Affirmed and Memorandum Opinion filed March 17, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00323-CR

EX PARTE HUGO STEVE RAMIREZ

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 993401A

M E M O R A N D U M   O P I N I O N

Appellant Hugo Steve Ramirez appeals the trial court's denial of his application for post-conviction habeas corpus relief on the grounds that (1) he was denied the effective assistance of counsel at the guilt-innocence stage; (2) his conviction was obtained in violation of his constitutional right to due process and due course of law; and (3) the trial court abused its discretion in concluding the doctrine of laches bars habeas corpus relief. We affirm.

I. BACKGROUND

In 2005, a jury convicted appellant of assaulting a public servant, Officer Chad Cook of the Pasadena Police Department. The jury assessed punishment at seven years' confinement but recommended community supervision. The trial court suspended appellant's sentence and placed him on community supervision for seven years. He appealed his conviction to this court, we affirmed, and his petition for review was denied by the Court of Criminal Appeals in October 2006.[1] At appellant's request in 2010, the trial court terminated his community supervision early.

In May 2014, appellant was informed that he would be evicted from an apartment in which he was residing in Florida because of his assault conviction. He filed an application for a post-conviction writ of habeas corpus in November 2014 under Texas Code of Criminal Procedure article 11.072. In his application, he alleged that his 2005 conviction was obtained due to ineffective assistance of counsel and that the State had violated his due process rights by not disclosing certain *Brady*[2] evidence to him prior to trial.[3] After a hearing, the habeas court denied his application. The habeas court made the following relevant written findings in denying appellant's application:

> 4. Applicant filed a motion for new trial based on ineffective assistance of counsel. The Court heard evidence and arguments on the motion and the motion was denied by Judge Don Stricklin on May 5, 2005.

[1] *See Ramirez v. State*, No. 14-05-00184-CR, 2006 WL 1026926, at *1 (Tex. App.—Houston [14th Dist.] Apr. 20, 2006, pet. ref'd) (not designated for publication).

[2] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[3] This evidence consisted of a "use of force" form and an "injury packet" mentioned in Officer Cook's incident report. These forms were also pertinent to appellant's ineffective assistance claims.

5. Applicant appealed his conviction and sentence based on ineffective assistance of counsel to the Fourteenth Court of Appeals in Case No. 14-05-00184-CR. The judgment was affirmed on April 20, 2006. Applicant's petition for discretionary review was refused on October 4, 2006.
6. On August 30, 2010, Applicant successfully completed his term of community supervision.
7. Applicant has failed to establish that Cedric Mohammed [trial counsel] was ineffective by failing to request a jury instruction on Resisting Arrest. The Court finds that it is reasonable and sound strategy not to request a lesser included offense in the charge if defense counsel reasonably believes the State has failed to make their case beyond a reasonable doubt.
8. Applicant has failed to show that defense counsel Cedric Mohammed provided ineffective assistance by failing to conduct an independent investigation. The Court find[s], based on the testimony of Cedric Mohammad at the Motion for New Trial hearing, that counsel reviewed the State's file, interviewed witnesses, discussed the case with applicant and his family and developed a reasonable strategy on the case.
9. The Court finds applicant has failed to establish that Cedric Mohammad was ineffective in his cross-examination of Officer Chad Cook. The trial record and the motion for new trial record are both silent on the issues of Cook's "injury packet" and "use of force" form. The Court finds the failure to cross examine on these issues may have been sound trial strategy.
10. Applicant has failed to establish that there is a reasonable probability of a different outcome at trial, even if trial counsel's conduct was deficient.
11. Applicant has failed to establish that he was denied due process based on prosecutorial misconduct or any Brady violations by prosecutors during or prior to trial.
12. There is insufficient evidence to establish that Officer Cook's "injury packet" and "use of force" form did not exist at the time of trial, rather, only that the "injury packet" and "use of force form" do not exist at the present time.

