

IN THE
SECOND COURT OF APPEALS
AT FORT WORTH

BARTON R. GAINES,
APPELLANT,
V.
SHAREN WILSON,
APPELLEE.

APPEALED FROM THE EIGHTH COUNTY CRIMINAL COURT OF
TARRANT COUNTY, TEXAS, THE HON. CHARLES L. VANOVER

APPELLANT'S OPENING BRIEF ON APPEAL

BARTON R. GAINES
TDCJ # 1139507
HH COFFIELD UNIT
2661 FM 2054
TENNESSEE COLONY,
TEXAS 75884

ATTORNEY FOR APPELLANT
BARTON R. GAINES

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BARTON R. GAINES,
Appellant,

v.

SHAREN WILSON,
Appellee.

IDENTITY OF PARTIES & COUNSEL

PARTIES

Appellant is Barton R. Gaines, or Bart. He is not represented by counsel. His (Bart's) address is 2661 FM 2054, Tennessee Colony, Texas 75884. Because Bart is in prison, he does not have a telephone number, fax number, or e-mail address. The prison he is at does have a telephone number, which is 903-928-2211, and he can be reached via telephone conference call per TDCJ Board Policy, BP-3.81, Sec. VII. It has to be prearranged, however.

Appellee is Sharen Wilson who is the Tarrant County District Attorney. Her address is 401 W. Belknap St., Ft. Worth, Tx 76196. Her telephone number is 817.884.1400.

COUNSELS

Appellant is representing himself. Appellee's attorney is Andrea Jacobs, Assistant Criminal District Attorney, State Bar No. 24037-596, 401 W. Belknap, Ft. Worth, Tx 76196-0201, telephone # 817-884-1687, fax # 817-884-1672, e-mail: ccaappellatealerts@tarrant countytxgov

STATEMENT ON ORAL ARGUMENT

The Court should grant oral argument for the following reasons:

a. Oral argument would give the Court a more complete understanding of the facts presented in this appeal. See Tex. R. App. P. 39.1(c). Appellant Barton R. Gaines is experiencing the collateral consequences of the, and he is actually innocent of the underlying conviction.

b. Oral argument would allow the Court to better analyze the complicated legal issues presented in this appeal. See Tex. R. App. P. 39.1(c). The issue whether laches applies is considered on a case by case basis; appellee was not and is not prejudiced; appellant is justified by his delay; and he is actually innocent of the offense of possession of marihuana.

c. Oral argument would significantly aid the Court in deciding this case. See Tex. R. App. P. 38.1(e), 39.1(d). Being able to test the veracity of the factual allegations to the legal standard would greatly enhance the Court's ability to weigh whether or not the trial court erred, especially considering its rush to judgment and refusal to rule on any of Bart's motions to test the veracity of the same, as will be more fully explored below.

STATEMENT OF THE CASE

Nature of the case. Appellant sued appellee for unlawful confinement in violation of the U.S. Constitution (USC). (CR). Appellee filed a response that Bart was not experiencing the collateral consequences of the marihuana conviction and the preceding erroneous injury to the disabled person arrest when the parole board denied him parole via excessive substance abuse involvment, but that even if he was the doctrine of laches bars him relief.

Course of proceedings. After a paper hearing, the fact-finder found that Bart was not experiencing the collateral consequences of the marihuana conviction and the preceding erroneous injury to the disabled person arrest, and that the doctrine of laches barred him relief.

Trial court disposition. The trial court rendered judgment on the verdict for appellee on February 6, 2020.

ISSUES PRESENTED FOR REVIEW

Issue 1: The evidence does not support the Court's finding that Bart is not experiencing the collateral consequences of the marihuana conviction and its preceding erroneous arrest for injury to the disabled.

Issue 2. The evidence does not support the Court's finding that equitable principles do not militate in favor of granting habeas relief.

Issue 3: The trial court erred by overruling, or refusing to rule on, Bart's motion to take the oral or written deposition of said deponents.

STATEMENT OF FACTS

August 18, 2001, Jason A. Tucker and Bart did a small moving job for Bart's stepdad, J. Corey Adams. Afterward, Corey gave Bart \$200. One hundred dollars was for Bart, since he drove the truck and ran the job, and \$80 was for Jason. Bart was supposed to break the \$100, give Jason \$80, and Corey back \$20. But Bart never got the chance.

After Jason and Bart left (Jason was living with Bart and his folks because he was helping Bart and Corey on the moving truck), they picked up Jason's friend, Billy Hunt, and their friend, Tony A. Durham. Tony had a keg and they were going to get it filled for Jason's 18th birthday party later on that night.

