NUMBER 13-16-00110-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

EX PARTE PHILLIP JACKSON

On appeal from the 28th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Benavides

This is an appeal from the denial of an application for writ of habeas corpus brought under article 11.09 of the code of criminal procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 11.09 (West, Westlaw through 2015 R.S.). By four issues, which we treat as one,[1]

[1] Jackson's issues are as follows:

(1) The trial judge's authority is only that which is given under the statutes, codes, and regulations the Legislature has enacted. When the Trial Judge steps outside the law, has he abused his discretion?

applicant Phillip Jackson asserts that the trial court erred in denying his habeas application. We affirm.

I. BACKGROUND

In 2011, the State indicted Jackson with aggravated assault with a deadly weapon, a second-degree felony. *See* TEX. PENAL CODE ANN. § 22.02(a) (West, Westlaw through 2015 R.S.). Jackson pleaded not guilty to the charge and was tried to a Nueces County jury in May of 2012. The jury found Jackson guilty of the lesser-included offense of assault, a Class A misdemeanor. *See id.* § 22.01(b)(2)(A) (West, Westlaw through 2015 R.S.). The docket sheet notes that after the jury found him guilty of assault, the State and Jackson reached a deal as to punishment, which called for a punishment of one-year imprisonment in county jail, credit for time served, and a finding of family violence.

In 2013, a Nueces County jury found Jackson guilty of a separate charge of assault involving family violence with a prior conviction, a third-degree felony and he was sentenced to two years' imprisonment with the Texas Department of Criminal Justice—Institutional Division. *See id.* § 22.01(b-1) (West, Westlaw through 2015 R.S.).

Jackson argued four grounds in support of his article 11.09 application for writ of habeas corpus, three dealing with the sufficiency of the evidence and the trial court's

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> (2) Even though the prior conviction has been discharged does the Petitioner have legal standing to bring constitutional violation before this Court?
>
> (3) Due to the collateral consequences connected to the Judge's illegal actions, does the Petitioner have legal standing to appear before this Court and have the constitutional violations corrected by removal of the family violence findings?
>
> (4) Was defense counsel ineffective for failure to object to the illegal actions of the trial judge, and failure to advise the Petitioner of the repercussions of the family violence ruling, and failure to advise Petitioner of his right to appeal?

(citations omitted). We construe these four issues as one general challenge to the trial court's denial of Jackson's application for habeas relief. *See* TEX. R. APP. P. 47.1.

authority to find family violence under his 2012 conviction, and the fourth asserting that Jackson's defense counsel in the 2012 case was ineffective for failure to object to the trial court's family-violence finding. The State responded to Jackson's application by asserting several arguments, including: (1) in 2015, this Court addressed the same arguments that are raised by Jackson in this appeal, *see In re Jackson*, No. 13-15-00290-CR, 2015 WL 4140609 at *1 (Tex. App.—Corpus Christi July 7, 2015, no pet.) (mem. op., not designated for publication) (per curiam); (2) the trial court has denied his motion to remove the prior family violence finding; (3) Jackson's claim that there is insufficient evidence to support the family violence finding is not a cognizable claim on habeas; and (4) even if the issue was cognizable, Jackson would not be entitled to relief.

The trial court denied Jackson's application, and this appeal followed.[2]

[2] We carried Jackson's previously filed motion for appointment of counsel in this proceeding. In his motion, Jackson argues that this Court should appoint him counsel because he is indigent, pro se, and "the interest of justice will always require appointed counsel under these circumstances."

We first note that the United States Supreme Court has held that there is no general constitutional right to the assistance of counsel on collateral review of a criminal conviction. *See Pennsylvania v. Finley*, 481 U.S. 551, 554–55 (1987); *see also Ex parte Graves*, 70 S.W.3d 103, 110 (Tex. Crim. App. 2002) (recognizing the *Finley* holding).

Despite this holding, we note that some conflict exists regarding this issue at the Texas Court of Criminal Appeals. For example, one judge has criticized *Finley's* holding and questioned its rationale and place in our nation's criminal justice system and jurisprudence. *See Ex parte Garcia*, 486 S.W.3d 565, 570 (Tex. Crim. App. 2016) (Alcala, J., dissenting) (arguing that "when a habeas applicant has complained of ineffective assistance of trial counsel, and when it appears to a habeas court that a colorable claim exists, based either on the substance of the *pro se* pleadings or in light of the record, the habeas court should appoint counsel for such an applicant to pursue that claim in order to ensure that he has been afforded his constitutional right to the effective assistance of counsel"); *but see id.* at 565–66 (Keller, P.J., concurring) (noting that various procedures are in place in Texas for appointment of counsel in post-conviction habeas cases).

