NUMBER 13-15-00147-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

SANDRA COY BRIGGS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 186th District Court
of Bexar County, Texas.

DISSENTING OPINION ON RECONSIDERATION

Before the Court En Banc
Dissenting Opinion on Reconsideration by Justice Contreras

The State argues that Briggs's guilty plea was not involuntary merely because (1) Briggs's trial counsel advised her that evidence obtained from her blood draw would be admissible at trial, and (2) the United States Supreme Court's decision in *Missouri v. McNeely* cast doubt upon that advice. I dissent because I agree with the State, and I

would find that the trial court did not abuse its discretion in denying Briggs's motion for new trial.

The State's motion cites two seminal United States Supreme Court cases: *Brady v. United States*, 397 U.S. 742 (1970) and *McMann v. Richardson*, 397 U.S. 759 (1970).[1] Like Briggs, the petitioners in these cases asserted that their guilty pleas were involuntary because their counsel gave bad information or advice. In *Brady*, petitioner's counsel advised him that the death penalty would be possible if he went to trial, and petitioner pleaded guilty based upon that advice, but a later case—*United States v. Jackson*—held the applicable death penalty statute to be unconstitutional. 397 U.S. at 748. Nevertheless, the Court found petitioner's guilty plea to be voluntary because "[h]e was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties." *Id*. at 756. The Court noted:

> The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was

[1] The State cited *Brady* but not *McMann* in its brief on original submission. This Court cited neither case in our opinion of March 9, 2017.

entered.

> The fact that Brady did not anticipate *United States v. Jackson*, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Id. at 757 (citation omitted).

McMann similarly held that petitioner's guilty plea was not involuntary, even though counsel advised him that his confession would be admissible, and a later decision—*Jackson v. Denno*—rendered that advice dubious. *See* 397 U.S. at 771–72. The *McMann* Court made several observations which are relevant to the circumstances of this case:

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts.
>
> That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing. Courts continue to have serious differences among themselves on the admissibility of evidence, both with respect to the proper standard by which the facts are to be judged and with respect to the application of that standard to particular facts. That this Court might hold a defendant's confession inadmissible in evidence, possibly by

a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective when he thought the admissibility of the confession sufficiently probable to advise a plea of guilty.

In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

. . . .

We are unimpressed with the argument that because the decision in *Jackson* has been applied retroactively to defendants who had previously gone to trial, the defendant whose confession allegedly caused him to plead guilty prior to *Jackson* is also entitled to a hearing on the voluntariness of his confession and to a trial if his admissions are held to have been coerced. A conviction after trial in which a coerced confession is introduced rests in part on the coerced confession, a constitutionally unacceptable basis for conviction. It is that conviction and the confession on which it rests that the defendant later attacks in collateral proceedings. The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The prior confession is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered in evidence. Whether or not the advice the defendant received in the pre-*Jackson* era would have been different had *Jackson* then been the law has no bearing on the accuracy of the defendant's admission that he committed the crime.

What is at stake in this phase of the case is not the integrity of the state convictions obtained on guilty pleas, but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof. It might be suggested that if *Jackson* had been the

> law when the pleas in the cases below were made—if the judge had been required to rule on the voluntariness of challenged confessions at a trial—there would have been a better chance of keeping the confessions from the jury and there would have been no guilty pleas. But because of inherent uncertainty in guilty-plea advice, this is a highly speculative matter in any particular case and not an issue promising a meaningful and productive evidentiary hearing long after entry of the guilty plea. The alternative would be a per se constitutional rule invalidating all New York guilty pleas that were motivated by confessions and that were entered prior to *Jackson*. This would be an improvident invasion of the State's interests in maintaining the finality of guilty-plea convictions that were valid under constitutional standards applicable at the time. It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk o[f] ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.

Id. at 769–71, 773–74 (footnotes omitted).

