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

HERVEY, J., filed a concurring opinion in which KEASLER and NEWELL, JJ., joined.

CONCURRING OPINION

"Buyer's remorse" perhaps, but "calamity of errors" seems more likely.

Background

Appellee, Rosa Arizmendi, was convicted of possessing more than 400 grams of methamphetamine with intent to deliver after police stopped the driver of the vehicle in which she was riding. Both Arizmendi and the driver were arrested. On April, 25, 2015, Arizmendi entered a guilty plea. She was sentenced to 25 years' confinement and

assessed a $5,000 fine.

The case against Arizmendi was set in motion following a traffic stop that was visually recorded but did not contain any audio of the proceedings. This video was available at the time of Arizmendi's trial but was not introduced into evidence. (In fact, no evidence other than her plea and judicial confession were introduced.) The trial court's "certification of her right to appeal" specifies that she could not appeal the trial court's judgment because she entered a guilty plea. However, in another set of preprinted documents there is a written waiver of her right to file a motion for new trial. Thus, conflicting documents exist in the record regarding the appellee's waivers.

On May 4, 2015, a motion to suppress hearing was held in Arizmendi's co-defendant's (Jose Luis Cortez) case. There, the video of the traffic stop was introduced into evidence, and the arresting officer testified. The trial court granted the co-defendant's motion to suppress, finding no violation of state law to justify the stop.

On May 15, 2015, Arizmendi filed a motion for new trial and arrest of judgment pursuant to Rule 21.3 and Rule 22.3 of the Texas Rules of Appellate Procedure. TEX. R. APP. P. 21.3 (new trials), 22.3 (arrest of judgment in a criminal case). The motion was filed within the 30-day filing period allowed under Rule 21 and 22, and a hearing was held on June 9, 2015, which was well within the 75 days during which the trial court could grant a motion for new trial. *Id.* 21.8.

Although this Court's opinion does not directly address the State's argument that

Arizmendi waived her right to file a motion for new trial, I make two observations. First, because Arizmendi was not aware of an ineffective-assistance-of-counsel claim until the hearing on the motion for new trial (which I address later), I do not believe that her waiver should be enforceable. In a similar situation, we have held that an applicant's bargained for waiver of any post-conviction habeas claim is unenforceable against a post conviction claim of an involuntary plea when the allegation is that of an involuntary plea. This is because there was "at least a reasonable likelihood that an accused who would have rejected a plea offer and pled not guilty but for the patent incompetence of his lawyers would have declined to waive habeas corpus relief as well." *Ex parte Reedy*, 282 S.W.3d 492, 500–01 (Tex. Crim. App. 2009). Although this case deals with a motion-for-new-trial waiver and not a post-conviction habeas waiver, I see no reason to apply a different rule. Both cases involved a plea, and in both cases, allegations of an involuntary plea have been made based on ineffective assistance of counsel that was not known at the time of the plea. The only apparent difference is at what point the involuntary-plea claims of ineffective assistance were raised.

Second, I agree with the reasoning of the court of appeals that the trial court implicitly granted Arizmendi permission to file the motion for new trial when it set the motion for a hearing. In the past, we have held that a "trial court's subsequent handwritten permission to appeal controlled over the appellant's previous written waiver of the right to appeal," and we noted that, in light of that, the appellant was allowed to

appeal despite the boilerplate waiver. *Ex parte De Leon*, 400 S.W.3d 83, 89 (Tex. Crim. App. 2013). We reasoned that the trial court was in the best position "to determine whether the previously executed waiver of appeal was validly executed and if there was any merit in the appellant's desire to appeal." *Id.*

Rule 21.3 of the Texas Rules of Appellate Procedure provides that,

> The defendant must be granted a new trial, or a new trial on punishment, for any of the following reasons:
>
> (a) except in a misdemeanor case in which the maximum possible punishment is a fine, when the defendant has been unlawfully tried in absentia or has been denied counsel;
>
> (b) when the court has misdirected the jury about the law or has committed some other material error likely to injure the defendant's rights;
>
> (c) when the verdict has been decided by lot or in any manner other than a fair expression of the jurors' opinion;
>
> (d) when a juror has been bribed to convict or has been guilty of any other corrupt conduct;
>
> (e) when a material defense witness has been kept from court by force, threats, or fraud, or when evidence tending to establish the defendant's innocence has been intentionally destroyed or withheld, thus preventing its production at trial;
>
> (f) when, after retiring to deliberate, the jury has received other evidence; when a juror has talked with anyone about the case; or when a juror became so intoxicated that his or her vote was probably influenced as a result;
>
> (g) when the jury has engaged in such misconduct that the defendant did not receive a fair and impartial trial; or
>
> (h) when the verdict is contrary to the law and the evidence.

