Opinion issued November 10, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00800-CR

EX PARTE OCTAVIAN BECCIU, Appellant

On Appeal from the County Criminal Court at Law No. 9
Harris County, Texas
Trial Court Case No. 1799007A

O P I N I O N

In 2011, appellant, Octavian Becciu, pleaded guilty to the Class A misdemeanor offense of assault on a family member.[1] Appellant was placed on deferred adjudication, which he successfully completed in January 2013. In 2019,

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1 *See* TEX. PENAL CODE ANN. § 22.01(a).

he brought the underlying application for a writ of habeas corpus, seeking to set aside the order of deferred adjudication on the basis that his guilty plea was not voluntary. The trial court denied the request for habeas relief on the basis of laches. In three issues, appellant contends that (1) his guilty plea was involuntary due to the severe pain that he was in as a result of a motorcycle accident that had occurred several days prior to the charged offense; (2) his original plea counsel rendered ineffective assistance of counsel and this appeal should be abated to allow him to raise this claim before the trial court; and (3) the trial court erred in concluding that his request for habeas relief was barred by the doctrine of laches.

We affirm.

Background

On December 16, 2011, appellant was involved in an altercation with his girlfriend, and he was arrested and charged with the Class A misdemeanor offense of assault on a family member. Three days later, on December 19, appellant pleaded guilty to the charged offense. The plea paperwork contained the following statement:

> I confess that I committed the offense as alleged in the State's information and that each element of the State's pleading is true. In open court I freely and voluntarily enter my plea of guilty/*nolo contendere* to the offense charged in the information and request the Court to make immediate disposition of this case based upon my plea.

The trial court accepted appellant's guilty plea, deferred adjudication of guilt, and placed appellant on community supervision for one year. Appellant successfully

discharged his community supervision obligation, and the trial court dismissed the case against him in January 2013.

In May 2019, appellant filed the underlying application for writ of habeas corpus. Appellant sought relief from the order of deferred adjudication, arguing that his guilty plea was involuntary. Appellant stated that he had been involved in a motorcycle accident on December 11, 2011, and fractured his leg. On December 16, five days later, appellant and his girlfriend became involved in a physical altercation at the apartment they shared, and appellant was arrested. Appellant stated that he was not allowed to take his pain medication to the jail with him. After he was booked in the jail, he saw medical personnel, but he was not given pain medication.

Appellant argued that three days after his arrest, on December 19, 2011, he was taken to court for his first court appearance, where he met his court-appointed counsel, David Fleischer, for the first time. Appellant argued:

> [Appellant] tried to explain that [his girlfriend] attacked him but [Fleischer] responded that, if he disputed her account, he would have to proceed to trial and that it could be months before that occurred, months that he would have to spend waiting in the Harris County Jail. [Appellant] immediately dismissed that idea and explained to [Fleischer] his injury, the lack of care or medication in the jail, and that he needed to get out immediately. [Fleischer] then explained that he was able to get the prosecutors to offer him deferred adjudication community supervision which would allow him to get out of jail immediately.
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> The most important thing to [Appellant] at that instant was the fact that, by accepting the plea offer, he would get released from the Harris County Jail. He agreed to do so and signed off on paperwork

> acknowledging he was entering his plea freely and voluntarily, even though in his mind, he knew his decision was anything but that.

Appellant appeared before a visiting judge and stated that he was pleading guilty because he was guilty, "even though he knew he was not guilty and his decision to plead guilty was not free and voluntary." The visiting judge accepted appellant's guilty plea and he was released from jail the next morning. Appellant immediately went to the hospital, and soon thereafter, he had surgery on his leg.

Appellant argued that he had been denied employment opportunities as a result of his criminal record. He argued that he had experienced periods of homelessness and financial difficulties following his release from jail and from the hospital. He stated that he attempted to enlist in the Army in 2014, but he could not enlist because his offense involved domestic violence and he was barred from possessing a firearm. He further stated that he had been turned down from employment opportunities because of his criminal history. Appellant's application for habeas relief raised one ground for relief: he argued that his guilty plea was involuntary "due to his medical condition and associated injury." Appellant did not argue that his plea counsel had rendered ineffective assistance.