At first they were going to get the keg filled at Majestic Liquor Store off I-20 & I-35, but because Majestic didn't want to fill somebody else's keg, Majestic suggested they go to Two Bucks up the street off I-35 and Felix Street because they would not only probably fill it, but they would also give them free cups.

So Tony came back out and they went up the street to Two Bucks. Bart exited I-35 for Felix. Bart turned left over the bridge. Bart passed the south bound access road and continued west down Felix Street until he came upon the entrance to the parking lot where he hung a right to enter it. As he was pulling into the parking lot surrounding the store, some guy (Robert Lee Haynie) came speeding across the parking lot and almost plowed right into Bart. Bart had to honk his horn to get his (Haynie's) attention,

or to let him (Haynie) know that Bart was there or to notice him. (Note: Bart's affidavit references pictures attached thereto exhibiting the various stages of this encounter).

The car came to an abrupt stop, rocking back and forth like the shocks were out. Then the driver (Haynie) through an empty beer bottle at Bart's brand new truck like it was his fault that he almost hit Bart. But it (the bottle) fell short and, in response, they (Tony) flipped him (Haynie) the bird and Bart pulled around him (Haynie) and up to the double doors in front of the Two Bucks on the other end of the parking lot.

Bart parked thinking Tony was just going in to check on the keg, then they would come back with a dolly or something to get it to fill. Tony still had the \$100 bill that Bart gave him from when they stopped at Majestic. But to Tony, it wasn't over. He tore ass out of Bart's truck to go try to catch that dude (Haynie) for throwing a beer bottle at Bart's truck.

Tony's dad owned a juck yard, and Tony took pride in cars. First this guy (Haynie) almost hit Bart's brand new truck with his old red hoopty. Then, to top it off, he through an empty beer bottle at Bart's truck like it was their fault he (Haynie) almost hit them.

So Tony bailed up out of Bart's truck and went to see if he could catch this guy (Haynie). Bart figured he (Haynie) was long gone (Bart couldn't see the entrance where they entered the parking lot and Haynie almost hit them because of the corner of the building of Two Bucks was blocking his view). Obviously Haynie was not gone,

and apparently the reason he (Haynie) was so mad, i.e., he (Haynie) threw an empty beer bottle at Bart's truck, and apparently the reason why he (Haynie) was still there, was because his car died, and now he (Haynie) needed somebody to jump him off. Jason and Billy who were in the back of Bart's truck with the keg, got out to follow Tony. Bart sat in his truck in front of the store.

Next thing Bart knew was Tony, Jason, and Billy came walking back up to Bart's truck talking about he (Tony) lost Bart's money. Dumbfounded, Bart asked him (Tony) where he thought he may have lost it, and Bart made him (Tony) show him (Bart). Jason and Billy followed. It was somewhere behind the Burger King parking lot, which is now, according to the pictures from Google Map, a Cesar's Taco.

While they were looking for Bart's money, Jason, Billy, and Tony kept talking about the cops were coming, but Bart wasn't quite sure for what, since he didn't see what took place or occurred on the opposite side of the building. Eventually Jason and Billy broke off and went into Burger King (Cesar's Taco, now). At that point Bart and Tony gave up and went back to his truck. As they were getting into his (Bart's) truck, a Ft. Worth cop car rushed in to block Bart's truck from leaving.

Next thing Bart new two more cops appeared at his door and tried to rip it off the hinges, but the automatic locks prevented them from opening it until Bart unlocked it for them to see what they wanted.

When Bart did that, they (the cops) yanked it open, reached in and pulled Bart out by the back of his neck, then they picked him up by his legs and hands, carried him a few feet away from his truck, then dropped him face first from about five feet up onto his face on the hot summer pavement. Then one of them drop-kicked him with thier knee in the middle of his back, and the other stomped on his head, like Bart was trying to resist, which he (Bart) assures he was not. Then they tried to break Bart's arms by bending them in a way that they don't normally bend so that they could cuff him. Then they picked him up like a lunch box and chunked him in the back of one of their cop cars.

Next they (the cops) walked up to the passenger side of Bart's truck and got Tony out all gentle like and turned him around to cuff him and walked him around to another cop car.

Next, one of the cops got in Bart's truck to search it. Bart seen him motion to his partner with his fingers up to his lips like he was smoking a joint like he found some weed. Then the same red hoopty pulled up, and a guy (Haynie) got out, reached in his back seat, got some crutches out, then hobbled around the cop cars that Tony and Bart were in. (Note in the police report attached to the application at Exhibit 3, page 2, Associated Objects, it says Haynie's car was a blue four door Ford, and note on page 4 lines 26-27, where Bridges says he changed the vehicle and plate number, probably because the red hoopty (two door) wasn't street legal; Bart specifically remembers Haynie flipping up the front seat to reach in and pull out some crutches).

