Reversed and Rendered and Memorandum Opinion filed January 21, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00472-CR

THE STATE OF TEXAS, Appellant

V.

CHARLES TRAHAN, Appellee

On Appeal from County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 1974704

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

After a visiting judge denied his motion for continuance, appellee Charles Trahan entered a plea of nolo contendere to misdemeanor driving while intoxicated. He asked for a new trial in the interest of justice because the visiting judge erred in denying the continuance. The presiding judge granted his motion for new trial and the State appealed. *See* Tex. Code Crim. Proc. Ann. art. 44.01(a)(3) (state may appeal order granting new trial). Because the presiding judge abused his

discretion in granting a new trial, we reverse and reinstate the trial court's judgment of April 6, 2015.

FACTUAL AND PROCEDURAL BACKGROUND

On July 25, 2014, appellee was charged by information with driving while intoxicated. On January 6, 2015, the case was set for jury trial to begin Monday, April 6.

On January 26, appellee filed a notice designating 65 experts he "expect[ed] to call" during his case in chief. The list includes experts on, among other things, breath testing devices, breath test interferences, field sobriety tests, toxicology, pharmacology, blood alcohol content, and accident reconstruction. Amanda Culbertson is number 49 on the list of experts. No information is provided about her education, experience, or area of expertise.

On Thursday, April 2, appellee's counsel told the presiding judge he was not ready for trial because the defense's "blood expert" had not prepared her report. The presiding judge offered to reset the case that day. Appellee's counsel said he did not want to "burn [his] continuance" needlessly. He believed the State might proceed to trial on another case, which would result in appellee's case being reset. The presiding judge told him a visiting judge would be on the bench on April 6, and he could not guarantee the visiting judge would grant appellee a continuance. Later, at the hearing on appellee's motion for new trial, appellee's counsel said he "chose to just wait until the next week, thinking [he] knew [the visiting judge] better than that and that he would give [the continuance] to [him]."

On the morning of April 6, appellee's counsel filed a motion for continuance. The substance of the handwritten motion states in its entirety:

> [Defense Counsel's office] did not receive blood discovery until March 17 or 18, 2015 and they sent it immediately to expert Amanda

> Culbertson for review. Defendant paid for the expert review which is still to be completed. Defense Counsel has not received the expert review or report in this case.
>
> Henceforth, Defendant must now move for a continuance because Defense Counsel cannot provide effective defense or counsel in a DWI blood case without an opportunity to have the discovery reviewed by their expert. Defendant would be harmed by trying to go for trial without effective representation. The expert is a necessary and retained witness.
>
> This is Defendant's First Motion for Continuance and not made for purpose of delay. Defendant used due diligence in trying to get this expert report.

The visiting judge heard appellee's motion for continuance the same morning. Counsel said he "did not actually get to pick up the [blood] discovery until March 17th or 18th." He said he sent the discovery, alleged to be "about 700 or 800" pages, to Amanda Culbertson, whom he described as "the expert we use for all our blood cases." Counsel recounted the presiding judge's offer the previous week to reset the case and explained his choice not to accept that offer. He reiterated that he was not prepared to try the case that day because he did not have Culbertson's expert report, and said "it would be malpractice" for him to proceed to trial.

In opposing the motion, the State said the discovery appellee wanted Culbertson to review was available to appellee's counsel in early February:

> I reached out to the Institute of Forensic Sciences and asked when the discovery was made available to the defense attorney; and the person at that location over discovery let me know that the defense attorney was notified on February 4th of this year that the discovery was made available to him. So the fact that it was picked up over a month after it was available to him, I'm not sure why that was the case.

The State said its witnesses were present and it was ready for trial that day.