In response, the State argued that appellant failed to meet his burden to prove, by a preponderance of the evidence, that his guilty plea was involuntary. The State argued that appellant "understood his options and that, if he disputed his guilt, he would have to go to trial, but he did not wish to do so." The State further contended

that appellant had not argued that, as a result of his medical condition, he was unable to understand the proceedings or the consequences of pleading guilty, but, instead, appellant "freely admits that he lied to the Court and manipulated the proceedings in order to gain his immediate release."

The State also argued that appellant's request for habeas relief should be barred by the doctrine of laches. The State argued that appellant had admitted that he learned of the adverse employment consequences his criminal history would have while he was still on deferred adjudication in 2012, but he waited until May 2019, more than seven years after he was placed on deferred adjudication, to bring his habeas claim. The State argued that appellant's delay in bringing his habeas claim caused it prejudice because it had destroyed its file pursuant to its two-year retention policy for misdemeanor cases and that it was likely that Fleischer, appellant's plea counsel, who was now the presiding judge of the Harris County Criminal Court at Law Number 5, would no longer be in possession of appellant's file. The State also argued that it was prejudiced because, two years after appellant's arrest, the arresting officer pleaded guilty to two counts of sexual assault of a child, was sentenced to prison, and was unlikely to be available as a witness in the event of a re-trial. As evidence, the State attached the judgments of conviction for the arresting officer, appellant's plea paperwork for the charged offense, the written admonishments appellant signed when he was placed on deferred adjudication, the offense report for

the charged offense, and the complainant's written statement concerning the charged offense.

The trial court held an evidentiary hearing on appellant's application, and appellant testified as the only witness. Appellant testified that he first came to the United States from Moldova in 2008 on a work and travel visa, that he applied for asylum in 2009, and that he became an American citizen in 2019. Appellant met the complainant in March 2010, and they moved in together in May 2010. The complainant was one of appellant's only connections in America. Appellant testified that he was involved in a series of motorcycle accidents in 2011. He was not injured in the first accident. The second accident occurred in September 2011, and appellant broke his ankle. Appellant had surgery, and doctors placed a plate and screws in his ankle. Appellant had a third motorcycle accident on December 11, 2011, and he fractured his leg. Hospital personnel prescribed narcotics to help with the pain and recommended that appellant consult a surgeon. Appellant was not able to walk without crutches, and he described his pain as "bad" but manageable with medication. Appellant had a follow up appointment scheduled for December 18 or 19.

Appellant testified that, on December 16, 2011, he was involved in an altercation with his girlfriend, who "kicked and stomped" his injured ankle. After appellant's girlfriend called the police, an officer arrived at their apartment and

arrested appellant. The officer did not allow appellant to take his pain medication with him to the jail, but he was allowed to take his crutches. Appellant testified that, at that time, he had around $20 in cash and less than $200 in a bank account. After appellant explained that he was injured, jail personnel took away his crutches and gave him a different set. Medical personnel ordered that appellant have a bottom bunk, but they did not give him any medication or refer him for further examination. When asked if he believed that he would be re-evaluated while at the jail, appellant stated, "They said I can come back in two months." Appellant believed that it was possible that he might be taken to the emergency room, but that did not happen. He testified that he did not have anyone to call to assist him in getting out of jail; he was not allowed to contact the complainant, and his mother lived in Greece. Appellant stated that his "main priority" was to "get out of the jail and fix [his] leg."

Appellant testified that he had his first court appearance on December 19, 2011. Before he appeared in court, he spoke with Fleischer, his court-appointed attorney, and explained his injury and his level of pain. Based on this conversation, appellant understood that "[t]he only way to get out of jail and to go and have surgery on my leg was to plead guilty" and that he would "be on probation for a year, and after this it's going to go away." He understood that, upon pleading guilty, he would be immediately released from jail. He testified that he did not know anything about obtaining a cash, surety, or personal bond. Appellant understood that by pleading

guilty, he had to admit that he was actually guilty of the charged offense, but he did not believe he was guilty. When asked why he decided to sign the plea paperwork, appellant stated: "I'm going to be able to go and fix my leg right now at Ben Taub [Hospital] and I will have to fulfill my obligations for a year [on community supervision]; and after this one year, it's going to go away." He testified that, based on his conversation with counsel, he understood that if he did not plead guilty, it would be three or four months before his case went to trial, and he would have to spend that time in jail, where he had not been given pain medication. He testified that he believed that pleading guilty was his only option for getting out of jail.

