Affirmed and Opinion filed January 24, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00805-CR

LANCE NEIL LACAZE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 775,760

O P I N I O N

Appellant Lance Neil Lacaze pleaded guilty to murder and was sentenced by the trial court to life imprisonment. In this appeal, he alleges the sentencing court violated his constitutional rights to due process and assistance of counsel by considering evidence from his co-defendant's trial. We affirm.

Lacaze was originally indicted for capital murder. In exchange for his promise to testify truthfully at his co-defendant's trial, the State agreed to reduce the charge to murder, recommend a sentence of thirty to thirty-five years, and dismiss a second charge. Lacaze pleaded guilty to the murder charge before presiding judge Jan Krocker on February 25,

1999. Judge Krocker deferred sentencing, pending Lacaze's scheduled testimony in the trial of Alex Alonzo, his co-defendant. Judge Krocker also added and initialed a note on the plea papers indicating "Parties agree that if court does sentencing, PSI will be ordered and court can consider 2nd case also and anything in PSI."

Before Alonzo's trial, the State discovered letters from Lacaze to Alonzo (including one entitled "Reason: To let you know that you are going home. And to let you know who your real homeboys are") indicating he intended to renege on "the so-called deal." The State consequently did not call Lacaze to testify at Alonzo's trial.

Visiting Judge Robert D. Jones was assigned to preside at Alonzo's trial and Lacaze's sentencing. Lacaze filed a pre-trial motion objecting to Judge Jones' assignment because of the risk he would consider facts presented during Alonzo's trial (which neither Lacaze nor his attorney attended) in sentencing Lacaze.[1] Judge Krocker denied Lacaze's motion.

After Alonzo's trial,[2] Judge Jones conducted Lacaze's sentencing. At the conclusion, Judge Jones pronounced the following:

> Mr. Lacaze, the Court is taking into consideration all the evidence that I heard in the trial of this case, all the facts. The Court is aware, one, that you didn't face a capital murder case; that you got a robbery case that was taken into consideration. Contrary to your agreement and the breach of that agreement, the Court having noticed that you were the initial shooter in this matter, the Court assesses your punishment and sentences you to life in the Institutional Division of the Texas Department of Criminal Justice.

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[1] Lacaze also objected to the appointment of any visiting judge while the elected judge was available. Because no ruling was obtained on this objection, it is not before us. TEX. R. APP. P. 33.1(a)(2).

[2] After being certified for trial as an adult, Alonzo was found guilty of capital murder and received an automatic life sentence. Upon conviction for a capital felony, Alonzo would be required to serve at least forty years of his life sentence before becoming eligible for parole. *See* TEX. GOV'T CODE ANN. § 508.145(b) (Vernon 1998). The Waco Court of Appeals has since reversed Alonzo's conviction for the trial court's failure to allow evidence implicating the initial suspect in the case, Gerald Landon Donner. *Alonzo v. State*, No. 10-00-224-CR, 2001 WL 1636404 (Tex. App.—Waco Dec. 19, 2001, no pet. h.).

Evidence From Which Trial?

Lacaze argues Judge Jones violated his rights to due process and assistance of counsel by considering evidence from his co-defendant's trial. The first problem with this argument is that it is not clear that Judge Jones did so. What he said was that he considered "all the evidence that I heard in the trial of *this case*." Lacaze interprets this remark as a reference to Alonzo's trial.

But the two cases were filed and tried separately, so "this case" read literally refers only to Lacaze's case, not Alonzo's. Nor does the reference to "the trial" point unequivocally to Alonzo's; sentencing by the court is a "trial" even though it is conducted using modified rules. *See Carroll v. State*, 975 S.W.2d 630, 631 (Tex. Crim. App. 1998) (holding sentencing after guilty plea becomes a "unitary trial").

Although no witnesses were called in Lacaze's case, