

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00185-CR

THE STATE OF TEXAS, Appellant

V.

JAMES CODY GUEDRY, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 09-07067

MEMORANDUM OPINION

The State appeals the trial court's order granting the defendant's motion for new trial.¹ In its appeal, the State raises two issues. In issue one, the State argues the trial court erred in granting the defendant's motion for new trial because the defendant should never have received a hearing on his motion which was not sworn or supported by affidavits. In issue two, the State argues the defendant failed to meet his burden to prove that his trial

¹Article 44.01(a)(3) of the Texas Code of Criminal Procedure allows an appeal from a trial court's decision to grant a new trial. Tex. Code Crim. Proc. Ann. art. 44.01(a)(3) (West Supp. 2012).

counsel rendered ineffective assistance of counsel, and concludes the trial court abused its discretion in granting a new trial on that basis. We conclude the trial court did not abuse its discretion by conducting an evidentiary hearing on the defendant's timely filed original motion seeking a new trial. We further conclude the trial court's finding that the defendant's trial counsel rendered ineffective assistance is supported by the evidence. Finally, we conclude the record is sufficient to demonstrate that trial counsel's performance prejudiced the defendant's right to a fair trial. Therefore, we affirm the trial court's order.

Background

This case arises from an altercation that occurred following a traffic stop. In August 2007, a City of Beaumont patrolman saw a car fail to yield the right-of-way to another car at a controlled intersection. There were three occupants in the stopped car, two in the front and one in the back. After the patrolman conducted the stop, other officers arrived at the scene to prevent the driver of the car and the front-seat passenger, D.N., from potentially interfering with the arrest of the back-seat passenger because that passenger had an outstanding warrant. An altercation resulted when one of the officers, James Cody Guedry, attempted to perform a pat-down search on D.N. During the altercation that erupted during Guedry's search, an officer near Guedry, David Todd Burke, began striking D.N. with his baton; then Guedry used his taser, striking D.N. twice. Subsequently, in separate indictments, the State charged Guedry and Burke with

official oppression, a Class A misdemeanor. *See* Tex. Penal Code Ann. § 39.03 (West 2011).² Guedry’s indictment alleges that in August 2007, Guedry, while acting as a peace officer, intentionally subjected D.N. to mistreatment “by shocking him with a ta[s]er, and he knew such action was unlawful.”

The State called four witnesses during Guedry’s trial. Lieutenant George “Chris” Schuldt authenticated two police videos that were used to record the stop and subsequent altercation with D.N. Officer Jason Torres, the officer who made the stop and who arrested the back-seat passenger, described what he saw that led to the altercation. Torres testified that he instructed Guedry to use his taser on D.N. during the altercation. Detective Charles Duchamp, Guedry’s field training officer, explained that the City’s policies on using a taser require the officer to provide the subject with an opportunity to avoid the taser’s use if feasible before the taser is discharged. D.N., the person the jury determined to have been mistreated, testified that he made a rude comment when Guedry patted him down, but he denied that he resisted the search by grabbing Guedry’s hand.

²Sec. 39.03. Official Oppression

(a) A public servant acting under color of his office or employment commits an offense if he:

- (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;
- (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or
- (3) intentionally subjects another to sexual harassment.

Tex. Penal Code Ann. § 39.03 (West 2011).

Guedry testified in his defense. According to Guedry, D.N. resisted the pat down search for weapons by grabbing his hand. Although the jury saw the videotape from the stop, it does not show that D.N. resisted nor does it demonstrate that he did not. Guedry also provided the jury with the testimony of an expert, Gary Duncan, on whether Guedry's use of the taser was reasonable. Duncan expressed the opinion that if D.N. resisted the search, Guedry's use of a taser was reasonable.