With respect to his appearance before the visiting judge, appellant testified:

> I was third or fourth in line. Somebody in front of me had some—they had [objections], and the judge said, "Okay. I'm not going to take your plea today. You'll have to wait." And I understood that if I say anything other than "Guilty" or "Not guilty" I'll have to wait until further in August.

Appellant stated that he was not willing to wait to go to trial because he was in an extreme amount of pain. He stated that the judge asked him if he was pleading guilty because he was guilty, and although appellant said that he was, he was pleading guilty because he was in pain, not because he was guilty.[2] Appellant was released

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[2] On cross-examination, appellant acknowledged that he had the option to go to trial, but he chose not to have a jury trial. He agreed with the prosecutor that he lied to the visiting judge when he said, under oath at the plea hearing, that he was pleading guilty because he was guilty and for no other reason. He agreed that he was "going to say whatever it takes to get out that day" because he "wanted the pain to go away."

from jail the next morning, and he went straight to the hospital upon his release. Once admitted to the hospital, appellant had to wait before having surgery, but medical personnel immediately gave him pain medication. While he was in the hospital, he began researching his case and started writing down contact information for attorneys. He testified, "I had an entire notebook of names of lawyers that I contacted."[3]

Appellant was released from the hospital on December 31, 2011. He testified that he was homeless for about three months. He rented a storage unit, where he sometimes slept, and he also sometimes slept underneath a bridge. Appellant was able to receive money from his mother during this time. Eventually, he met some people from Moldova, his home country, and they allowed him to stay with them.

Appellant testified that he searched for employment but was turned down because he was on community supervision. He obtained employment at Jyoti Americas in March 2012 and made $400 to $500 per week. Around this time, he started trying to contact attorneys but was not able to retain an attorney. He stated that all of the attorneys that he contacted wanted $15,000 or $20,000 as a retainer, they wanted payment upfront, and they were not willing to place him on a payment plan. He testified that he continued to contact attorneys after he was discharged from

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[3] Appellant presented this notebook to the trial court to view at the habeas hearing. This notebook was not offered as an exhibit, and it is not part of the appellate record.

community supervision in January 2013, but he still was not able to afford an attorney. Appellant lost his job at Jyoti Americas during the summer of 2012, but the same company re-hired him after a month. While he was at this job, he obtained some additional education, and at the time of the hearing, he was enrolled in junior college. Appellant maintained this job until the company filed for bankruptcy in 2016.

Appellant tried to enlist in the Army in 2014, and he scored well on the screening examination. He disclosed that he had a prior assault charge—specifically, a domestic violence charge—and the recruiter immediately told him that, under federal law, he would not be allowed to enlist. Appellant testified that, after he lost his job with Jyoti Americas in 2016, he was unemployed for three months before he obtained a job with a transportation company, which he held until May 2017. He made approximately $42,000 per year at this job. He stated that he was "saving up" to hire an attorney, but he still "did not have the full amount." Appellant switched jobs and worked at another company until his position was terminated in May 2018.[4] He testified that, after he lost this job, he told his girlfriend at the time, "I think I'm

[4] The hearing on appellant's habeas application occurred in August 2019. Appellant testified that he had been a contractor at a company since February 2019 and that company had extended him an offer for full-time employment two weeks prior to the hearing, but the company had not finished conducting his background check. He stated that he was concerned that the company would find out about his deferred adjudication and would not hire him on a permanent basis.

going to have to do something about this [the deferred adjudication order] because every time I'm going to apply for new jobs this is going to come [up] over and over again, and I have to do this right now, or I'm never going to be able to get out of this cycle." Appellant started contacting attorneys again, and he retained his writ counsel in July 2018. Appellant filed his application for writ of habeas corpus in May 2019.