TEX. R. APP. P. 21.3.

In her motion for new trial, Arizmendi alleged that the verdict in her case was contrary to the law and the evidence[1] and that the trial could should grant a new trial in the interest of justice.

Calamity of Errors

1. On January 24, 2014, Arizmendi and the driver, Cortez, were stopped by police. After the police found a large quantity of methamphetamine both were arrested and were indicted as co-defendants. They were charged with the same offense and their cases were in the same court, but they were represented by different attorneys on different days.

2. On April 28, 2015, Arizmendi entered a guilty plea and was sentenced. As part of her plea bargain, she did not have the right to appeal her conviction, and she also executed a waiver of appeal. (No "motion for new trial waiver" is in the record.)

3. On May 4, 2015, the trial court held a hearing on Cortez's (Arizmendi's co-defendant) motion to suppress. At that hearing, the recording of the traffic stop was admitted into evidence (although there is no audio). The arresting officer also testified. The trial court granted Cortez's motion, finding that "[t]he defendant was unlawfully stopped and detained; therefore, evidence garnered as a result of the detention is not admissible at trial."

4. Based on the outcome of her co-defendant's motion to suppress, Arizmendi filed a timely motion for new trial, *supra*, to which an affidavit is attached. In her motion for new trial, Arizmendi argued that the trial court should grant her motion because of "newly

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[1]When a defendant asserts that he is entitled to a new trial because the verdict was contrary to the law and the evidence, he has raised *only* a sufficiency challenge. *State v. Zalman*, 400 S.W.3d 590, 594 (Tex. Crim. App. 2013). Here, the only evidence was Arizmendi's judicial confession, which is sufficient evidence to support her judgment of conviction. *Potts v. State*, 571 S.W.2d 180, 182 (Tex. Crim. App. [Panel Op.] 1978).

> discovered evidence." According to her, the testimony of the arresting officer, together with the video of the traffic stop, and the findings of fact and conclusions of law in the Cortez case support her claim that she is entitled to a new trial in the interest of justice.
>
> 5. There was no attempt to amend the motion for new trial during the 30-day window.
>
> 6. At the motion-for-new-trial hearing, trial counsel offered into evidence a certified copy of the reporter's record and the trial court's findings of fact and conclusions of law from Cortez's case. No witnesses were called, and the recording of the traffic stop was not admitted at the hearing. Additionally, trial counsel admitted her errors, including that she never apprised Arizmendi of her right to file a motion to suppress, that "she got sidetracked with other issues," that she reviewed the case file only once, that she just "sat back" to wait for the results of laboratory testing, and that she thought the recording of the traffic stop was "a close call" in terms of whether a motion to suppress would have been successful.

At the hearing on the motion for new trial, Arizmendi's attorney orally appeared to argue that her client's plea was involuntary and was the result of ineffective assistance of counsel on her part, but those claims were not timely raised, nor were they in writing. Though those claims may have had merit, counsel also apparently did not understand the rules governing motions for new trial.

Bottom Line

While perhaps sympathetic to Arizmendi's dilemma, the trial court and the court of appeals both found a basis for granting a new trial, that of "new evidence" in the form of the arresting officer's testimony, which was only presented at her co-defendant's hearing on his motion to suppress. Unfortunately, despite the lower courts' apparent sense of

injustice, the majority is correct in deciding that Arizmendi could have filed a motion to suppress and could have called the officer to testify. It is also correct to conclude that the officer's testimony at the co-defendant's hearing adds nothing more than the video portrays and that Arizmendi had access to the video before her plea; thus, there is no "new evidence" to support a valid claim, even in the interest of justice. *Zalman*, 400 S.W.3d at 593 ("A judge may grant or deny a motion for new trial 'in the interest of justice,' but justice means in accordance with the law[,]" not based on a belief that the defendant got a raw deal).

As to other possible grounds for granting a new trial, counsel failed to properly raise them. The majority is therefore correct. I join the majority and I concur in the result.

The only other possible relief Arizmendi might be able to secure in the future would be in post-conviction proceedings.

Filed: May 17, 2017

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