**Affirmed and Opinion filed August 19, 1999, Withdrawn and Substitute Opinion on Rehearing filed October 7, 1999.**

**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00511-CR**

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**DAVID DALE ELLIS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 209th District Court**
**Harris County, Texas**
**Trial Court Cause No. 808724**

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## O P I N I O N  O N  M O T I O N  F O R  R E H E A R I N G

David Dale Ellis (Appellant) filed a motion for rehearing in this case. *See* TEX. R. APP. P. 49.1. In his motion for rehearing, Appellant contends that we should reconsider our decision to affirm the trial court's judgment because his failure to timely file his brief and reporter's record in this Court was not due to his conscience disregard or indifference. He further suggests that if we consider his brief and reporter's record, our decision will be different. We grant Appellant's motion for rehearing to the extent that we will consider his brief and reporter's record in reaching a resolution in this case. In all other respects,

Appellant's motion for rehearing is overruled. We withdraw our unpublished opinion of August 19, 1999, and substitute this opinion in its stead.

Appellant appeals from the trial court's habeas corpus judgment. Appellant pleaded guilty to the offense of falsely holding himself out as a lawyer. *See* TEX. PENAL CODE ANN. § 38.122 (Vernon 1994). He was placed on probation for a term of six years. Appellant filed a post-conviction application for writ of habeas corpus. Following an evidentiary hearing, the trial court denied Appellant's application. On appeal, he contends that he did not commit any criminal offense because he was licensed to practice law in another jurisdiction on the date of the offense and because he was denied effective assistance of trial counsel. We affirm.

## STANDARD OF REVIEW

The trial court's ruling in a habeas corpus proceeding should not be overturned unless the court clearly abuses its discretion. *Ex parte Bui*, 983 S.W.2d 73, 75 (Tex.App.–Houston [1st Dist.] 1998, pet. ref'd). A trial court abuses its discretion when it renders an arbitrary or unreasonable decision, or when it acts without any guiding rules and principles. *Id.*

## DISCUSSION

Appellant contends that because he was licensed to practice law in another state at the time of his offense, he committed no criminal offense and should not have been convicted of "falsely holding oneself out as a lawyer."

Section 38.122 of the Texas Penal Code provides the following:

> A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person holds himself or herself out as a lawyer, unless he or she is currently licensed to practice law in this state, another state, or a foreign country *and is in good standing with the State Bar of Texas* and the state bar or licensing authority of any and all other states and foreign countries where licensed.

TEX. PENAL CODE ANN. § 38.122(a) (Vernon 1994) (emphasis added).

The record in this case clearly shows that Appellant has been disbarred by the State Bar of Texas; therefore, he is not in "good standing" with the State Bar of Texas. It would be absurd to suggest that a person who has been disbarred from practicing law in Texas could rely on a law license issued by another state as a means to circumvent the disbarment and continue to hold himself or herself out as lawyer in Texas. Appellant's contention is wholly without merit.

Appellant also contends that his guilty plea was the product of his trial counsel's ineffective performance.

No plea of guilty or no contest may be accepted by a trial court unless it is freely and voluntarily given. *Ex parte Lafon*, 977 S.W.2d 865, 867 (Tex.App.–Dallas 1998, no pet.); TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon 1989). Moreover, an accused is entitled to effective assistance of counsel during the plea bargaining process. *Id.*; *see also Ex parte Battle*, 817 S.W.2d 81, 83 (Tex.Crim.App. 1991). A defendant's plea of guilty or no contest is not voluntary or knowing when it is based upon the erroneous advice of counsel. *Id.*; *see also Ex parte Battle*, 817 S.W.2d at 83; *see also Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). As a general rule, we determine the voluntariness of an appellant's plea based upon the "totality of the circumstances" surrounding the plea. *Id.*; *see also Griffin v. State*, 703 S.W.2d 193, 196 (Tex.Crim.App. 1986).

In evaluating a claim of ineffective assistance of counsel arising out of the plea process, we must apply the *Strickland* test. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 369-70, 88 L.Ed.2d 203, 209 (1985); *Hernandez v. State*, 726 S.W.2d 53, 56 (Tex.Crim.App. 1986). The test requires that the defendant demonstrate that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; that is, the defendant would not have pled guilty but would have instead insisted on going to trial. *Hill*, 474 U.S. at 57, 106 S.Ct. at 369-70; *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2064-65, 2068, 80 L.Ed.2d 674, 693, 697-98 (1984); *Ex parte Moody*, 991 S.W.2d 856, 857-58 (Tex.Crim.App. 1999). These two prongs must be established by a

preponderance of the evidence. *Moore v. State*, 694 S.W.2d 528, 531 (Tex.Crim.App. 1985). Furthermore, we must indulge in a strong presumption that the counsel's conduct was reasonable. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

