NUMBER 13-15-00386-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

THE STATE OF TEXAS, **Appellant,**

v.

MAURICIO CELIS, **Appellee.**

On appeal from the 148th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Garza and Perkes
Memorandum Opinion by Justice Garza

The State of Texas appeals an order granting an application for post-conviction writ of habeas corpus on grounds of ineffective assistance of counsel. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072 (West, Westlaw through 2015 R.S.). The challenged order awarded appellee Mauricio Celis a new trial on charges related to his alleged false identification as a Duval County sheriff's deputy. The State argues by two issues that (1)

the habeas court lacked authority to grant the application after it had initially rendered an order denying the application as frivolous, and (2) the habeas court abused its discretion in finding that trial counsel provided ineffective assistance. We reverse and render.

I. BACKGROUND

In 2007, Celis was charged by indictment with impersonating a public servant, a third-degree felony. *See* TEX. PENAL CODE ANN. § 37.11 (West, Westlaw through 2015 R.S.). On March 23, 2010, his trial attorneys filed a motion to quash the indictment and to suppress evidence, alleging that a sheriff's deputy badge purportedly displayed by Celis was obtained by the State "upon a false promise."

At a hearing on the motion on April 15, 2010, Paul Rivera testified that he was a captain in charge of criminal investigation with the Nueces County Sheriff's Office in September of 2007. Rivera stated that Nueces County Sheriff Jim Kaelin instructed him to investigate Celis's alleged unauthorized display of a Nueces County Sheriff's Office badge. Rivera contacted Larry Olivarez, a former Nueces County Sheriff and Rivera's former boss, who at the time was the general manager of Celis's law firm. Rivera knew that Olivarez and Celis were friends. Rivera met with Olivarez at a restaurant and retrieved the badge, which Rivera believed was property of the Nueces County Sheriff's Office. When asked how he "convinced" Olivarez to bring the badge with him to the restaurant, Rivera replied: "Very simple. I asked for it and he said, yeah, I'll give it to you." The badge, in fact, was a deputy badge from the Duval County Sheriff's Office.

Rivera initially denied that he spoke with Olivarez about "whether or not he was going to be prosecuted for the badge"; however, he later conceded that he told Olivarez that "this case was going to be closed as long as they gave you the badge." Rivera acknowledged that he wrote "case closed" in a report regarding the matter. He testified

that, at that time, he believed the badge was going to be returned to the Duval County Sheriff's Office and that there was "nothing else to do." However, Rivera stated that, shortly after their meeting, Olivarez began calling him repeatedly to ask for the badge to be returned to Celis. According to Rivera, this "opened the door to an investigation."

Following the hearing, the trial court denied the motion to quash and to suppress. Celis was subsequently convicted at trial of the lesser-included offense of false identification as a peace officer, a class B misdemeanor. *See id.* § 37.12 (West, Westlaw through 2015 R.S.). He was sentenced to thirty days in county jail, with the sentence suspended and community supervision imposed for two years.

Celis appealed the conviction, arguing by his first three issues that the evidence was insufficient to support a finding of guilt and by his fourth issue that the trial court erred in denying his motion to suppress the badge. *Celis v. State*, No. 13-10-00659-CR, 2013 WL 1189007, at *1–6 (Tex. App.—Corpus Christi Mar. 21, 2013, pet. ref'd) (mem. op., not designated for publication). We affirmed the trial court's judgment. *Id*. at *6. In our analysis of Celis's fourth issue, we assumed for the sake of argument, but did not decide, that the trial court erred in denying the motion to suppress. *Id*. at *5. Nevertheless, we concluded the error would be harmless because there was ample evidence—other than the badge itself—that Celis "was in possession of a badge that identified him as a reserve deputy sheriff." *Id*. (citing *Neal v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008)); *see* TEX. R. APP. P. 44.2(a). Celis then filed a motion for rehearing, which we denied, and a petition for discretionary review, which the Texas Court of Criminal Appeals refused. *See* TEX. R. APP. P. 49.1, 69.1.

