NO. 12-21-00115-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CHRISTOPHER CHANCE MCGARY, APPELLANT	***§***	***APPEAL FROM THE 241ST***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Christopher Chance McGary filed a motion for rehearing, which is overruled. We withdraw our opinion of May 18, 2022, and substitute the following opinion in its place.

Christopher Chance McGary appeals his conviction for possession of less than one gram of methamphetamine. In two issues, Appellant argues that the trial court abused its discretion in failing to hold a hearing on his motion for new trial and improperly assessing court costs against him. We modify and affirm as modified.

BACKGROUND

Appellant was charged by indictment with possession of less than one gram of methamphetamine and pleaded "guilty." The indictment also alleged that Appellant previously had been convicted of two felonies. Appellant pleaded "true" to the enhancement allegations. Following a trial on punishment at which Appellant declined to call any witnesses or introduce any evidence, a jury assessed Appellant's punishment at imprisonment for twenty years. Appellant filed a motion for new trial and requested a hearing. But no hearing was held, and Appellant's motion for new trial was overruled by operation of law. This appeal followed.

FAILURE TO HOLD HEARING ON MOTION FOR NEW TRIAL

In his first issue, Appellant argues that the trial court abused its discretion by failing to conduct a hearing on his motion for new trial.[1]

Standard of Review and Governing Law

The purpose of a hearing on a motion for new trial is (1) to decide whether the case shall be retried and (2) to prepare a record for presenting issues on appeal in the event the trial court denies the motion. ***Robinson v. State***, 514 S.W.3d 816, 825 (Tex. App.–Houston [1st Dist.] 2017, pet. ref'd); *see* ***Smith v. State***, 286 S.W.3d 333, 338 (Tex. Crim. App. 2009). A defendant does not have an absolute right to a hearing on his motion for new trial. ***Hobbs v. State***, 298 S.W.3d 193, 199 (Tex. Crim. App. 2009). However, a trial court abuses its discretion in failing to hold a hearing if the motion and the accompanying affidavits (1) raise matters that are not determinable from the record and (2) establish reasonable grounds showing that the defendant potentially could be entitled to relief. ***Id.***; ***Smith***, 286 S.W.3d at 340 ("If the trial judge finds that the defendant has met the criteria, he has no discretion to withhold a hearing."). A motion for new trial must be supported by an affidavit that specifically sets out the factual basis for the claim. ***Hobbs***, 298 S.W.3d at 199; ***Smith***, 286 S.W.3d at 339 (stating that, as prerequisite to hearing when grounds in motion for new trial are based on matters not already in record, motion must be supported by affidavit, either from defendant or someone else); ***Bahm v. State***, 219 S.W.3d 391, 395 (Tex. Crim. App. 2007) (stating that it is "judicial requirement" that motions for new trial be supported by affidavits when motion is based on matters not already part of record). "If the affidavit is conclusory, is unsupported by facts, or fails to provide requisite notice of the basis for the relief claimed, no hearing is required." ***Hobbs***, 298 S.W.3d at 199.

Although a defendant need not plead a prima facie case in his motion for new trial, "he must at least allege sufficient facts that show reasonable grounds to demonstrate that he could prevail." ***Id.*** at 199–200. Before a defendant will be entitled to a hearing on his motion for new trial alleging ineffective assistance of counsel, he must allege sufficient facts from which a trial

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[1] We previously held that the record did not support that Appellant "presented" his motion for new trial. *See* TEX. R. APP. P. 21.6; ***Rozell v. State***, 176 S.W.3d 228, 230 (Tex. Crim. App. 2005). In response to Appellant's motion for rehearing, we abated and remanded the cause to the trial court for the limited purpose of holding an evidentiary hearing to determine the facts surrounding the alleged presentment. *See, e.g.*, ***Butler v. State***, 6 S.W.3d 636, 638 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd). The trial court held the hearing and made findings of fact and conclusions of law that Appellant properly presented his motion for new trial to the court. Based on our review of the record of the evidentiary hearing, we agree.

court reasonably could conclude *both* that counsel failed to act as a reasonably competent attorney *and* that, but for counsel's failure, there is a reasonable likelihood that the outcome of his trial would have been different. *See* ***Smith***, 286 S.W.3d at 340–41 (emphasis in original); *see also* ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). We review a trial court's denial of a hearing on a motion for new trial for an abuse of discretion. ***Hobbs***, 298 S.W.3d at 200.

