In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00447-CR

EX PARTE DONNA JACKSON COLSON, APPELLANT

On Appeal from the 320th District Court
Potter County, Texas
Trial Court No. 67,653-D, Honorable Don R. Emerson, Presiding

September 29, 2017

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Pursuant to a plea-bargain agreement appellant Donna Jackson Colson pleaded guilty to the offense of tampering with physical evidence.[1] She was placed on deferred adjudication community supervision for four years. About a year after her plea, appellant filed an application for writ of habeas corpus in the trial court alleging her plea was involuntary and should be vacated.[2] After a hearing, the trial court denied the application.[3] Appellant appeals its denial.[4] We will affirm the trial court's order.

[1] TEX. PENAL CODE ANN. § 37.09(a)(1) (West 2016).

[2] *See* TEX. CODE CRIM. PROC. ANN. art. 11.072 (West 2015).

[3] Tex. Code Crim. Proc. Ann. art. 11.072, § 7.

[4] TEX. CODE CRIM. PROC. ANN. art. 11.072, § 8.

Background

According to appellant's testimony at the habeas hearing, her husband is Terry Young and he was involved in a kidnapping and murder. Appellant agreed that her role was to help Young clean blood from a vehicle. Appellant testified she was arrested and gave police a recorded statement. Thereafter an officer questioned her further by telephone. Appellant denied she received any constitutional or statutory warnings before her questioning. In an affidavit accompanying her habeas application, she expressed the belief that she was compelled to respond to the police questioning.

A complaint was filed stating that in her recorded statement appellant admitted committing the offense of tampering with physical evidence. An indictment thereafter charged appellant with that offense. She retained defense counsel. According to appellant, she and her counsel had "many consultations" but he did not explain to her the possibility of excluding evidence wrongfully obtained by police.

Before trial the State offered appellant a plea agreement that included a four-year term of deferred adjudication community supervision. A condition of community supervision required that she "[a]void persons of disreputable and harmful character, including but not limited to Terry Young . . . ." Appellant accepted the State's offer. The record does not include the reporter's record from the plea hearing but the clerk's record contains the court's written plea admonishments,[5] appellant's statement acknowledging her understanding of the court's admonishments and awareness of the consequences of her plea, her counsel's statement of appellant's competency and understanding, and the trial court's order approving its admonitions. Also in the clerk's record are

[5] *See* TEX. CODE CRIM. PROC. Ann. art. 26.13 (West Supp. 2016). Appellant does not argue she was improperly admonished.

appellant's judicial confession and waiver of appeal. According to the waiver-of-appeal document, appellant waived the right to raise on appeal the issue whether she entered her plea voluntarily and knowingly. The trial court approved appellant's waivers and received her judicial confession. It followed the parties' plea agreement. Appellant did not request the trial court's permission to appeal[6] nor did she file a motion challenging any conditions of community supervision.[7]

In her habeas application, appellant alleged that after her arrest police questioned her without first providing notice of her rights and her trial counsel rendered ineffective assistance by failing to explain improper police conduct to her and seek suppression of her statements. She further alleged the condition of community supervision forbidding her contact with her "common-law husband, Terry Young" deprived her of various rights under the United States Constitution.

Analysis

Second Issue

In her second issue, appellant contends her retained trial counsel rendered ineffective assistance by not seeking suppression of her statements and, apparently, by not negotiating away the community supervision term prohibiting her association with Terry Young.

Generally, we review a trial court's decision on an application for writ of habeas under an abuse of discretion standard. *Ex parte Garcia,* 353 S.W.3d 785, 788 (Tex. Crim. App. 2011). A trial court abuses its discretion if its decision lies outside the zone

[6] *See* TEX. R. APP. P. 25.2(a)(2)(B).

[7] TEX. CODE CRIM. PROC. ANN. art. 11.072, § 3(b).

of reasonable disagreement. *Ex parte Wolf,* 296 S.W.3d 160, 166 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