Celis filed the instant application for post-conviction writ of habeas corpus on February 13, 2015, alleging that his trial counsel provided ineffective assistance. The

application alleged specifically that, although the March 23, 2010 motion urged the court to "suppress the use of the badge for any purpose as the fruits of an illegal seizure" and requested "such other and further relief required that justice be done," counsel "apparently did not contemplate, articulate or identify the precise nature of any of the 'fruits' of the illegal seizure of the badge, as the motion is silent as to the 'fruits.'" The application stated:

> Counsels' failure to (1) contemplate, identify and articulate the "fruits" in Celis' motion to suppress, (2) rely upon not merely the Fourth Amendment, but also Article 38.23 of the Texas Code of Criminal Procedure; (3) develop evidence regarding the exact nature and/or parameters of the "fruits" at the suppression hearing held on April 15, 2010, and (4) object to the State's utilization of those "fruits" at trial, individually and collectively constitute deficient performance that undermines confidence in the outcome of the trial and the appeal.

The State filed a response to the application on March 19, 2015 arguing generally that that "there are no controverted, previously unresolved fact issues material to the legality" of the police action and that "expansion of the record by an evidentiary hearing or otherwise is not needed." The State argued specifically that Celis cannot show that he had a possessory interest in the badge or that the badge was obtained by a false promise, and therefore his motion to suppress was not supported by well-settled law and his counsel was not ineffective for the reasons stated in the application.

Without holding a hearing, the trial court rendered an order on March 30, 2015 denying Celis's application as frivolous. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 7(a). The trial court also rendered findings of fact and conclusions of law as follows:

> Having examined the above-styled Application for writ of habeas corpus, the State's Answer, the Court's recollections, and the record in this case, the Court makes the following findings of fact and conclusions of law: (1) there is no necessity for an evidentiary hearing or further expansion of the record because there is ample evidence in the record to rule on the relief sought; (2) the assertions contained in the State's Answer are correct; (3)

> the Applicant has failed to make a viable case for ineffective assistance of counsel as analyzed under *Strickland* [*v. Washington*, 466 U.S. 668, 687 (1984)]. The Applicant has failed to prove entitlement to relief, the present application is frivolous, and relief is hereby DENIED.

Celis filed a motion for reconsideration on April 15, 2015. The motion argued that the March 30 findings and conclusions should be withdrawn because the habeas judge was not the same judge that presided over the trial; therefore, according to Celis, the judgment could not have been based upon "the Court's recollections" as recited in the findings and conclusions, which were drafted by the State. Celis argued that the State "misled the Court" by submitting these proposed findings and conclusions.[1] The motion for reconsideration requested that the habeas court withdraw both the March 30 order and the March 30 findings and conclusions, and that it enter an order "directing Mr. Celis's trial counsel to file affidavits responding to Mr. Celis's claim and/or to hold an evidentiary hearing, and for such further relief to which he may be entitled."[2]

On April 22, 2015, the habeas court granted the motion to reconsider and rendered an order withdrawing both the March 30 findings and conclusions and the March 30 order.

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[1] The motion for reconsideration states:

> Counsel for the State misled the Court by filing an inaccurate proposed "Findings Of Fact And Conclusions Of Law" and a corresponding "Order." Whether that was an innocent error or otherwise is beyond the knowledge of undersigned counsel. Nevertheless, what matters to Mr. Celis and undersigned counsel is that inaccurate and incorrect "Findings Of Fact And Conclusions Of Law" have been signed by this Honorable Court. Because this was most certainly an inadvertent mistake, undersigned counsel is bringing it to the Court's attention with the request that the Court enter the attached order withdrawing its March 30, 2015, "Findings Of Fact And Conclusions Of Law" and its March 30, 2015, "Order."

[2] The motion for reconsideration also noted that the State mailed its response to the application for writ of habeas corpus to Celis's habeas counsel using an incorrect zip code. Nevertheless, the motion conceded that habeas counsel received his copy of the response on March 23, 2015, one week prior to the trial court's rendition of the order denying the application as frivolous on March 30. Celis's habeas counsel noted in the motion that, at the time he received his copy of the response, he "began diligently working on a reply" but "due to another, time-sensitive case," "was unable to file a reply before today." Specifically, counsel noted that he received a copy of the State's response in an unrelated appellate proceeding before the Third Court of Appeals "near 11:00 p.m. on Friday, March 27, 2015" and then "had to devote 100% of his time to the preparation of the reply brief" in that unrelated proceeding.

