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

KELLER, P.J., delivered the opinion of the Court in which KEASLER, HERVEY, YEARY, NEWELL, and KEEL, JJ., joined. HERVEY, J., filed a concurring opinion in which KEASLER and NEWELL, JJ., joined. NEWELL, J., filed a concurring opinion in which KEASLER, HERVEY, and YEARY, JJ., joined ALCALA, J., filed a dissenting opinion. WALKER, J., dissents. RICHARDSON, J., did not participate.

Appellee pled guilty pursuant to an agreement, but she moved for a new trial after her co-defendant prevailed on a motion to suppress. We conclude that appellee's allegations in the motion for new trial are without merit because her failure to discover the new information was due to her own lack of diligence. Even if appellee had been diligent, we also conclude that the ruling on the motion to suppress was not evidence and that the officer's testimony at the hearing was either

cumulative of the video evidence appellee had already seen or collateral because it was not material to the suppression issue in the co-defendant's case. Finally, we conclude that appellee's ineffective assistance allegation was not properly before the trial court because it was not made within thirty days of the judgment and the State objected to it. Consequently, we conclude that the court of appeals erred in upholding the trial court's granting of a new trial.

I. BACKGROUND

A. Trial-Level Proceedings

Appellee and co-defendant Jose Luis Cortez were traveling in a van that was stopped for a traffic violation—driving illegally on the improved shoulder of a highway. As a result of the stop, appellee was ultimately charged with possession with intent to deliver methamphetamine in an amount of more than 400 grams. She entered into an agreement to plead guilty and receive a sentence of twenty-five years' confinement and a $5,000 fine. She received various admonishments, orally or in writing, and the trial court asked whether she understood them. The trial court also inquired into the voluntariness of her plea, her mental capacity, and whether she was a citizen of the United States. Appellee answered all inquiries in a manner consistent with her plea being voluntary. She also signed a judicial confession, and she signed a section titled, "WAIVER OF APPEAL, et al.," which stated, "The Defendant, in writing and in open Court, and joined by counsel for defendant, waives and gives up the time provided by law in which to file a Motion for New Trial, Motion for Arrest of Judgment, and Notice of Appeal." The trial court accepted the plea agreement and sentenced appellee accordingly. These plea proceedings occurred on April 28, 2015.

On May 4, 2015, a motion to suppress hearing was held in Cortez's case, and the motion was

granted.[1] In its findings of fact, the trial court noted that the only evidence before it was the arresting officer's testimony and the video of the stop. The trial court found that the video showed Cortez's vehicle's "right rear tire (or its shadow) . . . to come in the proximity of and possibly touch the inside portion or more of the white line delineating the roadway from the improved shoulder [the "fog line"] . . . but not to extend past the . . . outermost edge of the fog line."[2] In what is labeled a conclusion of law, the trial court found that Cortez's "vehicle did not cross outside the outermost edge of the fog line onto the improved shoulder of the roadway."[3] The trial court further concluded that "[c]rossing over the portion of the fog line nearest the center of the roadway or upon the fog line is not a violation of Texas traffic law."[4]

Appellee filed a motion for new trial. The motion alleged that "[t]he verdict in this cause is contrary to the law and the evidence," and it asked the trial court to grant a new trial in the interests of justice. The motion referred to what happened in Cortez's case—the motion to suppress hearing, the video, and the granting of the motion to suppress—and it alleged that the record and the video "clearly show that the vehicle was stopped without probable cause or other lawful reasons." The motion further contended that "[t]he video evidence does not support the officer's testimony, but rather, it supports that no violation of law was committed by the suspect vehicle." The motion also alleged that the arresting officer's testimony at Cortez's motion to suppress hearing was new evidence that was not available or known at the time appellee pled guilty. The allegedly new

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[1] *See also State v. Cortez*, 501 S.W.3d 606 (Tex. Crim. App. 2016).

[2] *See also id.* at 607.

[3] *See also id.*

[4] *See also id.* at 607-08.

evidence in the officer's testimony was that the officer said, "I observed certain things that caught my attention," and that the things that caught his attention were that appellee's vehicle was a clean van. Appellee's attorney filed an affidavit mirroring these allegations.