Appellant's Motion for New Trial and Supporting Affidavits

In his motion for new trial, Appellant argued that his trial counsel rendered ineffective assistance at his trial on punishment because he failed to investigate, which resulted in his failure to call three mitigation witnesses. Appellant provided affidavits from these three witnesses who state they each were available to testify and would have testified had they been called. Among the witnesses are Appellant's mother and father, each of whom acknowledged that Appellant has a drug problem, but who respectively stated that (1) Appellant is not a danger to anyone, (2) Appellant is a good person who has a son, who he loves, (3) Appellant is smart, funny, sensitive, and tender-hearted, and (4) if he was given a shorter sentence and decided to devote himself to maintaining sobriety, Appellant was welcome in their home. A third witness, who met Appellant while attending a rehabilitation meeting with her husband, stated that Appellant has a good, tender heart and is very sensitive but has made bad choices. She believed, if given the opportunity to re-enter the free world, Appellant could succeed if he continued to stay in church, lived with family members, and obtained/maintained employment. In conclusion, she noted that Appellant "has a huge heart, and when he is sober, he is happy, laughs, and jokes around."

As the State notes, some of the statements of these witnesses' testimonies are based on contingencies, i.e., Appellant's sobriety, his dedication to church, his ability to stay with family, and his employment prospects. *See Contingent*, THE AMERICAN HERITAGE DICTIONARY (2nd College ed. 1982) (a "contingent" fact means one "dependent upon conditions or events not yet established"); *see also* ***Hobbs***, 298 S.W.3d at 199. Thus, Appellant's parents' testimonies about his being welcomed into their home are not facts upon which the trial court could rely because given their respective testimonies that Appellant has a drug problem, his sobriety still is in doubt. Moreover, the third witness's testimony regarding Appellant's ability to successfully re-enter the free world is cast into doubt because it is contingent on Appellant's ability to live with his family, as well as other uncertainties relating to church attendance and employment. Lastly, even the

positive character traits this witness describes hinge on Appellant's sobriety and, thus, do not carry the weight of established facts. Therefore, in the end, the trial court was left to consider only Appellant's parents' testimonies that (1) Appellant has a drug problem but is not a danger to anyone, (2) he is a good person who has a son, who he loves, and (3) he is smart, funny, sensitive, and tender-hearted, along with Appellant's friend's testimony that Appellant has a good, tender heart and is very sensitive but has made bad choices.

Discussion

An attorney's decision not to present witnesses at the punishment stage of trial may be a strategically sound decision if the attorney bases it on a determination that the testimony of the witnesses may be harmful, rather than helpful to the defendant. *See* ***Robinson v. State***, 514 S.W.3d 816, 824 (Tex. App.–Houston [1st Dist.] 2017, pet. ref'd); *see also* ***Stults v. State***, 23 S.W.3d 198, 209 n.6 (Tex. App.–Houston [14th Dist.] 2000, pet. ref'd) (logical and reasonable explanations for not calling certain witnesses include belief that witnesses would not favorably impress jury or that they were susceptible to impeachment and, therefore, presented more potential for harm than help). As ordinarily is the case on direct appeal, the record does not set forth specifically the reasons why Appellant's trial counsel decided not to call these witnesses. However, the record does support a reasonable determination on the trial court's part that this decision was, in fact, grounded in sound trial strategy.

Here, Appellant entered an open plea of "guilty" to possession of methamphetamine and pleaded "true" to two enhancements—burglary of a habitation and possession of a controlled substance in Penalty Group 1 between one and four grams. Thus, the only question before the jury was the length of Appellant's sentence.

The State presented evidence related to the charged offense of possession of a controlled substance as well as the two felonies underlying the enhancement allegations. The State further presented evidence and testimony regarding seven of Appellant's prior convictions. Among these convictions are two for possession of a controlled substance, two for burglary of a building, as well as convictions for obstruction/retaliation, endangering a child, and evading with a vehicle. Thus, had Appellant's counsel called any of the witnesses referenced in Appellant's motion for new trial, while they, as proffered, would have discussed Appellant's drug problem along with testimony that Appellant is, nonetheless, a good, tender-hearted person with a son, who he loves, the State almost certainly would have cross examined these witnesses about Appellant's extensive

criminal history. *See* TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1) (West Supp. 2021). Moreover, had Appellant called these witnesses, the State could have chosen to bolster its case by offering evidence of up to eight other of Appellant's prior convictions including, among others, three for possession of a controlled substance, as well as terroristic threat, and criminal mischief.[2] While the jury already heard rather boiler-plate testimony concerning Appellant's previous convictions, the trial court reasonably could have concluded that Appellant's counsel weighed the limited value of this "good character" testimony against the damage that potentially could occur to Appellant's case if the State were afforded the opportunity further to emphasize the litany of these and other prior convictions through Appellant's parents and a friend. *See* ***Robinson***, 514 S.W.3d at 824; ***Stults***, 23 S.W.3d at 209 n.6.