Celis subsequently filed a reply to the State's response to his application which included an affidavit executed by one of his trial attorneys, Jo Ellen Hewins. The affidavit stated in relevant part:

> 5. I am the attorney who was solely responsible for the preparation of and filed the Motion to Quash the Indictment and Motion To Suppress the Badge in a single motion in the above-styled case. The suppression portion of the motion was inadequate and did not include the request to suppress the fruits of the illegal seizure of the badge. This is elemental to any motion to suppress. The hearing that was conducted with regard to the Motion to Quash and Suppress did not address the "fruits" of the illegal seizure of the badge; that is, the suppression of the evidence subsequently acquired and used at trial as result of the illegal acts of law enforcement. The motion to suppress was incomplete and inadequate in its preparation and hearing.
>
> 6. The failure to object to and raise these issues both at the hearing on the motion and at time of trial, falls far below acceptable standards to be met by defense counsel in the effective and vigorous defense of her client. The illegal seizure of the badge led the State to witnesses, including the former and current Sheriffs of Duval County, TCLEOSE [Texas Commission on Law Enforcement Officers Standards and Education[3]] officials from Austin, and the badge, itself.
>
> 7. The fruits of the illegal seizure were used by the State without proper objection having been raised by defense counsel in its motion to suppress, at pretrial hearing or during the trial. The introduction of the badge and the otherwise illegal fruits of the seizure were not part of defense counsel's trial strategy, but are result of a failure to recognize the error and request the relief to which the client was entitled, that is suppression of the badge and other fruits of the illegal seizure. Such failure to vigorously defend the Applicant allowed the badge to be introduced as evidence at the trial, allowed harmful and prejudicial and inaccurate testimony from persons such as the current Sheriff of Duval County; harmed Mr. Celis in his defense; and materially affected the outcome of the trial. Without the badge and the testimony of the witnesses regarding the badge, there could not have been a conviction of this Applicant.
>
> 8. Based on consideration of the foregoing factors, the standard of

[3] TCLEOSE has since been renamed as the Texas Commission on Law Enforcement. *See* TEX. OCC. CODE ANN. § 1701.051–.060 (West, Westlaw through 2015 R.S.).

> effective counsel, it is my opinion that the services provided to Applicant in this matter fell far below acceptable standards of conduct expected and required of competent counsel. Further, the omissions recited above certainly were not part of defense strategy; and, moreover, the failure to properly object and to raise proper objections to the use of the fruits of the illegal seizure harmed the Applicant and changed the outcome of the trial.

A hearing was held on May 20, 2015, at which Hewins gave testimony consistent with her affidavit.[4]

On August 20, 2015, the trial court granted Celis's application for writ of habeas corpus and rendered an order awarding him a new trial. The trial court also issued the following relevant findings of fact and conclusions of law:

> 6. Trial counsel was ineffective and deficient in preparation of the pretrial motion [to suppress] because it did not identify or list any fruits of the alleged illegal seizure and did not expressly seek to suppress, as fruit of the poisonous tree, any fruits of the alleged

[4] At the hearing, habeas counsel also offered into evidence an excerpt from the transcript of the April 15, 2010 suppression hearing, where the trial judge stated the following in making his ruling:

> First of all, I have an inclination to agree with the State. That badge is not the property of your client's, [defense counsel]. That is property of the Duval County Sheriff's Department. And I have a tendency to agree with the State. I don't think the Defendant has a standing to challenge that, and I'll sustain that part of it. I also . . . don't think there's any contractual immunity under this situation. I don't. And I will overrule that part.
>
> As far as the—and—the other second part, really, these—these rulings are kind of superfluous since I said the Defendant didn't have any standing. But you may very well have a legitimate argument concerning the suppression aspect of that if your client did have standing. You know, but that's disputed issues. I guess you get those fact—those issues before a jury and let them determine that out.
>
> But you know, I agree with the defense to the extent that, you know, law enforcement can't go in and essentially lie to people and say you turn this over, you won't get prosecuted, and all that stuff. And therefore, to induce them to go to do something they probably normally wouldn't do. . . .
>
> But this—as far as the only true ruling based upon that is I agree with the State. I don't believe the Defendant has standing to challenge that. . . .
>
> [T]he fact of the matter is, it's different from a rental car. It's not possessory interest. Those badges are the—the property of the department who issues them.
>
> Now, apparently, the department was not very good at retrieving those badges when your client's commission expired. It should have been done. Should have been done, that's something that should have been done and was not done, and—and whoever had possession of that badge should not have had it. But I agree with the standing issue and I'll grant that on the State's.

illegal seizure.

7. After a hearing held on April 15, 2010, Judge Terrell overruled the motion, finding that Defendant Celis had no standing.

