In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00271-CR

ANGEL OBELLA, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 85th District Court
Brazos County, Texas
Trial Court No. 11-01948-CRF-85, Honorable Kyle Hawthorne, Presiding

June 15, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL, J. and HANCOCK, S.J.[1]

Appellant, Angel Obella, pled guilty to the offense of aggravated sexual assault of a child,[2] and the trial court sentenced him to thirty years' incarceration. In an opinion issued on July 1, 2016, this Court reversed the trial court's judgment and remanded the case to the trial court for a hearing on appellant's motion for new trial. *Obella v. State*, No. 07-15-00271-CR, 2016 Tex. App. LEXIS 7037, at *8 (Tex. App.—Amarillo July 1,

[1] Mackey K. Hancock, Justice (Ret.), Seventh Court of Appeals, sitting by assignment.

[2] *See* TEX. PENAL CODE ANN. § 22.021 (West Supp. 2016).

2016) (per curiam), *vacated and remanded by*, 2017 Tex. Crim. App. LEXIS 170 (Tex. Crim. App. Feb. 8, 2017). On review of the State's petition for discretionary review, the Texas Court of Criminal Appeals vacated our judgment and remanded the appeal to this Court to address whether appellant properly presented his motion for new trial to the trial court. *Obella*, 2017 Tex. Crim. App. LEXIS 170, at *4. Concluding that appellant did not present the trial court with his motion for new trial, we will affirm the trial court's judgment.

Factual and Procedural Background

After being indicted for the offense of aggravated sexual assault of a child, appellant pled guilty without any plea agreement with the State. Appellant waived a jury-assessed punishment. After hearing punishment evidence, the trial court sentenced appellant to thirty years' incarceration.

Appellant timely filed a motion for new trial that alleged that his plea of guilty was involuntary because he received ineffective assistance of counsel. Appellant attached affidavits from himself and his father to his motion. The affidavits make factual allegations that support appellant's claim that ineffective assistance of counsel led to his guilty plea. The State filed an extensive response, which included an affidavit from appellant's trial counsel that challenged the allegations made by appellant's motion. The trial court did not conduct a hearing on the motion for new trial and it was overruled by operation of law.

Appellant appealed the trial court's failure to hold a hearing on his motion for new trial. By his appeal, appellant contended that the trial court abused its discretion by not

holding a hearing after appellant raised sufficient facts to render his plea involuntary. Agreeing with appellant, this Court reversed the trial court's judgment and remanded the case to the trial court for a hearing on appellant's motion for new trial. *Obella*, 2016 Tex. App. LEXIS 7037, at *8. The State filed a motion for rehearing that alleged that appellant had failed to properly present his motion for new trial to the trial court. We denied the State's motion on the basis that the State did not raise the issue of presentment before the trial court or in its appellate brief.

The State filed its petition for discretionary review with the Texas Court of Criminal Appeals. That court held that presentment is a form of error preservation and, as such, is systemic and should be addressed by the reviewing court on its own motion. *Obella*, 2017 Tex. Crim. App. LEXIS 170, at *3-4. As a result, the court vacated our judgment and remanded the appeal to this Court to address whether appellant properly presented his motion for new trial to the trial court. *Id*. at *4.

We requested supplemental briefing from the parties. Appellant presents three issues by his supplemental brief. His first issue contends that the State's response to appellant's motion for new trial is sufficient evidence of presentment under Texas Rule of Appellate Procedure 21.6. By his second issue, appellant implores this Court to abate and remand the case for the trial court to hold a hearing to determine whether appellant presented his motion for new trial. Appellant's third issue contends that Rule 21.6 is unconstitutional.

Issue One: State's Response as Presentment

By his first issue, appellant contends that the fact that the State filed a response to his motion for new trial is sufficient evidence that the motion was presented to the trial court. He contends that, "[n]o reason exists for the State to file their Response in Opposition with controverting evidence if the Trial Court did not have actual knowledge of Appellant's Motion for New Trial."

The Texas Court of Criminal Appeals has laid out the standard required for presentment under Rule 21.6.

