TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00368-CR
NO. 03-16-00369-CR

Daniel Albert Talamantes, Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 7 OF TRAVIS COUNTY
NOS. C-1-CR-06-723321 & C-1-CR-06-722632,
HONORABLE ELISABETH ASHLEA EARLE, JUDGE PRESIDING

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

In each of the above causes, appellant Daniel Albert Talamantes filed an application for writ of habeas corpus, challenging the legality of his 2006 misdemeanor convictions for the offense of driving while intoxicated.[1] In each cause, Talamantes asserted that he had received ineffective assistance of counsel prior to pleading no contest to each offense. Following a hearing, the trial court denied relief, finding that the doctrine of laches barred relief and, alternatively, that Talamantes failed to show that he had received ineffective assistance of counsel. In two issues on appeal, Talamantes asserts that the trial court abused its discretion in denying relief on each of those grounds. We will affirm the orders denying relief.

[1] *See* Tex. Penal Code § 49.04.

BACKGROUND

The record reflects that on January 9, 2006, Talamantes was arrested and charged with the Class B misdemeanor offense of driving while intoxicated. He was appointed counsel and subsequently pleaded no contest to the charge, receiving a 30-day jail sentence. Talamantes received 3-for-1 trustee credit on his sentence and was released from jail on January 18, 2006. Two days later, on January 20, 2006, Talamantes was again arrested and charged with driving while intoxicated. Due to his prior DWI conviction, this offense was charged as a Class A misdemeanor.[2] Talamantes was again appointed counsel and pleaded no contest, this time receiving a 90-day jail sentence. Talamantes again received 3-for-1 trustee credit and was released from jail on February 18, 2006. On April 29, 2006, Talamantes was arrested a third time for driving while intoxicated. Because this was his third DWI offense, it was charged as a felony.[3] Also, while Talamantes had been driving, his vehicle had collided with another vehicle, resulting in the deaths of two children. Talamantes was subsequently charged with and convicted of two counts of felony murder.[4] Talamantes was sentenced to 50 years' imprisonment for each count, and this Court affirmed Talamantes's convictions on appeal.[5]

In 2015, in an attempt to collaterally attack his felony-murder convictions, Talamantes filed applications for writs of habeas corpus challenging the legality of his two misdemeanor DWI

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[2] *See id*. § 49.09(a).

[3] *See id*. § 49.09(b)(2).

[4] *See id*. § 19.02(b)(3).

[5] *See Talamantes v. State*, No. 03-07-00668-CR, 2009 Tex. App. LEXIS 1158, at *8 (Tex. App.—Austin Feb. 19, 2009, pet. ref'd) (mem. op., not designated for publication).

convictions.[6] The basis of Talamantes's complaint in each case was ineffective assistance of counsel. According to Talamantes, counsel had, among other deficiencies, "made no effort to obtain and review the patrol car video in order to make an independent verification of the facts."

The trial court held a hearing on the applications, at which it heard testimony from Talamantes and his appointed counsel in each case, Brian Tillman in the first DWI and Phil Campbell in the second DWI. Based on this and other evidence, which we discuss in more detail below, the trial court denied habeas relief, expressly finding on the ineffective-assistance-of-counsel issue that there was "no evidence that either of the trial attorneys in these cases acted in a manner that fell below an objective standard of reasonableness" and that Talamantes "failed to demonstrate that there is a reasonable probability that the outcome [of the plea proceedings] would have been different."[7] The trial court later made additional written findings of fact and conclusions of law, including findings that "the testimony of Mr. Tillman and Mr. Campbell is credible" and that "the testimony of the Applicant is not credible." These appeals followed.

STANDARD OF REVIEW

In reviewing the trial court's decision to grant or deny habeas corpus relief, we view the facts in the light most favorable to the trial court's ruling and uphold that ruling absent an abuse

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[6] *See* Tex. Code Crim. Proc. art. 11.09 (providing that person confined on misdemeanor charge may seek habeas-corpus relief); *Ex parte Crosley*, 548 S.W.2d 409, 410 (Tex. Crim. App. 1977) (holding that "confinement" on misdemeanor charge includes "collateral legal consequences" of that conviction); *Phuong Anh Thi Le v. State*, 300 S.W.3d 324, 326 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (same).

[7] The trial court also found that the doctrine of laches barred habeas relief.

of discretion.[8] A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to any guiding rules or principles.[9] We are not to reverse the trial court's ruling unless the decision "is so clearly wrong as to lie outside that zone within which reasonable persons might disagree."[10]

"An applicant for a post-conviction writ of habeas corpus bears the burden of proving his claim by a preponderance of the evidence."[11] In habeas corpus proceedings, "[v]irtually every fact finding involves a credibility determination" and "the fact finder is the exclusive judge of the credibility of the witnesses."[12] Thus, we are to afford almost total deference to a trial court's factual findings when supported by the record, especially when those findings are based upon credibility and demeanor.[13] We afford the same amount of deference to the trial court's application of the law to the facts, to the extent that the resolution of the ultimate question turns on an evaluation of credibility and demeanor.[14]

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[8] *Ex parte Gill*, 413 S.W.3d 425, 428 (Tex. Crim. App. 2013); *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *Ex parte Ali*, 368 S.W.3d 827, 830 (Tex. App.—Austin 2012, pet. ref'd).