Lastly, before Tony and Bart were carted off to jail, Bart looked back to see Jason and Billy, amongst several other on-lookers in the Burger King looking out the big glass window laughing their asses off at Bart's misfortune.

Although the only thing anybody ever said Bart ever did worthy of arrest was Haynie who said Bart flipped him off, officer Thetford and officer Moore arrested Bart for physically beating Haynie, and crushing his leg. Obviously they meant they arrested Bart for encouraging Tony to assault Haynie; though nobody was said to have told them (Thetford & Moore) they witnessed Bart encourage Tony to assault Haynie, they arrested him (Bart) for being a party to the assault.

And Haynie, who, according to Thetford, was beat to within an inch of his life, refused to go to the hospital.

At the Tarrant County jail Tony and Bart were placed in a holding tank in the basement with several other men awaiting their turn to get booked in. It was there and then that Bart learned what happened.

Tony told Bart that when he got out and went around the corner of the store that that guy (Haynie) was stalled out still at the entrance/exit to the parking lot and that he pretty much went ape-shit on his (Haynie's) car, but that the only contact that he had with the driver (Haynie) was when he (Haynie) threw open his door to get out. That Tony big-chested him with his hand and pushed him in the chest back down into his seat.

Tony told Bart that he was sorry for getting Bart in trouble, and that he would tell the cops that he didn't have anything to do with the assault. Bart asked him about the "weed" that he was being booked in on, and that he didn't have any damn weed in his truck. Tony told Bart that he was sorry for that too, and that he would tell the cops that the "weed" was his too. That he slid it in the console of his truck when the cops yanked him (Bart) out of his truck. Tony said that he would take responsibility for that too.

About three days after Bart was arrested on 8-21-01 Thetford's and Moore's supervisors, or the detective assigned the case for follow-up investigation, began trying to justify Bart's arrest upon subsequent grounds that he was intoxicated, though not once in the original narrative was anything ever said about anybody being intoxicated.

Detective Stevens again reiterated the fact that he would not be filing charges against Bart for being a party to the assault, though again nobody, not one single person, claimed to have heard Bart encourage Tony to assault Haynie.

Haynie had not still gone to the hospital, and was apparently falling down drunk all over the place when Stevens followed up investigation against Tony for the assault..

On 9-17-01 the DA's office contacted the Ft. Worth PD to try and build a case out of Bart's arrest for being intoxicated, or follow up arrest for being intoxicated. That the marihuana in the console of Bart's truck was his. And that Jason and Billy weren't involved in the assault, though, again, nobody, nobody,

but they (the Ft. Worth PD) were alleging to claim this. They needed to be on the same page.

Bart wound up hiring Jason's lawyer, Ed. G. Jones, to represent him. He was in the process of getting the marijuana case cleared up when Bart got picked up with Jason and his ~~other~~ Latin King buddy, Daniel Aranda, for the robbery conviction about six months later, and Bart has been in jail ever since then.

It wasn't until after Bart was back in the county on his appeal for the robbery case when the marihuana charge was resolved. The judge ynaked him (Bart) into court to account for the marihuana case, then court appointed Y. Leticia Sanchez Vigil to represent Bart in place of Ed. Edward must have had a heads up because, despite being paid to handle the case, he said he did all that he was going to do. Bart called his mom to call him, and that was what she told him (Bart) he (Ed.) told her.

So Bart was pretty much on his own from there on out. Leticia advised Bart to settle for time-served because:

a. a jury would never believe Bart's uncorroborated, self-serving statements that the marihuana wasn't his, and that he didn't know that it was in his truck.

b. trial was scheduled to start that day, and that the judge wouldn't waste the time or money to grant a continuance for her to go find Tony and bring him to court to tell the jury that it was his marihuana, and that Bart didn't know Tony stashed it in the console of his truck.

c. even if Bart was mistakenly arrested for being a party to the injury to the disabled, that the marihuana would have still been found because Thetford would've just arrested Bart for flipping Haynie off or a DWI or PI.

d. even if the inventory search was invalid that the marihuana would've inevitably been discovered.

e. if Bart fought the marihuana charge the judge would stack

the sentence onto the end of his (Bart's) robbery sentence so that when he (Bart) discharged it that he would have to start the sentence on the marihuana conviction, in such event as that. She said, which she assured was very probable.

f. And, the marihuana conviction wouldn't hurt his (Bart's) chances at making parole on his robbery convictions.

Also, on 10-31-02, Tony was convicted by a jury and sentenced to three years for the assault on Haynie.

On 7-24-19 Bart was denied parole for, in part, his substance abuse involvement or history. The parole interviewer not only asked Bart about the possession of the controlled substance case, but he also asked Bart about the assault on Haynie. But when Bart tried to go into it, the interviewer essentially cut Bart short to sum it up whether Haynie was seriously hurt, which Bart responded, no, as far as he knew based off what Tony had told him. (Bart) that Haynie had not been seriously injured.