The visiting judge asked appellee's counsel about the 65 experts he had designated:

> Court: [O]ne of my problems here: [Counsel], you filed a notice of experts where you listed 65 people who could be your expert; and you mentioned one who is not available to do your work today. When you list 65 experts you have at your [beck and] call to testify down here regarding blood issues and you say, The one I picked is not available, how about the other 64 you listed in your discovery?
>
> Counsel for appellee: Judge we've already paid Amanda Culbertson. We only need to pay one of them; and that's the one we've been using because we've been most successful with her because she's based out of Houston and has all these — these are experts for different issues that may arise in different blood cases.
>
> Counsel for the State: Then the State would argue that was not a motion — or, I'm sorry, a notice that was filed in good faith.
>
> Court: I'm kind of with you. Basically, you pulled out the phone book of everyone who has a PhD and put them in your expert list. Go ahead and get ready for trial, because, folks, I'm going to deny the Motion.
>
> . . .
>
> I'm going to find there's not due diligence for this Motion. It should've been filed last week or perhaps earlier in the 3-month trial setting. To hide behind the docket, come to court on the day of trial and say, Now, since

you reached me, I'm not really ready today, is just simply not due diligence counsel.

Appellee entered a plea-bargain agreement with the State that day. In exchange for appellee's plea of nolo contendere, the State recommended a suspended sentence, 15 months of community supervision, and a $1,500 fine. The trial court rendered judgment on the parties' agreement.

Appellee timely filed a motion for a new trial. The basis for a new trial stated in the motion is "in the interest of justice." He acknowledged that the Institute of Forensic Sciences informed appellee's counsel on February 4 that the discovery documents were ready. He then alleged for the first time that the documents were not provided to counsel's runner when the runner "went to pick up several discovery packets for various cases." The motion does not indicate when the runner picked up those packets. The motion is not verified and does not attach any evidence.

The presiding judge heard appellee's motion for new trial. Appellee announced at the hearing that the Culbertson report was ready, but he did not offer the report into evidence or provide any information about the report's content. He said he was ready to proceed to trial at any time.

In response, the State argued appellee's motion for new trial should be denied because he did not satisfy his burden to prove (1) the visiting judge erred in denying a continuance; and (2) harm. The State also said appellee could have proceeded to trial and, if he was found guilty, he could have appealed, raising the denial of the continuance as an issue on appeal.

After both lawyers presented their arguments, the presiding judge said:

Court: All right. You know, here's the thing, guys: Everybody makes mistakes. And first of all,

[counsel], you understand that you did make a mistake, that you should've filed that continuance?

Counsel for appellee: Yes.

Court: And you were hoping that you could get a — you know, a free deal on this. But — and then it turned around and bit you because we had another judge that came and took my place, and I'm not responsible for what another judge does. You know, even though you might — all of y'all might know what I'm going to do and how I'm going to react on a certain situation, when another judge comes in here, he handles this court the way he so chooses; and now you're trying to get me to second-guess another judge's decision.

But, you know, a long time ago, when I first started this, you know, Judge Mike Anderson told me, you know, that this is a court of justice and fairness and if — you know, would you do this for the State, if the State came to me and said we can't get our expert here because we have to fly him down from Dallas or from Colorado or from some other place and we don't — you know, we just couldn't get a plane ticket for this time, can we get a continuance? And so if I do it for the State, shouldn't I do it for the Defense, in fairness?

And that's what this is all about. Even though this is a young case — nobody has asked for a continuance on this case before; and I told you from the beginning that if somebody came to me beforehand on a — you know, on a case that needed a continuance for the first time, I would

probably grant it to either side, if you came to me beforehand. You did come to me beforehand, but then you choose [sic] not to take it.

Counsel for appellee: Right.

Court: And now we're here in this — in the midst of doing this. And for one reason or another, I hope that you and everybody else has learned a lesson on this.

Counsel for appellee: Yes, sir.

Court: Because we're not going to do this. But, again, we go back to fairness. And in all fairness, I think everybody should have their day in court; and I'm going to grant the new trial.

Following the judge's pronouncement, the State said:

Counsel for the State: I would like to point out for the record that the standard is not fairness. The standard is reasonableness and whether a reasonable trial judge would have found that the Motion for Continuance was filed — would be filed for the purposes of delay, and that is what the Trial Court found on that day.

Court: Okay. Well, I don't feel that it was a purposeful delay because he had come to me beforehand; and him coming to me beforehand explained the reason why he needed it. And it being the first time up to bat on this case is the reason — and I'd do it for both sides. And the only mistake that he made was he didn't take it, but I would have granted it then.