An applicant seeking habeas corpus relief bears the burden of proving, by a preponderance of the evidence, that the facts entitle her to relief. *Ex parte Richardson,* 70 S.W.3d 865, 870 (Tex. Crim. App. 2002). In reviewing the habeas court's decision, we view the evidence in the light most favorable to the ruling and afford great deference to the habeas court. *Ex parte Lafon,* 977 S.W.2d 865, 867 (Tex. App.—Dallas 1998, no pet.). The judge of the habeas court is the fact finder in habeas corpus proceedings, *Ex parte Garcia,* 353 S.W.3d 785, 788 (Tex. Crim. App. 2011), and we therefore afford the utmost deference to the habeas judge's determination of the facts that are supported by the record, especially when they are based on an evaluation of credibility and demeanor. *Ex parte Martinez,* No. 13-10-00390-CR, 2013 Tex. App. LEXIS 7276, at *6-7 (Tex. App.—Corpus Christi June 13, 2013, no pet.) (mem. op., not designated for publication) (citations omitted). This high degree of deference applies even when no witnesses testify and all of the evidence is submitted by affidavit. *Ex parte Wheeler,* 203 S.W.3d 317, 325-26 (Tex. Crim. App. 2006). We allow the same degree of deference to the habeas court's determination of mixed questions of law and fact if resolving those ultimate questions turns on evaluating witness credibility and demeanor. *Guzman v. State,* 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We may review de novo mixed questions of law and fact not requiring determination of credibility and demeanor. *Id.*

Habeas corpus is an extraordinary remedy available only if no adequate remedy at law exists. *Ex parte Cruzata,* 220 S.W.3d 518, 520 (Tex. Crim. App. 2007). Texas Code of Criminal Procedure article 11.072 provides the procedure for writ of habeas

corpus "in a felony or misdemeanor case in which the applicant seeks relief from an order or a judgment of conviction ordering community supervision." TEX. CODE CRIM. PROC. ANN. art. 11.072, § 1. "At the time the application is filed, the applicant must be, or have been, on community supervision, and the application must challenge the legal validity of the conviction for which or order in which community supervision was imposed; or the conditions of community supervision." TEX. CODE CRIM. PROC. ANN. art. 11.072, § 2(b). When deciding an application for habeas corpus under section 11.072, the habeas court may order affidavits, depositions, interrogatories, or a hearing, and may rely on the court's personal recollection. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 6(b). Unless the court determines from the face of the application that it is frivolous, it shall enter a written order including findings of fact and conclusions of law. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 7.

Claims of ineffective assistance of counsel form an exception to the general rule that relief by habeas corpus is not available for claims that could have been presented on direct appeal. *Ex parte Nailor,* 149 S.W.3d 125, 130 (Tex Crim. App. 2004) ("Claims of ineffective assistance of counsel are frequently raised on direct appeal without the benefit of an adequate record and then re-urged on a writ of habeas corpus after they have been adequately developed in a post-conviction evidentiary hearing"); *Ex parte Torres,* 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) ("because the direct appeal record contained insufficient evidence to evaluate the ineffective assistance issue, . . . the rejection of [applicant's] claim on direct appeal does not bar relitigation of his claim on habeas corpus to the extent that applicant seeks to gather and introduce additional evidence not contained in the direct appeal record"); *id.* (rule denying relief by habeas in claims raised and rejected on direct appeal "should not be applied where direct appeal

cannot be expected to provide an adequate record to evaluate the claim in question, and the claim might be substantiated through additional evidence gathering in a habeas corpus proceeding").

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in criminal prosecutions. *See* U.S. CONST. AMEND. VI. To show ineffective assistance of counsel, a defendant must demonstrate both (1) that her counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An ineffective assistance claim will not succeed if the applicant fails to make either of the required showings of deficient performance and sufficient prejudice. *Rylander v. State,* 101 S.W.3d 107, 110 (Tex. Crim. App. 2003). The *Strickland* standard applies when a defendant claims she received ineffective assistance of counsel in pleading guilty. *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *Ex parte Torres,* 483 S.W.3d 35, 43 (Tex. Crim. App. 2016). The standard applies to challenges to the effectiveness of retained counsel, as well as appointed counsel. *Ex parte Briggs,* 187 S.W.3d 458, 469 (Tex. Crim. App. 2005) (quoting *Cuyler v. Sullivan,* 446 U.S. 335, 344-45, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)).

A guilty plea is not knowing and voluntary if it results from counsel's ineffective assistance. *Ex parte Niswanger,* 335 S.W.3d 611, 614-15 (Tex. Crim. App. 2011), *abrogated in part on other grounds by Cornwell v. State,* 471 S.W.3d 458 (Tex. Crim. App. 2015). If a defendant does not enter a guilty plea knowingly and voluntarily, the plea is invalid. *See North Carolina v. Alford,* 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed.