13. There is insufficient evidence to establish that Officer Cook's "injury packet" or "use of force" form was impeachment evidence undermining Officer Cook's testimony or that this evidence would have been exculpatory or mitigating.
14. The Court finds no evidence that the prosecution team failed to deliver Officer Cook's "injury packet" or "use of force" form to counsel upon request or failed to disclose the absence of this evidence for impeachment purposes. Applicant has failed to show that the State violated his due process rights in failing to disclose potentially exculpatory or mitigating material.
15. Applicant has failed to establish that there is a reasonable probability of a different outcome at trial based on his assertion of violation of due process.

Appellant timely noticed his appeal of the denial of his habeas application.[4]

II. ANALYSIS

First, we discuss the applicable standard of review for appeal from an article 11.072 habeas application. With this standard in mind, we then address appellant's ineffective-assistance and *Brady* claims.

A. Standard of Review

Where, as here, the habeas court has made written findings and conclusions in support of its order, we review the trial court's order for an abuse of discretion. *Ex parte Garcia*, 353 S.W.3d 785, 787–88 (Tex. Crim. App. 2011) (adopting the abuse-of-discretion standard articulated in *Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997) for appellate review of article 11.072 habeas proceedings). The

[4] After appellant filed this appeal, the State filed a motion to abate so the trial court could make additional findings regarding whether the equitable doctrine of laches bars relief on appellant's habeas application. *See Ex parte Bowman*, 447 S.W.3d 887–88 (Tex. Crim. App. 2014). Although the trial court determined that laches barred appellant's writ and made written findings following a hearing that were included in a supplemental record filed in this court, we determine this appeal on the merits. Thus, we do not detail the trial court's laches findings in this memorandum opinion. *See* Tex. R. App. P. 47.1.

habeas court is the sole finder of fact in an article 11.072 habeas proceeding, and we afford almost total deference to its determinations of historical fact that are supported by the record, particularly when those findings rely on evaluations of witness credibility and demeanor. *Id.*; *Ex parte Skelton*, 434 S.W.3d 709, 717 (Tex. App.—San Antonio 2014, pet. ref'd). We also defer to the trial court's application of law-to-fact questions that turn on witness credibility and demeanor. *Skelton*, 434 S.W.3d at 717; *see Guzman*, 955 S.W.2d at 89. However, if the trial court's resolution of ultimate questions involves only the application of legal standards, we review those determinations de novo. *Skelton*, 434 S.W.3d at 717 (citing *Guzman*, 955 S.W.2d at 89; *Ex parte Mello*, 355 S.W.3d 827, 832 (Tex. App.—Fort Worth 2011, pet. ref'd); *Ex parte Urquhart*, 170 S.W.3d 380, 283 (Tex. App.—El Paso 2005, no pet.)).

B. Ineffective-Assistance-of-Counsel Claim

In his first issue, appellant asserts the trial court erred in denying his writ application because he was denied the effective assistance of counsel during the guilt-innocence stage of his trial. Specifically, he contends his counsel was ineffective in five ways:

- failing to conduct an adequate investigation, which allegedly would have revealed that Cook, in his report, claimed to have filed a "use of force form" and an "injury packet," but those documents did not exist;[5]
- failing to cross-examine Cook about the non-existence of those forms;

[5] Although we resolve the ineffective-assistance-of-counsel issue on the absence of prejudice, we note that appellant's claims of deficient performance here are contrary to the factual findings below. The trial court **did not** find that the forms did not exist at the time of appellant's trial. Rather, the trial court concluded that the forms did not exist at the time of the habeas hearing in 2015. We have neither a finding nor evidence in this record to support a conclusion that the forms did not exist in February 2005 during appellant's trial or, for that matter, that such forms were or were not in the possession of appellant's trial counsel before or during appellant's trial.

- failing to adequately investigate and uncover that Cook had a pre-existing scar on his left cheek and cross-examine Cook about whether the picture of his injury showed only this pre-existing scar;
- failing to cross-examine Cook about the fact that the Department of Safety did not require Cook to wear eyeglasses while driving; and
- failing to request that the jury charge include a lesser-included offense instruction on resisting arrest.

