



NUMBERS 13-14-00556-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

THE STATE OF TEXAS,

Appellant,

v.

SHIELA CASSIANO,

Appellee.

**On appeal from the 319th District Court
of Nueces County, Texas.**

MEMORANDUM OPINION

**Before Justices Rodriguez, Benavides and Perkes
Memorandum Opinion by Justice Perkes**

The State appeals from the trial court's order granting appellee Shiela Cassiano's motion for new trial. See TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(3) (West, Westlaw through 2015 R.S.) (allowing State to appeal granting of new trial). By one issue, the State argues that the trial court did not have the authority to grant the motion for new trial

while Cassiano was on deferred adjudication, and that its order granting a new trial is a nullity.¹ We reverse and remand.

I. BACKGROUND²

A grand jury indicted Cassiano on charges of burglary of a habitation with intent to commit a felony and aggravated assault. See TEX. PENAL CODE ANN. §§ 22.02, 30.02 (West, Westlaw through 2015 R.S.). Two days after jury selection, the parties rested, and the court submitted the case to the jury. During jury deliberations, Cassiano changed her plea to nolo contendere. The trial court thereafter placed Cassiano on community supervision deferred adjudication for a period of two years.

Cassiano subsequently filed a motion for new trial on grounds of: (1) insufficiency of the evidence to support “conviction . . . at trial”; and (2) if evidence supports the charges, her conduct was justified. The trial court later granted Cassiano’s motion for new trial without a hearing. This appeal followed.

II. APPLICABLE LAW

Rule 21 of the rules of appellate procedure governs a defendant’s motion for new trial in a criminal case. See TEX. R. APP. P. 21; *State v. Mercier*, 164 S.W.3d 799, 810 (Tex. App.—Corpus Christi 2005, pet. struck). A new trial in a criminal case is “the rehearing of a criminal action after the trial court has, on the defendant’s motion, set aside a finding or verdict of guilt.” TEX. R. APP. P. 21.1. The legal grounds for which a trial

¹ Cassiano concedes on appeal that a trial court does not have authority to grant a new trial when a defendant’s guilt has not yet been adjudicated.

² Because this is a memorandum opinion and the parties are familiar with the facts, we will not recite them here except as necessary to advise the parties of the Court’s decision and the basic reasons for it. See TEX. R. APP. P.47.4.

court must grant a new trial are listed in Texas Rules of Appellate Procedure Rule 21.3, but that list is illustrative, not exclusive. *State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007) (citing TEX. R. APP. P. 21.3).

Article 42.12 of the Code of Criminal Procedure provides that

when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, *defer further proceedings without entering an adjudication of guilt*, and place the defendant on community supervision.

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a) (West, Westlaw through 2015 R.S.) (emphasis added).

In a deferred adjudication proceeding there is no “finding or verdict of guilt.” See *Donovan v. State*, 68 S.W.3d 633, 636 (Tex. Crim. App. 2002); *Hammack v. State*, 963 S.W.2d 199, 200 (Tex. App.—Austin 1998, no pet.). Accordingly, “there is nothing to set aside so as to create an occasion for implementation of Rule 21.” *Donovan*, 68 S.W.3d at 636; see *Labib v. State*, 239 S.W.3d 322, 329–30 (Tex. App.—Houston [1st Dist.] 2007, no pet.). A trial court is therefore without authority to rule on a motion for new trial when a defendant's adjudication has been deferred. See *Donovan*, 68 S.W.3d at 638; see also *State v. Garza*, No. 13-09-00125-CR, 2010 WL 746713, at *1 (Tex. App.—Corpus Christi Mar. 4, 2010, no pet.) (mem. op., not designated for publication); *Gomez v. State*, No. 05-02-00153-CR, 2003 WL 21468756, at *1 (Tex. App.—Dallas 2003, no pet.) (mem. op., not designated for publication) (“[B]ecause the trial court deferred adjudication of [the defendant]'s guilt, it lacked jurisdiction to consider a motion for new trial.”). If a trial court

grants a motion for new trial in this situation, that action is a nullity. *State v. Ellis*, 976 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

III. DISCUSSION

Cassiano pleaded nolo contendere and the trial court entered an order deferring adjudication of guilt and placing Cassiano on community supervision. After entry of that order, the trial court granted Cassiano's motion for new trial.

Because the trial court deferred adjudication, Cassiano was never convicted of the charged offense. See TEX. CODE CRIM. PROC. ANN. art. 42.12, § 5(a); *Hammack*, 963 S.W.2d at 200. Absent a finding or verdict of guilt, there was nothing for the trial court to set aside, and Rule 21 does not apply. See *Donovan*, 68 S.W.3d at 636. The trial court was, therefore, without authority to grant Cassiano's motion for new trial, and its action in granting the motion was a nullity. See *Ellis*, 976 S.W.2d at 791; see also *Garza*, 2010 WL 746713, at *2. We sustain the State's issue.

IV. CONCLUSION

We reverse the order of the trial court granting Cassiano's motion for new trial and remand for further proceedings consistent with this opinion.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
30th day of June, 2016.