The jury determined that Guedry subjected D.N. to mistreatment that he knew to be unlawful. The trial court assessed Guedry's punishment at thirty days in county jail, but the trial court suspended the imposition of Guedry's sentence, and instead, placed him on community supervision for ninety days. Guedry filed a timely motion for new trial. Guedry's motion alleges several claims, including a claim that he received ineffective assistance of counsel.

After conducting a hearing, the trial court granted Guedry's motion, finding that Guedry's trial counsel rendered ineffective assistance and that the interest of justice warranted a new trial. The State timely perfected its appeal of that ruling. *See* Tex. Code Crim. Proc. Ann. art. 44.01(a)(3) (West Supp. 2012) (providing the State with the right to appeal an order of a court in a criminal case if the order grants a new trial).

Validity of Guedry's Original Motion for New Trial

In its first issue, the State contends the trial court erred by holding a hearing on Guedry's motion for new trial. It makes two arguments in support of its issue; first, the

State argues that Guedry's original motion for new trial was wholly insufficient because it was not sworn and was not supported by affidavits. Second, the State argues that the trial court erred when it allowed Guedry to amend his original unsworn motion by filing an amended motion more than thirty days after the date the trial court imposed Guedry's sentence. *See* Tex. R. App. P. 21.4 (prescribing a thirty-day deadline that begins on the date the trial court imposes sentence in a criminal case for the filing of an original or amended motion for new trial).

Less than thirty days after the trial court imposed a sentence, Guedry, with a new attorney who had not represented him during the trial, filed an instrument titled "Motion for New Trial." Guedry's motion for new trial is neither sworn nor supported by affidavit. Guedry's motion alleges, among other claims, that Guedry's trial counsel rendered ineffective assistance; however, Guedry's motion does not provide any detail regarding the claim that he received ineffective assistance of counsel. According to the State, Guedry's motion for new trial is a nullity because it was not verified or accompanied by affidavits.

We disagree that the lack of verification or the lack of affidavits deprived the trial court of its right to conduct a hearing on Guedry's motion. Neither the statute referencing motions for new trial in criminal cases nor the rules that govern the procedure on motions for new trials in criminal cases require the motion to be verified or to be supported with affidavits. *See* Tex. Code Crim. Proc. Ann. art. 40.001 (West 2006) (concerning new

trials that are based on newly discovered evidence, which was not the basis of the motion that is at issue here); Tex. R. App. P. 21.1-21.9. Moreover, a trial court's decision to hold a hearing on a motion for new trial, despite the absence of a verification or supporting affidavits, does not deprive it of jurisdiction to decide the motion. *See Bitterman v. State*, 195 S.W.3d 777, 779 (Tex. App.—Waco 2006, pet. ref'd) (declining to adopt State's argument that trial court lacked jurisdiction to conduct hearing on motion that lacked verification or affidavits); *see also* 43A George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 50.17 (3d ed. 2011).

When a motion for new trial is filed, the rules allow the trial court to “receive evidence by affidavit or otherwise[,]” but do not describe the type of hearing the trial court may choose to conduct. *See* Tex. R. App. P. 21.7. While the trial court might have chosen not to hold an evidentiary hearing based on the absence of sworn evidence supporting Guedry's motion, we conclude that the trial court was not prohibited from holding an evidentiary hearing to allow the claims asserted in Guedry's original motion to be further developed with evidence. *Cf. Wallace v. State*, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003) (discussing when defendant becomes “entitled” to a hearing on a motion for new trial). Accordingly, the trial court in this case exercised its discretion to receive evidence at an evidentiary hearing. One of the claims alleged in Guedry's original motion, filed within thirty days of the date the trial court imposed sentence, included a claim for ineffective assistance of counsel. We hold that Guedry's timely filed motion

allowed the trial court to conduct an evidentiary hearing on Guedry's claim of ineffective assistance of counsel.