The trial court held a hearing on the motion. Speaking as an officer of the court, appellee's attorney explained that she had reviewed the video before the plea and thought that the stop "was somewhat of a close call" but that a motion to suppress would not be successful. She also stated that she "got sidetracked with other issues" and never told her client that a motion to suppress was an option. She contended that her failure to do so was ineffective, and the State interjected, "I'm going to object to this line; that's not part of this Motion." The trial court allowed defense counsel to continue with her contention that she was ineffective. Defense counsel also tendered the transcript and findings of fact from the hearing on Cortez's motion to suppress.[5]

The State argued that appellee waived a right to a new trial in the plea papers. The State also argued that appellee had not presented any new evidence that was likely to result in a different ruling. The State pointed out that appellee had access to the video prior to the plea, that the only new evidence appellee was offering was the officer's statement about the vehicle being a clean van, and that the vehicle being a clean van was not the basis for the stop. The State further argued that the trial court's ruling in Cortez's case was incorrect and that the stop was lawful. With respect to the ineffective assistance allegation, the State contended that it was not properly before the court because it was not part of the original motion for new trial and was not otherwise filed within thirty days after

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[5] The State said it had no objection, and the trial court received them for the purposes of the motion.

judgment.[6] Finally, the State argued that appellee was simply suffering from "buyers' remorse": thinking the plea bargain was a good deal at the time but later finding out that Cortez had obtained a different result.

With respect to whether appellee waived her right to a new trial, appellee's counsel stated, "I will agree . . . that my client signed the waivers . . . however, a client's waiver of motion for new trial, rights to appeal, all of the waivers that she executed at that time, must be knowing and voluntary . . . And again, without having been advised, there can be no knowing waiver. And I . . . confess that there couldn't have been knowing because of my failure." The State responded that this claim was also barred as untimely.[7]

The trial court granted appellee's motion for new trial "in the interest of justice," and the State appealed.

B. Appeal

On appeal, the State complained that the trial court abused its discretion in granting the motion for new trial. In support of this contention, the State made four arguments. First, it contended that appellee waived the right to seek a new trial. Second, it contended that appellee failed to meet the legal requirements necessary to obtain relief on the basis of newly discovered evidence. Third, it contended that the ineffective assistance of counsel issue was not properly before the trial court at the time of the motion for new trial hearing. Finally, it contended that appellee failed to offer any evidence that would have allowed the trial court to grant a new trial.

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[6] The hearing on the motion for new trial was held on June 9, 2015.

[7] Because of our disposition, we need not decide whether the timeliness requirement for raising a claim in a motion for new trial would apply to an involuntariness allegation used solely for the purpose of overcoming a waiver of the right to a motion for new trial.

The court of appeals first held that appellee's written waiver of a new trial did not bar the trial court from granting relief.[8] Relying upon *Willis v. State*,[9] the court of appeals found this to be so because, by setting a hearing on the motion for new trial, "the trial court implicitly granted [a]ppellee permission to file her motion for new trial notwithstanding her waiver."[10]

On the merits of the motion, the court of appeals held that appellee had presented new evidence to the trial court because (1) the video of the stop contained no audio,[11] and (2) the testimony at the suppression hearing was new because it did not exist at the time she pled guilty.[12] The court of appeals asserted that, "The chronology demonstrates that the failure to obtain the evidence was not due to a lack of diligence" and the arresting officer's "testimony was not cumulative, corroborative, collateral, or impeaching."[13] Because appellee's case was pending in the same court as her co-defendant's, the court of appeals concluded that the arresting officer's testimony probably would have resulted in a similar ruling if a motion to suppress had been filed in appellee's case.[14] Consequently, the court of appeals found that appellee satisfied the test for

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[8] *State v. Arizmendi*, No. 07-15-00238-CR, 2016 Tex. App. LEXIS 5385, *5 (Tex. App.—Amarillo May 19, 2016) (not designated for publication).

[9] 121 S.W.3d 400, 403 (Tex. Crim. App. 2003) (holding that trial court's permission to appeal controls over a defendant's previous waiver of the right to appeal in printed plea documents).

[10] *Arizmendi*, 2016 Tex. App. LEXIS 5385, *4-5.

[11] No audio was recorded because the audio portion of the recording equipment had not been turned on.

[12] *Id.* at *6-7. The court of appeals stated that appellee had "introduced into evidence as an exhibit the entire transcription of the suppression hearing in her co-defendant's case." *Id.* at *7.

[13] *Id.*

[14] *Id.* at *7-8.

granting a new trial on the basis of newly discovered evidence.[15]

Finally, in light of its disposition of appellee's newly-discovered-evidence claim, the court of appeals declined to determine whether appellee's ineffective assistance claim was properly before the trial court.[16]

II. ANALYSIS

The State contends that the court of appeals erred in affirming the trial court's order granting a new trial because appellee "affirmatively waived that right and failed to present a valid legal claim."[17] We will focus on the State's second contention that appellee failed to present a valid legal claim.[18] The State argues that appellee failed to satisfy the requirements for granting a new trial on the basis of newly discovered evidence. The State also argues that appellee's ineffective assistance of counsel claim was untimely and was therefore not a proper basis for granting a new trial.

