdiction to review the denial of his article 11.072 habeas application. *See id.* § 8 ("If the application is denied in whole or part, the applicant may appeal under Article 44.02 and Rule 31, Texas Rules of Appellate Procedure.").

Generally, an appellate court reviews a trial court's decision to grant or deny habeas corpus relief for an abuse of discretion. *See Ex parte Montano*, 451 S.W.3d 874, 877 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). In reviewing the trial court's decision to grant or deny habeas corpus relief, we view the evidence in the light most favorable to the trial court's ruling. *See id.*

We afford almost total deference to the trial court's determination of historical facts supported by the record, especially when the fact findings are based upon credibility and demeanor. *Ex parte Montano*, 451 S.W.3d at 877 (citing *Guzman v.*

State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997)). And we afford the same amount of deference to the trial judge's rulings on applications of law to fact questions if the resolution of those ultimate questions turns on an evaluation of credibility and demeanor. *Sandifer v. State*, 233 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Guzman*, 955 S.W.2d at 89). If the resolution of those ultimate questions turns on an application of legal standards, however, we review the determination de novo. *Id.* (citing *Guzman*, 955 S.W.2d at 89). We will uphold the habeas court's judgment as long as it is correct under any theory of law applicable to the case. *See Ex parte Taylor*, 36 S.W.3d 883, 886 (Tex. Crim. App. 2001) (per curiam). An appellate court reviews the evidence presented in the light most favorable to the trial court's ruling, regardless of whether the court's findings are implied or explicit, or based on affidavits or live testimony, provided they are supported by the record. *See Ex parte Wheeler*, 203 S.W.3d 317, 325–26 (Tex. Crim. App. 2006); *Ex parte Murillo*, 389 S.W.3d 922, 926 (Tex. App.—Houston [14th Dist.] 2013, no pet.). We may treat findings mislabeled as conclusions of law as findings of fact. *See Ray v. Farmers State Bank of Hart*, 576 S.W.2d 607, 608 n.1 (Tex. 1979).

B. Applicable Law

To establish that trial counsel rendered ineffective assistance, an appellant must demonstrate, by a preponderance of the evidence, that (1) his counsel's

performance was deficient and (2) there is a reasonable probability that the result of the proceeding would have been different but for his counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004); *see also Robinson v. State*, 514 S.W.3d 816, 823 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). The appellant's failure to make either of the required showings of deficient performance or sufficient prejudice defeats the claim of ineffective assistance. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").

We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and, therefore, the appellant must overcome the presumption that the challenged action constituted "sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Williams*, 301 S.W.3d at 687; *see also Robinson*, 514 S.W.3d at 823. Our review is highly deferential to counsel, and we do not speculate regarding counsel's trial strategy. *See Bone v. State*, 77 S.W.3d 828, 833, 835 (Tex. Crim. App. 2002). To prevail on an ineffective assistance claim, the appellant must provide an appellate record that affirmatively demonstrates that counsel's performance was not based on sound strategy. *See*

Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (holding that record must affirmatively demonstrate alleged ineffectiveness).

Part of the duty to investigate is counsel's responsibility to seek out and interview potential witnesses. *Ex parte Welborn*, 785 S.W.2d 391, 394 (Tex. Crim. App. 1990). To demonstrate ineffective assistance of counsel based on an uncalled witness, an appellant must show two things: (1) the witness would have been available to testify; and (2) the witness's testimony would have been of some benefit to the defense. *Ex parte Ramirez*, 280 S.W.3d 848, 853–54 (Tex. Crim. App. 2007) (per curiam) (denying habeas relief based on argument that trial counsel was ineffective for failing to call witnesses); *Ex parte White*, 160 S.W.3d at 52; *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983); *see also Robinson*, 514 S.W.3d at 824. To meet the availability requirement, the proposed witness must testify or swear in an affidavit that he or she was available to testify at the defendant's trial. *See Ex parte Ramirez*, 280 S.W.3d at 853 (denying habeas relief after holding appellant's trial attorney was not ineffective for not calling witness whose alleged statement was "not sworn or signed" and witness did "not state that she was available to testify at [defendant's] trial"); *Ex parte White*, 160 S.W.3d at 52; *King*, 649 S.W.2d at 44.[2]

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[2] *See, e.g.*, *Alvarado v. State*, No. 04-03-00289-CR, 2006 WL 332536, at *5–9 (Tex. App.—San Antonio Feb. 15, 2006, pet. ref'd) (mem. op., not designated for publication) (finding that witnesses stating that they would have talked to defense

This type of ineffectiveness claim may be established through either testimony on the record or an affidavit from the uncalled witness (i.e., mere allegations in a motion/petition are not sufficient to establish these factors). *See Ex parte White*, 160 S.W.3d at 52 (applicant provided affidavit from uncalled witness); *see also Robinson*, 514 S.W.3d at 824 (rejecting ineffectiveness claim where appellate counsel obtained letters from proposed witnesses, not affidavits, which neither indicated their availability or willingness to testify at appellant's trial nor described substance of testimony had they been asked to testify). While we give deference to any underlying historical fact determinations made by the habeas court, we review the ultimate question of prejudice de novo. *See Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005).

