Opinion on remand issued August 2, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00139-CR

EX PARTE OSCAR MINJARE SANCHEZ, JR.

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

EN BANC OPINION ON REMAND

Oscar Minjare Sanchez, Jr. appealed from the denial of his post-conviction application for a writ of habeas corpus filed under Texas Code of Criminal Procedure art. 11.072. Sanchez contended that his trial counsel rendered ineffective assistance by failing to call exculpatory witnesses during the guilt/innocence phase of his trial. We reversed the trial court's denial of habeas relief and remanded for further

proceedings. *Ex parte Sanchez*, 608 S.W.3d 222, 234 (Tex. App.—Houston [1st Dist.] 2020), *rev'd*, *Ex parte Sanchez*, 625 S.W.3d 139 (Tex. Crim. App. 2021). The Texas Court of Criminal Appeals granted the State's petition for discretionary review, determined that a court of appeals reviews a trial court's ruling in an article 11.072 proceeding for abuse of discretion, reversed our judgment, and remanded the cause to this Court for further proceedings.[1] *Sanchez*, 625 S.W.3d at 144. We affirm the trial court's judgment.

I. Background

Sanchez was the designated driver for his four passengers on a night out. While driving the group home in his Ford F-250, a police chase occurred in front of him. An unmarked police car, a Chevy Impala driven by Harris County Sheriff's Office Lieutenant G. Goudeau, suddenly moved in front of him, causing Sanchez to swerve left to try to avoid an accident.

According to one officer who observed the F-250 and the Impala from his rear-view mirror while participating in a high-speed police chase, the front of the F-250 collided with the back of the Impala. The officer saw the rear of the Impala go up in the air before it struck a curb and spun into a parking lot.

[1] There remains some inconsistency about the applicable standard of review when a habeas court is not in an appreciably better position than the reviewing court and the decision does not turn on the credibility or demeanor of witnesses. *See Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999).

Sanchez continued home without stopping. After Lieutenant Goudeau radioed for help, Sergeant K. Benoit, who was following the vehicles in the chase, testified that he had seen the accident, returned to the scene, and saw that Lieutenant Goudeau was injured. Sergeant Benoit waited with Lieutenant Goudeau until an ambulance transported her to the hospital, where she stayed for four days to treat severe injuries.

After hearing about the accident on the news the next morning, Tomball Police Department Captain R. Grassi, who was a passenger in the car with Sanchez, called the captain of the Harris County Sheriff's Office to share information about the incident. Sanchez was with him.

Sanchez told Deputy A. Marines that an Impala had suddenly darted into his lane on the Highway 249 feeder road and that he hit his brakes, swerved, and entered the middle lane to avoid hitting it. Sanchez did not know where the Impala went after it entered his lane. Sanchez answered Deputy Marines's questions and allowed him to examine the F-250 twice. Deputy Marines testified that it was rare for someone to come forward and cooperate as Sanchez did.

Although Lieutenant Goudeau's vehicle sustained serious damage, the investigation revealed only minor cosmetic damage to Sanchez's truck. Photos depicted a faint scuff mark on the bumper between the fog lamp and the tail ring, a crack on the right side of the grill, a dark plastic piece embedded in the tread of a tire, and a scuff mark on the undercarriage. Deputy Marines did not see it the first

time he inspected the truck, but upon a second inspection, he saw a bit of gray metallic paint that appeared to match the Impala. Chemical analysis revealed that the paint could have come from the Impala or any other vehicle with similar paint.

Sanchez was convicted of the third-degree felony offense of failure to stop and render aid. *See Sanchez v. State*, No. 01-16-00293-CR, 2017 WL 1424949, at *1 (Tex. App.—Houston [1st Dist.] Apr. 20, 2017, pet. ref'd) (mem. op., not designated for publication). The State called none of the passengers in Sanchez's car as witnesses. The defense did not put on any witnesses.