8. The Court finds and concludes that a jury could have found Defendant Celis had standing to contest the seizure of his Duval County Deputy Sheriff's badge and it was ineffective assistance of counsel not to submit a 38.23 issue to the jury regarding same, especially considering that without the badge there was no case against the defendant, [the trial judge] commented in the record after overruling the suppression issue that counsel would have an opportunity to place the issue before the jury to determine, but ultimately did not do so, and there was no indication counsel abandoned this critically important and viable defense, especially considering the State's argument that Celis had no standing was weak.

9. The Court finds and concludes that a jury could have found Defendant Celis had a lawful possessory interest in the badge from May 14, 1997 through and including September 21, 2007, because:

   (a) it was issued to him on May 14, 1997 by Duval County Sheriff Barrera;

   (b) he served at the pleasure of Duval County Sheriff Barrera, regardless of whether he was or was not licensed by TCLEOSE (i.e., Texas Commission on Law Enforcement Officer Standards and Education);

   (c) it is uncontroverted that the badge was never requested to be returned by anyone employed by the Duval County Sheriff;

   (d) it is uncontroverted that Defendant Celis was never informed by anyone at TCLEOSE or at the Duval County Sheriff that his TCLEOSE certification had been terminated;

   (e) it is uncontroverted that as of September 21, 2007, Defendant Celis was still listed as a Duval County Reserve Deputy by the Duval County Sheriff; and

   (f) it was uncontested that on September 21, 2007, after the badge was seized from Defendant Celis's agent, Larry Olivare[z], by Captain Paul Rivera of the Nueces County Sheriff's office, Duval County Sheriff Barrera requested that it be returned to Defendant Celis . . . .

10. The Court finds and concludes that a jury could have found there

was a promise made by Captain Rivera to Larry Olivare[z] on September 21, 2007 for the following reasons:

(a) Judge Terrell's statements on April 15, 2010, which reflect a belief that there was a promise and that but for his ruling finding no standing, Judge Terrell probably would have found a promise; and

(b) the content of Exhibit A attached to Defendant Celis's motion to suppress, which is a "Witness Statement" prepared by Captain Rivera on October 8, 2007, which reflects that Captain Rivera concluded his statement with the notation "[t]his case will be closed. No Action Taken," because this is consistent with a promise not to prosecute Defendant Celis.

11. The Court finds and concludes that a jury could have found that the badge was illegally seized from Defendant Celis's agent (Larry Olivare[z]), who obtained it from Defendant Celis, after Captain Paul Rivera of the Nueces County Sheriff's office promised that the case would be closed and no further action would be taken if he returned the badge . . . .

12. The Court finds and concludes that the State has not rebutted or attempted to rebut the testimony of Jo Ellen Hewins at the May 20, 2015, writ hearing that fruits of the initial illegal seizure of the badge were introduced at trial, including ST.EX. 2 to 7 and the testimony of Romeo Ramirez, Santiago Barrera, Jr., Bruno Valdez, Paul Rivera, Larry Olivare[z], and Timothy Braaten.

13. The Court finds and concludes that the affidavit of Jo Ellen Hewins, introduced as Exhibit 1 at the May 20, 2015, writ hearing and her testimony at said hearing is truthful, candid and believable in all respects.

14. The Court finds and concludes that defense counsel's failure to do the following, none of which were strategic decisions, fell below prevailing professional norms and constitute ineffective, deficient performance which prejudiced the Defendant:

(a) to identify the direct and indirect "fruits" of the illegal seizure of the "badge" on September 21, 2007 in Defendant Celis's March 23, 2010 [motion to suppress];

(b) to move to suppress the direct and indirect "fruits" of the illegal seizure on September 21, 2007 in Defendant Celis's March 23, 2010 [motion to suppress];

(c) to object at trial to the State's introduction of ST.EX. 2 to 7, as

the fruits of the illegal seizure of the badge on September 21, 2007;

(d) to object at trial to testimony adduced by the State from Romeo Ramirez, Santiago Barrera, Jr., Bruno Valdez, Paul Rivera, Larry Olivare[z], and Timothy Braaten, all of whom testified regarding matters which Jo Ellen Hewins testified were the fruits of the initial, illegal seizure of the badge;

(e) to request a charge under Article 38.23 of the Texas Code of Criminal Procedure, particularly given [the trial judge's] comments on April 15, 2010 . . . and to have the jury determine whether the seizure was illegal and whether it could consider the evidence identified by Jo Ellen Hewins as the "fruits" in its jury determinations.

15. The Court finds and concludes that it is the State's burden to show that evidence is not the direct or indirect fruit of an illegal seizure or illegal search, or that the taint is attenuated, and that the State did not and has not attempted to do so.