The reason why Bart has not filed anything prior to now or complained prior to now is because Bart didn't know the parole board was going to use this conviction and the arrest that preceded the marihuana arrest, the assault arrest, to deny him (Bart) parole. Had he (Bart), Bart would have done so before now.

The Institutional Parole Officer (IPO) Harris did not ask Bart at the interview about (1) the drug transaction, but he did ask Bart about the assault on Mike and Andy, and (2) Bart's prior drug use, involvement, or history.

SUMMARY OF THE ARGUMENT

Bart's first argument challenges the legal and factual sufficiency of the Court's (Charles's) finding that Bart is not experiencing adverse collateral consequences of the marihuana conviction and its preceding nagging erroneous arrest for injuring a disabled person. Wilson, through Andrea, candidly admits there is evidence in the record that supports the finding that Bart is experiencing the adverse collateral consequences of the marihuana conviction, etc. Charles's (Andrea's) finding to the contrary is against the great weight and preponderance of the evidence. Charles (Andrea) tries to point to a Second District Court of Appeals opinion to support its theory that Bart was denied parole because of his prior drug use and the fact that his robbery convictions revolved around a drug deal gone bad. However, at the parole hearing Bart was asked specifically about the marihuana arrest and conviction, and the preceding injury arrest, not the marihuana deal and prior recreational drug use. Therefore, Charles's (Andrea's) finding that Bart is not experiencing the adverse collateral consequences of the marihuana conviction, etc., is against the great weight and preponderance of the evidence.

Bart's second argument challenges the legal and factual sufficiency of Charles's (Andrea's) finding that Bart should be denied relief because of laches. Charles (Andrea) overlooks the fact that Bart is actually or factually innocent of the offense of knowingly and intentionally possessing two ounces or less of marihuana, which is a factor to be considered in deciding whether laches should apply or not. Beside the prejudice factor, which

s/he focused on nearly exclusively, is the justification prong. Charles (Andrea) ignores the fact that Bart explained why he waited so long when she argued Bart didn't explain why he waited so long to attack the marihuana conviction. As for the other prong of laches, respondent isn't prejudiced by the delay; although respondent's retention records on such cases (i.e., misdemeanors) elapsed, the records were no doubt tucked away in his felony case file for prosecution therein (i.e., the records necessary to retry Bart still exist; they are no doubt right there in the DA's own office).

Bart's last argument is that Charles (Andrea) erred by overruling his (Bart's) request to dispose various deponents in an effort to rebut Andrea's argument (1) that sworn statements aren't enough to justify relief (i.e., to corroborate himself), and (2) that respondent is prejudiced by Bart's delay. What Charles (Andrea) essentially did was deny Bart his ability to carry his burden of proof, then find and conclude that Bart failed to carry his burden of proof, i.e., the case turned hereto.

ARGUMENT

Issue 1: The evidence does not support the Court's finding that Bart is not experiencing the collateral consequences of the marijuana conviction and its preceding erroneous arrest for injury to the disabled.

ARGUMENT & AUTHORITIES

When the appellant asserts that a finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, the proper standard of review is factual sufficiency. Cain v. Bain, 709 SW2d 175, 176 (Tex 1986); Playboy Enters. v. Editorial Caballero, S.A. de C.V., 202 SW3d 250, 264 (CA13 2006, pet denied). This type of review is limited to cases before the courts of appeals and cannot be argued in the Texas Supreme Court. In re Doe, 19 SW3d 249, 253 (Tex 2000); see Golden Eagle Archery, Inc. v. Jackson, 116 SW3d 757, 761 (Tex 2003) (S.Ct. can determine whether CA applied correct standard in conducting factual-sufficiency review). Depending on which party had the burden of proof at trial, a factual-sufficiency review is based on either (1) insufficient evidence or (2) being against the great weight and preponderance of the evidence. Raw Hide Oil & Gas, Inc. v. Maxus Expl. Co. 766 SW2d 264, 275-76 (CA7 1988, writ denied).

The preponderance standard is used to evaluate the evidence supporting an issue on which the appellant had the burden of proof at trial. See Croucher v. Croucher, 660 SW2d 55, 58 (Tex 1983); Ulogo v. Villanueva, 177 SW3d 496, 499 (CA1 2005, no pet); Gooch v. American Sling Co., 902 SW2d 181, 184 (CA2 1995, no writ); Raw Hide, 766 SW2d at 276. The appellate court must consider and weigh all the evidence in the record and may set aside a finding only if the evidence is so weak or if the finding is

so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. Dow Chem. Co. v. Francis, 46 SW3d 237, 242 (Tex. 2001); see Golden Eagle Archery, 116 SW3d at 761-62. The court may conclude that a finding is against the great weight and preponderance of the evidence even if the record contains some evidence to support the finding. In re King's Estate, 244 SW3d 660, 661 (Tex 1951).