The trial court assessed Sanchez's punishment at 10 years' confinement but probated the sentence by placing him on 10 years' community supervision, with 30 days' confinement in the Harris County Jail as a condition of probation. *See id.* This Court affirmed Sanchez's conviction. *Id.* The Texas Court of Criminal Appeals refused Sanchez's petition for discretionary review, and this Court's mandate issued.

Sanchez applied for a writ of habeas corpus under Texas Code of Criminal Procedure article 11.072 and requested a hearing. In his application, Sanchez alleged that his trial counsel 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, R. Grassi, S. Martin, and B. 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 unaware of a collision. The State did not respond to Sanchez's application.

The habeas court signed an order denying Sanchez's habeas application without an evidentiary hearing. Sanchez timely filed notice of appeal and the habeas court certified that Sanchez had a right of appeal. Because the habeas court's order did not deny Sanchez's habeas application as frivolous and the clerk's record did not include the required findings of fact and conclusions of law, this Court abated the appeal. *See* TEX. CODE CRIM. PROC. art. 11.072, § 7(a).

In response to the abatement, the habeas court filed a supplemental clerk's record containing its findings and conclusions. The pertinent findings of the habeas court were that (1) trial counsel did not call any witnesses during the guilt stage of trial; (2) trial counsel elicited testimony on cross-examination that Grassi, Martin, and Flores all made consistent statements about what happened; (3) Sanchez and Grassi made consistent statements with each other; and (4) trial counsel argued in closing that because the State did not call the passengers as witnesses, it failed to bring "every piece of evidence," as promised, because their testimony would not match the State's theory. The habeas court determined that Sanchez failed to show that trial counsel was deficient and failed to establish a reasonable probability that the result of the proceedings would have been different. It also concluded that

Sanchez "fail[ed] to show that Grassi, Martin, and Flores were available and that their testimony would have benefitted the defense."

After reinstating the appeal, we reversed the habeas court's denial of habeas relief and remanded for further proceedings. The State appealed our ruling, and the Texas Court of Criminal Appeals reversed our judgment and remanded the case for further proceedings.

II. Standard of Review

We review a trial court's ruling on a habeas corpus application for abuse of discretion. *Ex parte Zantos-Cuebas*, 429 S.W.3d 83, 87 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (citing *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006)). We "must review the record evidence in the light most favorable to the trial court's ruling and must uphold that ruling absent an abuse of discretion." *Kniatt*, 206 S.W.3d at 664. We "will sustain the lower court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case." *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006).

"[I]n Article 11.072 cases, the trial court is the sole finder of fact, and the reviewing court acts only as an appellate court." *Sanchez*, 625 S.W.3d at 144 (citing *Ex parte Garcia*, 353 S.W.3d 785, 787–88 (Tex. Crim. App. 2011)). The appellate court affords almost total deference to a trial court's factual findings when those findings are supported by the record. *See Ex parte Garcia*, 353 S.W.3d at 787–88;

Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). But mixed questions of law and fact that do not turn on an evaluation of credibility and demeanor are subject to de novo review. *See Sanchez*, 625 S.W.3d at 144; *Guzman*, 955 S.W.2d at 89.

III. Applicable Law

To establish an ineffective-assistance claim, an appellant must show, 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 (1984); *Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004). An appellant's failure to satisfy either prong defeats the ineffective-assistance claim. *See Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009).

We indulge a presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance, so an appellant must overcome the presumption that the challenged action constituted "sound trial strategy." *Strickland*, 466 U.S. at 689; *Williams*, 301 S.W.3d at 687. Our review is highly deferential to trial counsel, and we do not speculate on their trial strategy. *See Bone v. State*, 77 S.W.3d 828, 833, 835 (Tex. Crim. App. 2002). To prevail on an ineffective-assistance claim, an appellant must provide a record that shows that counsel's

performance was not based on sound strategy. *See Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

A defendant in a criminal case is entitled to reasonably effective assistance of counsel, including investigation of the defendant's case. *Strickland*, 466 U.S. at 690–91. Part of the duty to investigate is trial counsel's responsibility to seek out and interview potential witnesses. *Butler v. State*, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986). To show deficient performance by trial counsel based on an uncalled witness, an appellant must show: (1) that witness would have been available to testify; and (2) that witness's testimony would have been of some benefit to the defense. *Everage v. State*, 893 S.W.2d 219, 222–23 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd). To meet the availability requirement, proposed witnesses must testify or swear in an affidavit that they were available to testify at the defendant's trial. *See Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007).

