IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0623-16

THE STATE OF TEXAS

v.

ROSA ELENA ARIZMENDI, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SEVENTH COURT OF APPEALS
POTTER COUNTY

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

For well over a hundred years, trial judges in Texas have been permitted to grant a new trial in the interest of justice, subject to reversal by an appellate court only under circumstances showing that a trial judge abused his discretion in granting the new-trial motion.[1] In light of this longstanding historical practice, I would affirm the judgments of the

[1] *See State v. Gonzalez*, 855 S.W.2d 692, 694 (Tex. Crim. App. 1993).

trial court that awarded Rosa Elena Arizmendi, appellee, a new trial in this case, and of the court of appeals that upheld the trial court's ruling. In the instant case, the record from the new-trial hearing clearly established a proper legal theory underlying the trial court's decision to grant appellee a new trial in the interest of justice—her guilty plea was involuntarily made due to her attorney's ineffectiveness. Although that legal theory was not expressly included in appellee's written motion for new trial, I would hold that the State failed to preserve its complaint with respect to appellee's implied amendment of her motion because it failed to obtain an adverse ruling from the trial court, and, alternatively, that even if the State had preserved its objection, the trial court retained its inherent authority to permit the amendment. Under these circumstances, I agree with the court of appeals's conclusion that the trial court did not abuse its discretion by granting appellee a new trial. I, therefore, respectfully dissent from this Court's judgment that reverses the judgment of the court of appeals and affirms appellee's conviction.

I. Background

A police officer stopped a van driven by appellee's co-defendant on a freeway because the officer believed he had observed a traffic violation. Appellee was a passenger in the vehicle. As a result of the traffic stop, the co-defendant and appellee were each charged with possession with intent to deliver a controlled substance weighing over 400 grams. The traffic stop was recorded on a video, a copy of which was given to appellee prior to trial, but the video did not contain any audio recording. Appellee's counsel decided not to file a motion

to suppress the evidence from the traffic stop, but she neglected to discuss that decision with appellee. Appellee pleaded guilty pursuant to an agreed plea bargain for twenty-five years' confinement and a $5,000 fine. After appellee's plea of guilty, her co-defendant filed a motion to suppress the evidence, and, after a hearing, all of the evidence was suppressed on the basis that the officer did not have any lawful reason for the traffic stop.

Appellee filed a combined motion for new trial and motion in arrest of judgment. Appellee's motion alleged that the verdict was "contrary to the law and the evidence." In support of her motion, appellee referenced the trial court's decision to suppress all of the evidence in her co-defendant's case. She further noted that the trial judge who granted her co-defendant's motion to suppress was the same judge who had accepted her plea of guilty. After summarizing the substance of the officer's testimony at the co-defendant's suppression hearing, appellee's motion asserted that the officer's testimony was "new evidence which was not available or known" to appellee at the time that she entered her plea of guilty. The motion stated that the trial court "has the discretion to grant a new trial in the interests of justice." The motion concluded, "For the foregoing reasons, and for such other reasons that may arise on the hearing of this Motion, Defendant requests a new trial."

At the evidentiary hearing on appellee's motion for new trial, appellee's counsel offered the reporter's record of the co-defendant's suppression hearing and the findings of fact and conclusions of law that had been made by the trial judge at that hearing. Although she did not call any witnesses, appellee's counsel indicated that she would like to "address

the Court with some additional information from myself, as an officer of the court." She stated on the record that, prior to appellee's plea of guilty, she had reviewed the case file and the officer's patrol-car video, and she personally decided not to pursue a motion to suppress because she did not believe that the motion would be successful. Counsel explained that she "got sidetracked with other issues in the case" and neglected to "present[] the option of a motion to suppress to [appellee] as something that we could do." Counsel told the trial court that she believed that failing to discuss the suppression issue with appellee was a "mistake" and that it "was ineffective." Trial counsel said, "And I . . . confess that there couldn't have been knowing [waiver] because of my own failure." Counsel told the trial court that the option of a motion to suppress "should have been presented to [appellee] for her to understand and her to make the choice of whether that's a risk that she wanted to take or not because it goes to the heart of this case." Counsel told the court that she did not want to see appellee "pay for a mistake" that was "purely" counsel's alone.