[9] *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016).

[10] *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005); *Robisheaux v. State*, 483 S.W.3d 205, 217 (Tex. App.—Austin 2016, pet. ref'd).

[11] *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016) (citing *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002)).

[12] *Ex parte Mowbray*, 943 S.W.2d 461, 465 (Tex. Crim. App. 1996); *Ali*, 368 S.W.3d at 830.

[13] *Ex parte Garcia*, 353 S.W.3d 785, 787 (Tex. Crim. App. 2011).

[14] *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003) (per curiam), *overruled in part on other grounds by Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007).

ANALYSIS

In his first issue, Talamantes asserts that the trial court abused its discretion in finding that the doctrine of laches barred relief. In his second issue, Talamantes asserts that the trial court abused its discretion in finding that Talamantes failed to show that he had received ineffective assistance of counsel. We will address the second issue first as we consider it to be dispositive of these appeals.[15]

The two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.[16] "[A]n applicant must demonstrate that (1) counsel's performance was deficient, in that it fell below an objective standard of reasonableness, and (2) the applicant was prejudiced as a result of counsel's errors, in that, but for those errors, there is a reasonable probability of a different outcome."[17] "In the context of a collateral challenge to a guilty [or no-contest] plea, the focus of the prejudice inquiry is on 'whether counsel's constitutionally ineffective performance affected the outcome of the plea process,' and on whether a defendant has shown that 'but for counsel's errors, he would not have pleaded guilty [or no contest] and would have insisted on going to trial.'"[18]

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[15] *See* Tex. R. App. P. 47.1; *see also Ex parte Bowman*, ___ S.W.3d ___, 2017 Tex. Crim. App. LEXIS 582, at *3 (Tex. Crim. App. June 28, 2017) (declining to address laches issue in similar habeas case because ineffective-assistance-of counsel issue was dispositive).

[16] *Hill v. Lockhart*, 474 U.S. 52, 57-59 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)); *Ali*, 368 S.W.3d at 830.

[17] *Torres*, 483 S.W.3d at 42 (citing *Strickland*, 466 U.S. at 687, 693).

[18] *Id*. (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Constructive denial of counsel

As an initial matter, Talamantes claims that prejudice should be presumed in these cases because he was "constructively" denied the assistance of counsel altogether at each plea hearing.[19] Constructive denial of counsel occurs "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," so as to "make[] the adversary process itself presumptively unreliable."[20] In such cases, no actual showing of prejudice is required because prejudice is presumed.[21] However, for this presumption to apply, "the attorney's failure must be complete."[22] This situation is characterized "by the 'inert' or 'potted plant' lawyer who, although physically and mentally present in the courtroom, fails to provide (or is prevented from providing) any meaningful assistance."[23] This is a "narrow exception" to *Strickland* that will "infrequently" apply.[24]

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[19] The State argues in its brief that this complaint has not been preserved for review because Talamantes did not raise it in his habeas applications. On the contrary, Talamantes asserted in his applications that counsel's performance "deprived him of any meaningful adversarial testing of the prosecution's case against him," which is the test used to determine whether a defendant has been constructively denied the assistance of counsel. *See United States v. Cronic*, 466 U.S. 648, 659 (1984); *Cannon v. State*, 252 S.W.3d 342, 349 (Tex. Crim. App. 2008). Moreover, the record reflects that Talamantes argued this issue extensively at the habeas hearing. We conclude that this issue has been preserved for review. *See* Tex. R. App. P. 33.1(a); *see also Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) ("[A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.").

[20] *Cronic*, 466 U.S. at 659.

[21] *See id.*; *Cannon*, 252 S.W.3d at 349.

[22] *Bell v. Cone*, 535 U.S. 685, 697 (2002).

[23] *Ex parte McFarland*, 163 S.W.3d 743, 752 (Tex. Crim. App. 2005).

[24] *See Florida v. Nixon*, 543 U.S. 175, 190 (2004).