Further still, even had Appellant's counsel called these witnesses, who would testify as to Appellant's general good character (if he was sober)[3] and ability to live with his parents and be a productive citizen if he was given a reduced sentence (also prefaced on his sobriety and other uncertain factors), the trial court nonetheless reasonably could conclude that it is unlikely, given what the jury heard about Appellant's extensive criminal history, which the State surely would emphasize further through cross examination, that Appellant would have received a shorter sentence. *Cf., e.g.*, ***Smith***, 286 S.W.3d at 345 (trial court could have concluded, without necessity of hearing, that appellant suffered no prejudice from any deficiency on his trial counsel's part).

Thus, because much of the testimony in the supporting affidavits is based on contingent facts, an apparent, sound trial strategy is discernible from the record before us, and the trial court reasonably could conclude that Appellant could not meet the second prong of ***Strickland***, the trial court did not abuse its discretion in declining to hold a hearing on Appellant's motion for new trial. *See* ***Smith***, 286 S.W.3d at 340–41; ***Robinson***, 514 S.W.3d at 824; ***Stults***, 23 S.W.3d at 209 n.6. Appellant's first issue is overruled.

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[2] The clerk's record contains the State's Amended Notice of Intent to Offer Evidence Under Article 404(b) and 609 of the Texas Rules of Evidence and Under Article 37.07 of the Texas Code of Criminal Procedure. The State's notice specifies fifteen prior convictions, in addition to the two convictions used for enhancement.

[3] The jury also heard testimony from Appellant's community supervision officer about Appellant's participation in an in-patient rehabilitation program, which he failed to complete after he received a positive drug test, at which point he admitted to her that he had been using methamphetamine in violation of the terms of his community supervision. This testimony does not bode well for the likelihood of Appellant's continued sobriety.

COURT COSTS

In his second issue, Appellant argues that the trial court erroneously assessed costs for the county and state "judicial support fee." In its brief, the State agrees that these fees should not have been assessed.

Standard of Review and Applicable Law

We review the assessment of court costs on appeal to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost, and traditional ***Jackson v. Virginia*** evidentiary sufficiency principles do not apply. ***Johnson v. State***, 423 S.W.3d 385, 389–90 (Tex. Crim. App. 2014) (citing ***Jackson v. Virginia***, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Appellant need not object at trial to raise a claim challenging the bases of assessed costs on appeal. ***Id***. at 391. When a trial court improperly includes amounts in assessed court costs, the proper appellate remedy is to reform the judgment to delete the improperly assessed fees. *See* ***Cates v. State***, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013). Court costs may not be assessed against a criminal defendant where the law does not provide expressly for the assessment of such costs. *See* TEX. CODE CRIM. PROC. ANN. art. 103.002 (West 2018).

Discussion

Here, the judgment, bill of costs, and Order to Withdraw Funds show that Appellant was assessed $249.00 in court costs. The bill of costs includes $0.60 for the "Judicial Support Fee – (County)" and $5.40 for the "Judicial Support Fee – (State)[.]" These costs were authorized under former Section 133.105 of the Texas Local Government Code. *See* TEX. LOC. GOV'T CODE ANN. § 133.105(a) (West 2019), *repealed by* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 1.19(12), 2019 Tex. Sess. Law Serv. 3982 (eff. Jan. 1, 2020). During its 86th Regular Session, the Texas Legislature comprehensively revised the statutory array of criminal court costs and fees imposed on conviction (the Act). *See generally* Act of May 23, 2019, 86th Leg., R.S., ch. 1352, 2019 Tex. Sess. Law Serv. 3982 (eff. Jan. 1, 2020). Yet, "[e]xcept as otherwise provided by" the Act, "the changes in the law made by" the Act "apply only to a cost, fee, or fine on conviction for an offense committed on or after the effective date of" the Act, i.e., January 1, 2020. Act of May 23, 2019, 86th Leg., R.S., ch. 1352, § 5.01, 2019 Tex. Sess. Law Serv. 3982, 4035–36. An offense committed before the Act's effective date "is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose." ***Id.***

Thus, because the indictment in this case alleges that the offense was committed on or about May 10, 2020, we conclude that the former Section 133.105(a) does not apply. Accordingly, we will modify the trial court's judgment, bill of costs, and Order to Withdraw Funds to delete these improperly assessed fees. *See* ***Sturdivant v. State***, 445 S.W.3d 435, 443 (Tex. App.–Houston [14th Dist.] 2014, pet. ref'd). Appellant's second issue is sustained.

DISPOSITION

We have overruled Appellant's first issue and sustained his second issue. Having done so, we ***modify*** the trial court's judgment, bill of costs, and Order to Withdraw Funds to reflect that Appellant's court costs are $243.00 by deleting the "Judicial Support Fee – (County)" and "Judicial Support Fee – (State)." We ***affirm*** the trial court's judgment ***as modified***.

JAMES T. WORTHEN
Chief Justice

Opinion delivered September 30, 2022.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.