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

MAJORITY OPINION

Appellant pleaded guilty to two aggravated robberies involving the use of a deadly weapon without an agreed recommendation as to punishment. After hearing evidence about these robberies, three other robberies, and appellant's criminal history, the trial court assessed punishment at fifty years' imprisonment in each case to run concurrently. In her sole issue on appeal, appellant requests an

abatement to file a motion for new trial because she contends that she was not represented by counsel during the time period for filing the motion.

Assuming without deciding that appellant has rebutted the presumption of representation during the time period for filing a motion for new trial, "this deprivation of counsel is subject to a harmless error or prejudice analysis." *Cooks v. State*, 240 S.W.3d 906, 911 (Tex. Crim. App. 2007). The error is harmless beyond a reasonable doubt if the defendant does not present a "facially plausible claim" that could have been presented in a motion for new trial. *Id.* at 911–12.[1]

In *Cooks*, for example, the defendant failed to allege a facially plausible claim when the defendant made conclusory allegations that his trial counsel failed to call a "named material witness" and failed to conduct a "promised investigation." *Id.* at 912 (citing *Rozell v. State*, 176 S.W.3d 228, 230 (Tex. Crim. App. 2005) for the proposition that the right to a hearing on a motion for new trial is not absolute, and that the motion and attached affidavits must raise matters that are not determinable from the record and that could entitle the defendant to relief). The defendant failed to identify what evidence or information the witness or investigation would have revealed that reasonably could have changed the result of the case. *Id.*

In this case, appellant alleges:

[1] This standard is the one that appellant asks this court to apply. The dissent would apply a different standard—one that this court recently adopted for "total" deprivations of counsel during the thirty-day period for filing a motion for new trial. *See Parker v. State*, No. 14-18-00948-CR, 2020 WL 3422301 (Tex. App.—Houston [14th Dist.] June 23, 2020, order). The dissent would presume harm and extend *Parker* to the facts of this case when, allegedly, appellate counsel was appointed one day before the expiration of the time period for filing a motion for new trial. In *Parker*, the defendant was deprived of appellate counsel for the full thirty-day period for filing a motion for new trial, the defendant asked this court to presume harm, and the State agreed to an abatement for an out-of-time motion for new trial. *See id.* at *2-3. None of these circumstances is present here, so *Parker* does not apply.

> Here, there are facially plausible issues that should be investigated for a motion for new trial including, but not limited to:
>
> 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; and
> 3. Trial counsel's strategy in failing to challenge the identification procedures utilized by law enforcement to identify Ms. Calhoun at trial.

Appellant also alleges in her reply brief that she attempted to withdraw her guilty plea on the first day of the punishment hearing, and her "effort to withdraw her plea is yet another facially plausible claim that clearly demonstrates she was harmed by the late appointment of counsel on appeal."

Appellant's allegations are analogous to the ones in *Cooks*. *See id.* at 912. They are conclusory and present no facially plausible claim to be raised in a motion for new trial. Appellant does not identify any potential deficiencies in counsel's investigation or failure to challenge the identification procedures used by police. Appellant does not explain how a motion for new trial relates to appellant's reviewing the contents of her file. The file is her property. *See In re McCann*, 422 S.W.3d 701, 705 (Tex. Crim. App. 2013). Regarding withdrawal of her plea, appellant identifies no potential evidence that could be adduced on a motion for new trial that does not already appear in the record. As the trial court explained when overruling her motion, the grounds for withdrawal were "all expressed in here fully in your motion."[2]

[2] Appellant asked to withdraw her guilty plea after the trial court adjudicated her guilt, and she does not assign error to the trial court's denial. *See generally DeVary v. State*, 615 S.W.2d 739, 740 (Tex. Crim. App. [Panel Op.] 1981) (no abuse of discretion in overruling a

Because 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. *See Cooks*, 240 S.W.3d at 911–12.

Appellant's sole issue is overruled. The trial court's judgment is affirmed.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Jewell, and Poissant. (Poissant, J., dissenting).
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motion to withdraw guilty plea when the appellant moved to withdraw the plea at the punishment hearing); *Stone v. State*, 951 S.W.2d 205, 207 (Tex. App.—Houston [14th Dist.] 1997, no pet.) ("Generally, a request to withdraw a plea is late or untimely if it is made after the case has been taken under advisement or guilt has been adjudicated.").