Amended Motion for New Trial

Next, we address the State's argument that the trial court erred when it allowed Guedry to amend his original motion by filing an amended motion more than thirty days after the date the trial court imposed Guedry's sentence. *See* Tex. R. App. P. 21.4. Guedry amended his motion for new trial one day before the trial court conducted an evidentiary hearing on his motion. Guedry's amended motion for new trial provides detail regarding why Guedry claimed that he received ineffective assistance, but the claim of ineffective assistance is alleged in Guedry's original motion.

On the date Guedry filed his amended motion, the trial court signed an order granting leave to amend, and the trial court conducted a hearing the next day. On the day after the hearing, but still within the period during which the trial court retained jurisdiction over Guedry's case, the trial court granted Guedry's motion based on its determination that Guedry's trial attorneys had rendered ineffective assistance. *See* Tex. R. App. P. 21.8(a) (requiring ruling within 75 days after the trial court imposes or suspends sentence in open court).

We note that the trial court's order includes a finding that a new trial should be granted "in the interest of justice." It appears from the trial court's order that the trial court's finding that a new trial was warranted in the interest of justice was not intended

by the trial court to constitute a finding on a separate claim, as the trial court's factual findings regarding the basis of its decision to grant a new trial all relate to Guedry's claim of ineffective assistance of counsel. Further, the order granting Guedry's motion states that Guedry's "amended new trial motion raised no additional legal basis in support of granting a new trial, but merely provided an itemized list of numerous instances taken from the trial record which evidenced trial defense counsel's [name omitted] alleged deficient performance and resulting prejudice to [Guedry's] defense." A claim based on the independent ground that a new trial should be granted in the interest of justice is not alleged in either Guedry's original or amended motion. Thus, we are confident that the trial court's order reflects the trial court's intent to grant a new trial based only on Guedry's claim that he received ineffective assistance, which was a ground for new trial that Guedry raised in his original motion.

We conclude the trial court properly based its ruling on one of the claims—ineffective assistance—that Guedry raised in his timely filed original motion. We further conclude that Guedry's timely filed motion allowed the trial court to conduct the subsequent evidentiary hearing to allow the claim of ineffective assistance to be developed with evidence. Consequently, having addressed the State's issue one arguments, we overrule issue one.

Ineffective Assistance

In issue two, the State asserts that Guedry failed to prove that he received ineffective assistance of trial counsel. Decisions granting a defendant's motion for new trial are reviewed under an abuse of discretion standard. *See State v. Gonzalez*, 855 S.W.2d 692, 696 (Tex. Crim. App. 1993) (applying abuse of discretion standard to appeal arising under article 44.01(a)(3) of the Texas Code of Criminal Procedure). In explaining how the standard applies in the context of a trial court's decision on a motion for new trial, the Court of Criminal Appeals has stated that the question the reviewing court must answer

“is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action; rather, it is a question of whether the trial court acted without reference to any guiding rules or principles, and the mere fact that a trial court may decide a matter within its discretionary authority differently than an appellate court does not demonstrate such an abuse.”

State v. Herndon, 215 S.W.3d 901, 907-08 (Tex. Crim. App. 2007) (citing *Howell v. State*, 175 S.W.3d 786, 792 (Tex. Crim. App. 2005) (quoting *Brown v. State*, 870 S.W.2d 53, 55 (Tex. Crim. App. 1994))). The *Herndon* Court then explained:

We need not today set out bright-line rules concerning appellate review of a trial court's discretion in this area, but we do conclude that a trial court would not generally abuse its discretion in granting a motion for new trial if the defendant: (1) articulated a valid legal claim in his motion for new trial; (2) produced evidence or pointed to evidence in the trial record that substantiated his legal claim; and (3) showed prejudice to his substantial rights under the standards in Rule 44.2 of the Texas Rules of Appellate Procedure. The defendant need not establish reversible error as a matter of law before the trial court may exercise its discretion in granting a

motion for new trial. On the other hand, trial courts do not have the discretion to grant a new trial unless the defendant demonstrates that his first trial was seriously flawed and that the flaws adversely affected his substantial rights to a fair trial.