2d 162 (1970) (guilty plea is valid only if it "represents a voluntary and intelligent choice among the courses of action open to the defendant"). A habeas applicant satisfies the prejudice component of the *Strickland* standard "by showing a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Niswanger*, 335 S.W.3d 615 (quoting *Hill*, 474 U.S. at 58-59); *accord Ex parte Moussazadeh*, 361 S.W.3d 684, 690-91 (Tex. Crim. App. 2012).

A prima facie showing that a guilty plea was knowingly and voluntarily entered is made if the record indicates the defendant was properly admonished. *Arreola v. State,* 207 S.W.3d 387, 391 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Martinez v. State,* 981 S.W.2d 195, 197 (Tex. Crim. App. 1998)). Once a prima facie showing is established, a defendant may still claim involuntariness but she bears the burden of demonstrating she did not fully understand the consequences of her plea and suffered harm accordingly. *Martinez,* 981 S.W.2d at 197. The uncorroborated testimony of a defendant that counsel misinformed her is insufficient to establish her plea was involuntary. *Arreola,* 207 S.W.3d at 391.

Appellant filed an affidavit supporting her habeas application. Therein she stated that police officers ordered her out of her vehicle at gunpoint, placed her in handcuffs, and took her to the police station. There the handcuffs were removed and an officer told her the police "needed to talk to [her] and find out what [she] knew." The officer then questioned appellant for an hour but did not inform her of "any right against self-incrimination, the right to have a lawyer present, or any other right." After the questioning appellant was told to leave the station. Later another officer contacted appellant by telephone and questioned her further. He did not inform her she could remain silent or invoke other unspecified rights. According to appellant, her responses

to the telephone questions, when combined with her responses to the questions at the police station, formed the entirety of the State's case against her. Appellant added, she consulted with her retained counsel "many" times but he did not inform her that her statements were subject to suppression. Instead, according to appellant, he told her she could either accept the State's plea offer or face going to the penitentiary. Appellant continued, she would not have entered the plea agreement had she known the State's evidence could be challenged. Appellant concluded she did not sign the plea papers knowingly and voluntarily because her counsel did not adequately inform her that in large part the State's evidence against her was inadmissible.

Appellant testified briefly at the habeas hearing. She acknowledged her guilt and stated that she incriminated herself by giving the statement to police. When asked by the prosecutor on cross-examination why she believed her trial counsel rendered ineffective assistance, appellant responded that he did not file any motions on her behalf and did not listen to her when she told him the police failed to provide the required warnings prior to questioning.

Appellant's trial counsel did not testify at the habeas hearing but his affidavit was before the court. Therein he stated he conducted an investigation and was aware of appellant's station-house interview and her questioning by telephone. His affidavit included the statements that he and appellant "discussed that she was initially called in as a mere witness against her husband and was not a target of the investigation nor in custody." It also included the statement, "We also discussed that there was evidence of tampering independent of any statement made by [appellant]." The affidavit recited that in counsel's meetings with appellant, they discussed the results of his investigation, including a review of the incident report and supplements, witness statements,

confessions of various individuals, and the theories of the case. They also discussed a duress defense. According to counsel, he initially had difficulty communicating with appellant because of her substance abuse problem but with his encouragement she eventually obtained counseling. Appellant did not want to risk the prospect of confinement. For that reason, according to counsel, she did not want the case tried even if that meant abandoning her defenses. Counsel explained to appellant a guilty plea meant she could not advance any defense. She, according to counsel, "adamantly refused the opportunity to go to trial." The State made an initial plea offer which did not include community supervision, but later conveyed a new offer which included deferred adjudication community supervision. Counsel further stated that appellant was aware that a condition of community supervision forbade her contact with Terry Young.

Following the habeas hearing, the court filed an order denying appellant's application. It contained findings of fact and conclusions of law which, relevant to appellant's ineffective assistance of counsel claim, included the following findings:

> Counsel filed pre-trial motions including *Motion for Discovery*, *Motion for Witness List*, *Defendant's Motion to Elect the Jury to Assess Punishment*, *Motion to Suppress*, and *Defendant's Request for Evidence*.
>
> [Appellant] was not in custody when questioned by law enforcement.
>
> Counsel and [appellant] discussed and signed written plea admonishments detailing waiver of rights including waiver of jury, waiver of confrontations of witnesses, and waiver of indictment.
>
> Prior to plea Counsel and [appellant] had sufficient time to discuss the preparation of a defense to the charge alleged as well as plea offers.
>
> [Appellant] signed the written plea admonishments knowingly and voluntarily.
>
> [Appellant] and his [sic] counsel negotiated a plea offer of community supervision on this matter in accordance with [appellant's] wishes.
>
> [Counsel's] affidavit is credible and supported by the record.