As an intermediate appellate court, we must follow the binding precedent of the court of criminal appeals, which has recognized that that there is no general constitutional right to the assistance of counsel on collateral review of a criminal conviction. *See Villarreal v. State*, 504 S.W.3d 494, 509 (Tex. App.—Corpus Christi 2016, pet. filed). Accordingly, we deny Jackson's motion. *See Ex parte Graves*, 70 S.W.3d at 110.

II. ARTICLE 11.09 HABEAS CORPUS APPLICATION

By his single issue, Jackson asserts that the trial court erred in denying his habeas application.

A. Standard of Review

In reviewing a trial court's decision on a habeas corpus application, we view the facts in the light most favorable to the trial court's ruling, and absent an abuse of discretion, we uphold the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006). We afford almost total deference to the judge's determination of the historical facts that are supported by the record, especially when the fact findings are based on an evaluation of credibility and demeanor. *Ex parte Garza*, 192 S.W.3d 658, 660–61 (Tex. App.—Corpus Christi 2006, no pet.). If the resolution of the ultimate questions turns on an application of legal standards, we review the determination de novo. *Id.*

B. Discussion

Jackson makes four arguments in support of his habeas application, which we have divided into two categories. The first deals with the trial court's finding of family violence stemming from his 2012 conviction, and the second deals with whether his counsel was ineffective in the 2012 proceeding when the trial court made its family-violence finding. We will address each in turn.

1. Collateral Attack of the Family-Violence Finding

By his first three arguments, Jackson seeks to collaterally attack the 2012 judgment's family-violence finding based on insufficient evidence. A threshold determination in any post-conviction habeas corpus application is whether the claim presented is cognizable by way of collateral attack. *Ex parte McLain*, 869 S.W.2d 349,

350 (Tex. Crim. App. 1994) (en banc). Traditionally, habeas corpus is available only to review jurisdictional defects, or denials of fundamental or constitutional rights. *Id.* Among those claims, which are not cognizable by way of post-conviction collateral attack, is a challenge to the sufficiency of the evidence. *Id.* Although Jackson weaves constitutional citations of due process violations into his argument, neither the substance of Jackson's arguments nor the record indicates that any jurisdictional defects or denials of fundamental or constitutional rights took place in Jackson's 2012 trial and subsequent sentencing. Accordingly, this claim is not cognizable under a post-conviction habeas proceeding, and the trial court did not abuse its discretion by denying relief based on this ground. *See id.*; *see also Wheeler*, 203 S.W.3d at 324.

2. Ineffective Assistance of Counsel

By his fourth argument, Jackson asserts a claim to relief based on ineffective assistance of counsel. *See Ex parte Smith*, 296 S.W.3d 78, 79 (Tex. Crim. App. 2009) ("Ineffective assistance of counsel may be a ground for habeas-corpus relief after conviction").

The Sixth Amendment to the United States Constitution guarantees the right to reasonably effective assistance of counsel in state criminal proceedings. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *see also Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986). To establish ineffective assistance of counsel, an appellant must show that (1) his counsel's representation fell below the standard of prevailing professional norms, and (2) but for counsel's deficiency, there is a reasonable probability that the result of the trial would have been different. *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland v. Washington*, 466 U.S. 668, 686–89

(1984)). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

In determining whether an attorney's performance was deficient, we apply a strong presumption that the attorney's conduct was within the range of reasonable professional assistance. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). We review the effectiveness of counsel in light of the totality of the representation and particular circumstances of each case. *Id*. at 143. The defendant has the burden to prove a claim of ineffective assistance of counsel by a preponderance of the evidence. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996).

Jackson asserted in his application that when the family-violence finding was made during his 2012 trial, Jackson "[objected] to his defense attorney that the alleged victim was not any family relation, and that they were not in any dating relationship. The defense attorney responded that [Jackson] had received time served, so it was not important." Jackson further argues that his trial counsel also "did not explain the ramifications of the decision by the trial judge" and that trial counsel did not inform Jackson of his right to appeal. Jackson argues that he suffered prejudice through "collateral consequences" as a result of this alleged deficiency because it affected his punishment in a separate conviction in 2013 for assault family violence.

First, the record reveals that an agreement was reached between the State and Jackson regarding his 2012 sentence. Jackson fails to rebut the strong presumption that his counsel acted within the range of reasonable professional assistance by not objecting to a family violence finding in light of the agreement reached on punishment.

Furthermore, after viewing the record in the light most favorable to the trial court's ruling, we conclude that the trial court could have also found within its discretion that Jackson's assertions that he informed his trial counsel that the alleged victim in the 2012 case was not under any family relation, and that they were not in any dating relationship were incredible and given no weight. *See Ex parte Garza*, 192 S.W.3d at 660–61.

We overrule Jackson's issue on appeal.

III. CONCLUSION

We affirm the trial court's order.

GINA BENAVIDES,
Justice

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

Delivered and filed the
8th day of June, 2017.