A showing of a collateral consequence, without more, is now sufficient to establish "confinement" so as to trigger application of Tex. Code Crim. Proc. Ann. art. 11.0[9]. That an applicant is not in the actual physical custody of the government at the time of filing does not preclude his application nor deprive the trial court of jurisdiction to consider it. Ex parte Harrington, 310 S.W.3d 452, 457 (CCA 2010).

The terms "confinement" and "restraint" encompass incarceration, release on bail or bond, release on community supervision or parole, or any other restraint on personal liberty. Harrington, 310 SW3d at 457 n.12.

Judge Charles erred by finding that (1) "[t]here is no evidence that [Bart]'s denial of parole ... was, in part, because of this conviction [i.e., the marihuana conviction, which is keeping him from expunging the erroneous injury arrest]" "because his record indicates excessive substance abuse involvement." and (2) "[t]here is no evidence that [Bart] is suffering collateral consequences as a result of this conviction."

Andrea even concedes this point.

If it is any indication as to how the parole board views the

marihuana conviction and its antecedent arrest (i.e., the injury arrest), just look at how hard the DA (Andrea) is defending this simply little old marijuana case. While most other state's are not only legalizing marijuana, they are taking the initiative to expunge the same

In support of Charles's finding, he (Andrea) points to Bart's aggravated robbery convictions, which were committed during a drug deal involving a pound of marijuana.

However, Bart poses this fact was embodied within the other part of the set-off dealing with the nature of the offense.

37CTAC § 145.6(d)(1)-(10).

Also in support thereof, Charles (Andrea) points to evidence introduced at Bart's robbery trial showing his prior use of alcohol, marijuana, Xanax, cocaine, and methamphetamine.

There was little to no evidence introduced at Bart's robbery trial hereto, and zero evidence the parole board relied upon this to deny Bart parole, but even if there was, it does not disprove the fact that the IPO specifically asked Bart about the marihuana conviction and the arrest that preceded the marihuana arrest, the erroneous assault on the disabled man arrest.

In fact, it is ridiculous to try and say that the marihuana conviction, which is keeping Bart from being able to expunge the character assassinating injury to the disabled person arrest (is that what the State is worried about losing?), is not harming Bart's ability to make parole. It is a disingenuous assessment of the truth of the matter.

It begs the question, to say the least. The only thing etched in stone regarding Bart's substance abuse involvement, or his history, which Charles (Andrea) tries to draw a distinction between, which is really a red herring, is this conviction, the marihuana conviction, which parole no doubt was referencing when it made reference to substance abuse involvement.

It is for these reasons that Bart urges the Court to find and conclude, hold, Charles's finding is against the great weight and preponderance of the evidence and is manifestly unjust.

Issue 2: The evidence does not support the Court's finding that equitable principles do not militate in favor of granting habeas relief.

ARGUMENT & AUTHORITIES

It is consistent with equitable principles for the court to reject the application of laches when a record shows that:

1. an applicant's delay is not unreasonable because it is due to a justifiable excuse or excusable neglect;
2. the State will not be materially prejudiced as a result of the delay; or
3. the applicant is entitled to equitable relief for other compelling reasons, such as new evidence that shows he or her is actually innocent of the offense or, in some cases, that he or she is reasonably likely to prevail on the merits.

See Ex parte Perez, 445 SW3d 719, 724 (CGA 2014).

Judge Charles erred by finding that (1) "[Bart] does not explain why he waited over sixteen years to attack his counsel's representation." (2) "[Bart] does not explain why he could not have filed an application alleging that he received ineffective assistance of counsel [IAC] before his plea any time after he was convicted over sixteen years ago." and (3) "[t]he fact that [Bart] had plenty of opportunity to complain about counsel but chose not to prejudices the credibility of his [IAC] claim."

To the contrary, Bart specifically stated; (1) "Leticia advised [him] to settle for time-served because ... the [marihuana] conviction wouldn't hurt [his] chances of making parole on the robbery case." ¶ "That was 10-8-03. On 7-25-19, about 16 years later, it is affecting [his] ability to make parole. In fact, at [his] parole hearing, the parole interviewer (Harris) not only asked [him] about the possession of the controlled substance case, but he also asked [him] about the assault on Haynie. But when

[he] tried to go into it, he essentially cut [him] short to sum it up that the dude (Haynie) wasn't seriously hurt, which [he] responded, no, as far as [he] knew [from] what Tony told [him] ([he] tried to get the injury arrest expunged in 2013, but because of the marijuana conviction, Sturns wouldn't expunge it, while the prosecutor vehemently objected)." and (2) "[t]he reason why [he] had not filed anything prior to now is because [he] didn't know the parole board was going to use this conviction and the arrest that preceded the marihuana arrest, the assault arrest, to deny [him] parole. Had [he], [he] would have done so before now.... IPO (Harris) asked [him] about the marihuana conviction, and the arrest that preceded it for assaulting Haynie."