Id. at 909.

Guedry's motion for new trial alleges ineffective assistance of trial counsel, a claim that, if proven, is a valid legal basis on which a trial court may grant a defendant's motion for new trial. *See Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (noting that because the Sixth Amendment does not specify particular requirements of effective assistance, the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms"). Courts apply a two-pronged test to resolve ineffective assistance of counsel claims. *See* 466 U.S. at 687; *Garza v. State*, 213 S.W.3d 338, 347-48 (Tex. Crim. App. 2007); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). To succeed on a claim alleging ineffective assistance of counsel, a defendant must show by a preponderance of the evidence that his counsel's representation fell below the standard of prevailing professional norms; he must also show there is a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Strickland*, 466 U.S. at 687; *Garza*, 213 S.W.3d at 347-48; *Thompson*, 9 S.W.3d at 812. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thompson*, 9 S.W.3d at 812. Although the question of whether Guedry suffered prejudice is a question that is reviewed *de novo*, "the trial court should be afforded deference on

any underlying historical fact determinations.” *Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005).

The trial court’s findings reflect its concern with the fact that Guedry’s trial attorneys had also represented Burke in connection with the charges against him arising from the altercation with D.N. The State first raised a potential conflict regarding Guedry’s representation on the first day of trial before the parties picked a jury. The State raised additional concern about potential conflicts of counsel when another of Guedry’s attorneys, who had not been present during jury selection and who had filed a motion to withdraw due to a potential conflict, appeared on Guedry’s behalf for the first time on the third day of the trial. At both of these points, the State brought its concerns regarding potential conflicts to the trial court’s attention, and after being given time to consider the fact that the attorneys representing him also represented Burke, Guedry advised the trial court that he wanted the trial to continue.

The argument presented to the trial court at the motion for new trial focused on whether the judgments made by Guedry’s trial attorneys in handling Guedry’s case were impaired by the duty they were under based on their representation of Burke. Although the trial court’s order does not expressly state that Guedry’s waiver of the conflict was uninformed, the trial court’s stated reasons for granting Guedry’s motion reflects the trial court’s belief that the judgments made by Guedry’s attorneys in handling his case were adversely affected by their duty to Burke. The trial court’s order granting the motion for

new trial states that the deficiencies of Guedry's trial counsel "adversely affected the outcome of the trial and [Guedry's] rights to a fair trial and effective legal counsel." However, the trial court's findings do not address whether Guedry voluntarily waived any conflict related to the fact that his attorneys also represented Burke.

To support his motion for new trial, Guedry presented the testimony of Gerald Bourque, a board certified criminal defense attorney with thirty-two years of experience in the practice of law. Among the many choices made by trial counsel that Bourque criticized, he was particularly critical of the choice Guedry's attorney made to use Duncan, the same expert used in Burke's trial to justify Burke's use of force. At trial, Duncan testified that Guedry had not used excessive force in the altercation. During Duncan's cross-examination, the State proved that Duncan had previously testified that Burke's conduct was also reasonable. Bourque described the choice to use Duncan in Guedry's case as "an anchor around Guedry's neck[,]" and as "a huge, huge mistake." Bourque testified that Guedry's actions should have been evaluated by an independent expert to allow Guedry to distance himself from being associated with Burke's conduct.

In our view, Guedry should not be subjected to ineffective assistance regardless of whether he knowingly waived any conflict. In assessing the trial court's determination that Guedry did not receive effective representation, we are mindful of the requirement that we are to defer to the trial court's right to weigh the credibility of the testimony that comes before the trial court at the hearing on the motion for new trial. *See Salazar v.*

State, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001); *Etter v. State*, 679 S.W.2d 511, 515 (Tex. Crim. App. 1984); *see also Morris v. State*, 696 S.W.2d 616, 620 (Tex. App.—Houston [14th Dist.] 1985), *aff'd*, 739 S.W.2d 63 (Tex. Crim. App. 1987). This deference is required even if we would weigh the testimony differently than the trial court did. *See Salazar*, 38 S.W.3d at 148. Additionally, we note that the State was given extra time to present evidence on the State’s behalf and to rebut the testimony offered by Guedry, but elected not to do so.