Counsel for the State: So, for the record, is the Court finding that [the visiting judge] erred in that — in that no

	reasonable trial judge would have ruled the way [the visiting judge] did?
Court:	Well, I guess that's for the Appellate Court to make that decision on, if it goes there.
Counsel for appellee:	And, Judge, we also just want to put on the record: We included that last part in the interest of justice, that justice requires a new trial, which I think trumps any Judge's error for denying a continuance.
. . .	
Counsel for the State:	And for appellate purposes, for the State to be able to appeal it, are you declining to make a ruling about whether [the visiting judge] erred; or are you making the ruling?
Court:	I'm not going to make a ruling on if [the visiting judge] erred or not.
Counsel for the State:	And are you declining to make a ruling about whether no reasonable trial judge would have denied the Motion for Continuance?
Court:	I think that a reasonable trial judge would have granted the continuance.

The trial court signed an order granting appellee's motion for a new trial, and the State appealed.

ANALYSIS

A trial court has discretion to grant a new trial "in the interest of justice." *State v. Herndon*, 215 S.W.3d 901, 906 (Tex. Crim. App. 2007); *State v. Sanders*, 440 S.W.3d 94, 99 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). That discretion has limits. "Justice" means in accordance with law. *Herndon*, 215 S.W.3d at 906; *Sanders*, 440 S.W.3d at 99. It may not grant a new trial on "mere

sympathy, an inarticulate hunch," or because it believes the defendant is innocent or "received a raw deal." *Herndon*, 215 S.W.3d at 906; *Sanders*, 440 S.W.3d at 99. In considering whether to grant a new trial in the interest of justice, a trial court should weigh the defendant's claim for justice against the interests of the public in finality. *See State v. Hart*, 342 S.W.3d 659, 664 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd).

We presume the trial court correctly granted a new trial; the State has the burden to establish the contrary. *Sanders*, 440 S.W.3d at 99. We will uphold the trial court's judgment if any appropriate ground exists to support it. *Id.* A trial court may not grant a new trial unless the first proceeding was not in accordance with law. *Herndon*, 215 S.W.3d at 906; *Sanders*, 440 S.W.3d at 99.

I. Legal Standards

A. Motion for Continuance

Continuances in criminal cases are governed by chapter 29 of the Code of Criminal Procedure. Article 29.03 allows the trial court to continue a case on the written motion of the defendant or the State "upon sufficient cause shown; which cause shall be fully set forth in the motion." Tex. Code Crim. Proc. Ann. art. § 29.03 (West 2006). If a defendant seeks a continuance due to the absence of a witness, his first motion must contain certain information including the witness' name and residence; the diligence used to procure the witness' attendance; the facts he expects the witness to prove; an affirmation that he did not procure or consent to the witness' absence; and an affirmation that the motion is not made for delay. *See id.* § 29.06(1)–(5).

Denial of a motion for continuance is within the trial court's broad discretion. *Head v. State*, 299 S.W.3d 414, 440 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). To establish an abuse of discretion, the movant must show (1) the

trial court wrongly denied the motion, and (2) he was actually prejudiced by the denial of his motion. *Gonzales v. State*, 304 S.W.3d 838, 843 (Tex. Crim. App. 2010); *accord Nwosoucha v. State*, 325 S.W.3d 816, 825 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). A trial court errs in denying a motion for continuance when "the case made for delay was so convincing that no reasonable trial judge could conclude that scheduling and other considerations as well as fairness to the State outweighed the defendant's interest in delay of the trial." *Gonzales*, 304 S.W.3d at 843.

Harm is demonstrated "only if the record shows with considerable specificity how the defendant was harmed by the absence of more preparation time than he actually had." *Id.* at 842–43. "This showing can ordinarily be made only at a hearing on a motion for new trial, because almost always only at that time will the defendant be able to produce evidence as to what additional information, evidence or witnesses the defense would have had available if the motion for delay had been granted." *Id.*; *accord Nwosoucha*, 325 S.W.3d at 825.

Examples of harm suffered through denial of a continuance include unfair surprise, an inability to effectively cross-examine the State's witnesses, and the inability to elicit crucial testimony from witnesses. *Janecka v. State*, 937 S.W.3d 456, 468 (Tex. Crim. App. 1996); *Barfield v. State*, 464 S.W.3d 67, 76 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).

