

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00087-CR

Zachary Fennessey-Underwood, Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. CR2013-567, HONORABLE DIB WALDRIP, JUDGE PRESIDING**

MEMORANDUM OPINION

A jury convicted appellant Zachary Fennessey-Underwood of trafficking of a child and compelling prostitution of a child. *See* Tex. Penal Code §§ 20A.02(a)(2)(7), 43.05(a)(2). Punishment was assessed at sixteen years' imprisonment for each count with sentences running consecutively. In five issues, Fennessey-Underwood contends that he was denied due process of law because of the State's delayed disclosure of certain evidence and that the trial court abused its discretion by denying his second and third motions for continuance, denying his motion for new trial, and denying a hearing on his motion for new trial. We will affirm the judgment.

BACKGROUND¹

Fennessey-Underwood filed two pretrial motions for continuance and a motion for new trial, contending that the State delayed in disclosing certain evidence to him, including information in the victim's juvenile records, the contents of Fennessey-Underwood's computer, and statements from a witness, A.M. The court denied the motions for continuance and the motion for new trial. This appeal followed.

DISCUSSION

Challenge to denial of motions for continuance was not preserved

Fennessey-Underwood contends that the trial court abused its discretion by denying his second and third motions for continuance. We review a trial court's ruling on a motion for continuance for abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007). Motions for continuance must be sworn by someone with personal knowledge of the facts upon which the movant relies to justify the continuance. Tex. Code Crim. Proc. art. 29.08. A sworn and written motion is required to preserve an appellate complaint about the denial of a motion for a continuance. *Anderson v. State*, 301 S.W.3d 276, 279 (Tex. Crim. App. 2009); *Lowrey v. State*, 469 S.W.3d 318, 327 (Tex. App.—Texarkana 2015, pet. ref'd) (written but unsworn motion for continuance failed to preserve claim for appellate review); *Kirvin v. State*, 394 S.W.3d 550, 564 (Tex. App.—Dallas 2011, no pet.) (same); *Salazar v. State*, No. 04-04-00363-CR, 2005 Tex. App.

¹ Because Fennessey-Underwood does not challenge the sufficiency of the evidence supporting his conviction but complains only of the court's pretrial and post-trial rulings, we limit our factual discussion to those rulings and do not recite the facts of the offense. See Tex. R. App. P. 47.1.

LEXIS 8964, at *3 (Tex. App.—San Antonio June 15, 2005, no pet.) (mem. op., not designated for publication) (same). The record reflects that Fennessey-Underwood’s second and third motions for continuance were not sworn; thus he has failed to preserve these complaints for our review.² See Tex. R. App. P. 33.1(a). We overrule Fennessey-Underwood’s first and second issues.

No abuse of discretion shown in denial of motion for new trial and denial of hearing

Fennessey-Underwood also complains that the trial court erred by denying his motion for new trial and by not conducting a hearing on the motion. In the motion, Fennessey-Underwood contended that he was entitled to a new trial because he was denied effective assistance of counsel due to the State’s delayed disclosure of evidence. We review the trial court’s denial of a hearing on a motion for new trial for abuse of discretion, and reverse only when the trial judge’s decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Smith v. State*, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009).

A defendant has no absolute right to a hearing on his motion for new trial. *Hobbs v. State*, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009). When as here, the grounds in the motion for new trial are based on matters not already in the record, the motion must be supported by an affidavit, either of the defendant or someone else, specifically setting out the factual basis for the claim, as a prerequisite to a hearing. *Smith*, 286 S.W.3d at 339. A motion for new trial alleging facts outside the record without supporting affidavits is not a proper pleading and is defective; a trial court does not err in refusing to grant a hearing on such a motion. *Klapesky v. State*, 256 S.W.3d 442, 454

² We note that the second motion for continuance contains a jurat but no attestation by counsel (or any other person) as to the facts alleged in the motion. See Tex. Code Crim. Proc. art. 29.08.