On this record, we cannot conclude that the trial court abused its discretion in failing to find that this "narrow exception" applied here. Although neither Tillman nor Campbell could recall the specific circumstances of their representation of Talamantes in 2006, they both provided testimony from which the trial court could have reasonably inferred that Talamantes had received "meaningful assistance" from each of them. Tillman testified that it was his practice to discuss the plea paperwork with his clients and explain to them the rights that they would waive by pleading guilty. Tillman added that he would never have a client sign a plea agreement without discussing the legal ramifications of the plea. When asked if he would have his client sign off on a guilty plea if that client had informed him that he was not guilty, Tillman testified, "No, I wouldn't. I mean, it's absolutely the client's choice whether they proceed to trial or not. I mean, I can advise them on it; but it's not my decision to make." Tillman further testified that it was his practice to review all of the documents in the State's file before recommending that his client accept a plea offer, and Tillman "felt safe in saying that" he had followed this practice in Talamantes's case. Tillman explained,

> [T]he general practice would be to sit next to [the defendant] physically with the State's file and all the contents and go through this is what the officer observed, run through the whole—the whole thing. And then based on what the client's response to that is or—I mean, there's a number of factors for clients to make decisions in any direction; but if he—if he had asked to see the video, then, yes, I would—I would have had to explain it's going to take a while to get here. But if you're contesting what the officer has in his report, then, absolutely, that's your right to do it and we can set it and, actually, like . . . put it on the trial docket quickly to get things moving while he's in custody.

Tillman also testified that if Talamantes had told him that he wanted to contest the case, Tillman would not have signed the plea agreement or advised his client to do so.

Campbell similarly testified that his practice was to "get the State's file, go over to [his client] with [the file], show [him] the probable-cause affidavit. If there's a police report, go over that." Campbell added, "Generally, I read [the offense report] to them or summarize what's in there, and then talk to them about what other evidence the State might have, like a blood test, Breathalyzer test, or talking about the field sobriety tests." Campbell testified that he would also ask his clients to summarize their personal recollection of the incident and to tell him whether they agreed with the officer's statements in the offense report or the probable-cause affidavit. When asked if he had any reason to believe that he "did not make every diligent effort possible to capably represent and advise Mr. Talamantes about his options on that date, whether to plea the case, accept the plea bargain, or whether to contest the case," Campbell testified, "I'm sure I went over all available options . . . with him, [and] that . . . I effectively represented him in that particular case." Campbell further testified that he does not "force anybody to take a plea bargain" and that "it's the client's decision" whether to plead guilty "based on what the evidence is, what the [State's] recommendation is, whether or not the client wants to accept the recommendation," and Campbell's advice to his client. When asked how much time he typically spends with his clients at jail call discussing their cases, Campbell testified, "I spend whatever time is necessary to educate the defendant about the evidence in the case; go over the plea form; plea form recommendation; various options they might have, such as taking it to trial. If they're not comfortable entering the plea, I'm always happy to reset it." Campbell added,

> I never pressure any client to take any kind of deal. I always tell them, look, if you need more time to think about this, we can reset it. If you want to take it to trial, we can reset it. If you want me to go back one more time and talk to the prosecutor

> and make a counteroffer, try to get a better deal, I'll be glad to do that. So there's absolutely no pressure on my part to make the client enter into a plea bargain agreement.

Talamantes, in his testimony, disputed various aspects of Tillman's and Campbell's testimony. However, the trial court found the attorneys' testimony credible and Talamantes's testimony not credible, and we are to defer to the trial court's credibility determinations on appeal.[25] Accordingly, on this record, we cannot conclude that the trial court abused its discretion in failing to find that Talamantes was constructively denied the assistance of counsel in either case.[26]

Prejudice

Because the record supports the trial court's failure to find that Talamantes was constructively denied the assistance of counsel, the usual *Strickland* framework applies, including the requirement that Talamantes "affirmatively prove prejudice."[27] Again, to prove prejudice in the

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[25] *See Garcia*, 353 S.W.3d at 787.

[26] *See Bell*, 535 U.S. at 697; *McFarland*, 163 S.W.3d at 752-53; *State v. Frias*, 511 S.W.3d 797, 810-11 (Tex. App.—El Paso 2016, pet. ref'd); *see also Gochicoa v. Johnson*, 238 F.3d 278, 284-85 (5th Cir. 2000) (explaining that prejudice cannot be presumed when "the defendant complains of errors, omissions, or strategic blunders" and counsel provided at least "some meaningful assistance" to defendant); *Woodard v. Collins*, 898 F.2d 1027, 1028-29 (5th Cir. 1990) (concluding that there was no constructive denial of counsel in plea-bargain case where counsel investigated offense, "determined that the prosecution would probably prove its case," and "struck what he thought was a good plea bargain"); *Craker v. McCotter*, 805 F.2d 538, 542-53 (5th Cir. 1986) (concluding that there was no constructive denial of counsel in plea-bargain case where counsel had "investigated the case and advised Craker to plead guilty," "satisfied himself that Craker wanted to go through with the bargain," and "ensured that Craker understood the terms of the bargain and discussed various options with Craker").