An ineffectiveness claim based on the failure to call witnesses may be established through either testimony on the record or an affidavit from the uncalled witness. *See Ex parte White*, 160 S.W.3d at 52 (applicant provided affidavit from uncalled witness).

IV. Analysis

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

Grassi, and Martin were available to testify and would have aided his defense. The State argues that Sanchez's claim fails because he did not show that the witnesses were available or how their testimony would have benefited the defense. The State also argues that Sanchez failed to address trial counsel's trial strategy and cannot meet either of the *Strickland* prongs because he cannot show 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.

A. Performance Prong

For the first *Strickland* prong, performance of counsel, as discussed above, to show ineffectiveness of counsel based on an uncalled witness, an appellant must show two things: (1) the uncalled witness would have been available to testify; and (2) the witness's testimony would have been of some benefit to the defense. *See Everage*, 893 S.W.2d at 222.

1. Flores's Affidavit

Sanchez has failed to show that Flores was available to testify. Flores's affidavit stated that he was a passenger in Sanchez's vehicle on the night of the incident, and that he did not see or feel Sanchez's vehicle strike another vehicle. But Flores did not state that he was available to testify at Sanchez's trial. *See Ex parte Ramirez*, 280 S.W.3d at 853. Because Sanchez failed to show Flores was available, he cannot show that trial counsel was deficient for not calling him to testify. So we

need not address whether Flores's testimony would have been of some benefit to the defense.

2. Grassi's Affidavit

As with Flores, Sanchez has failed to show that Grassi was available to testify. Grassi's affidavit stated that he was a Tomball police captain and that on the night of the incident, he was a passenger in Sanchez's truck when they observed a high-speed car chase conducted by the Harris County Sheriff's Office. Grassi 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, but Grassi stated he was never aware of Sanchez's truck striking that vehicle, and he did not see any visible damage to Sanchez's truck the next day. Grassi added 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[.]"

Grassi did not state that he would have been available to testify at Sanchez's trial. *See Ex parte Ramirez*, 280 S.W.3d at 853. Because Sanchez did not show that Grassi was available, he cannot show that trial counsel was deficient for not calling Grassi. Thus, we need not address whether Grassi's testimony would have been of some benefit to the defense.

3. Martin's Affidavit

Martin's affidavit stated that, "[o]n the night of August 11, 2013, my husband [B.] Flores, [R.] Grassi and his girlfriend [M.], Oscar Sanchez and me went out for [Grassi]'s birthday . . . at a pub playing shuffle board and then decided to go to Whiskey River." After leaving Whiskey River, "there was a high speed chase on 249 going north" and Grassi asked Sanchez to follow the chase while he contacted his police station. Martin recalls sitting behind Sanchez chatting with M., not paying attention to the road ahead, but also noticing a car ahead on the left of Sanchez's vehicle. "Oscar [slammed] on his brakes and [honked] his horn, and [swerved] away from a car." Martin did not see any collision between Sanchez's truck and any other car. Finally, Martin stated that had she been asked to testify at Sanchez's trial, she would have.

Martin's representation that she would have been available to testify at Sanchez's trial satisfies the first prong of the performance inquiry. *See Everage*, 893 S.W.2d at 222. The remaining question is whether Martin's testimony would have been of "some benefit" to the defense. *See id.* Given that Sanchez put on no defense and Lieutenant Goudeau could not recall the collision, the jury heard an incomplete story from those closest to the action with the best opportunity to observe it. The State's witnesses testified that Sanchez's passengers' recollection of the accident

was "consistent with" the State's theory that Sanchez struck Lieutenant Goudeau's vehicle, but Martin's affidavit conveys the opposite.