Appellant's writ counsel twice stated that he was not raising an argument that Fleischer, appellant's plea counsel, had rendered ineffective assistance. The trial court indicated that it wanted to hear from Fleischer concerning what he remembered from appellant's plea. Because Fleischer was not available to testify that day, the trial court recessed the hearing for a week.

When the hearing resumed, appellant's writ counsel stated that he had spoken with Fleischer, and Fleischer informed him that "he did not have any specific recollection of the case, [and] he had no files pertaining to the case." Writ counsel also stated that Fleischer told him that, when he was in practice, he did not have any standard procedures, that he would handle cases differently based on the particular case, and he had "no recollection of what actually took place" in appellant's case. Writ counsel determined that he would not call Fleischer to testify.

At the close of the hearing, the trial court pointed out that appellant became aware in 2012, while he was still on community supervision, that the order of deferred adjudication had negative effects on his employment prospects, but he

waited seven years to file his application for habeas relief. The trial court also stated that it did not see all of the notebook that appellant had used to keep track of his search for an attorney, but it saw a "handful of pages." The court stated:

> If somebody was trying to do something for six or seven years, I would expect to have different colors of ink, several pages. And it was a very small notebook, probably three and a half by five inches tops. And I only saw like four or five pages that had anything even written on there.

The court further pointed to appellant's testimony that, after he lost a job in 2018, he told his girlfriend that "it looks like I'm going to have to do something about this or it's going to follow me around." The court stated, "So that makes me believe that all of this came to fruition when he came to that realization, which was probably in the last year or two," but appellant "had notice that this was going to be an issue eight months after the plea, 18 months after the plea, several times in between then." The trial court found the State's laches argument persuasive and denied appellant's application for writ of habeas corpus.

The State submitted proposed findings of fact and conclusions of law, and the trial court signed these proposed findings and conclusions. The trial court made several findings concerning appellant's financial situation, his post-arrest periods of employment, and his attempts to hire writ counsel. The trial court made the following findings relevant to the question of laches:

> 44. The Court finds the applicant has maintained steady, gainful employment since March of 2012, with only minimal periods of being laid off and drawing unemployment benefits.

45. The Court reviewed the relevant portions of the notebook the applicant said he used to list all of his attempts to contact lawyers to assist him in post-conviction proceedings, and was not persuaded that he had made a consistent, persistent attempt to obtain representation or to file a post-conviction writ of habeas corpus; specifically, the Court believes that a true six-to-seven year effort would have revealed different colors of ink, over several pages. Instead, only four or five pages of the three-by-five-and-one-half inch notebook had anything recorded concerning the lawyer search.

46. The Court is further convinced the applicant did not decide to seek post-conviction relief until recently because of his own testimony that, after losing a job in May of 2018, he told his girlfriend that he needed to do something about his criminal history.

47. The Court finds the applicant had notice within the first year of his plea that his criminal history would be an issue with employment, but he waited over seven years to file his habeas application.

48. The Court finds the applicant knew of his own medical condition at the time he entered his plea of guilty; he had received medical treatment and had educated himself as to the availability of post-conviction remedies within thirty days of his plea—well within the statutory time limits to file a motion for new trial.

49. The Court finds the applicant's alleged reasons for delay in seeking post-conviction habeas relief to be not credible and unpersuasive.

50. The Court finds the applicant failed to present evidence of any compelling reason the doctrine of laches should not apply.

51. The Court finds the State has been prejudiced in its ability to retry the applicant's case because of his delay in seeking post-conviction relief: (1) The State's original file has been destroyed; (2) the arresting officer has been convicted of sexual assault of a child and sentenced to prison; and (3) the memories of necessary witnesses have likely faded.

The trial court also entered conclusions of law on both laches and the merits of appellant's claim that his guilty plea was not voluntary. The trial court concluded

that appellant was not "credible with regard to his reasons for delay" in bringing his habeas claim, appellant "had access to funds on a regular basis and educated himself concerning his legal remedies within thirty days of entering his plea of guilty," all equitable factors relevant to determining whether laches should apply were resolved against appellant, and appellant "waited seven years to file his application, and the State has amply demonstrated how it has been prejudiced by the delay." This appeal followed.