To prevail on an ineffective-assistance claim, an appellant must show that (1) counsel's performance was deficient by falling below an objective standard of reasonableness; and (2) counsel's deficiency caused the appellant prejudice—there is a probability sufficient to undermine confidence in the outcome that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010). An appellant must satisfy both prongs by a preponderance of the evidence. *Perez*, 310 S.W.3d at 893.

Here, even if counsel's performance were deficient for the reasons appellant claims, appellant cannot show that he was prejudiced by any such deficient performance. *See id.* at 896–97. As outlined below, we agree with the trial court's finding that there is not "a reasonable probability of a different outcome at trial, even if trial counsel's conduct was deficient" for the following reasons.

Appellant's first four complaints focus on his counsel's failure to attack the credibility of or impeach the complaining witness, Officer Chad Cook, regarding an alleged missing "use of force" form and "injury packet" that Cook referred to in his police report, a pre-existing scar that Cook had on his cheek, and whether Cook was wearing eyeglasses when the assault occurred. But appellant is wholly incorrect in his allegation that the State's proof of the assault on Officer Cook rested entirely on Cook's credibility. Officer Cook was not the only witness who

testified at appellant's trial. Indeed, two other officers, Gary White and April Armstrong—both present at the scene and witnesses to the offense—corroborated Cook's testimony regarding the facts leading up to and surrounding the assault.[6]

Officer White described arriving at the scene with Cook; they were both in uniform. He described, as did Officer Cook, seeing a vehicle with an open door in the driveway, hearing a female screaming from inside the home, and what sounded like slapping sounds coming from inside. White testified he heard a man, later identified as appellant, screaming something like, "I'll f**king kill you, you b**tch," which was the basis for the officers' decision to enter the residence. According to White, and consistent with Cook's testimony, the officers drew their weapons and approached the front door, which was slightly ajar. White stated that Cook, who was first in line, announced, "Pasadena Police" and then pushed the door, but someone pushed it back at him. Cook pushed the door open again, and as soon as the officers entered the residence, White saw appellant take "a swing at Officer Cook's face." According to White, Cook was able to avoid the blow, and then stepped toward appellant, while at the same time attempting to holster his weapon because it was apparent that appellant was unarmed. As Cook re-holstered his weapon, appellant "stepped forward again and did make contact with another right hand to the left side of Officer Cook's face." White said that Cook then "took [appellant] down to the ground" and placed cuffs on him. White saw that Cook "had an abrasion to his left cheek." Officer White's testimony strongly corroborated Cook's description of the events that resulted in appellant assaulting Officer Cook.

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[6] The basic facts of this case are outlined in our previous opinion. *See Ramirez*, 2006 WL 1026926, at *1. We do not detail Officer Cook's testimony in this opinion; instead, we focus on the corroborating testimony provided by the other officers who witnessed appellant's assault of Cook.

Officer Armstrong described a very similar series of events. She stated she arrived at the scene around the same time as Officers Cook and White; she heard much the same sounds coming from the house as they approached as the other officers described.[7] Her testimony about appellant's assault of Officer Cook corroborated both White's and Cook's testimony. She agreed that appellant struck Cook "[w]ith his right hand against [Cook's] left cheek." She also stated she saw that Officer Cook "had an abrasion on the left side of his cheekbone."

In short, even if the jury had found Cook's testimony to be less credible resulting from cross-examination or impeachment, two other officers fully corroborated his description of the essential elements of the offense of assault of a public servant. Accordingly, appellant was not prejudiced by his counsel's deficient performance, if any. Thus, appellant's first four allegations of ineffective assistance concerning the investigation into and cross-examination of Officer Cook do not provide a basis for an ineffective-assistance-of-counsel claim.