> A motion for new trial must be 'presented' to the trial court within ten days of being filed. TEX. R. APP. P. 21.6. The defendant must put the trial judge on actual notice that he desires the judge to take some action, such as making a ruling or holding a hearing, on his motion for new trial. *See Stokes v. State*, 277 S.W.3d 20, 21 (Tex. Crim. App. 2009) ("The purpose of the presentment rule is 'to put the trial court on actual notice that a defendant desires the trial court to take some action on the motion for new trial such as a ruling or a hearing on it.'"). "Presentment" must be apparent from the record, and it may be shown by such proof as the judge's signature or notation on the motion or proposed order, or an entry on the docket sheet showing presentment or setting a hearing date." *Id*. at 22; *see also Carranza v. State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998) ("[T]he record must show the movant for a new trial sustained the burden of actually delivering the motion for new trial to the trial court or otherwise bringing the motion to the attention or actual notice of the trial court. This may be accomplished in several ways such as, for example, obtaining the trial court's ruling on a motion for new trial.").

Gardner v. State, 306 S.W.3d 274, 305 (Tex. Crim. App. 2009). It is clear from the above that it is the trial court that must be put on notice.

Because presentment requires that the trial court be given notice of the filing, the State's response to appellant's motion for new trial does not constitute evidence of

presentment. The State's response proves only that the State received notice of appellant's motion. It is, however, no evidence that it was presented to the trial court or the trial court had actual knowledge that it had been filed. Consequently, we overrule appellant's first issue.

Issue Two: Abatement and Remand

By his second issue, appellant contends that this Court should abate this appeal and remand to the trial court to hold a hearing to determine whether appellant presented his motion for new trial.

Appellant cites *Butler v. State*, 6 S.W.3d 636 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (op. on reh'g), as providing some authority for this Court to abate and remand to the trial court to resolve issues regarding whether a motion for new trial had been presented. *Id*. at 638. In *Butler*, the record reflected that he had timely presented his motion for new trial to the court coordinator, who noted its entry in the court's computer system. *Id*. Subsequently, an agreed setting form was executed by the court coordinator, who marked that the setting was "Approved by Court." *Id*. Because there existed some evidence of presentment in the record, the First District Court "abated the appeal and remanded the cause to the trial court for the limited purpose of holding an evidentiary hearing to determine the facts surrounding the alleged presentment." *Id*. The *Butler* court determined that the record reflected that there was a genuine fact issue on presentment that needed to be resolved by the trial court and it was on that basis that it abated the appeal and remanded the case to the trial court to resolve the factual issue. *Id*.; *Hiatt v. State*, 319 S.W.3d 115, 123-24 (Tex. App.—San Antonio 2010, pet.

ref'd) (discussing *Butler*). However, when the record does not affirmatively reflect a genuine issue of fact regarding presentment, abatement is improper. *Hiatt*, 319 S.W.3d at 123-24; *Hernandez v. State*, 84 S.W.3d 26, 32-33 (Tex. App.—Texarkana 2002, pet. ref'd).

In the present case, the record reflects no evidence that appellant presented his motion for new trial to the trial court. In fact, appellant bases his entire argument in support of presentment on the State's filing of a response. However, we rejected this contention above. As such, abating the appeal and remanding the case to the trial court for a hearing on presentment would be improper. *Hiatt*, 319 S.W.3d at 123-24; *Hernandez*, 84 S.W.3d at 32-33. Accordingly, we overrule appellant's second issue.

Issue Three: Constitutionality of Texas Rule of Appellate Procedure 21.6

By his third issue, appellant contends that Rule 21.6 has no rational basis and violates the equal protection and due process provisions of the United States and Texas Constitutions. His issue challenges the constitutionality of the rule both facially and as applied.

Appellant did not present this constitutional challenge to the trial court in open court or in his motion for new trial and, consequently, it has not been preserved for review. Both "facial" and "as applied" challenges must be raised in the trial court or they are waived. *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (facial challenge may not be raised for the first time on appeal); *Sony v. State*, 307 S.W.3d 348, 352-53 (Tex. App.—San Antonio 2009, no pet.) (when a facial or as applied challenge to the constitutionality of a statute is not raised in the trial court, it has not

been preserved for appellate review). Since appellant did not preserve this issue for our review, we overrule his constitutionality challenge.

Conclusion

Having overruled each of appellant's issues, we affirm the judgment of the trial court. *See* TEX. R. APP. P. 43.2(a).

Mackey K. Hancock
Senior Justice

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