Laches

In his first issue, appellant argues that the trial court erred by denying habeas relief because his guilty plea was involuntary. In his second issue, he requests that this Court abate this appeal to allow him to raise, in the trial court, the ineffectiveness of his plea counsel as a ground for habeas relief. In his third issue, appellant contends that the trial court erred by concluding that his request for habeas relief was barred by the doctrine of laches. Because the trial court expressly ruled that laches applied to bar relief, and this issue is dispositive of this appeal, we address this issue first.

A. Standard of Review

Code of Criminal Procedure article 11.072 governs habeas corpus proceedings involving a person who is serving or who has completed a term of community supervision. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072; *Ex parte Vasquez*, 499 S.W.3d 602, 606 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd). In

a proceeding under article 11.072, the trial court is the sole finder of fact. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, §§ 6–7 (providing that trial court shall enter written order granting or denying relief sought and shall enter written order including findings of fact and conclusions of law); *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013); *Ex parte Garcia*, 353 S.W.3d 785, 787–88 (Tex. Crim. App. 2011) (stating that, in article 11.072 habeas case, in which trial court is sole fact finder, there is "less leeway" to disregard trial court's findings as opposed to article 11.07 habeas case, in which Court of Criminal Appeals is ultimate fact finder).

An applicant seeking habeas corpus relief must prove his claim by a preponderance of the evidence. *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016); *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). The trial court may believe any or all of a witness's testimony. *Guerrero*, 400 S.W.3d at 583. We afford almost total deference to a trial court's fact findings when supported by the record, especially when the findings are based upon credibility and demeanor. *Id.*; *Ex parte Ali*, 368 S.W.3d 827, 830 (Tex. App.—Austin 2012, pet. ref'd) ("'When the trial court's findings of fact in a habeas corpus proceeding are supported by the record, they should be accepted' by the reviewing court."). We afford the same amount of deference to the trial court's application of the law to the facts when the resolution of the ultimate question turns on an evaluation of credibility and demeanor. *Vasquez*, 499 S.W.3d at 606; *Ali*, 368 S.W.3d at 831. We must review the

record evidence in the light most favorable to the trial court's ruling, and we must uphold that ruling absent an abuse of discretion. *Kniatt*, 206 S.W.3d at 664; *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *see Ex parte Osvaldo*, 534 S.W.3d 607, 623 (Tex. App.—Corpus Christi–Edinburg 2017) (applying "highly deferential" standard of review to laches issue because laches is fact question and, in article 11.072 proceedings, trial court is sole fact finder), *aff'd sub nom. Ex parte Garcia*, 547 S.W.3d 228 (Tex. Crim. App. 2018). We review de novo mixed questions of law and fact that do not depend upon credibility and demeanor. *Ex parte Weinstein*, 421 S.W.3d 656, 664 (Tex. Crim. App. 2014).

B. Doctrine of Laches

The writ of habeas corpus is an extraordinary remedy, and granting the writ "must be underscored by elements of fairness and equity." *Ex parte Smith*, 444 S.W.3d 661, 666 (Tex. Crim. App. 2014). The elements of equity and fairness "require a consideration of unreasonable delay." *Ex parte Bowman*, 447 S.W.3d 887, 888 (Tex. Crim. App. 2014) (per curiam); *see Smith*, 444 S.W.3d at 666 ("To determine whether equitable relief should be granted then, it behooves a court to determine whether an applicant has slept on his rights and, if he has, whether it is fair and just to grant him the relief he seeks."); *see also Kniatt*, 206 S.W.3d at 664 (stating that applicant's delay in seeking habeas relief may prejudice credibility of his claim). The Court of Criminal Appeals has thus held that the common law

doctrine of laches applies to all habeas cases. *Bowman*, 447 S.W.3d at 888; *Ex parte Perez*, 398 S.W.3d 206, 215 (Tex. Crim. App. 2013) ("Texas courts may apply the common-law doctrine of laches in determining whether to grant habeas relief.").

The Court of Criminal Appeals has defined the common law doctrine of laches as follows:

> [The] neglect to assert [a] right or claim which, taken together with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. Also, it is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done.

