

Affirmed and Majority and Dissenting Opinions filed July 23, 2020.



In The
Fourteenth Court of Appeals

NO. 14-18-01066-CR
NO. 14-18-01067-CR

ELONDA CALHOUN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause Nos. 1545108 and 1545140

DISSENTING OPINION

The majority opinion denies appellant’s request for an abatement to file a motion for new trial, stating “[b]ecause appellant has not alleged a facially plausible claim that could have been presented in a motion for new trial, any deprivation of counsel during the time period for filing a motion for new trial was harmless beyond

a reasonable doubt.” (citing *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007)).

The record shows that on December 5, 2018, the trial court entered judgment and granted appellant’s trial lawyer’s request to withdraw from representation of appellant. Appellate counsel was not appointed by the trial court until January 3, 2019, leaving appellant without legal counsel for 29 of the 30 days she had to file a motion for new trial. Appellant’s counsel had 24 hours or less to investigate grounds for, prepare, and file a motion for new trial.

In *Parker v. State*, No. 14-18-00948-CR, 2020 WL 3422301, at *2, __ S.W.3d __, __ (Tex. App.—Houston [14th Dist.] June 23, 2020, published order), our court recognized that partial deprivation of counsel during the 30–day critical stage for filing a motion for new trial is subject to a “harmless beyond reasonable doubt” standard, but if a defendant was deprived of counsel for all of this critical stage, then the deprivation was total, and harm is presumed. (citing *Carnell v. State*, 535 S.W.3d 569, 572 (Tex. App.—Houston [1st Dist.] 2017, published order)).

Appellant’s brief indicates that appellant seeks to investigate potential grounds for new trial, such as ineffective assistance of counsel and whether appellant’s guilty plea was voluntary. Specifically, appellant argues that there are facially plausible grounds that should be investigated, including:

1. The extent of trial counsel’s investigation into mitigation and other punishment issues;
2. The contents of trial counsel’s file regarding possible reports by investigators, interviews with potential witnesses, interviews with Ms. Calhoun at jail; notes regarding negotiations with prosecutors;
3. Trial counsel’s strategy in failing to challenge the identification procedures utilized by law enforcement to identify Ms. Calhoun at trial: and .

4. Whether appellant's guilty plea was voluntary.

Clearly, one day was not adequate time for appellant's newly appointed counsel to investigate these potential grounds for new trial and prepare and file a motion for new trial. If, as our court held in *Parker*, 2020 WL 3422301, at *2, harm must be presumed if the defendant is unrepresented for 30 days of the 30 day period for filing a motion for new trial, then arguably, harm should also be presumed when the defendant is unrepresented for 29 days of the 30 day period, given that one day is not adequate time to investigate potential grounds for new trial. In these circumstances, harm should be presumed, or alternatively, appellant has shown harm.

Therefore, this appeal should be abated to permit appellant's new counsel to investigate potential grounds for a new trial and file an out of time motion for new trial if warranted.

For this reason, I dissent.

/s/ Margaret 'Meg' Poissant
Justice

Panel consists of Justices Wise, Jewell, and Poissant (Wise, J., majority).

Publish — Tex. R. App. P. 47.2(b).