The Texas Court of Criminal Appeals recently invoked both *Brady* and *McMann* in determining that a plea of guilty to possession of cocaine was voluntary, even though it was later discovered that the State could not prove the substance the defendant possessed was cocaine because there was not enough substance to test. *See Ex parte Palmberg*, 491 S.W.3d 804, 810 (Tex. Crim. App. 2016). The Court remarked:

> As the Supreme Court's cases described above make clear, the voluntariness of a defendant's guilty plea is not contingent upon his awareness of the full dimension of the prosecution's case. While any defendant who is deciding whether or not to plead guilty would certainly prefer to be apprised of his exact odds of an acquittal at trial, the reality is that every defendant who enters a guilty plea does so with a proverbial roll of the dice. Naturally, the more information the defendant acquires beforehand about the prosecution's case, the better informed his decision to plead guilty will be, providing him the opportunity to make a "wise" plea. But even if the defendant is less well-informed, as long as he has a sufficient awareness of his circumstances—including an awareness that some facts simply remain unknown to him or are undetermined as of the time of the plea—his potentially unwise plea is still a voluntary one.

> There could be any number of situations in which evidence the defendant initially thought admissible is actually inadmissible, a witness thought to be available is actually unavailable, or, as in this case, evidence thought to be subject to forensic testing is, in fact, not testable. The correct question for due process purposes is not whether Applicant knew every fact relevant to the prosecution of his case. Rather, the correct question is whether he was aware of sufficient facts—including an awareness that there are or may be facts that he does not yet know—to make an informed and voluntary plea.
>
> . . . .
>
> All of this is not to say that we would never grant an uninformed Applicant relief. If an applicant was affirmatively led to believe that the substance could definitively be tested due to misrepresentations by the State, or perhaps because of ineffective assistance of counsel, then his plea might be constitutionally challengeable. But neither the record nor Applicant's brief suggests any prosecutorial misrepresentation or ineffectiveness of defense counsel. Perhaps Applicant knew that law enforcement possessed the substance found on his person at the time of arrest, but he did not know whether or not it had been tested, or even whether or not it could have been tested. So long as Applicant was aware that this was still an unknown variable in his prosecution—so long as he knew what he did not know—then he was sufficiently aware of the relevant circumstances surrounding his case. The fact that his roll of the dice did not turn out as favorably as it might have had he proceeded to trial is not a ground for invalidating his plea.

Id. at 809, 810 (footnotes and citation omitted).

The involuntariness claims in *Brady*, *McMann*, and *Palmberg* were raised by petitions for habeas corpus, whereas Briggs's case is technically on direct appeal from the denial of a motion for new trial. Nevertheless, I see no reason why those cases, and the principles elucidated therein, should not apply here. Whether brought via a collateral or direct attack, a claim that conviction violated due process because of an involuntary plea requires the appellate court to ask the same question: Was the plea "a voluntary and intelligent choice among the alternative courses of action open to the defendant"? *See id*. at 807 (habeas petition); *State v. Diaz–Bonilla*, 495 S.W.3d 45, 53 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (direct appeal); *Anthony v. State*, 457 S.W.3d 548,

552 (Tex. App.—Amarillo 2015), *rev'd on other grounds*, 494 S.W.3d 106 (Tex. Crim. App. 2016) (direct appeal); *Gutierrez v. State*, 65 S.W.3d 362, 368 (Tex. App.—Corpus Christi 2001), *rev'd on other grounds*, 108 S.W.3d 304 (Tex. Crim. App. 2003) (direct appeal); *Ainsworth v. State*, 973 S.W.2d 720, 723 (Tex. App.—Amarillo 1998, no pet.) (direct appeal); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (direct appeal). It follows that, regardless of whether a guilty plea is challenged directly or collaterally, it may not be vacated as involuntary merely because the "good-faith evaluations of a reasonably competent attorney" turn out to be mistaken. *See McMann*, 397 U.S. at 770.

It is true, as we stated in our opinion, that because the instant case comes to us on direct appeal, we are required to apply any new rules that have been created or announced by higher courts since the judgment of conviction was rendered—regardless of whether the rule constitutes a clear break from precedent—and that we would not be required to do so when reviewing a collateral attack on an already-final judgment. *Compare Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) *and McClintock v. State*, 444 S.W.3d 15, 18 n.8 (Tex. Crim. App. 2014) (direct appeals) *with Teague v. Lane*, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."). Accordingly, as we correctly stated in our opinion, the rule set forth by the United States Supreme Court in *Missouri v. McNeely*, 133 S.Ct. 1552 (U.S. 2013), must be applied retroactively to Briggs's case.