A trial court's decision to grant a new trial is reviewed only for abuse of discretion, but that discretion is not unbounded or unfettered.[19] A trial court may not grant a motion for new trial simply

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[15] *Id.* at *8.

[16] *Id.*

[17] This quoted statement appears immediately under the "argument" heading in the State's petition for discretionary review. The State's ground for review is framed as follows: "Was [a]ppellee entitled to a new trial, as both lower courts held, when she waived the right to seek a new trial and presented no valid legal claim supported by new evidence not previously available or discoverable with due diligence."

[18] As detailed above, defense counsel at the motion for new trial hearing claimed that the waiver of the right to file a motion for new trial was involuntary due to ineffective assistance of counsel. On discretionary review, appellee claims that a trial court has discretion to grant a motion for new trial despite any waiver. Due to our disposition, we need not address the waiver issue.

[19] *State v. Zalman*, 400 S.W.3d 590, 593 (Tex. Crim. App. 2013).

because it believes that the defendant has received a raw deal.[20] Granting a new trial for a "non-legal or legally invalid reason is an abuse of discretion."[21] There is generally no abuse of discretion in granting a new trial if the defendant (1) articulated a valid claim in the motion, (2) produced evidence or pointed to record evidence that substantiated his claim, and (3) showed prejudice under applicable harmless error standards.[22]

The legal claim articulated in appellee's motion for new trial was that she had obtained newly discovered evidence. Article 40.001 of the Code of Criminal Procedure provides, "A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial."[23] To obtain relief under this provision, the defendant must satisfy the following four-prong test:

> (1) the newly discovered evidence was unknown or unavailable to the defendant at the time of trial;
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> (2) the defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence;
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> (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and
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> (4) the new evidence is probably true and will probably bring about a different result in a new trial.[24]

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[20] *Id.*

[21] *State v. Herndon*, 215 S.W.3d 901, 907 (Tex. Crim. App. 2007).

[22] *Zalman*, 400 S.W.3d at 593; *Herndon*, 215 S.W.3d at 909.

[23] TEX. CODE CRIM. PROC. art. 40.001.

[24] *Carsner v. State*, 444 S.W.3d 1, 2-3 (Tex. Crim. App. 2014). *See also Keeter v. State*, 74 S.W.3d 31, 36-37 (Tex. Crim. App. 2002) (interpreting Article 40.001 "in conformity with our prior caselaw and continu[ing] to adhere to the four-part test.").

Although appellee's motion for new trial discussed the video of the stop, her attorney stated at the hearing on the motion for new trial that she had reviewed the video before appellee's plea. The video was, therefore, not newly-discovered. Appellee claimed that three things were newly-discovered: (1) the trial court's ruling on the co-defendant's motion to suppress, (2) the testimony of the arresting officer at the co-defendant's suppression hearing, and (3) more specifically, the arresting officer's statement about appellee's vehicle being a clean van.

We first note that the trial court's ruling on the motion to suppress is not "evidence" in the context of appellee's newly-discovered-evidence claim.[25] It is a legal determination, not a fact relevant to the validity of the arresting officer's conduct. To be sure, the trial court's ruling involved its assessment of the evidence before it, but the ruling itself is not evidence with respect to the suppression issue.

And even if the suppression ruling were deemed to be evidence, appellee's failure to "discover" this ruling would be a result of her lack of diligence. "[E]very defendant who enters a guilty plea does so with a proverbial roll of the dice."[26] A guilty plea does not violate due process even when the defendant miscalculates the admissibility of important evidence.[27] If appellee wanted

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[25] *Cf. Plumlee v. State*, 106 Tex. Crim. 361, 365, 293 S.W. 1109 (1927) (on second motion for reh'g) ("The statements of the trial judge are not evidence."). *See Manganiello v. City of New York*, 612 F.3d 149, 769-70 (10th Cir. 2010) (trial judge instructing that his "rulings are not evidence"); *United States v. Campbell*, 317 F.3d 597, 607 (6th Cir. 2003) (same)

[26] *Ex parte Palmberg*, 491 S.W.3d 804, 809 (Tex. Crim. App. 2016).

[27] *See id.* at 807-08 ("A guilty plea does not violate due process, the Supreme Court observed, even when the defendant enters it while operating under various misapprehensions about the nature or strength of the State's case against him—for example, misestimating the likely penalty, failing to anticipate a change in law respecting punishment, miscalculating the admissibility of a confession, or misjudging the availability of a potential defense.").

to know whether a motion to suppress would be successful, she could have filed and litigated one.[28]

The testimony of the arresting officer at the suppression hearing is evidence, but with the exception of the testimony about the clean van, appellee and the court of appeals have not explained how that evidence differs from the evidence defense counsel had already seen. Our review of the evidence at the co-defendant's suppression hearing indicates that the arresting officer's testimony was consistent with the video. The arresting officer's testimony, in general, was cumulative, because the appellee's counsel was aware of and had access to evidence (the video) that would convey the same facts with at least the same degree of credibility.[29] In fact, the video was the crucial evidence relied upon by the trial court in deciding that the officer had violated the law.