16. The Court finds and concludes that but for the ineffective and deficient conduct of defense counsel, as found above, there is a reasonable probability sufficient to undermine confidence in the outcome of the trial and appeal and that the result of the trial and the appeal would have been different but for that ineffective and deficient conduct which clearly prejudiced the Defendant.

17. The Court finds and concludes, by competent, believable evidence beyond a preponderance of the evidence, that a new trial should be granted due to defense counsel's ineffective, deficient and prejudicial performance.

(Record references omitted.) This appeal followed.

II. DISCUSSION

By its second issue, the State contends that the habeas court abused its discretion by granting Celis's application on grounds of ineffective assistance of trial counsel.

A. Standard of Review

In reviewing the trial court's decision to grant 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 of discretion. *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); *Ex parte Karlson*, 282 S.W.3d 118, 127 (Tex. App.—Fort Worth 2009, pet. ref'd). A trial court abuses its discretion when it acts without reference to any guiding rules or principles or when it acts arbitrarily or unreasonably. *Ex parte Ali*, 368 S.W.3d at 830; *Ex parte Wolf*, 296 S.W.3d 160, 166 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

To prevail on a post-conviction writ of habeas corpus, the applicant bears the burden of proving, by a preponderance of the evidence, the facts that would entitle him to relief. *Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002). In habeas corpus proceedings, "the fact finder is the exclusive judge of the credibility of the witnesses." *Ex parte Mowbray*, 943 S.W.2d 461, 465 (Tex. Crim. App. 1996); *see Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011).

We 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. *Ex parte Garcia*, 353 S.W.3d at 788; *Ex parte Ali*, 368 S.W.3d at 830. Moreover, "a reviewing court will defer to the factual findings of the trial judge even when the evidence is submitted by affidavit." *Ex parte Thompson*, 153 S.W.3d 416, 425 (Tex. Crim. App. 2005) (citing *Manzi v. State*, 88 S.W.3d 240, 242–44 (Tex. Crim. App. 2002)). We also defer 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. *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); *see Ex parte Ali*, 368 S.W.3d at 831. However, when the facts are uncontested and the trial court's ruling does not turn on the credibility or demeanor of witnesses, a de novo review

by the appellate court is appropriate. *Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999); *see Ex parte Brown*, 158 S.W.3d 449, 453 (Tex. Crim. App. 2005).

B. Ineffective Assistance of Trial Counsel

In determining whether trial counsel provided ineffective assistance, courts apply the well-known *Strickland* two-pronged test. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under that test, a defendant must show that: "(1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense, resulting in an unreliable or fundamentally unfair outcome of the proceeding." *Davis v. State*, 278 S.W.3d 346, 352 (Tex. Crim. App. 2009) (citing *Strickland*, 466 U.S. at 687). "Deficient performance means that 'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Ex parte Napper*, 322 S.W.3d 202, 246 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 687). "The prejudice prong of *Strickland* requires showing 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. at 248 (quoting *Strickland*, 466 U.S. at 694). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id*. (quoting *Strickland*, 466 U.S. at 694). "[E]ach case must be judged on its own unique facts." *Davis*, 278 S.W.3d at 353.

Failure to file a suppression motion or to object to the admission of evidence does not necessarily constitute ineffective assistance of counsel. *See Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim. App. 2002); *Cotton v. State*, 480 S.W.3d 754, 757 (Tex. App.—Houston [1st Dist.] 2015, no pet.). To show that counsel's performance was deficient, the appellant must prove the motion would have been granted or the objection would have been sustained. *See Ortiz*, 93 S.W.3d at 93 ("When an ineffective assistance claim alleges

that counsel was deficient in failing to object to the admission of evidence, the defendant must show, as part of his claim, that the evidence was inadmissible."); *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (holding that to prevail on his claim of ineffective assistance, appellant was obliged to prove that a motion to suppress would have been granted); *Roberson v. State*, 852 S.W.2d 508, 510–11 (Tex. Crim. App. 1993) (holding that without a showing that a pretrial motion had merit and that a ruling on the motion would have changed the outcome of the case, counsel is not ineffective for failing to assert the motion).

"An attorney need not advance every argument, regardless of merit, urged by the appellant, but if appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it." *Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012) (footnotes and quotations omitted).

