Affirmed and Opinion filed March 2, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00333-CR

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JOSE A. CAVAZOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 754,418

O P I N I O N

This is an appeal from a conviction of a felony offense for driving while intoxicated. TEX. PEN. CODE ANN. § 49.04 (Vernon 1994). Appellant, Jose A. Cavazos, pleaded not guilty to the indictment and the case was tried to the trial judge. The trial judge found appellant guilty. Appellant pleaded true to an enhancement paragraph and was sentenced to 10 ½ years in the Institutional Division of the Texas Department of Criminal Justice. In five points of error, appellant complains that the evidence was legally and factually insufficient to support his conviction, the he received ineffective assistance from counsel, that the trial judge erred

by refusing to hold a hearing on his motion for new trial, and by failing to grant his motion. We affirm.

Legal and Factual Sufficiency

In his fourth and fifth points of error, appellant contends that the evidence was legally and factually insufficient to support his conviction because the State did not offer sufficient evidence to show that appellant did not have the normal use of his physical or mental faculties by reason of the introduction of alcohol into his body.

When reviewing the legal sufficiency of the evidence, this court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App.1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App.1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App.1993).

When reviewing the factual sufficiency of the evidence, we consider all of the evidence without the prism of "in the light most favorable to the prosecution," and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). We review the jury's weighing of the evidence and are authorized to disagree with the jury's determination. *See Id*. at 133. This review, however, must be appropriately deferential so as to avoid substituting our judgment for that of the jury. *See Id.* We must consider all of the evidence, both that which tends to prove or disprove a vital fact in evidence. *See Taylor v. State*, 921 S.W.2d 740, 746 (Tex. App.--El Paso 1996, no pet.). A factual insufficiency point should be sustained only if the verdict is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust. *Id*.

The record shows that Houston Police Officer P.G. Saldivar responded to a domestic disturbance call. Appellant's ex-girlfriend told Saldivar that appellant had been threatening her and she was afraid that he would hurt her. Saldivar went to appellant's place of employment to investigate the complaint. When Saldivar arrived, he met with the landlady and they went into appellant's shop. While in the building, Saldivar heard the "uproar of an engine" traveling at a high rate of speed. He looked toward the street and saw a green car coming to the shop. Saldivar testified that the appellant was driving the car erratically, like someone was drag racing. The car pulled into the driveway.

Saldivar walked toward the car. A Hispanic male was sitting in the passenger seat. The landlady identified the driver and said, "that's Jose A. Cavazos." Saldivar told appellant to get out of the car. Appellant did not respond. Saldivar opened the door and helped appellant out of the car. Appellant smelled of alcohol and his eyes were bloodshot. Appellant was swaying and had difficulty maintaining his balance. Saldivar said that appellant's speech was slurred and that appellant made no sense when he tried to speak to him. Saldivar did not perform any field sobriety test at the scene because he feared appellant would run. In addition, a bottle of cold beer was found under the drivers seat. Appellant was placed under arrest for driving while intoxicated.

Saldivar transported appellant to the police station. Appellant was offered a breath test and refused. He also refused to sign the written warnings. Appellant cursed at Saldivar throughout this encounter and was generally combative and uncooperative.

In his case-in-chief, appellant testified, along with two other witnesses. Ruth Belinda Moreno, appellant's girlfriend, said that she drove appellant to the house of Luis Ochoa the morning of the arrest. She talked to Ochoa's mother, while appellant and Luis Ochoa went to the shop. She testified that Ochoa was driving the car when he and appellant left the house. Josaphina Reyes, Luis' mother, also said that Luis was driving when they left her house. Appellant said that he and Luis were already at the shop before Officer Saldivar arrived and that

he never drove the car. He then claimed that Saldivar arrested him for bugging his ex-girlfriend.

After considering all the evidence, we find that the evidence is legally and factually sufficient to support appellant's conviction. Appellant's fourth and fifth points of error are overruled.

Motion for New Trial

In his first, second, and third points of error, appellant contends that the trial court abused its discretion when it (1) denied his motion for new trial without holding an evidentiary hearing, (2) failed to grant the motion after appellant introduced newly discovered evidence, and (3) failed to grant the motion because appellant's trial counsel provided ineffective assistance. We will address each contention in turn.