How much clearer must Bart be? Clearly, Bart explained why he did not file until now. Therefore, the first prong of Perez is or was met. Moreover, Charles finding is against the great weight and preponderance of the evidence.

It was only a marihuana case, a misdemeanor at that. And the injury arrest didn't even make it beyond the Ft. Worth PD, apparently because they knew their two rookie cops, Thetford and Moore, messed up big arresting Bart for assaulting Haynie, or encouraging Tony to assault Haynie, since nobody nobody! told them that, but their own misguided intuition or zeal to get the bad guy, who (Bart) was as innocent here as the man on the moon.

Judge Charles erred by finding that (1) "[t]he Tarrant County Criminal District Attorney's Office (TCCDA) retains files of these types of cases for only ten years." (2) "[i]t is reasonable that the marihuana in question has been destroyed." (3) "[t]he

State asserts that [Bart]'s over sixteen year delay prejudices the State's ability to retry this case because assembling the documentation and witness evidence after more than sixteen years to prove [Bart] committed the offense of possession of marihuana beyond a reasonable doubt would be a tremendously difficult, if not impossible, task." and (4) "[t]he State has demonstrated prejudice as a result of [Bart] waiting over sixteen years to allege he recieved [IAC]."

Although the TCCDA may only retain these files for misdemeanors for only 10 years, the TCCDA's office no doubt stuffed these files away in Bart's felony file, which, according to its retention file, it still has. Bart filed for production of its felony file on him, but Charles refused to rule and/or overruled his motion for production for the same by operation of law via his motion for new trial. Therefore, how can Charles deny Bart's ability to rebut Andrea's argument, then find Bart failed to prove up this element? This finding is also against the great weight and preponderance of the evidence, which is discussed more fully under Issue 3.

Second, although the marihuana has no doubt been destroyed, the lab results proving up what the substance was no doubt exist; and it is probably tucked away in Bart's felony file within the TCCDA's office. Moreover, Bart is not contesting what the substance was, only whose it was.

Thirdly, Andrea just said the documentation was destroyed. Now she, and the court (Charles) through her, say assembling the doc-

umentation would be a tremendously difficult, if not impossible task. Which one is it? Does the documentation exist or not? Additionally, assembling the witness evidence isn't any more difficult than sifting through Bart's felony file; in fact, it's less so. Bart filed a whole and 100% complete discovery pack equiped with supoenas and everything. All needs be done is serve them. The sheriff/constable serve subpoenas all the time. What's so hard about that? Respondent can determine whether it wants to move forward after testing the validity after the habeas hearing/deposition. It's got to know or realize by now Bart really didn't knowingly possess a usable quantity of marihuana in the amount of two ounces or less (i.e., less than half an ounce (9-grams)). At any rate, this argument and the court's findings hereto are disingenious. And this finding too is against the great weight and preponderance of the evidence.

Fourthly, and lastly, the respondent (Andrea) has not demonstrated prejudice as a result of Bart waiting over sixteen years to allege IAC. Respondent had to cheat to get the conviction. The constitution doesn't mean anything any more? Who cares about wigg^{ing} if they got to cheat to get it? Winning is winning? How can respondent (Andrea) be prejudiced by something it was never entitled to in the first place? It's hard to claim a right to something it had to cheat to get through Leticia. Therefore, this finding too is against the great weight and preponderance of the evidence.

Judge Charles erred by finding that (1) Bart's "[s]worn pleadings" were "inadequate" to grant "habeas" "relief[.]" In other

words, Bart is entitled to relief because he is actually innocent. Bart could have presented newly discovered or available evidence of actual innocence through Jason, Billy, Tony, and possibly even Moore and Thetford whether they seen Tony discard anything in Bart's truck console while they were "cuffing" Bart, but by denying Bart the ability to dispose them, the trial court (Charles) denied Bart his ability to do so.