C. Analysis

In his application for writ of habeas corpus, Celis argued that his trial counsel was ineffective by failing to engage in four specific actions: (1) to "contemplate, identify and articulate" the "fruits" of the alleged illegal seizure of the badge in the March 23, 2010 motion to suppress; (2) to "rely upon not merely the Fourth Amendment, but also Article 38.23 of the Texas Code of Criminal Procedure"; (3) to "develop evidence regarding the exact nature and/or parameters" of the "fruits" at the April 15, 2010 suppression hearing; and (4) to object to "the State's utilization of those 'fruits' at trial." Hewins's affidavit and hearing testimony reiterated these allegations. Hewins additionally testified that counsel was ineffective by failing to request a jury charge instruction under code of criminal procedure article 38.23.

At the outset, we note—both generally and specifically with respect to the facts of this case—that whether the "fruits" of an alleged illegal seizure are identified in a motion to suppress or at a suppression hearing has no actual bearing on the *merits* of such a motion. The question the court is called upon to answer in considering a motion to suppress is whether the challenged evidence was obtained in violation of law. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.23 (West, Westlaw through 2015 R.S.) ("No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."). The "fruit of the poisonous tree" doctrine concerns only the scope of the exclusion—i.e., what evidence, in addition to the allegedly illegally obtained evidence, would be excluded—should the trial court find that the motion is meritorious. *See Segura v. United States*, 468 U.S. 796, 804 (1984) ("[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, . . . but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'").

Here, the trial court denied the motion to suppress. Thus, even if trial counsel had "contemplate[d], identif[ied] and articulate[d]" the "fruits" of the alleged illegal seizure in the motion to suppress, "develop[ed] evidence regarding the exact nature and/or parameters" of the "fruits" at the suppression hearing, and objected to "the State's utilization of those 'fruits' at trial," those "fruits" would still have been admitted because the motion to suppress had already been denied. Celis therefore cannot show any possibility that the outcome of the trial would have been different had trial counsel

performed in the manner suggested. *See Ex parte Napper*, 322 S.W.3d at 248 (explaining prejudice prong of *Strickland* test). The habeas court abused its discretion to the extent it found otherwise.

Celis appears to be arguing instead that the outcome of the *appeal* would have been different had trial counsel provided effective assistance. As noted, in our analysis of Celis's fourth issue in that appeal, we assumed but did not decide that the trial court erred in denying the motion to suppress, but nevertheless concluded that any error would be harmless because there was ample evidence, other than the badge itself, that Celis "was in possession of a badge that identified him as a reserve deputy sheriff." *Celis*, 2013 WL 1189007, at *5.[5] Had trial counsel specified the "fruits" of the alleged illegal seizure in his motion to suppress and objected to the admission of the "fruits" as evidence, it is

[5] Our full analysis of the issue was as follows:

> Assuming for the sake of argument that there was a violation of the Fourth Amendment, and assuming further that the trial court erred in denying appellant's motion to suppress, we will conduct a harm analysis.
>
> . . . .
>
> At trial, there was uncontroverted testimony from a number of eyewitnesses that appellant was in possession of a badge that identified him as a reserve deputy sheriff. The physical evidence of the badge was additional evidence of the same fact. The badge did not introduce a new fact issue.
>
> On its own, the uncontroverted eyewitness testimony was sufficient to prove that appellant was in possession of a badge that identified him as a reserve deputy sheriff. In addition, we note that the eyewitness testimony included accounts of the statements made by appellant when he displayed the badge and orally identified himself as a reserve deputy sheriff. *See McCarthy v. State*, 65 S.W.3d 47, 55–56 (Tex. Crim. App. 2001) ("A defendant's statement, especially a statement implicating [him] in the commission of the charged offense, is unlike any other evidence that can be admitted against the defendant.").
>
> In sum, there is no reasonable likelihood that the physical evidence of the badge materially affected the course or outcome of the jury's deliberations. Based on the foregoing, we find beyond a reasonable doubt that the error, if any, in the trial court's ruling regarding the suppression of the badge was harmless. *See Neal* [*v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008)]. Appellant's fourth issue is overruled.