Perez, 398 S.W.3d at 210 (quoting *Ex parte Carrio*, 992 S.W.2d 486, 487 n.2 (Tex. Crim. App. 1999)). When considering whether the State has been prejudiced by the defendant's delay in seeking habeas relief, courts may consider "anything that places the State in a less favorable position, including prejudice to the State's ability to retry a defendant." *Id.* at 215; *Vasquez*, 499 S.W.3d at 612. Proof of "mere passage of time" is insufficient to raise laches. *Perez*, 398 S.W.3d at 219. The decision of whether to apply the doctrine of laches is a "case-by-case inquiry." *Id.* at 216. Courts may consider "the totality of the circumstances in deciding whether to grant equitable relief," including "the diminished memories of trial participants and the diminished availability of the State's evidence." *Id.* at 215–16 (noting that "diminished memories of trial participants" and "diminished availability of the

State's evidence" both "may often be said to occur beyond five years after a conviction becomes final").

In *Perez*, the Court of Criminal Appeals addressed relevant factors a court should consider when determining whether a claim for habeas relief should be barred by laches:

> Similar to a court's review of a claim that a defendant's right to a speedy trial has been violated, it may be proper to consider, among all relevant circumstances, factors such as the length of the applicant's delay in filing the application, the reasons for the delay, and the degree and type of prejudice resulting from the delay. As we have observed with respect to speedy-trial complaints, "[n]o single factor is necessary or sufficient." Instead, courts must "engage in a difficult and sensitive balancing process" that takes into account the parties' overall conduct. In considering whether prejudice has been shown, a court may draw reasonable inferences from the circumstantial evidence to determine whether excessive delay has likely compromised the reliability of a retrial. If prejudice to the State is shown, a court must then weigh that prejudice against any equitable considerations that militate in favor of granting habeas relief.

Id. at 217. The extent of prejudice that the State must show "bears an inverse relationship to the length of the applicant's delay" in bringing the habeas proceeding. *Id.* The longer a defendant delays in filing a habeas application, "and particularly when an applicant delays filing for much more than five years after conclusion of direct appeals," the less evidence the State must present to demonstrate prejudice. *Id.* at 217–18. The Court of Criminal Appeals reasoned that this "sliding-scale approach is based on the common-sense understanding that the longer a case has been delayed, the more likely it is that the reliability of a retrial has been

compromised." *Id.* at 218. Additionally, when determining whether habeas relief is warranted, we must consider "the State's broad interest in the finality of a long-standing conviction." *Id.*; *see Ex parte Saenz*, 491 S.W.3d 819, 826 (Tex. Crim. App. 2016) ("In general, the doctrine of laches is intended to address the broader interests of the criminal-justice system, such as prejudice to the State's ability to prosecute a defendant or to respond to allegations due to the loss of evidence . . . .").

Courts may reject the State's reliance on laches when the record shows that (1) an applicant's delay was not unreasonable because it was the result of a justifiable excuse or excusable neglect; (2) the State would not be materially prejudiced as a result of the delay; or (3) the applicant is entitled to equitable relief for other compelling reasons, such as new evidence showing that he is actually innocent of the offense or, in some cases, that he is reasonably likely to prevail on the merits. *Perez*, 398 S.W.3d at 218; *see Smith*, 444 S.W.3d at 667 ("But equity does not require that an applicant be barred from relief by mere delay alone."). Generally, in cases of "excessive" delay, it is more likely that the State will be able to show prejudice as a result of the delay, and the applicant "will face a difficult task to show why his application should not be barred by laches." *Perez*, 398 S.W.3d at 219.

The Court of Criminal Appeals declined to impose a requirement that a defendant assert a claim for habeas relief within a specific period of time, stating instead that it "will continue to apply laches as a bar to relief when an applicant's

unreasonable delay has prejudiced the State, thereby rendering consideration of his claim inequitable." *Id.* The Court noted, however, that a delay of more than five years "may generally be considered unreasonable in the absence of any justification for the delay." *Id.* at 216 n.12; *Vasquez*, 499 S.W.3d at 613.

C. Analysis

Here, the trial court expressly determined that the doctrine of laches barred appellant's claim for habeas relief and made specific fact findings and conclusions of law. It is undisputed that appellant pleaded guilty to the charged offense and was placed on deferred adjudication community supervision on December 19, 2011. He successfully completed community supervision, and the trial court dismissed the charge against him in January 2013. Appellant filed his application for habeas relief on May 19, 2019.