Even so, Sanchez must overcome the presumption that trial counsel's decision constituted "sound trial strategy." *Strickland*, 466 U.S. at 689. "The decision whether to present witnesses is largely a matter of trial strategy." *Lopez v. State*, 462 S.W.3d 180, 185 (Tex. App.—Houston [1st Dist.] 2015, no pet.). When the record is underdeveloped, as it is here because the habeas court held no hearing, we assume a strategic motivation if any can be imagined. *Garcia*, 57 S.W.3d at 440.

The habeas court found that (1) Flores, Grassi, and Martin all made consistent statements about what happened on the night of the incident; (2) Grassi and Sanchez made consistent statements about what happened that night; and (3) trial counsel argued that the State did not call Flores, Grassi, or Martin because their testimony would not match the State's theory of what occurred that night.

While the record does not support the habeas court's conclusion that Martin was unavailable, it does support the possibility that trial counsel's decision to not call Martin as a witness was strategic. Trial counsel's cross examination of Deputy Musil and Deputy Marines revealed that multiple eyewitnesses made consistent statements that matched Sanchez's statement.

Cross of Deputy Musil:

Q. But at this point now, you know that there are some people, some passengers in a vehicle, right?
A. Yes.
Q. And you also know that there's a driver of a vehicle, right?
A. Yes.

. . .

Q. So, what you chose to do at that point, which makes perfect sense, is to go talk to these people, right?
A. Yes.

. . .

Q. Because they're going to give accounts in versions of what they witnessed in that truck, right?
A. Correct.

. . .

Q. Okay. Now, you interviewed a gentleman named [B.] Flores, right?
A. Yes.
Q. You also interviewed a lady named [C.] Martin, right?
A. Yes.
Q. You interviewed a lady named [M.] Oshman, correct?
A. Yes.
Q. You also interviewed a Captain [R.] Grassi from the Tomball P.D., correct?
A. Yes.
Q. Okay. They're witnesses to an alleged crime?
A. Yes.

. . .

Q. Okay. Now, each of these people voluntarily met with you, right?
A. Yes, they did.
Q. Without saying what these people told you, they told you the events as they perceived
them, right?
A. Yes, they did.
Q. And all of their statements, without saying what they said, were consistent, correct?
A. Yes, they were.

. . .

Q. What they told you was consistent with your theory of this case?
A. Other than one aspect of it, yes.

Cross of Deputy Marines:

Q. You spoke with Captain Grassi and took down his version of events, correct?
A. Yes, sir.
Q. Then you also spoke to Mr. Sanchez that first day, correct?
A. Yes, sir.
Q. [Sanchez] gives [his] statement, writes it all down, reads it, signs it?
A. I typed it, yes, sir, and gave him a copy of it. He looked at it and agreed to the contents, yes, sir.
Q. In terms of history, it's generally consistent with what he's been telling you all along, right?
A. So far, yes, sir.
Q. And you also had the ability to compare that to what other people had said, correct?
A. I didn't get to speak to the other occupants in the vehicle. I believe Deputy Musil spoke to them. The only people that I was able to speak to in reference to was Captain Grassi and Oscar Sanchez.
Q. And Captain Grassi's statement was consistent, I'm saying generally. You can get in there and find — if you so choose, but generally speaking, both of their stories were consistent?
A. Yes, sir.

Trial counsel's closing argument then tied this testimony in by highlighting that the State had said it would bring "every piece of evidence" but then failed to call multiple eyewitnesses because their statements did not match the State's theory. Moreover, trial counsel continued to emphasize that the State failed to bring every piece of evidence by highlighting that Grassi's phone records and the dispatch tapes related to the incident were not provided, the "black box" from Sanchez's car was not provided, and the dash cam from Sergeant Benoit's vehicle the night of the incident was not provided.