As a court of review, we are bound by the record, and matters not present in the record provide no basis upon which an appellate court may make a decision. *Powers v. State*, 727 S.W.2d 313, 316 (Tex.App.–Houston [1st Dist.] 1987, pet. ref'd). Allegations of the existence of facts may not be considered. *Shepherd v. State*, 673 S.W.2d 263, 267 (Tex.App.–Houston [1st Dist.] 1984, no pet.). A claim of ineffective assistance of counsel can only be sustained if it is firmly grounded in the record. *Johnson v. State*, 614 S.W.2d 148, 151 (Tex.Crim.App. 1981); *Davis v. State*, 830 S.W.2d 762, 765 (Tex.App.–Houston [1st Dist.] 1992, pet. ref'd).

Appellant did not provide this Court with the record of his guilty plea proceedings. We have been presented only Appellant's application for writ of habeas corpus and the reporter's record of his habeas corpus hearing. In his application, Appellant contends that he was disbarred by the State Bar of Texas Grievance Committee in October 1996. He contends that while he was present in the Houston Municipal Court in January 1997 with a "previous client," an assistant city attorney notified authorities that he was in court holding himself out as a lawyer. Appellant states that charges were filed against him and that he was later confined in jail. Because of his indigence, Ken Goode (Goode) was appointed to represent Appellant. Appellant avers that Goode negotiated a plea with the State to place Appellant on probation for a period of six years. Appellant contends that on advice of his trial counsel, he entered a guilty plea and accepted probation. Appellant maintains that Goode provided ineffective assistance of trial counsel because he did not interview the municipal court judge, the assistant city attorney, or his former client.

At his habeas corpus hearing, Appellant testified that Goode failed to investigate any facts of his case. He testified that on the date in question, he was not in the municipal court for the purpose of dispensing legal advice to his "former client," nor holding himself out as

a lawyer.[1] He testified that he was in the courtroom merely to advise his "former client" to request a jury trial. He testified that he only "whispered . . . for her to tell the judge . . . to ask for a jury trial." As we understand it, Appellant contends that Goode would not have recommended that Appellant plead guilty if Goode would have uncovered these facts.

Goode filed an affidavit stating, *inter alia*, that Appellant's "guilty plea was voluntary, knowing, and a decision [made] in light of the strong evidence of guilt and lack of any defense to the charges." Goode also stated that Appellant "understood the admonitions given to him by the judge orally and in writing under Article 26.13(a). [Appellant] was aware of the consequences of his plea. He pled guilty because he was guilty." Goode stated that Appellant told him that he was guilty and "that he did not want me to investigate further."

On cross-examination, Appellant acknowledged that during the plea proceedings, Goode asked him whether any further investigation was necessary, whether he had gone over the facts of the case with him, if he understood what he was charged with, and if there were any defenses available to him. We infer from the habeas corpus record that Appellant responded to Goode that no further investigation was necessary, that he had gone over the facts with Appellant, that Appellant understood what he was charged with, and that there were no available defenses.

Based on the record, we conclude that Appellant has failed to establish that his trial counsel's representation fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for trial counsel's unprofessional errors, if any, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 687-88, 694, 104 S.Ct. at 2064-65, 2068, 80 L.Ed.2d at 693, 697-98.

Lastly, Appellant contends that "the record does not reflect that he was admonished by the Trial Court pursuant to Article 26.13 of the Code of Criminal Procedure." We note that Goode stated in his opposing affidavit that "[Appellant] contends he was not admonished. This is a lie. Judge McSpadden orally admonished him under Article 26.13(a). And [Appellant]

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[1] *See Satterwhite v. State*, 979 S.W.2d 626, 628 (Tex.Crim.App. 1998).

signed a written admonishment containing the Article 26.13(a) required admonishments." We have not been provided with a record of Appellant's plea proceedings. *See* TEX. R. APP. P. 37.3(c). Consequently, nothing is presented for review.

At the conclusion of the habeas corpus hearing, the trial judge stated to Appellant the following:

> [T]his court . . . is going to deny the Application, and further state, for the record, that the Court finds that you are certainly loose with the truth in a courtroom, and the Court is embarrassed by your conduct.

We discern no abuse of trial court discretion in denying Appellant's application for writ of habeas corpus. *See Ex parte Bui*, 983 S.W.2d at 75. We overrule Appellant's respective points of error.

The habeas corpus judgment is affirmed.

PER CURIAM

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).