In response to the statements by appellee's trial counsel, the State objected. It suggested that a possible claim of involuntary plea due to ineffective assistance of counsel was "not part of this motion" and "cannot be addressed here" because appellee had failed to include that theory in her written new-trial pleadings. Relying on an unpublished case from the Seventh Court of Appeals,[2] the State argued that a litigant is "barred from bringing up any other theories, other than what is in [her] Motion, filed within 30 days of the entry of the

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[2] *See State v. Barrow*, No. 07-13-00147-CR, 2014 WL 3536981 (Tex. App.—Amarillo July 16, 2014) (mem. op., not designated for publication).

judgment." The State noted that appellee's motion "here says merely new evidence." When the State objected to defense counsel's discussion of ineffectiveness as being outside of the scope of the issues raised by the new-trial motion, the judge responded by stating, "I'll let her continue." The trial court did not make any express ruling on the State's objection. In an order issued subsequent to the hearing, the court granted appellee's motion for new trial on the basis that it was in the interest of justice.

On appeal, the court of appeals upheld the trial court's ruling awarding appellee a new trial. The court of appeals explained that, "according to the ruling of the trial court in [the co-defendant's suppression] proceeding, that evidence established the trooper did not lawfully stop her co-defendant's van." *State v. Arizmendi*, No. 07-15-00238-CR, 2016 WL 2986041, at *3 (Tex. App.—Amarillo May 19, 2016) (mem. op., not designated for publication). The court of appeals determined that this "'new evidence' in the form of the trooper's testimony could not have been available to [appellee] before entering her guilty plea on April 28, 2015, when the trooper's testimony did not exist until her co-defendant's suppression hearing on May 4, 2015." *Id.* The court of appeals explained that the "chronology demonstrates that the failure to obtain the evidence was not due to a lack of due diligence." *Id*. The court of appeals continued that the "trooper's testimony was not cumulative, corroborative, collateral, or impeaching." *Id*. Furthermore, the court of appeals decided that, considering that appellee's case was pending in the same court as her co-defendant's case, appellee would probably have been successful had she pursued a motion

to suppress, and thus the outcome of the proceedings likely would have been different had she been aware of the trooper's testimony prior to entering her plea of guilty. *Id.* The court of appeals concluded that appellee had demonstrated that she was entitled to a new trial on the basis of newly discovered evidence, and it upheld the trial court's ruling granting her motion on that basis. *Id*.

In addition, given its holding in appellee's favor as to the issue of newly discovered evidence, the court of appeals declined to reach the State's argument that the trial court had abused its discretion by considering the issue of ineffective assistance of counsel that had not been expressly pleaded in appellee's written new-trial motion. *Id.* The court of appeals explained, "Because we have already found that the trial court did not abuse its discretion in granting Appellee a new trial based upon newly discovered evidence, we need not reach the issue of ineffective assistance of counsel." *Id*.

II. Analysis

Applying the abuse-of-discretion standard of review to this case, I conclude that the trial court's decision to grant appellee a new trial must be upheld. I reach this conclusion by determining that the State failed to preserve its complaint that the trial court abused its discretion by considering appellee's evidence and implied amendment of her new-trial motion to include an ineffective-assistance-of-counsel theory.[3] Despite the fact that her

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[3] I agree with the majority opinion's assessment that the court of appeals erred by concluding that the officer's testimony at the suppression hearing constituted newly discovered evidence that would entitle appellee to a new trial. As the majority opinion suggests, that evidence was not truly "new" because appellee could have obtained that same evidence through a suppression motion and

written motion did not expressly ask for a new trial on the basis of her plea being involuntary due to counsel's failure to pursue a suppression motion on her behalf, the record of the new-trial hearing clearly established that appellee intended to expand her motion to include that theory as a basis for relief. Although the State objected to appellee's expansion of her theory that had been pleaded in her written motion, the trial court never ruled on that objection, and thus the State has not preserved this complaint for appeal. In the alternative, I would hold that a trial court retains inherent authority to consider an untimely basis for granting a new trial, regardless of whether the State objects. I explain my reasoning below.

A. Appellate Courts Must Review Trial Court Rulings on New-Trial Motions for Abuse of Discretion

The standard of review when a trial court grants a motion for new trial is abuse of discretion. *State v. Thomas*, 428 S.W.3d 99, 103 (Tex. Crim. App. 2014). In reviewing a trial court's decision to grant a motion for new trial, an appellate court views the evidence in a light most favorable to the trial court's ruling, defers to the court's credibility determinations, and presumes that all reasonable fact findings in support of the ruling have been made. *Id*. at 103-04.