B. Motion for New Trial

A new trial is "the rehearing of a criminal action after the trial court has, on the defendant's motion, set aside a finding or verdict of guilt." Tex. R. App. P. 21.1(a). The trial court must grant a new trial, or a new trial on punishment, in nine

situations, none of which appellee urges in this case.[1] By contrast, a new trial is permissible but not mandatory "in the interest of justice." *State v. Gonzalez*, 855 S.W.2d 692, 694 (Tex. Crim. App. 1993); *State v. Provost*, 205 S.W.3d 561, 566 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

Additionally, if a motion for continuance based on the absence of a witness is denied and the defendant is convicted, a motion for new trial should be granted "if it appear upon the trial that the evidence of the witness or witnesses named in the motion was of a material character, and that the facts set forth in said motion [for continuance] were probably true." Tex. Code Crim. Proc. Ann. art. 29.06(6); *see Nwosoucha*, 325 S.W.3d at 825. "Facts" in subsection (6) refers to "[t]he facts which are expected to be proved by the witness, and it must appear to the court that they are material." Tex. Code Crim. Proc. Ann. art. 29.06(3).

II. Trial Court Abused Its Discretion in Granting New Trial

A. Burden of Proof

Appellee contends the trial court's order granting a new trial must be affirmed because (1) the State failed to negate any basis for a new trial, and (2) the State did not make an adequate appellate record. He says:

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[1] Tex. Code Crim. Proc. Ann. art. 40.001 ("A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial."); Tex. R. App. P. 21.3 ("(a) except in a misdemeanor case in which the maximum possible punishment is a fine, when a defendant has been tried in absentia or has been denied counsel; (b) when the court has misdirected the jury about the law or has committed some other material error likely to injure the defendant's rights; (c) when the verdict has been decided by lot or in any manner other than a fair expression of the jurors' opinion; (d) when a juror has been bribed to convict or has been guilty of any other corrupt conduct; (e) when a material defense witness has been kept from court by force, threats, or fraud, or when evidence tending to establish the defendant's innocence has been intentionally destroyed or withheld, thus preventing its production at trial; (f) when, after retiring to deliberate, the jury has received other evidence; when a juror has talked with anyone about the case; or when a juror became so intoxicated that his or her vote was probably influenced as a result; (g) when the jury has engaged in such misconduct that the defendant did not receive a fair and impartial trial; or (h) when the verdict is contrary to the law and the evidence.").

> None of the arguments advanced by the [State] at the hearing on the motion for new trial or the instant appeal suggest [Culbertson] was available and prepared. In other words, none of the arguments offered by the [State] can be construed as an attempt to controvert the Appellee's stated basis for requesting a new trial. As noted, the basis offered in support of Appellee's request for a new trial was that his "expert . . . had not yet completed the forensic review of the evidence in this case." The [State] made no attempt to controvert the Appellee's assertion (i.e. that his expert witness had not yet completed her forensic review of the evidence). In essence, what the [State] argued was that the Appellee should have picked up the discovery sooner, and that his expert witness should have been prepared. But, that is not the same as arguing that she had in fact completed her review, and that counsel was requesting a continuance for some other, non-legal reason.

Appellee relies heavily on *Gonzalez*, 855 S.W.2d at 696, to support his argument.

In that case, the defendant moved for a new trial in the interest of justice "to present witnesses that were not presented at the time of sentencing" to testify on his behalf. *Id.* The State "did *not* take issue with any reason set forth in the motions." *Id.* (italics in original). The defendant brought one witness to the hearing on his motion for new trial, who testified he was unavailable at the time of the sentencing hearing. *Id.* The State elected not to cross-examine that witness or otherwise controvert his testimony. *Id.* The trial court granted the defendant's motion for new trial because it was "*uncontroverted by the State* that this witness was unavailable." *Id.* (italics in original). Both the Dallas Court of Appeals and the Court of Criminal Appeals affirmed the grant of the new trial because "the State fail[ed] to provide an appellate record establishing an abuse of discretion." *Id.*