Relevant conclusions of law were:

> Based on the totality of the circumstances, counsel's representation of [appellant] in this matter did not fall below an objective standard of reasonableness;
>
> Counsel's performance did not result in any deficiencies that prejudiced the outcome of the case nor would have resulted in a different outcome.
>
> [Appellant] did not meet the standard of proving that her counsel was ineffective.

At the habeas hearing, appellant testified her counsel was ineffective because he did not file unspecified motions and did not listen to her when she told him the police failed to provide the required warnings prior to questioning. The record shows, and the habeas court found, counsel did file motions. Even assuming appellant intended a specific charge that her counsel did not urge her motion to suppress, the habeas court had trial counsel's affidavit explanation of independent evidence of appellant's involvement in the offense and her steadfast refusal to test the State's case at trial even if it meant giving up her defenses. Counsel's stated strategy was to accommodate appellant's desire to avoid a trial and potential incarceration. Counsel achieved that objective by obtaining a plea-bargain offer which appellant accepted without complaint. The habeas court was further entitled to believe appellant was aware of the condition prohibiting contact with Terry Young before accepting the plea offer. Appellant does not now point to evidence in the record of the involuntariness of her plea and her uncorroborated, conclusory affidavit testimony to that end is not sufficient. The habeas court's findings of fact have record support and are entitled to great deference on appeal. *Ex parte Garcia,* 353 S.W.3d at 788 ("In an article 11.072 habeas case . . . the trial judge is the sole finder of fact. There is less leeway in an article 11.072 context to disregard the findings of a trial court"). The findings support the conclusion that

counsel's performance was not deficient. No abuse of discretion has been shown. Appellant's second issue is overruled.

First Issue

By her first issue, appellant argues the police subjected her to custodial interrogation without providing the mandatory constitutional and statutory warnings and notification of rights.[8] Appellant did not adjudicate this issue in her criminal prosecution. It was never considered by the trial court in that proceeding. What she now seeks by habeas is a finding of unlawful police interrogation and suppression of her statements under the exclusionary rule. But the efficacy of such relief depends on her entitlement to a new trial because of an involuntary plea. Because we have found the trial court did not err in its rejection of her contention her trial counsel was ineffective, our review of her first issue would serve no purpose. We find no abuse of discretion by the habeas court in failing to grant relief on the ground presented as issue one. Appellant's first issue is overruled.

Third Issue

In her third issue, appellant urges the unlawfulness of a condition of community supervision that provides appellant shall "[a]void persons of disreputable and harmful character, including but not limited to Terry Young and specifically avoid association with anyone previously convicted of a crime or currently on community supervision (adult or juvenile)[.]" It is not disputed on appeal that Terry Young is appellant's husband.

[8] The intended reference seems to be to Texas Code of Criminal Procedure articles 15.17(a) and 38.22, section 2. *See* TEX. CODE CRIM. PROC. ANN. arts. 15.17(a) (West Supp. 2016) and 38.22, § 2 (West Supp. 2016).

With the assistance of counsel not found ineffective, appellant agreed to the no-contact condition she now complains of. She has not sought modification of the condition by the trial court. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 11(a)[9] (providing trial court may alter or modify conditions of community supervision at any point during period of community supervision). And appellant chose not to challenge the condition by appeal. Instead, she now seeks habeas relief. Article 11.072, § 3(a) provides, "An application may not be filed under this article if the applicant could obtain the requested relief by means of an appeal under Article 44.02 and Rule 25.2, Texas Rules of Appellate Procedure." TEX. CODE CRIM. PROC. ANN. art 11.072, § 3(a). Appellant's issue on appeal that she received ineffective assistance of trial counsel has been overruled. Otherwise, she does not present a cogent reason why she could not have obtained relief directly from the trial court or by appeal. *See Ex parte Marx,* No. 09-06-00535-CR, 2007 Tex. App. LEXIS 5441, at *9-10 (Tex. App.—Beaumont July 11, 2007, pet. ref'd) (mem. op., not designated for publication) (citing *Ex parte Townsend,* 137 S.W.3d 79, 81 (Tex. Crim. App. 2004); *Ex parte Gardner,* 959 S.W.2d 189, 199 (Tex. Crim. App. 1996) (op. on reh'g)). Accordingly, it is unclear to us that article 11.072, § 3(a) permitted appellant to challenge the no-contact condition by habeas. Assuming it would have been possible for the trial court to grant such relief under these circumstances, however, we find appellant has not demonstrated the court abused its discretion by denying relief.