C. Analysis

In his sole issue, Sanchez claims that the habeas court abused its discretion because he proved that his trial counsel was ineffective by showing that Captain

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counsel, if contacted, was not evidence that witnesses were "available to testify on the date of [appellant's] trial"); *Granados v. State*, No. 03-04-00399-CR, 2005 WL 1584354, at *3 (Tex. App.—Austin July 6, 2005, no pet.) (mem. op., not designated for publication) (affirming conviction and denial of motion of new trial because motion did "not specify the facts to which each witness would have testified or whether they were available to testify on the date of trial"); *Bethany v. State*, Nos. 05-04-00361–362-CR, 2005 WL 1385224, at *4 (Tex. App.—Dallas June 13, 2005, pet. ref'd) (op. on rehr'g, not designated for publication) (affirming conviction and denial of motion for new trial because "[a]lthough his motion for new trial lists three 'material witnesses to the defense' who appellant claims should have been called, the motion does not indicate what those witnesses would have testified to or whether they were available to testify on the date of trial").

Grassi and Sharleen Martin were available to testify and would have aided his defense. The State contends that Sanchez's ineffectiveness argument is irrelevant because the witnesses' affidavits did not state that they were available on the date of trial and would have benefited the defense. In any event, the State argues that Sanchez cannot show either of the *Strickland* prongs because he cannot demonstrate that his trial counsel's performance was deficient or that there was a reasonable probability that the jury would have acquitted him had the witnesses testified.

1. Performance Prong

With respect to the first *Strickland* prong, performance of counsel, as discussed above, to demonstrate ineffectiveness of counsel based on an uncalled witness, an appellant must show two things: (1) the witness would have been available to testify; and (2) the witness's testimony would have been of some benefit to the defense. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Ex parte Ramirez*, 280 S.W.3d at 853; *Ex parte White*, 160 S.W.3d at 52. Sanchez conceded that Bobby Flores's affidavit did not state that he was available to testify, so we only need to analyze the affidavits of Sharleen Martin and Captain Grassi. Here, although the habeas court mislabeled it as a conclusion of law No. 3, as noted above, we construe the habeas court's finding that Sanchez failed to show that Grassi and Martin were available and that their testimony would have benefited the defense as a finding of fact. *See Ray*, 576 S.W.2d at 608 n.1.

a. Sharleen Martin's Affidavit

Martin's affidavit stated in pertinent part, that "[o]n the night of August 11, 2013, my husband Bobby Flores, Rick Grassi and his girlfriend Mariam, Oscar Sanchez and me went out for Rick's birthday . . . at a pub playing shuffle board and then decided to go to Whiskey River." Martin's affidavit continued that, after leaving Whiskey River, "there was a high speed chase on 249 going north" and "Rick asked Oscar to follow the chase while he was on the phone with someone from his police station where he works." Martin's affidavit stated that "I was sitting behind Oscar chatting with Mariam not really paying much attention to the road up ahead but did see a car up ahead on the left side of us," and then "Oscar slams on his brakes and honks his horn, and swerves away from a car." Martin's affidavit concluded that, "I did not observe any collision between Oscar's truck and any car that night," and "[i]f we had been in a collision I would have noticed it," and that, "[i]f I had been asked to testify at Mr. Sanchez's trial, I would have gladly done so."

Although Martin's affidavit stated that, if she had been asked to testify, she "would have gladly done so," this indicates only a conditional willingness to testify if asked, not that she was actually available to testify at Sanchez's trial. *See Ex parte Ramirez*, 280 S.W.3d at 853 (witness did not state that she was available to testify at defendant's trial); *Ex parte White*, 160 S.W.3d at 52; *King*, 649 S.W.2d at 44. Thus, Sanchez did not show that Martin would have been available to testify on the

dates of his trial. Therefore, there is no need to discuss the second requirement of whether Martin's testimony would have been of some benefit to the defense.

b. Captain Richard Grassi's Affidavit

Captain Grassi's affidavit stated in pertinent part, that he was a Tomball police captain and that on August 11, 2013, the date in question, he was riding as a passenger in Sanchez's truck with three other passengers when they observed a high-speed car chase conducted by the Harris County Sheriff's Office. Captain Grassi further stated that he contacted the Tomball Police Department to advise them what he was witnessing, and he told Sanchez to follow the chase. During the chase, an unmarked police vehicle cut directly in front of Sanchez's truck, forcing Sanchez to veer to the left to avoid striking the car, but Captain Grassi stated he was never aware of Sanchez's truck actually striking that vehicle, and he did not see any visible damage to Sanchez's truck the next day. Captain Grassi concluded that he "was not aware of having collided with the other vehicle," but that Sanchez's "truck is a large, heavy-duty work truck, so it is possible there was a glancing strike to the other vehicle, but nobody in Oscar's vehicle showed any knowledge of having been in a collision[.]"

Sanchez cannot show that Captain Grassi would have been available to testify because his affidavit did not state anything about his availability to testify at Sanchez's trial. *See Ex parte Ramirez*, 280 S.W.3d at 853; *King*, 649 S.W.2d at 44.

Therefore, there is no need to discuss the second requirement of whether Captain Grassi's testimony would have been of some benefit to the defense.

We afford total deference to the habeas court's findings of fact that Sanchez failed to show that Martin and Captain Grassi were available to testify at Sanchez's trial because they are supported by the record. *See Ex parte Wheeler*, 203 S.W.3d at 325–26. Thus, we conclude that Sanchez cannot show that either Martin or Captain Grassi was available to testify at Sanchez's trial. *See Ex parte White*, 160 S.W.3d at 52; *see also Robinson*, 514 S.W.3d at 824.

2. Prejudice Prong

With respect to the second *Strickland* prong, as noted above, the "appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong." *Williams*, 301 S.W.3d at 687. Thus, because Sanchez failed to demonstrate that his trial counsel's performance was deficient, this Court does not need to consider the prejudice prong. Accordingly, we hold that the trial court acted within its discretion in denying Sanchez habeas relief. We overrule his sole issue.

CONCLUSION

We affirm the order of the trial court denying habeas relief.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Massengale, and Brown.

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