We reject appellee's contentions because he misplaces the burden of proof. The State, as appellant, has the burden to show the trial court abused its discretion in granting a new trial. But as the movant in the trial court, appellee bore the burden to establish his entitlement to a new trial. The defendant in *Gonzalez*

satisfied that burden; he presented evidence at the hearing on his motion for new trial and argued why that evidence was material. *Id.* The burden then shifted to the State to controvert that evidence or convince the trial court the evidence was immaterial. *Id.* Because the State did not meet its burden, the order granting a new trial was affirmed. *Id.*

By contrast, in this case appellee did not satisfy his initial burden of proof for the reasons explained below. As a result, the State had no burden in the trial court to negate appellee's statements.

B. New Trial Based on Denial of Continuance

To be entitled to a new trial, appellee was required to show that the visiting judge wrongly denied a continuance and that he was harmed by the denial. *Gonzales*, 304 S.W.3d at 843. Appellee does not contend the visiting judge erred in denying the continuance. To the contrary, appellee concedes in his brief that the visiting judge "was well within his rights to deny [appellee's] first motion for continuance."

Appellee did not satisfy the second part of his burden, which was to establish he was harmed by the denial of the continuance. He did not offer any evidence, either by affidavit attached to his motion for new trial or through testimony at the hearing on his motion. He said Culbertson had completed her report, but he did not offer the report into evidence, explain its content, or indicate what Culbertson would have testified had her report been completed by the time trial began.

Moreover, appellee did not comply with article 29.06, which authorizes a new trial after the denial of a motion for continuance based on the absence of a witness. The article requires the motion for continuance to include "the facts which are expected to be proved by the witness, and it must appear to the court that they

are material." Tex. Code Crim. Proc. Ann. art. 29.06(3). "[M]ere conclusions and general averments" are not sufficient to establish materiality. *Nelson v. State*, 297 S.W.3d 424, 432 (Tex. App.—Amarillo 2009, pet. ref'd). Appellee's motion for continuance did not set forth any facts to which he expected Culbertson, his "blood expert," to testify, much less explain why those facts were material.

Although appellee acknowledges the visiting judge had discretion to deny his motion for continuance, he nonetheless contends the existence of this discretion is not relevant to the question of whether the presiding judge properly granted a new trial. He writes in his brief:

> The question is not whether it was error for [the visiting judge] to deny the Appellee's motion for continuance and whether that error harmed him. Rather, the question is whether it was legally permissible for the trial court to recognize the iniquity foisted upon the Appellee and couched in terms of a Hobson's choice, and to correct it, in the interests of justice.

We reject that contention because a trial court has no discretion to grant a new trial if the first proceeding was in accordance with the law. *Herndon*, 215 S.W.3d at 906; *Sanders*, 440 S.W.3d at 99. Therefore, we conclude the presiding judge abused his discretion in granting appellee's motion for new trial insofar as that grant was based on the visiting judge's denial of appellee's motion for continuance.

C. New Trial Based "In the Interest of Justice"

Appellee contends the order granting the new trial is supportable because it was made "in the interest of justice." At the hearing on the motion for new trial, appellee's lawyer said the interest-of-justice ground "trumps any judge's error for denying a continuance."

Though broad, the trial court's discretion to grant a new trial in the interest of justice is not unlimited. "Justice" means in accordance with law. *Herndon*, 215 S.W.3d at 906; *Sanders*, 440 S.W.3d at 99. Under appellee's interpretation, the phrase "in the interest of justice" would have "no substantive legal content; it would be a mere platitude . . . ." *Hart*, 342 S.W.3d at 664.

This standard also does not relieve the movant of his burden to satisfy the evidentiary requirements of a motion for new trial. Appellee did not establish the materiality of the "blood discovery" or Culbertson's analysis of it. He did not attach evidence to his motion and did not bring Culbertson to testify. Nor did he establish harm.

We sustain the State's issue.

CONCLUSION

Having concluded the trial court abused its discretion by granting appellee's motion for new trial, we reverse the trial court's order granting a new trial, and we reinstate the judgment of conviction and sentence for appellee.

/s/ William J. Boyce

Panel consists of Justices Boyce, Busby, and Brown.
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