But to say that we are required to apply *McNeely* retroactively to this case does not mean that Briggs's trial counsel made a material misrepresentation or provided

ineffective assistance when he failed to anticipate it.[2] Instead, under *Brady* and *McMann*, Briggs "is bound by [her] plea and [her] conviction unless [s]he can allege and prove serious derelictions on the part of counsel sufficient to show that [her] plea was not, after all, a knowing and intelligent act." *McMann*, 397 U.S. at 774. She has not made that showing because it is undisputed that counsel's advice comported with the prevailing professional view of the law at the time the advice was rendered. Under such circumstances, I do not believe counsel's advice—that the blood evidence would be admitted at trial—constitutes a "misrepresentation" of the sort that would render a guilty plea involuntary. *See Ex parte Barnaby*, 475 S.W.3d 316, 322 (Tex. Crim. App. 2015) (noting that misrepresentations by defense counsel may cause a plea to be involuntary).

Moreover, although Briggs couches her claim in terms of "misrepresentation" by defense counsel, I believe it may also be accurately viewed as a challenge to the effectiveness of trial counsel's assistance. We evaluate claims of ineffective assistance using the familiar *Strickland* standard, under which a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance was prejudicial, resulting in an unreliable or fundamentally unfair outcome. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Texas Court of Criminal Appeals has recognized that *Strickland* applies "[w]hen a defendant enters his

[2] To say that certain higher-court case law "applies retroactively" means only that it constitutes precedent which we, as an appellate court, are bound to follow. Accordingly, had Briggs's trial counsel filed a motion to suppress the blood evidence, and had that motion been denied, we would certainly apply the tenets of *McNeely* in evaluating the merits of that ruling, because the case is on direct appeal. But that is not the situation we are presented with here. We are not reviewing a trial court's decision to suppress or not to suppress evidence, but rather, we are reviewing the trial court's determination that Briggs's plea was made voluntarily. That review necessarily entails determining whether the plea was induced by misrepresentation, but there is no authority requiring this Court to impute knowledge of subsequently-decided case law to counsel in making that determination.

plea upon the advice of counsel and subsequently challenges the voluntariness of that plea based on ineffective assistance of counsel." *Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex. Crim. App. 1997) *see Ex parte Harrington*, 310 S.W.3d 452, 459 (Tex. Crim. App. 2010) ("When counsel's representation falls below [the *Strickland*] standard, it renders any resulting guilty plea involuntary."). This is true for both collateral and direct attacks. *See Riley v. State*, 378 S.W.3d 453, 458 (Tex. Crim. App. 2012) (direct appeal); *Ex parte Moussazadeh*, 361 S.W.3d 684, 691 (Tex. Crim. App. 2012) ("To obtain habeas corpus relief on a claim of involuntary plea, an applicant must meet both prongs of the *Strickland* standard.").

Notwithstanding that *McNeely* applies retroactively to this case, Briggs has not satisfied either *Strickland* prong. First, as noted, counsel's advice that Briggs's blood evidence would be admitted was not only within the wide range of reasonable professional assistance, it was the predominant view of practitioners and courts at the time the advice was given. *See Ex parte Welch*, 981 S.W.2d 183, 184 (Tex. Crim. App. 1998) ("[C]ounsel's performance will be measured against the state of the law in effect during the time of trial and we will not find counsel ineffective where the claimed error is based upon unsettled law."). Second, the trial court found that there were exigent circumstances which would have made the blood admissible even if counsel had anticipated *McNeely* and filed a motion to suppress based on its holding. That finding was supported by the evidence at the new trial hearing, and so we are required to give deference to it. *See Johnson v. State*, 169 S.W.3d 223, 239 (Tex. Crim. App. 2005). Accordingly, even if counsel was ineffective by failing to anticipate *McNeely*, Briggs has not shown that the ineffectiveness prejudiced her defense.

For the foregoing reasons, I would find that the record in this case supports the trial court's implicit finding that Briggs's guilty plea was voluntary. Therefore, I respectfully dissent.

DORI CONTRERAS
Justice

Dissenting Opinion on Reconsideration joined by Justice Longoria

Publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the 21st
day of November, 2017.