"The test for abuse of discretion is not whether, in the opinion of the appellate court, the facts present a suitable case for the trial court's action, but rather, whether the trial court acted without reference to any guiding rules or principles." *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016). An appellate court does not substitute its judgment for that

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hearing, and thus the evidence was not unavailable to her at the time that she pleaded guilty.

of the trial court; rather, an appellate court decides "'whether the trial court's decision was arbitrary or unreasonable.'" *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014) (quoting *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006)).

This Court has acknowledged that, for well over a hundred years, Texas trial judges have had the discretion to grant new trials in the interest of justice. *State v. Gonzalez*, 855 S.W.2d 692, 694 (Tex. Crim. App. 1993). In *Gonzalez*, this Court quoted language from the Texas Supreme Court's 1872 opinion in *Mullins v. State* indicating that a trial court "should never hesitate to use [its] discretion" to grant a new trial "whenever the ends of justice have not been attained by" the verdict. *Id.* (quoting *Mullins v. State*, 37 Tex. 337, 339-40 (1872-73)). In more recent cases, this Court has held that, in general, a trial court does not abuse its discretion by granting a new trial if a defendant (1) articulated a valid legal claim in her motion for new trial, (2) produced evidence or pointed to evidence in the trial record that substantiated her legal claim, and (3) showed prejudice to her substantial rights. *See State v. Herndon*, 215 S.W.3d 901, 909 (Tex. Crim. App. 2007). In *Herndon*, this Court clarified that a defendant "need not establish reversible error as a matter of law before the trial court may exercise its discretion in granting a motion for new trial." *Id.*; *see also id.* at 907 ("Even errors that would not inevitably require reversal on appeal may form the basis for the grant of a new trial, if the trial judge concludes that the proceeding has resulted in 'a miscarriage of justice.'"). On the other hand, trial courts do not have the discretion to grant a new trial "unless the defendant demonstrates that his first trial was seriously flawed and that the flaws

adversely affected his substantial rights to a fair trial." *Id*. at 909. Thus, a trial court's grant of new trial must be made on a legally valid reason and may not be done for mere sympathy, or based on a personal belief that a defendant is innocent or got a bad deal. *See Thomas*, 428 S.W.3d at 104.

The issue in this case is whether the trial court abused its discretion by granting appellee's request for a new trial in the interest of justice on the basis that her plea was involuntary due to ineffective assistance of counsel under these circumstances in which that theory was not expressly pleaded in her written motion for new trial. As I explain below, I conclude that the trial court did not abuse its discretion by considering trial counsel's ineffectiveness because the State did not obtain an adverse ruling from the trial court after it objected to the court's consideration of that claim, and thus the State's complaint has not been preserved for appeal. Alternatively, I conclude that the trial court had the inherent authority to grant appellee's motion for new trial even as to matters that were raised at the evidentiary hearing on her motion for new trial that had not been expressly pleaded in her written motion.

B. The State Failed to Preserve Its Complaint that the Trial Court Was Barred from Considering Appellee's Implicit Amendment to her Motion and New Evidence on Ineffective Counsel

As I explain below, this Court has held in *State v. Moore* that a trial court has jurisdiction and authority to consider untimely amendments to motions for new trial, and I agree with that holding. *State v. Moore,* 225 S.W.3d 556, 557 (Tex. Crim. App. 2007)

(holding that, "at least so long as the State does not timely object to a late-filed amended motion for new trial, the trial court does not err to grant it"). This Court, however, has also held that, upon the State's objection, a trial court may not consider untimely amendments to motions for new trial, but I conclude that this holding is incorrect because it does not comport with this Court's general jurisprudence for preserving complaints for appeal. Given that the trial court's violation at issue is merely its consideration of a matter included in an untimely amendment to a motion for new trial, which is a matter that implicates the failure to comply with a statute or rule, at most, the State should have preserved its complaint with an objection and by obtaining an adverse ruling from the trial court. Here, I would overrule *Moore* and its progeny to the extent that those decisions imply that the State may preserve its complaint by objection only and that it is unnecessary for the State to obtain an adverse ruling from the trial judge in order to preserve its complaint for appeal. Furthermore, I would hold that, because it did not obtain an adverse ruling from the trial court in this case, the State failed to preserve its complaint that the trial court considered grounds exceeding the scope of appellee's motion for new trial.