Celis v. State, No. 13-10-00659-CR, 2013 WL 1189007, at *5 (Tex. App.—Corpus Christi Mar. 21, 2013, pet. ref'd) (mem. op., not designated for publication).

likely—though not certain[6]—that, instead of assuming error and advancing directly to a harm analysis, we would have fully reviewed the merits of Celis's fourth issue.[7]

Crucially, neither Celis's application nor Hewins's testimony establishes that there is a reasonable likelihood that we would have reversed the trial court's denial of the motion to suppress in such a scenario. *See Ex parte Napper*, 322 S.W.3d at 248. We would have reviewed the trial court's ruling for abuse of discretion using a bifurcated standard of review, giving "almost total deference" to "determinations of historical facts and mixed questions of law and fact that rely on credibility," but reviewing de novo purely legal questions and "mixed questions of law and fact [that] do not depend on the evaluation of credibility and demeanor." *State v. Kerwick*, 393 S.W.3d 270, 273 (Tex. Crim. App. 2013). We would have upheld the trial court's ruling "under any applicable theory of law supported by the facts of the case," regardless of whether the trial court made express conclusions of law. *Id.*; *see Alford v. State*, 400 S.W.3d 924, 929 (Tex. Crim. App. 2013) ("Even if the trial court had limited its conclusion of law to a particular legal theory, an

[6] Hewins testified at the habeas hearing that "almost the entire prosecution case would have been fruits" of the alleged illegal seizure of the badge. We note that the "fruit of the poisonous tree" doctrine is subject to several potential exceptions—for example, evidence will not be excluded under the doctrine where "the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint" or where police had an "independent source" for discovery of the evidence. *Segura v. United States*, 468 U.S. 796, 805 (1984). Hewins did not address whether these exceptions would apply. Nevertheless, we assume for the sake of argument that application of the doctrine would have compelled exclusion of all the State's trial evidence had the court granted the motion to suppress the badge.

[7] In his motion for rehearing following our March 21, 2013 memorandum opinion, Celis argued in part that we erred in considering the "fruits" of the alleged illegal seizure in our harm analysis because the State had the burden, but failed, to demonstrate that those pieces of evidence were not in fact derived from the initial allegedly illegal seizure. In response, the State pointed out that "the only specific relief that Celis requested" in his motion to suppress "was for the trial court 'to suppress the use of the badge for any purpose as the fruits of an illegal seizure'" and therefore Celis "preserved his complaint only as to the use of the badge itself." As noted, we denied the motion for rehearing. In light of our conclusion herein that the trial court did not err in concluding that Celis lacked standing to challenge the admissibility of the badge, we further find that Celis has not established the second prong of *Strickland* with regard to his allegation that trial counsel was ineffective for failing to request suppression of the "fruits" of the alleged illegal seizure.

appellate court would not be required to defer to that theory under its de novo review."); *Armendariz v. State*, 123 S.W.3d 401, 403 (Tex. Crim. App. 2003) (noting that this rule holds "even if the trial court gave the wrong reason for its ruling").

The trial court denied the motion to suppress apparently on the basis that Celis lacked standing to contest the alleged seizure. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (noting that "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed" and "since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections" (citations omitted)). A person has standing to assert a Fourth Amendment challenge to a seizure if "there is some meaningful interference with an individual's possessory interests in that property." *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). It is undisputed that the owner of the badge in question was the Duval County Sheriff's Office—not Celis. It was further undisputed at the suppression hearing that TCLEOSE notified the State that Celis's status as a reserve deputy sheriff terminated on October 15, 2003. Accordingly, on the date Rivera obtained the badge in 2007, Celis had no possessory interest in the badge.[8] And therefore, had we considered the merits of the trial court's ruling on direct appeal, we would have concluded that the trial court did

[8] This is true notwithstanding the fact, as found by habeas court, that no representative of TCLEOSE or the Duval County Sheriff's Office informed Celis that he was no longer authorized to show the badge or requested that the badge be returned. We note that there was no evidence supporting the habeas court's finding of fact that Celis was "still listed" as a reserve deputy by the Duval County Sheriff's Office at the time the badge was obtained.

not err in determining that Celis lacked standing to challenge the admissibility of the badge.

Even if Celis did have standing, the motion to suppress lacked merit because it is undisputed that Olivarez gave the badge to Rivera. *See Alford*, 400 S.W.3d at 929; *Kerwick*, 393 S.W.3d at 273; *Armendariz v. State*, 123 S.W.3d at 403 (noting that courts must affirm a trial court's suppression ruling "under any applicable theory of law supported by the facts of the case"). Though there was a dispute as to whether Rivera promised anything to Olivarez in exchange for the badge, Celis has not established, even if Rivera did make such a promise, that this would constitute illegal behavior by Rivera rendering the badge inadmissible. *See Martinez v. State*, 220 S.W.3d 183, 189 n.7 (Tex. App.—Austin 2007, no pet.) ("Even absent a warrant, stratagem or deception utilized to obtain evidence is generally permissible.") (citing *Lewis v. United States*, 385 U.S. 206, 208–09 (1966)); *see id.* at 189 ("Deception is necessary at times to accomplish the mission of police officers and does not by itself violate the Constitution.") (citing *People v. Mastin*, 115 Cal. App. 3d 978, 987 (Cal. Ct. App. 1981)).