[27] *See Strickland*, 466 U.S. at 693. Because we conclude that the prejudice prong of *Strickland* is dispositive, we need not address whether counsel performed deficiently. *See id*. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice

context of plea proceedings, the applicant is required "to show a reasonable probability that counsel's errors affected the outcome of the plea proceedings, in the sense that, but for counsel's errors, the applicant would have rejected the plea bargain and instead pursued a trial."[28] "Stated another way, he 'must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'"[29] "'The test is objective; it turns on what a reasonable person in the defendant's shoes would do.'"[30] Factors to consider in the analysis include "the evidence supporting an applicant's assertions, the likelihood of his success at trial, the risks the applicant would have faced at trial, the benefits received from the plea bargain, and the trial court's admonishments."[31]

Here, the record supports the trial court's finding that Talamantes failed to prove in either case that he would have insisted on going to trial if counsel had obtained the video recording of the traffic stop and reviewed it with Talamantes. Regarding the first DWI, if Talamantes had insisted on going to trial, he would have faced a maximum sentence of 180 days in jail and a $2,000 fine.[32] Instead, he received a plea offer of 30 days in jail and no fine. Moreover, on the video recording of the traffic stop taken from the arresting officer's patrol-car dash camera, a copy of

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suffered by the defendant as a result of the alleged deficiencies."); *Ex parte Fassi*, 388 S.W.3d 881, 887 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Ali*, 368 S.W.3d at 835.

[28] *Torres*, 483 S.W.3d at 46 (citing *Hill*, 474 U.S. at 59).

[29] *Ali*, 368 S.W.3d at 835 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)).

[30] *Id*. at 835 (quoting *United States v. Smith*, 844 F.2d 203, 209 (5th Cir. 1988)).

[31] *Torres*, 483 S.W.3d at 48.

[32] *See* Tex. Penal Code § 12.22.

which was admitted into evidence at the habeas hearing, Talamantes's vehicle could be seen swerving on the road and failing to maintain a single lane of traffic. Additionally, in the arresting officer's probable-cause affidavit, a copy of which was also admitted into evidence, the officer noted numerous signs of intoxication, several of which were reflected on the video recording of the stop, including Talamantes falling asleep in the officer's patrol car following his arrest. At the habeas hearing, Talamantes acknowledged that, having now seen the recording, "I don't think I would have wanted to take [the first case] to trial." Based on this and other evidence, the trial court would not have abused its discretion in finding that Talamantes failed to show that a decision to reject the plea offer in the first DWI case would have been rational under the circumstances.

The same can be said of the second DWI case. This time, the offense had been charged as a Class A misdemeanor, which meant that Talamantes would have been facing up to a year in jail and a $4,000 fine if he had insisted on going to trial.[33] Instead, he received an offer of 90 days in jail and no fine. In this case, Talamantes claimed that he would have insisted on going to trial if he had seen the video recording of the stop because, in his view, he "did everything right" during the stop and his performance on the field sobriety tests was "perfect." However, the trial court would not have abused its discretion in finding otherwise. On the video recording, which was admitted into evidence,[34] Talamantes could be seen occasionally swaying as he stood and having some difficulty maintaining his balance during the field sobriety tests. Talamantes could also be

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[33] *See id.* § 12.21.

[34] Although this recording was not reviewed by the trial court during the habeas hearing, the trial court informed the parties at the conclusion of the hearing that it would review the recording prior to its ruling the following day.

heard admitting to the arresting officer that he had consumed "two or three" beers prior to the stop, and his speech sounded slurred. Also, following his arrest and placement inside the patrol car, Talamantes could be seen and heard yelling loudly and repeatedly at an unidentified individual who was outside the vehicle, which would also support a finding by the trial court that Talamantes appeared intoxicated. Moreover, according to the arresting officer's probable-cause affidavit, which was also admitted into evidence, Talamantes had exhibited several signs of intoxication during the stop, and seven bottles of Bud Light and four cans of Budweiser were recovered from Talamantes's vehicle following his arrest, all of which, the officer noted, were "cold to the touch." This and other evidence supports the trial court's finding that it would not have been rational under the circumstances for Talamantes to reject the plea offer and insist on going to trial. Because the record supports the trial court's finding that Talamantes was not prejudiced in either case by counsel's deficient performance, if any, we cannot conclude that the trial court abused its discretion in denying Talamantes's applications for writs of habeas corpus.[35]

We overrule Talamantes's second issue. Because our resolution of this issue is dispositive of these appeals, we need not consider Talamantes's first issue.[36]

CONCLUSION

We affirm the trial court's orders denying habeas relief.

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Bob Pemberton, Justice

[35] *See Torres*, 483 S.W.3d at 50-51; *Ali*, 368 S.W.3d at 840.

[36] *See* Tex. R. App. P. 47.1.

Before Justices Puryear, Pemberton, and Field

Affirmed

Filed: August 31, 2017

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