Regarding a trial court's authority to consider a basis for granting a new trial that was not timely presented either in an original motion for new trial or in a timely amendment, this Court has held that a trial court may grant a new trial on such a basis only in the event that the State does not object. In *Moore*, the trial court had granted a new trial on the basis of a ground presented in the defendant's second amended motion for new trial that had been filed

outside the thirty-day window for filing such motions. *Id.* at 557; *see also* TEX. R. APP. P. 21.4(b) (permitting defendant to amend his timely filed new-trial motion within 30 days after the date when the trial court imposes or suspends sentence in open court, but before the court overrules any preceding motion for new trial). In assessing whether the rules of appellate procedure would prohibit such action by the trial court, we held that, although the defendant's amended motion was untimely under Rule 21.4(b), that fact did not "deprive the trial court of the authority to rule on a tardy amendment to a timely motion for new trial, at least absent an objection from the State, at any time within the seventy-five days for ruling on a motion for new trial." *Moore*, 225 S.W.3d at 558; *see also* TEX. R. APP. P. 21.8(a) (trial court must rule on new-trial motion within seventy-five days after imposing or suspending sentence in open court). Relying on the Supreme Court's reasoning in *Eberhart v. United States*,[4] we determined that the timeliness requirement of Rule 21.4(b) "affects neither the jurisdiction nor the authority of the trial court." *Moore*, 225 S.W.3d at 568. We further explained,

> Under current law, the subject-matter jurisdiction of the trial court over the case and the defendant extends, should the defendant timely file a sufficient notice of appeal, to the point in time at which the record is filed in the appellate court. Moreover, the trial court's authority to rule on a motion for new trial extends to the seventy-fifth day (so long as a timely original motion for new trial is filed on or before the thirtieth day) after sentence is imposed or suspended in open court. . . . Because a trial court retains the authority to rule on a timely filed original motion for new trial within the seventy-five-day period, we hold that it also retains the authority to allow an amendment to that original motion within that same period, and to rule on that amendment, so

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[4] 546 U.S. 12 (2005).

> long as the State does not object. Thus, the lateness of an amendment to a timely original motion for new trial affects neither the jurisdiction nor the authority of the trial court to rule.

Id. at 568-69. We indicated that the type of right at issue—the State's right to prevent an untimely amendment to a timely filed new-trial motion—was not the type of "absolute" requirement that could be raised at any time, but rather was a forfeitable right that requires a timely objection in the trial court. *Id.* at 569-70. We held that, in the event that a trial court refused to limit its ruling to the original motion and granted relief on the basis of an untimely amendment over the State's objection, "the appellate court should consider only the validity of the original and any timely amended motion for new trial, and should reverse any ruling granting a new trial based upon matters raised for the first time in an untimely amendment." *Id.* at 570. The rule after *Moore*, therefore, is that a defendant must plead and present any basis for seeking a new trial in his new-trial motion or in a timely amendment to that motion, or risk an objection from the State that would prevent the trial court from being able to consider the untimely raised ground. *See id.*; *see also State v. Zalman*, 400 S.W.3d 590, 591, 595 (Tex. Crim. App. 2013) (reversing a trial court's order granting a new trial where the defendant did not present evidence of the same claim that was raised in his motion, and the State properly objected; it was "error for the trial court to grant [Zalman's] motion for new trial over the State's objection when the appellee argued only unpled (or untimely pled) grounds at the hearing"). This rule has been applied to situations where, as here, the defendant did not file any written amendment to his new-trial motion but simply presented

new evidence and argument at the new-trial hearing that enlarged the grounds upon which he had indicated he was seeking relief in his new-trial motion. *See Clarke v. State*, 270 S.W.3d 573, 581 (Tex. Crim. App. 2008) (holding that trial court could properly consider evidence and arguments raised for the first time at new-trial hearing because "*Moore* explicitly permits a trial court to consider the merits of an untimely amendment to a motion for new trial if, as in this case, the State does not object"); *see also Shamim v. State,* 443 S.W.3d 316, 326-28 (Tex. App.—Houston [1st Dist.] 2014).

Although this Court's *Moore* decision focused on whether the State had objected to Moore's amended motion, this Court should have more properly additionally considered whether the State had preserved its complaint for appeal by obtaining an adverse ruling from the trial court. This Court has repeatedly noted that an objection alone is not enough to preserve error. To preserve error, the complaining party must object and get an adverse ruling from the trial court. *See Smith v. State*, 499 S.W.3d 1, 5 (Tex. Crim. App. 2016) ("To preserve error, a party must, among other things, obtain a ruling on the complaint or object to the trial judge's refusal to rule."). Here, although the State objected, it did not obtain an adverse ruling from the trial court. Thus, the State has not preserved its complaint that the trial court erred by granting appellee's motion for new trial, as implicitly amended at the motion for new trial hearing. I, therefore, conclude that this Court errs by holding that the State's objection alone is adequate to preserve its complaint that the trial court abused its discretion by considering appellee's amended motion for new trial. I would hold that,

because the State did not preserve its objection to the trial court's consideration of appellee's implicitly amended motion for new trial, the State may not now complain that the trial court granted appellee's motion for new trial on the basis of ineffective assistance of counsel.