The arresting officer's comment about the clean van was not cumulative, but at best, that comment related to the officer's subjective reasons for the stop. The standard for whether a stop is legal is an objective one, and the subjective intent of the officer is irrelevant.[30] The comment about the clean van was, at best, collateral.

Moreover, appellee could have asked to speak to the arresting officer or could have sought

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[28] *See Etter v. State*, 679 S.W.2d 511, 514 (Tex. Crim. App. 1984) (even if co-defendant's testimony was considered to be newly available, defendant did not exercise diligence because he failed to file a motion for severance).

[29] *See Moore v. State*, 882 S.W.2d 844, 849 (Tex. Crim. App. 1994) (new evidence was at most cumulative of other evidence of victim's alleged drug usage); *Shelton v. State*, 155 Tex. Crim. 187, 189, 233 S.W.2d 148, 149 (1950) ("[W]hatever portion of such testimony that seems to be material to appellant's defense was in the main but cumulative of the testimony of three other witnesses for appellant who testified to substantially the same facts."); *Moyers v. State*, 135 Tex. Crim. 387, 389, 120 S.W.2d 597, 598 (1938) (testimony of new witness who claimed to know a particular person that defendant said he bought a car from was not newly discovered evidence because the defendant knew four other individuals who could have testified to the same facts).

[30] *Arguellez v. State*, 409 S.W.3d 657, 664 (Tex. Crim. App. 2013).

a police report. Even if neither of those requests could be satisfied, she nevertheless could have filed a motion to suppress and obtained the officer's testimony at a suppression hearing—just as her co-defendant did. Consequently, appellee's failure to obtain the officer's testimony at the suppression hearing was due to her lack of diligence.[31]

Finally, we turn to the State's contention that appellee's ineffective assistance claim was untimely. Although the court of appeals did not resolve this issue, the State argues that we should reach it for the sake of judicial economy. Ordinarily, when we reject a court of appeals's disposition of an issue, we remand the case to that court to address any remaining issues that need to be addressed.[32] But in exceptional situations, when the disposition of the remaining issue is clear, we will sometimes dispose of the case in the name of judicial economy.[33] This is one of those situations.

A motion for new trial must be filed within thirty days after sentence is imposed or suspended in open court.[34] The motion can be amended at any time during that thirty-day period, but the trial court is barred from considering a ground raised outside the thirty-day period if the State properly objects.[35] Appellee did not raise an ineffective assistance claim in her motion for new trial. That claim was raised for the first time at the hearing on the motion for new trial, and that hearing was conducted outside the thirty-day period. At the hearing, the State objected that the ineffective

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[31] *See supra nn.* 26-28 and accompanying text.

[32] *Davison v. State*, 405 S.W.3d 682, 691 (Tex. Crim. App. 2013).

[33] *Id.* at 691-92.

[34] TEX. R. APP. P. 21.4(a); *Zalman*, 400 S.W.3d at 593.

[35] *Zalman*, 400 S.W.3d at 593-95. *See also* TEX. R. APP. P. 21.4(b).

assistance claim was untimely, and the State was correct.[36] The trial court was barred from considering the ineffective assistance claim.

We conclude that the court of appeals erred in upholding the trial court's decision to grant the motion for new trial. Consequently, we reverse the judgments of the courts below and remand the case to the trial court with instructions to reinstate the judgment of conviction and the sentence.

Delivered: May 17, 2017

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[36] The hearing itself was timely because it was conducted within seventy-five days after sentencing, TEX. R. APP. P. 21.8(a), but the new claim that was advanced at the hearing was untimely because it was made more than thirty days after sentencing.

The dissent claims that a liberal construction of appellee's motion for new trial shows that appellee advanced a claim that her plea was involuntary due to ineffective assistance of counsel for failing to apprise her of the relevant facts. We disagree. The motion contained no statement that appellee's plea was involuntary or that counsel performed deficiently, nor did it allege that counsel failed to apprise appellee of relevant facts. Rather, the motion for new trial requested the granting of a new trial in the interest of justice and it stated that the officer's testimony at Cortez's motion to suppress hearing was new evidence that was not available or known at the time appellee pled guilty. If anything, the allegation that new evidence that was unknown at the time of trial has been discovered is the exact opposite of saying that counsel failed to apprise the defendant of evidence that was known at the time of trial. A party could certainly make alternative claims, but appellee's motion plainly did not do that.