On appeal, appellant argues that the seven-plus year delay in bringing his habeas claim was reasonable and justifiable because of his economic hardships and his need to save money to retain an attorney, which took several years. The trial court found that, upon being released from jail on December 20, 2011, appellant immediately went to the hospital, where he stayed for approximately ten days. The trial court found that, while he was in the hospital, appellant began researching his case and compiling names of attorneys who could potentially represent him. According to appellant, every attorney he contacted wanted between $15,000 and

$20,000 to represent him. The trial court made several specific findings concerning appellant's employment history at specific companies and his search for an attorney. The court also made the following findings:

> 44. The Court finds the applicant has maintained steady, gainful employment since March of 2012, with only minimal periods of being laid off and drawing unemployment benefits.
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> 45. The Court reviewed the relevant portions of the notebook the applicant said he used to list all of his attempts to contact lawyers to assist him in post-conviction proceedings, and was not persuaded that he had made a consistent, persistent attempt to obtain representation or to file a post-conviction writ of habeas corpus; specifically, the Court believes that a true six-to-seven year effort would have revealed different colors of ink, over several pages. Instead, only four or five pages of the three-by-five-and-one-half inch notebook had anything recorded concerning the lawyer search.
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> 46. The Court is further convinced the applicant did not decide to seek post-conviction relief until recently because of his own testimony that, after losing a job in May of 2018, he told his girlfriend that he needed to do something about his criminal history.
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> 47. The Court finds the applicant had notice within the first year of his plea that his criminal history would be an issue with employment, but he waited over seven years to file his habeas application.

Ultimately, the trial court found that appellant's "alleged reasons for delay in seeking post-conviction habeas relief to be not credible and unpersuasive" and that appellant "failed to present evidence of any compelling reason the doctrine of laches should not apply."

The Court of Criminal Appeals has declined to apply a specific, bright-line time period in which a defendant must seek post-conviction habeas relief; however,

the court has noted that a delay of more than five years in seeking habeas relief "may generally be considered unreasonable in the absence of any justification for the delay." *See Perez*, 398 at 216 n.12; *Vasquez*, 499 S.W.3d at 613. Here, it is undisputed that appellant waited more than seven years after he pleaded guilty to seek habeas relief. Appellant argues that the record "accounts for all the time that [appellant] has sought relief from his plea," and he emphasizes his employment history and financial instability as justifications for his delay.

The trial court, however, expressly found appellant's testimony and reasons for his delay in seeking habeas relief to be not credible. The trial court made findings, which are supported by the record, that while appellant had periods in which he was unemployed, he was employed for the majority of time between March 2012 and May 2019, when he sought habeas relief.[5] The trial court also found that appellant realized while he was on community supervision in the year following his guilty plea that his criminal history could have an adverse effect on his employment opportunities, but appellant waited more than seven years—until May 2019—to bring his habeas claim. This finding was supported by appellant's testimony

[5] We note that, in an unpublished opinion, the Court of Criminal Appeals has stated that "[l]ack of funds, *pro se* status, and/or the lack of sophistication of the law would not, without more, excuse [the defendant's] twenty-two year delay" in seeking habeas relief. *Ex parte Caudill*, No. WR-86,762-02, 2019 WL 1461929, at *7 (Tex. Crim. App. Jan. 30, 2019) (not designated for publication). In *Caudill*, the Court of Criminal Appeals disagreed with the trial court's recommendation to grant habeas corpus relief, concluded that laches applied, and denied habeas relief. *Id.* at *9.

concerning his difficulty finding a job in 2012 and his testimony that he attempted to enlist in the Army in 2014, but he could not do so because his offense involved domestic violence. Appellant told his girlfriend in 2018 that he thought he would "have to do something about this [the deferred adjudication order] because every time I'm going to apply for new jobs this is going to come [up] over and over again, and I have to do this right now, or I'm never going to be able to get out of this cycle."