C. Alternatively, a Trial Court Has Inherent Authority to Grant a New Trial Even As to Matters Untimely Raised at an Evidentiary Hearing on a Motion for New Trial

Although I have applied this Court's precedent in *Moore* in other cases, I now conclude that it is time for this Court to revisit whether the portion of *Moore* that focuses only on the State's objection was correctly decided. As I explained above, *Moore* should have focused on whether the State's complaint was preserved rather than on whether the State made a mere objection. Furthermore, *Moore* should have determined that a trial court has the inherent power to grant relief on the basis of an untimely amendment to a motion for new trial. I explain my reasoning by discussing the Texas Rules of Appellate Procedure and the Texas Supreme Court's treatment of a similar rule in the context of civil cases.

The *Moore* rule is not rooted in the language of the rules of appellate procedure. As *Moore* points out, we have construed Rule 21.4(b) simply to prohibit any amendments by a defendant to a timely filed new-trial motion outside of the 30-day window for filing such motions. 225 S.W.3d at 566. The language of the rule itself does not speak to a trial court's authority to permit arguments or evidence that may emerge after the 30-day window has expired. The rule states, "Within 30 days after the date when the trial court imposes or suspends sentence in open court but before the court overrules any preceding motion for new

trial, a defendant may, without leave of court, file one or more amended motions for new trial." TEX. R. APP. P. 21.4(b). Our analysis in *Moore* confirmed that the rule does not speak to a trial court's jurisdiction or authority over an untimely amendment to a motion for new trial. This Court indicated that the rule's "limitation on filing an amendment to a timely filed original motion for new trial affects neither the jurisdiction nor the authority of the trial court." *Moore*, 225 S.W.3d at 568. Nothing in the language of the rules of appellate procedure suggests that the trial court did not have the inherent authority to consider an untimely amendment to a motion for new trial. This Court's holding today limiting the trial court's inherent authority to grant relief in this context is not required by the rules of appellate procedure.

In light of the fact that the Texas Supreme Court has held that a trial court does have the inherent authority to consider an untimely amendment of a motion for new trial, this Court's decision today makes criminal law more difficult for parties to obtain relief than civil litigants. Civil courts of Texas are authorized to grant a new trial under their inherent authority even on a basis that is not timely raised. *See Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003) ("[T]he trial court may, at its discretion, consider the grounds raised in an untimely motion and grant a new trial under its inherent authority before the court loses plenary power."). This is true even though the rules of civil procedure impose time limits on filing and amending new-trial motions much in the same manner as the criminal rules. *Compare* TEX. R. CIV. P. 329b(a), (b), *with* TEX. R. APP. P. 21.4(a), (b). In *Moritz*, the Texas

Supreme Court explained that, although an untimely raised basis for seeking a new trial would not entitle a litigant to appellate review of the trial court's ruling denying relief on that basis, a trial court could exercise its discretion to consider that ground as a basis to grant relief. *See Moritz*, 121 S.W.3d at 720 (although trial court may consider such a basis for granting a new trial, "[a] trial court's order overruling an untimely new trial motion cannot be the basis of appellate review, even if the trial court acts within its plenary power period"). It further explained,

> If the trial court ignores the tardy motion, it is ineffectual for any purpose. The court, however, *may look to the motion for guidance in the exercise of its inherent power and acting before its plenary power has expired, may grant a new trial*; but if the court denies a new trial, the belated motion is a nullity and supplies no basis for consideration upon appeal of grounds which were required to be set forth in a timely motion.

*Id. (*emphasis added). The *Moritz* Court did not indicate that the trial court's inherent power to consider an untimely raised basis for granting a new trial would be limited in any way by an objection from the opposing party. But it did indicate that a litigant would be barred from complaining on appeal that the trial court had ignored or denied relief on an untimely raised basis for relief. Had this case landed in the Texas Supreme Court rather than this Court, the trial court's grant of a new trial for appellee likely would have been upheld.