Bourque testified in Guedry’s favor with respect to the material issues in dispute. He was the sole witness who testified at the hearing. The fact that the trial court chose to believe Bourque’s testimony that Guedry’s trial attorney made choices in defending Guedry that no reasonable attorney would have made does not establish the trial court abused its discretion. *See Gonzalez*, 855 S.W.2d at 695 (“An appellate court should not fault a trial judge for granting a motion for new trial when the State fails to provide an appellate record establishing an abuse of discretion.”).

The trial court pointed to Bourque’s testimony in its ruling. *See id.* (noting that the State failed to provide an appellate record establishing an abuse of discretion because it elected not to controvert the testimony of the witness who testified in support of the motion for new trial). We conclude that the record does not support the State’s claim that the trial court abused its discretion by finding that Guedry’s trial attorney was guilty of

“numerous deficiencies, by acts and omissions, [that] certainly adversely affected the outcome of the trial and [Guedry’s] rights to a fair trial and effective legal counsel.”

Next, we determine whether Guedry’s trial attorney’s deficient conduct undermines confidence in the verdict. *See Strickland*, 466 U.S. at 687; *Ex parte Menchaca*, 854 S.W.2d 128, 132 (Tex. Crim. App. 1993). Guedry’s use of force expert, Duncan, was the only expert to testify at trial regarding the lawfulness of Guedry’s actions; therefore, Duncan’s trustworthiness as a reliable witness on using force was crucial to Guedry’s defense. It is also apparent that Duncan’s reliability was burdened with having previously testified regarding use of force in Burke’s trial.

Although Duncan’s reliability was critical, the reliability of his testimony was adversely affected by the State’s decision in cross-examination to bring out Duncan’s testimony in Burke’s case which had already been tried. Additionally, in closing argument, the State argued that Duncan was not credible on the question of using force because he had changed his testimony from the testimony he gave in Burke’s trial. Finally, in closing argument, the prosecutor argued that the jury did not have to rely on Duncan’s testimony. Instead, the jury was left to rely on the prosecutor’s assertion in closing argument that Guedry could not find another expert witness except Duncan because the prosecutor “knew that [Guedry’s conduct] is official oppression.”

Moreover, to find Duncan’s testimony trustworthy, the jury would likely need to agree with Duncan’s view that another party’s use of force was reasonable—a course

that, according to Bourque, an effective attorney would likely not choose to require the jury to navigate. Bourque, Guedry's expert on ineffective counsel, testified that the choice to use Duncan as an expert was a decision that no reasonable criminal defense attorney would make. According to Bourque, the deficiencies of Guedry's trial counsel prejudiced Guedry's right to receive a fair trial. *See Gonzalez*, 855 S.W.2d at 695.

On the evidence in the record before us, we conclude that Guedry's substantial rights to a fair trial were prejudiced by trial counsel's choice to use Duncan. In our view, that same prejudice would exist even if the same choice of expert were to be made by an attorney not burdened by any conflicts arising from their representation of multiple officers involved in the same altercation. Because the record is sufficient to demonstrate that Guedry received ineffective assistance of counsel, we overrule the State's second issue.

Our review has been limited to Guedry's claim of ineffective assistance of counsel, the ground on which Guedry obtained a favorable finding and a ground that Guedry advanced in his timely filed original motion for new trial. Because we have concluded that the trial court did not abuse its discretion by conducting a hearing and granting Guedry's original motion for new trial for ineffective assistance, we affirm the trial court's order.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on December 27, 2011
Opinion Delivered September 5, 2012
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.