While the record here is silent on trial counsel's reasoning, it does provide support for the Court to "assume a strategic motivation." *See Garcia*, 57 S.W.3d at 440. Trial counsel could have decided not to call Martin because it fit into his larger argument that the State was failing to provide the jury with all the evidence it had because the excluded evidence would cast doubt on its theory of the case. Moreover, the fact that trial counsel also points to other evidence that was not provided (the cell records, "black box", and the dash cam) shows a unifying strategy on the part of trial counsel. The dissent decides that based on the record, not calling Martin was "not a plausible strategic option." But choosing an "undoubtedly risky" trial strategy that does not pay off is not necessarily unacceptable or "wholly unjustified." *See Delrio v. State*, 840 S.W.2d 443, 446–47 (Tex. Crim. App. 1992) (per curiam); *see also Heiman v. State*, 923 S.W.2d 622, 626–27 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) (holding that counsel was not ineffective for failing to object to evidence of extraneous offenses because the record reflected a plausible trial strategy).

Based on the cross-examination and the defense's arguments in closing, one could conclude that trial counsel intentionally highlighted the State's failure to call all eyewitnesses while still obtaining testimony that the passengers described the accident consistently with Sanchez. *See Kniatt*, 206 S.W.3d at 664 (reviewing the evidence in the light most favorable to the lower court's ruling). The dissent finds problematic that we did not identify any particular risk Martin could have posed as

a witness. But that is not what we are required to do. *See Delrio*, 840 S.W.2d at 447 ("we must presume that counsel is better positioned than the appellate court to judge the pragmatism of the particular case") (citing *Strickland*, 466 U.S. at 690). We assume a strategic motivation if any can be imagined, *Garcia*, 57 S.W.3d at 440, and it is the appellant's burden to overcome the presumption that trial counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

On a silent record, it is not difficult to imagine a strategic justification for not calling a witness. Trial counsel could have contacted any witness and discovered they did not respond to multiple requests, changed their mind about testifying, had criminal history, were easily impeached, were not credible in the first place, or had poor demeanor in the interview for any number of reasons.

The dissent relies on *Ex parte Overton*, 444 S.W.3d 632 (Tex. Crim. App. 2014), and *Everage* to argue that failing to call Martin constitutes ineffective assistance. But trial counsel in *Overton* and *Everage* admitted they were ineffective. In *Overton*, trial counsel described the failure to call a specific witness as "completely ineffective." *Overton*, 444 S.W.3d at 640. And in *Everage*, trial counsel admitted "he was not adequately prepared to defend his client." *Everage*, 893 S.W.2d at 222. These comments by trial counsel obviated any argument that the

failure to call witnesses was strategic. But there is no confession of ineffectiveness here.

The dissent's remaining concern is that trial counsel could have highlighted the State's failure to produce all evidence and witnesses while also calling Martin as a witness. But while another defense attorney may have chosen a different trial strategy that does not render trial counsel ineffective. *See Strickland*, 466 U.S. at 689. Consequently, Sanchez did not show that trial counsel's decision to not call Martin "was so outrageous that no competent attorney would have engaged in it" to overcome the presumption that counsel's conduct was within the wide range of reasonable professional assistance. *See Garcia*, 57 S.W.3d at 440.

Because Sanchez has failed to satisfy one prong of the *Strickland* test, we need not consider the other prong. *See Williams*, 301 S.W.3d at 687. Thus, the habeas court did not abuse its discretion.

V. Conclusion

In sum, on this record, reviewing the evidence in the light most favorable to the habeas court's ruling, Sanchez did not satisfy *Strickland*. The habeas court did not abuse its discretion in denying habeas relief. We affirm.

Sarah Beth Landau
Justice

The en banc court consisted of Chief Justice Radack and Justices Kelly, Goodman, Landau, Hightower, Countiss, Rivas-Molloy, Guerra, and Farris.

Justice Goodman dissenting.

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