Applying these principles here, I would hold that the trial court acted within its discretion in granting appellee a new trial on a basis that was not expressly included in her written new-trial pleadings, where the record at the new-trial hearing clearly established that theory as a basis for granting her relief. I would abandon the rule in *Moore* to the extent that

it prohibits a trial court from exercising its discretion in this manner whenever the State objects to the untimeliness. Perhaps the proper remedy under those circumstances would be to grant the State a continuance so that it may prepare evidence and argument in rebuttal, but, in any event, I would not hold that the trial court abused its discretion by considering appellee's ineffective-assistance arguments that emerged at the new-trial hearing.

D. Trial Court Did Not Abuse Its Discretion by Granting Appellee's Motion

In my view, the resolution of this case comes down to whether the trial court could properly grant appellee a new trial on the basis of an involuntary plea due to the ineffectiveness of her counsel for failing to investigate and pursue a suppression motion on her behalf. Appellee's written motion did not raise that argument, but the record from the new-trial hearing clearly established that ground as a valid basis to grant her relief.

I would hold that the trial court acted within its discretion in granting appellee a new trial on a basis that was not expressly included in her written new-trial pleadings, where the record at the new-trial hearing clearly established that theory as a basis for granting her relief. I would abandon the rule in *Moore* to the extent that it prohibits a trial court from exercising its discretion in this manner whenever the State objects to the untimeliness and instead focus on whether the trial court abused its discretion by overruling the State's objection.

Further, turning to the merits of appellee's ineffective-assistance ground, the record viewed in a light most favorable to the trial court's ruling demonstrates that the trial court's grant of a new trial was not an abuse of discretion. *See Herndon*, 215 S.W.3d at 909. First,

regarding the requirement that a trial court's decision be based on a valid legal theory, as discussed above, here the record from the new-trial hearing clearly indicated that appellee was seeking to advance an argument that her trial counsel had been ineffective for failing to discuss with appellee the prospects of filing a motion to suppress on her behalf and that this prejudiced appellee because the trial court would likely have suppressed the evidence, as it did in appellee's co-defendant's case, had a motion been filed. *See, e.g., Ex parte Harrington,* 310 S.W.3d 452, 460 (Tex. Crim. App. 2010) (holding that Harrington's plea of guilty "was the result of ineffective assistance of counsel" due to counsel's failure to conduct an adequate investigation and his plea "was thus involuntary"). Because the evidence and arguments adduced at the new-trial hearing clearly gave rise to a viable claim that appellee's trial counsel had rendered ineffective assistance during the plea proceedings, the situation in this case does not constitute a trial court acting upon mere sympathy or personal belief that the defendant got a bad deal. *See Herndon*, 215 S.W.3d at 909.

The second criteria in *Herndon* requires that appellee have produced evidence or pointed to evidence in the trial record that substantiated her legal claim. *See id.* The substantiation of a legal claim, however, does not necessarily mean that a defendant must show that he absolutely would have prevailed on the issue on appeal. *Id.* In this case, appellee has shown that, at the time she pleaded guilty, she was unaware of the evidence provided by the trooper at the co-defendant's suppression hearing, and counsel has acknowledged failing to apprise appellee of all of the pertinent facts before the plea of guilty and the possibility of

a suppression hearing. Appellee's trial counsel explained that she had performed ineffectively in failing to fully apprise appellee of the pertinent facts and that, in light of that failure, appellee's waiver of her rights and plea agreement could not have been knowingly made. Given that evidence, appellee has produced evidence that substantiated her legal claim that a new trial was necessary in the interest of justice because her counsel's ineffectiveness prejudiced her rights to seek and likely prevail on a motion to suppress. *See id*.

The third criteria in *Herndon* requires appellee to show prejudice to her substantial rights. *See id.* I would defer to the trial court's implicit determination that appellee received ineffective assistance of counsel that prejudiced her substantial rights to seek suppression of the evidence that had been obtained by the police against her. I conclude that appellee would not have pleaded guilty had she been properly advised by counsel and, thus, the trial court correctly determined that it was in the interest of justice to award her a new trial.

III. Conclusion

The issue in this case comes down to whether this Court must disturb a trial court's ruling granting a motion for new trial in the interest of justice when the evidence and arguments from the hearing on appellee's motion clearly established a valid legal basis for granting her motion. I cannot agree with this Court's conclusion that the trial court acted without reference to guiding legal principles in granting her motion under these circumstances. I, therefore, would uphold the court of appeals's judgment that determined that the trial court did not abuse its discretion in awarding appellee a new trial in the interest

of justice. I, therefore, respectfully dissent from this Court's judgment reversing the lower courts' rulings in this case.

Filed: May 17, 2017

Publish