Turning to appellant's final claim that his counsel was ineffective by failing to request a lesser included offense instruction on resisting arrest, to be entitled to a lesser-included offense instruction, there must be evidence in the record tending to show that the defendant, if guilty, is guilty *only* of the lesser-included offense. *See Lofton v. State*, 45 S.W.3d 649, 651 (Tex. Crim. App. 2001). The offense of resisting arrest requires proof that the defendant prevented or obstructed a person he knew was a peace officer from effectuating an arrest, search, or transportation of the defendant or someone else. *See* Tex. Penal Code Ann. § 38.03(a). Here, the evidence establishes that the police officers heard screaming and violent threats

[7] Testifying about the same incident as Officer White, Officer Armstrong testified that she heard appellant shout, "I'm going to f**king kill you, b**ch," before the three officers made entry into the residence. She further stated that Officer Cook only stated, "Police," before he entered the residence, rather than "Pasadena Police."

coming from inside appellant's residence. They entered the residence because of the apparent ongoing emergency. When Officer Cook pushed the door open, the door was pushed back forcefully toward him. Cook then entered, and appellant punched Cook in the face. There was no evidence, from any source, that Cook was attempting to arrest, search, or transport appellant (or anyone else) at the time appellant struck Cook's face.

Appellant identifies no evidence that would have supported an instruction for resisting arrest. He points out that his trial "counsel's strategy was to challenge Cook's allegation that Appellant struck him in the face which caused bodily injury." Appellant asserts that if the jury disbelieved that appellant intentionally caused bodily injury, "evidence would still have existed to permit the jury to find Appellant guilty of the misdemeanor offense of resisting arrest." But, in a trial for assaulting a peace officer, the possibility that the jury will disbelieve that the defendant caused bodily injury to the officer does not entitle the defendant to an instruction on resisting arrest; rather, there must be affirmative evidence tending to show guilt of the lesser, but not the greater, offense. *See Lofton*, 45 S.W.3d at 651–52. Because appellant was not entitled to a lesser-included-offense instruction under the facts of his case, his trial counsel could not have been ineffective for failing to request one. *See Fuentes v. State*, 991 S.W.2d 267, 272 (Tex. Crim. App. 1999) (holding that counsel was not ineffective for failing to request lesser-included-offense instruction when there was no evidence to support the instruction); *see also Washington v. State*, 417 S.W.3d 713, 726 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) ("To demonstrate deficient performance based on the failure to request a jury instruction, an appellant must show that he was entitled to the instruction."). Moreover, as explained above, appellant was not

prejudiced by his counsel's alleged deficiency; i.e., appellant has not satisfied the second prong of the *Strickland* test.

In sum, the trial court did not err in denying appellant's habeas application based on ineffective assistance of counsel. We thus overrule appellant's first issue.

C. Alleged *Brady* Due Process Violations

In his second and third issues, appellant asserts that his conviction was obtained in violation of his state and federal due process rights because the State failed to disclose certain *Brady* evidence to him—i.e., the alleged absence of an "injury packet" and "use of force" form that Officer Cook stated in his police report he completed. Appellant complains that, had the State disclosed that Cook had not completed the "use of force" form and "injury packet" when Cook stated he had completed these forms in his police report, that evidence would have impeached Cook. Assuming, without deciding, that the absence of a form can constitute *Brady* evidence,[8] we conclude that appellant has failed to meet the *Brady* test.

The United States Supreme Court held in *Brady v. Maryland* that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963); *accord Ex parte Miles*, 359 S.W.3d 647, 665 (Tex. Crim. App. 2012). To

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[8] We presume for purposes of this issue that the alleged failure of the State to disclose the absence or non-existence of evidence is subject to a *Brady* analysis. However, appellant offers no support for such a duty, and we have found no case establishing such. Although the State has a duty to discover *Brady* evidence known to others acting on the State's behalf, "'*Brady* and its progeny do not require prosecuting authorities to disclose exculpatory information to defendants that the State does not have in its possession and that is not known to exist.'" *Harm v. State*, 183 S.W.3d 403, 406–07 (Tex. Crim. App. 2006) (quoting *Hafdahl v. State*, 805 S.W.2d 396, 399 (Tex. Crim. App. 1990) (stating that "[t]here can be no *Brady* violation without suppression of favorable evidence")).