Byway of comparison, Dequinncy Tyson, Edgard Alejandro Recendez-Lopez, Jeffery Lyn Gaston, Marcus Tate, Jr., Cleaven Clark, and Jesse Earl Jones were actually innocent. The CCA found principles of equity militated in favor of granting them habeas relief in their felony controled substance cases, even though they each waited "several years" after their guilty pleas to discover evidence of their actual innocence, though each and every one of them had to have been acutely aware of the fact they weren't in possession of any kind of controled substance. The main difference, or the only difference here is Bart was beholden to the trial court (Charles) who denied him his ability to discover his newly discovered or available evidence, whereas they were beholden to nobody but the forensic lab. Therefore, because part of the outcome of the court's (Charles/Andrea) laches determination turned upon the fact of whose it was, not what it was, and whether Bart was aware of its presence in his console, as explored more fully below, Charles's finding hereto is also against the great weight and preponderance of the evidence, i.e., indeed, sworn pleadings

are inadequate, in and of themselves, upon which to base habeas relief. So why did the court (Charles) deny Bart's motion to corroborate himself? Was it easier to run over Bart and the constitution rough shod? Apparently so.

Issue 3: The trial court erred by overruling, or refusing to rule on, Bart's motion to take the oral or written deposition of said deponents.

ARGUMENT & AUTHORITIES

As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

(b) In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complain properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

Tex. R. App. Proc. 33.1(a)-(b). Under TRAP 33.1(a)(2), error is preserved by an express ruling, an implicit ruling, or a refusal to rule. TRAP 33.1 relaxed the requirement in former TRAP 52(a) for express rulings and codified case law recognizing implicit rulings. Frazier v. Yu, 987 SW2d 607, 610 (CA2 1999, pet denied).

If the court does not make an express ruling but takes other action that implicitly overrules the motion or objection, error is preserved. See TRAP 33.1(a)(2)(A); In re Z.L.T., 124 SW3d 163, 165 (Tex 2003); see, e.g., Rosemond v. Al-Lahiq, 331 SW3d 764,

767 (Tex 2011)(ruling on motion to dismiss for inadequate expert report implicitly overruled motion to dismiss for untimely service of report because court could rule on report's adequacy only if it was timely served); Chilkewitz v. Hyson, 22 SW3d 825, 828 (Tex 1999)(by rendering judgment on verdict, court "impliedly" overruled motion for JNOV); Salinas v. Rafati, 948 SW2d 286, 288 (Tex 1997)(ruling granting one party's motion, which was opposite of other party's motion, "automatically" denied other party's motion); Woods v. Woods, 193 SW3d 720, 723 (CA9 2006, pet denied)(objection to commissioner's report on division of property was implicitly overruled when court accepted the report); Lopez v. Lopez, 55 SW3d 194, 201 (CA13 2001, no pet)(ruling granting divorce implicitly overruled motion to reopen); Amalgamated Acme Affiliates, Inc. v. Minton, 33 SW3d 387, 392 n.2 (CA3 2000, no pet)(constitutional arguments in motion to dissolve injunction were implicitly overruled when court refused to consider motion).

The trial court does not have the discretion to refuse to rule. In re Shredder Co., 225 SW3d 676, 679 (CA8 2006, orig proceeding); Barnes v. State, 832 SW2d 424, 426 (CA1 1992, orig proceeding). If the trial court refuses to rule, the party must (1) object to the court's refusal to rule and (2) make sure all of the following appear in the appellate record: the request for a ruling, the court's refusal to rule, and the objection to the court's refusal to rule. See TRAP 33.1(a)(2)(B); see, e.g., In re Shredder Co., 225 SW3d at 679-80 (D attempted to secure ruling on motion to compel arbitration at five separate hearings, but the court refused to rule); Goodchild v. Bombardier-Rotax

GMBH, 979 SW2d 1, 6-7 (CA14 1998, pet denied)(error was waived because P did not object to court's refusal to rule); O'Donnell v. Roger Bullivant of Tex., Inc., 940 SW2d 411, 416 (CA2 1997, writ denied)(error was preserved because P objected to court's refusal to rule), overruled on other grounds, Perry Homes v. Alwattari, 33 SW3d 376 (CA2 2000, pet denied).

If the trial court abuses its discretion in a discovery ruling, the complaining party must still show harm on appeal to obtain a reversal; harmful error is error that "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case to the court of appeals." When discovery is denied and because of the denial the evidence sought does not appear in the record, determining harm from the denial is impossible and the party is prevented from properly presenting its case on appeal. Accordingly, the trial court's abuse of discretion in denying discovery was harmful. Ford Motor Co. v. Castillo, 279 SW3d 656, 667 (Tex 2009)

A successful challenge to evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. Texas DOT v. Able, 35 SW3d 608, 617 (Tex 2000).

It is not necessary for the complaining party to prove that "but for" the exclusion of evidence, a different judgment would necessarily have resulted. The complaining party is only required to show that the exclusion of evidence probably resulted in the rendition of an improper judgment. McCraw v. Maris, 828 SW2d 756, 758 (Tex 1992). See also Benavides v. Cushman, Inc., 189

SW3d 875, 879 (CA1 2006, no pet); \$18,000 v. State, 961 SW2d 257, 266 n.3 (CA1 1997, no writ).