Under these circumstances, we cannot say that the trial court abused its discretion by denying Celis's motion to suppress. It follows that, even if trial counsel had performed the four specific actions suggested by Celis in his habeas application, the result of the direct appeal would have been the same: we would have affirmed the conviction. The habeas court therefore erred in determining that Celis established the second prong of *Strickland* on these grounds.

As noted, Hewins additionally stated at the habeas hearing that trial counsel was ineffective by failing to request an article 38.23 jury charge instruction. The State argues that the habeas court erred by basing its ruling in part on this ground because it was not

explicitly set forth in the application for writ of habeas corpus. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985) ("In a postconviction collateral attack, the burden is on the applicant to allege and prove facts which, if true, entitle him to relief. In the context of an allegation of an egregiously erroneous charge, one which rises to the level of having denied the applicant a fair and impartial trial, this requirement of pleading will be strictly pursued.").

Even assuming that the issue was properly pled, we again conclude that Celis has failed to establish a reasonable likelihood that, had counsel requested the instruction, the outcome of the proceeding would have been different. *See Ex parte Napper*, 322 S.W.3d at 248. Article 38.23 provides as follows:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (West, Westlaw through 2015 R.S.). The Texas Court of Criminal Appeals has held that, to be entitled to an article 38.23 jury instruction, "three predicates must be met: (1) the evidence heard by the jury must raise an issue of fact, (2) the evidence on that fact must be affirmatively contested, and (3) the contested factual issue must be material to the lawfulness of the challenged conduct." *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012) (citing *Oursbourn v. State*, 259 S.W.3d 159, 181 (Tex. Crim. App. 2008)); *Madden v. State*, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007) ("If there is no disputed factual issue, the legality of the conduct is determined by the trial judge alone, as a question of law.").

At the suppression hearing, the facts regarding the September 2007 meeting between Rivera and Olivarez were largely undisputed. Ultimately, the trial court determined that Celis did not have standing to challenge the "seizure" that Rivera made from Olivarez. This was a question of law which we have already determined was not erroneously decided by the trial court. *See Hamal*, 390 S.W.3d at 307 (holding that appellant was not entitled to an article 38.23 instruction where there was "no factual dispute" about what the information the officer "received before and during the [traffic] stop"); *Madden*, 242 S.W.3d at 514 (same where there was "no conflict in the evidence that raised a disputed fact issue material to the legal question of 'reasonable suspicion'"). Accordingly, Celis was not entitled to an article 38.23 jury charge instruction, and the habeas court erred in concluding that trial counsel provided ineffective assistance by failing to request such an instruction.

We conclude as a matter of law that Celis failed to satisfy the two prongs of the *Strickland* test for ineffective assistance of counsel with respect to any of the alleged deficiencies. The habeas court therefore abused its discretion in granting Celis a new trial. The State's second issue is sustained.[9]

[9] The State argues by its first issue that the habeas court "lacked authority" to reconsider its initial order denying Celis's application as frivolous. *See Ex parte Smith*, 690 S.W.2d 601, 603 (Tex. Crim. App. 1985) ("[W]here a trial court has validly dismissed a case, the trial court has no authority to consider the dismissal ineffective and reinstate the case.") (citing *Garcia v. Dial*, 596 S.W.2d 524 (Tex. Crim. App. 1980); *Haley v. Lewis*, 604 S.W.2d 194 (Tex. Crim. App. 1980)). Jurisdiction over the appeal is a threshold issue which we ordinarily consider first. *See State v. Roberts*, 940 S.W.2d 655, 657 (Tex. Crim. App. 1996), *overruled on other grounds by State v. Medrano*, 67 S.W.3d 892, 903 (Tex. Crim. App. 2002). Here, however, in light of our resolution of the State's second issue, we will assume, but not decide, that the trial court had the authority to reconsider its initial order and that we have jurisdiction over the appeal. *See* TEX. R. APP. P. 47.1.

III. CONCLUSION

We reverse the trial court's judgment and render judgment denying Celis's application for post-conviction writ of habeas corpus.

DORI CONTRERAS GARZA
Justice

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

Delivered and filed the
21st day of December, 2016.