[9] The Legislature repealed article 42.12, effective January 1, 2017, and enacted Chapter 42A, as part of a nonsubstantive revision of community-supervision laws. *Araujo v. State,* No. 07-16-00463-CR, 2017 Tex. App. LEXIS 8436, at *3 (Tex. App.—Amarillo Sept. 5, 2017, no pet. h.) (mem. op., not designated for publication). *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, §§ 1.01, 3.01, 4.01-.02, 2015 TEX. GEN. LAWS 2321, 2321-2395 (codified at TEX. CODE CRIM. PROC. ANN. art. 42A.301 (West Supp. 2016)). The judgment in the present case was signed October 17, 2016, before the effective date of Chapter 42A. We cite to the article applicable at the time the judgment was signed.

A trial court judge has broad, but not unfettered, discretion to set the conditions of community supervision. *Butler v. State,* 189 S.W.3d 299, 303 (Tex. Crim. App. 2006) (citing *Speth v. State,* 6 S.W.3d 530, 533 (Tex. Crim. App. 1999)). Former article 42.12(11)(a) provided, "[t]he judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant." TEX. CODE CRIM. PROC. ANN. art 42.12, § 11(a). Accordingly, conditions of community supervision must bear a reasonable relationship to the treatment of the accused and the protection of the public. *Simpson v. State,* 772 S.W.2d 276, 280-81 (Tex. App.—Amarillo, no pet.); *id.* at 280 ("proper probationary conditions are those that contribute significantly both to the rehabilitation of the convicted person and to the protection of society") (citing *Tamez v. State,* 534 S.W.2d 686, 692 (Tex. Crim. App. 1976)). A community-supervision condition is invalid if it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to the future criminality of the offender or does not serve the statutory ends of [community supervision]." *Simpson,* 772 S.W.2d at 280-81.

It is undisputed that appellant and Terry Young were participants in a criminal episode involving kidnapping and murder. Appellant's trial counsel's affidavit said appellant "repeatedly stated she only did what she did because her husband was yelling at her and had just killed a man . . . ." In ordering the no-contact condition the trial court was in the best position to take into account the roles appellant and Young played in their criminal conduct, and the benefits to society and appellant of her separation from Young for a time. By granting appellant deferred adjudication community supervision, the trial court obviously found a genuine prospect for her rehabilitation. The no-contact

condition as to Young was reasonably related to achieving appellant's rehabilitation and avoiding recidivism.

Appellant cites *United States v. Woods*, in which the Fifth Circuit set aside a condition of federal supervised release that prohibited Woods from residing with any person to whom she was not ceremonially married or was not related by blood. 547 F.3d 515, 516 (5th Cir. 2008) (per curiam). Woods objected to the condition at her sentencing, and the appeals court agreed that it was overbroad and imposed a greater deprivation of her liberty than was reasonably necessary to achieve sentencing purposes, and thus it deviated from the requirements of the applicable federal statute. *Id*. at 519. Here, by contrast, the condition appellant challenges requires that she avoid contact with a particular individual directly involved in the offense to which she plead guilty. The court in *Woods* cited with approval a Third Circuit decision affirming a condition prohibiting the defendant from contact with her husband when the trial court found she committed crimes at her husband's behest. *Id*. at 518 (citing *United States v. Rodriguez*, 178 Fed. Appx. 152, 158-59 (3d Cir. 2006) (unpublished)). The opinion in *Woods* does not suggest the trial court here abused its discretion against the standard applicable to our state court community supervision conditions. *See Simpson,* 772 S.W.2d at 280-81.

Appellant agreed to the condition of which she now complains. She has not filed a motion to amend the conditions. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 3 (b). Again assuming the trial court had authority to grant the habeas relief she requested, we see no abuse of discretion in the trial court's denial of relief. Appellant's third issue is overruled.

Conclusion

Having overruled appellant's three issues on appeal, we affirm the order of the trial court.

James T. Campbell
Justice

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