(Tex. App.—Austin 2008, pet. ref’d). To be timely, a motion for new trial must be filed no more than 30 days after the date the trial court imposes sentence. Tex. R. App. P. 21.4(a). An amended motion for new trial must be filed within 30 days after the imposition of sentence and before the trial court overrules any previously filed motion for new trial. *Id.* R. 21.4(b). Filing affidavits in support of a motion for new trial more than 30 days after sentencing is considered an untimely attempt to amend the motion. *Klapesky*, 256 S.W.3d at 455.

Here, Fennessey-Underwood filed a motion for new trial with a two-sentence affidavit stating: “I am the attorney for the Defendant in this cause. I have read the above Motion for New Trial and it is all true and correct to the best of my knowledge.” This verification was insufficient to support Fennessey-Underwood’s motion for new trial because it does not specifically set out the factual basis for his claim.³ *See Smith*, 286 S.W.3d at 339. In apparent recognition of this defect, Fennessey-Underwood later filed an “Affidavit in Support of Motion for New Trial.” However, that affidavit was untimely because it was filed 38 days after the date that he was sentenced. *See id.* at 454-55; *see also* Tex. R. App. P. 21.4(b).⁴ Fennessey-Underwood’s motion for new trial, which alleged facts outside the record without the necessary supporting affidavit, was not a proper pleading

³ We note that counsel’s verification does not meet the requirement that allegations in a motion for new trial be supported by an affidavit. *See Robinson v. State*, Nos. 01-15-00808-CR & 01-15-00809-CR, 2017 Tex. App. LEXIS 457, at *18 n.5 (Tex. App.—Houston [1st Dist.] Jan. 19, 2017, pet. filed) (mem. op., not designated for publication) (concluding that counsel’s verification was defective for stating only, “I have read the above and foregoing Motion for New Trial, and the factual allegations contained therein are true and correct to the best of my knowledge and as presented to me.”) (citing *Alcott v. State*, 26 S.W.3d 1, 4-5 (Tex. App.—Waco 1999), *aff’d*, 51 S.W.3d 596 (Tex. Crim. App. 2001)).

⁴ This affidavit was also filed more than a week after the trial court had denied Fennessey-Underwood’s motion for new trial.

and was defective. *See Smith*, 286 S.W.3d at 339; *Klapesky*, 256 S.W.3d at 454. The trial court's refusal to grant a hearing on that defective motion and refusal to grant the motion were not outside the zone of reasonable disagreement. *See Smith*, 286 S.W.3d at 339; *Klapesky*, 256 S.W.3d at 454. We overrule Fennessey-Underwood's third and fourth issues.

Due-process complaint relies on evidence outside the record

Fennessey-Underwood's final complaint is that he was denied due process of law because the State delayed disclosure of certain evidence, including information in the victim's juvenile records, the contents of Fennessey-Underwood's computer, and statements from a witness, A.M. Under *Brady v. Maryland* and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, a prosecutor has an affirmative duty to disclose evidence that is material and favorable to the defense. *Michaelwicz v. State*, 186 S.W.3d 601, 613 (Tex. App.—Austin 2006, pet. ref'd) (citing *Brady*, 373 U.S. 83, 87-88 (1963)). However, “[a]ssertions of fact that are outside the record cannot support a claim that *Brady* was violated.” *Alvarado v. State*, No. 03-10-00775-CR, 2012 Tex. App. LEXIS 1479, at *8 (Tex. App.—Austin Feb. 24, 2012, no pet.) (mem. op., not designated for publication); *see Carraway v. State*, 507 S.W.2d 761, 764 (Tex. Crim. App. 1974) (concluding that court could not determine accuracy of appellant's claim of *Brady* violation because claim was based on witness statement that was not included in record). Here, the record includes none of the evidence that Fennessey-Underwood contends that the State delayed disclosing to him, and without that evidence, we cannot determine whether it would have been material or favorable to the defense. We overrule Fennessey-Underwood's fifth issue.

CONCLUSION

We affirm the judgment of conviction.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: April 20, 2017

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