Evidentiary Hearing

Generally, a defendant has a right to hearing on a motion for new trial when the motion raises matters that are not determinable from the record. *Vera v. State*, 868 S.W.2d 433, 435 (Tex. App.–San Antonio 1994, no pet.). However, a defendant must request an evidentiary hearing. *See Smith v. State*, 1999 WL 816249, *2 (Tex. App.–Houston [14th Dist.] Oct 14, 1999); *Brooks v. State*, 894 S.W.2d 843, 847 (Tex. App.–Tyler 1995, no pet.). Appellant's motion failed to include a request for a hearing on his allegations. The trial court is not required to convene a hearing on a motion for new trial absent a request by the movant for such hearing. *Id.*; *See Martin v. State*, 823 S.W.2d 395, 397 (Tex. App.--Texarkana 1992, pet. ref'd). We find that the trial court did not err in failing to hold an evidentiary hearing.

Newly Discovered Evidence

The decision to grant or deny a motion for new trial is left to the sound discretion of the trial court and in the absence of abuse of discretion an appellate court should not reverse. *See Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App.1995). Additionally, motions for new

trial based on newly discovered evidence are not favored by the courts and are viewed with great caution. *See Drew v. State*, 743 S.W.2d 207, 225 (Tex. Crim. App.1987). To establish an abuse of discretion, the defendant must show that: (1) the evidence was unknown to him before trial; (2) his failure to discover it was not due to his want of diligence; (3) it is probably true and its materiality is such as will probably bring about a different result upon a new trial; and (4) it is competent, not merely cumulative, corroborative, collateral, or impeaching. *Drew*, 743 S.W.2d at 226; *Sawyer v. State*, 778 S.W.2d 541, 545 (Tex. App.–Corpus Christi 1989, pet. ref'd).

Appellant presented two affidavits in his motion for new trial. In the first affidavit, Luis Ochoa said that appellant did not drive the car on the day that he was arrested. He also said that he was prepared to testify, but was in jail on some outstanding traffic tickets and that appellant's attorney did not attempt to secure his presence. In the second affidavit, Stephen Newhouse, an attorney employed by appellant's appellate attorney, said that he spoke with the landlady, Josephine Rincon. She said that she never saw a car pull into the driveway of appellant's shop. She also claimed that she did not accompany Saldivar to the front of the business, but stayed close behind.

Neither affidavit shows that the evidence was unknown before trial or that the failure to discover this evidence was due to a lack of diligence. Ochoa's affidavit is merely cumulative of appellant's testimony and that of other defense witnesses. Rincon's unsworn affidavit, only serves to impeach Saldivar's testimony on collateral issues and is cumulative of other testimony. Furthermore, the judge at the trial and at the hearing on the motion for new trial was the same. He could have determined that the weight of the evidence was not such as to bring about a different result. *See Kennerson v. State*, 984 S.W.2d 705, 708 (Tex. App.–Houston [1st Dist.] 1998, no pet.).

Ineffective Assistance from Counsel

We will address the trial courts denial of appellant's ineffective assistance ground in the motion for new trial along with his third point of error claiming ineffective assistance. In

each instance, appellant contends that his trial counsel failed to investigate and secure the presence of Luis Ochoa and Rincon. Appellant has the burden to show that his counsel's representation fell below an objective standard of reasonableness and to show that the probability, but for counsel's errors, that the trial would have resulted in a different outcome. We find that appellant was unable to discharge either burden.

For counsel to be ineffective at either the guilt/innocence or punishment phase of trial, the attorney's actions must meet the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Strickland* requires a defendant to show: (1) that his counsel's representation fell below an objective standard of reasonableness, and (2) the probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App.1999). In looking at these requirements, a court is to keep in mind that the right to counsel does not guarantee an error-free counsel or counsel whose competency is judged by hindsight. *See Hernandez v. State*, 726 S.W.2d 53, 58 (Tex. Crim. App.1986).

The decision to call a witness is generally a matter of trial strategy. *State v. Thomas*, 768 S.W.2d 335, 337 (Tex. App.–Houston [14th Dist.] 1989, no pet.). Appellant did not submit an affidavit from his trial counsel, nor did he request that his trial counsel testify at a motion for new trial as to why he did not call either witness. We will not speculate as to why trial counsel did not call either of these two witnesses. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Moreover, we have previously found that the Such testimony would not have changed the outcome of the trial. Appellant has failed to satisfy his burden under *Strickland* and *Hernandez*. We overrule appellant's first, second, and third points of error.

Having overruled all of appellant's points of error, we affirm the judgment of the trial court.

/s/ D. Camille Hutson-Dunn

Justice

Judgment rendered and Opinion filed March 2, 2000.

Panel consists of Justices Cannon, Draughn and Hutson-Dunn.*

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* Senior Justices Cannon, Draughn, and Hutson-Dunn sitting by assignment.