Furthermore, although appellant testified that he attempted to search for an attorney who would assist him, but he could not afford the initial retainer, the trial court expressly found this testimony to be not credible as well. The trial court viewed portions of a notebook—which is not part of the appellate record—that appellant kept detailing his search for an attorney, but the court did not believe that these efforts constituted a "consistent, persistent attempt to obtain representation" which could potentially justify the delay in seeking habeas relief. The trial court found that, instead, it was only after appellant experienced difficulties obtaining a job in May 2018, more than six years after his guilty plea, that he decided to seek post-conviction relief. As this proceeding is governed by Article 11.072, and the trial court is the ultimate fact finder, we afford almost total deference to the trial court's fact findings when they are supported by the record, especially when those fact findings turn on an evaluation of credibility and demeanor. *See Guerrero*, 400 S.W.3d at 583; *Ali*, 368 S.W.3d at 830 ("'When the trial court's findings of fact in a

habeas corpus proceeding are supported by the record, they should be accepted' by the reviewing court.").

In addition to finding that appellant's delay in seeking habeas relief was unreasonable and not justified, the trial court also found that this delay prejudiced the State. Specifically, the trial court found that the State had been prejudiced because its original file had been destroyed pursuant to its retention policies, the arresting officer had been convicted of sexual assault of a child and sentenced to prison, and "the memories of necessary witnesses have likely faded." In its response to appellant's writ application, the State explained that it has a two-year retention policy for misdemeanor cases and that, while appellant's plea paperwork was still available on a Harris County computer system, the State's file for the case had been destroyed. *See Ex parte Roberts*, 494 S.W.3d 771, 776–77 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (concluding that State had been prejudiced by delay in seeking habeas relief in part because, during intervening time period, both State and trial counsel had "lost or destroyed relevant evidence"); *see also Vasquez*, 499 S.W.3d at 614 (considering evidence that files had been destroyed and relevant plea participants lacked independent recollection of plea due to passage of time between plea and habeas proceedings and concluding that record supported trial court's finding of material prejudice to State by defendant's delay). The State also attached copies of judgments reflecting that the officer who arrested appellant had been

convicted of two counts of sexual assault of a child, and the State argued that this officer would likely be unavailable as a witness if appellant's case was retried. *See Perez*, 398 S.W.3d at 215 (stating that, when considering whether the State has been prejudiced by delay in bringing habeas proceedings, court may consider "anything that places the State in a less favorable position, including prejudice to the State's ability to retry a defendant").

Ultimately, the trial court concluded that no evidence justified appellant's seven-year delay in filing his writ of habeas corpus, that the State demonstrated that it had been prejudiced by appellant's delay, that appellant had presented no evidence of any compelling reason why laches should not apply, and that appellant's claim for habeas relief should be barred by laches. Viewing the record in the light most favorable to the trial court's findings and affording almost total deference to the trial court's findings, especially those that turn on credibility and demeanor, as we must in this Article 11.072 habeas proceeding, we cannot conclude that the trial court abused its discretion by determining that the doctrine of laches applies and bars appellant's claim for habeas relief. *See Kniatt*, 206 S.W.3d at 664; *Osvaldo*, 534 S.W.3d at 623. We therefore hold that the trial court did not abuse its discretion in denying appellant's application for a writ of habeas corpus.

We overrule appellant's third issue.[6]

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Lloyd, and Landau.

Publish. TEX. R. APP. P. 47.2(b).

[6] Because we conclude that the trial court did not err by determining that laches barred appellant's request for habeas relief, we need not address appellant's first issue—whether the trial court erred by concluding that his guilty plea was involuntary. In his second issue, appellant argues that this Court should abate the appeal to allow him to raise, in the trial court, the ineffectiveness of his plea counsel. Appellant's writ counsel expressly stated at the writ hearing that he was not asserting that appellant's plea counsel rendered ineffective assistance. Although we are mindful of the limited basis on which a person can seek subsequent habeas relief after the final disposition of an initial application for habeas relief, *see* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 9 (providing that court may not consider merits of subsequent application unless applicant demonstrates that current issues and claims have not been and could not have been presented previously because factual or legal basis for claim was unavailable on date previous application was filed), we decline to abate this appeal under the circumstances presented here, in which appellant's writ counsel twice affirmatively stated that he was not raising an ineffective assistance of counsel claim.