On 1-31-20 Bart filed request (motion) to take oral deposition or written deposition of, among other people, the Tarrant County district Attorney's Office's Custodian of Record; specifically for the production of (a) Maria Mendoza's (1) deposition statement discussed on page 4, lines 53-54 of the Ft. Worth PD (FWPD) Service Report #01610355, and (2) photo line up results discussed on lines 50-52 of the same; (b) Robert L. Haynie's (1) hand wrote statement discussed on lines 60-61 of the same, and (2) photos discussed on on lines 67-68 of the same; (c) Steven's photos of the crime scene discussed on line 68 of the same, and (d) any other photos or sworn statements related to the assault and possession cases.

On 1-31-20 Bart also filed to take the oral or written deposition of Jason, Billy, and Tony.

On 2-13-20 with his motion for new trial Bart also filed to take the oral or written deposition of the Tarrant County District Attorney's Office's Custodian of Record; specifically for the production of its file in (1) The State of Texas v. Barton Ray Gaines in the 213th Judicial District Court's cause or file numbers 0836979A and 0836985A, and (2) The State of Texas v. Tony Allen Durham in the Criminal District Court's, number 3, cause or file number 0816810A.

The Court, i.e., Charles, implicitly overruled the aforesaid motion, or motions, by adopting respondent's (Andrea's) proposed findings of fact and conclusions of law.

Alternatively, the court, i.e., Charles, overruled the motions by operation of law byway of his (Bart's) motion for new trial. Tex. R. App. Proc. 33.1(b).

As pointed out above, this prevented Bart from rebutting Andrea's argument that the documents in this case were destroyed, i.e., it prevented Bart from being able to rebut Andrea's prejudice complaint under laches.

Also as pointed out above, it prevented Bart from introducing newly discovered or available evidence through Jason, Billy, and Tony of actual (factual) innocence--that Bart didn't knowingly and intentionally possess a usable quantity of marihuana in the amount of two ounces or less (9-grams; less than half a-ounce), which was a necessary component toward finding whether equitable principles militated in favor of granting habeas relief. In fact, it was also a necessary component whether they militated in favor of the same whether respondent was prejudiced.

The Court should therefore reverse and remand for further proceedings consistent with the opinion of the court of appeals, i.e., to allow Bart to dispose the deponents identified in his motions to take depositions, either orally or written.

CONCLUSION

Collateral Consequences

Bart is experiencing the collateral consequences of the marihuana conviction, which is preventing Bart from expunging the erroneous arrest for injuring Haynie.

The IPO focused almost exclusively upon the two, to the exclusion of the felony drug deal and prior drug use.

This conviction is Bart's only substance abuse etched in stone, i.e., the conviction thereto.

It is ridiculous to try to say Bart is not experiencing the collateral consequences thereto.

Laches

Clearly, Bart explained why he has not filed anything hereto until now.

The records necessary for respondent to retry Bart hereto no doubt do exist, and they are no doubt tucked in his felony jacket.

The marihuana is unnecessary to retry this case due to the lab report that no doubt exist in either the TCCDA's file, and/or the FWPD's file.

Respondent (Andrea) equivocates whether the documents still exist.

Assembling the witnesses hereto is not as hard as respondent feigns.

And, respondent cannot be prejudiced by the taking away of something it was never entitled to have in the first place.

Bart is actually innocent of knowingly and intentionally possessing 9-grams of marihuana.

Discovery

The trial court implicitly overruled Bart's motion to rebut Andrea's prejudice argument and laches argument (actual innocence).

The trial court overruled the same by operation of law.

PRAYER

Bart therefore prays that this Court not turn a blind eye to or do an end run around his rights like it did in his felony convictions or sentences regarding the applicable jury charge law regarding his potential criminal or culpable responsibility for the unadjudicated-extraneous-aggravating-sentencing factor and reverse the entire judgment of the case at hand and render judgment in favor of Bart, with instructions to the trial court to initiate expunction proceedings on both the marihuana conviction and the injury arrest.

Alternatively, Bart prays the same that this Court reverse the trial court's (Charles's) laches determination, and render judgment in favor of Bart is experiencing the collateral consequences of the marihuana conviction and the underlying erroneous injury arrest.

Or, alternatively, Bart prays the same that this Court reverse and remand the trial court's (Charles's) with instructions to hold an evidentiary hearing or deposition whether Bart is actually innocent, and whether the docuemnts are in Bart's felony case file, i.e., produce the same for Bart's copying and inspection thereto.

Respectfully submitted on: / / 2020;

By:

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