establish a *Brady* violation, a habeas applicant must demonstrate that: (1) the State failed to disclose evidence, regardless of the prosecution's good or bad faith; (2) the withheld evidence is favorable to him; and (3) the evidence is material, that is, there is a reasonable probability that, had the evidence been disclosed, the outcome of the trial would have been different. *Miles*, 359 S.W.3d at 665. As to the first *Brady* prong, the trial court did not abuse its discretion in determining that appellant failed to establish that the State failed to deliver these forms or disclose their non-existence to appellant at the time of trial. As excerpted above, the trial court found that there was insufficient evidence that Cook's "injury packet" and "use of force" form "did not exist at the time of trial, rather only that [these forms] do not exist at the present time" and that there was "no evidence" that the State failed to deliver these forms or disclose their absence to appellant at the time of trial." The record reflects that appellant established that the Pasadena Police Department did not have any "use of force" forms related to appellant's case *as of November 15, 2007*, several years after appellant's trial. Appellant provides no support for his bare allegation that the "injury packet" did not exist at the time of trial.[9]

Appellant asserts that, because (1) his trial counsel testified at the hearing on his motion for new trial in 2005 that the "only" report he reviewed in connection with appellant's case was the police report and (2) the habeas record reflects that these forms were not part of that report, he established that the prosecution failed to disclose the absence of these forms. But appellant's trial counsel did not state

[9] At the hearing on the State's motion to abate for laches findings, the State presented evidence that the Pasadena Police Department routinely destroyed "use of force" forms and would have done so prior to appellant's inquiry into the form in this case. The State further presented evidence that the City of Pasadena, the custodian of the "injury packets," routinely destroyed these documents years prior to appellant's writ application. Our record was supplemented with this evidence, but it was not before the trial court when it denied appellant's writ application on the merits.

that he "only" reviewed the police report in this case. Instead, he stated at the hearing on appellant's motion for new trial that the Harris County District Attorney's Office had an "open file" to which he was given access, that he familiarized himself with the information contained in the file, and that the file contained an offense report detailing the allegations from the officer's perspective. Thus, appellant's trial counsel's testimony at the motion-for-new-trial hearing does not support appellant's contention that the State failed to disclose the absence of the "injury packet" or "use of force" form. In fact, there is no testimony from appellant's trial counsel whatsoever regarding whether he was aware that these forms existed or did not exist; this issue simply was not addressed at the motion-for-new-trial hearing. And, by the time appellant filed his habeas application over eight years after his conviction was final, his trial counsel simply could not remember any details from appellant's trial, including details about the presence or absence of these forms. Thus, the record supports the trial court's findings that (a) there is insufficient evidence that these forms did not exist at the time of trial and (b) no evidence that the State failed to deliver these forms or disclose their non-existence to appellant at the time of trial.

Further, as to the third *Brady* prong and, as discussed above, appellant's planned use of the alleged absence of these documents—to cross-examine Officer Cook and impeach his credibility—the presence or absence of this evidence likely would have had little impact on the jury's verdict in light of the strength of the corroborating testimony of the other two officers at the scene of the offense. Thus, appellant has not demonstrated that, had the State either disclosed these documents or disclosed their non-existence, "it is reasonably probable that the outcome of the trial would have been different." *See id.*

In short, appellant failed to establish two of the three prongs of his *Brady* claim: the State's failure to disclose and a reasonable probability that the outcome of his trial would have been different. *See id.* And, because appellant failed to demonstrate a *Brady* violation, his state and federal due process rights likewise were not violated. *See Brady*, 373 U.S. at 87; *Miles*, 359 S.W.3d at 665. Under these circumstances, the trial court properly denied appellant habeas corpus relief. We overrule appellant's second and third issues.

III. Conclusion

We have overruled appellant's three issues. The trial court's order denying appellant's habeas application is affirmed.

/s/ Sharon McCally
Justice

Panel consists of Chief Justice Frost and Justices Christopher and McCally.
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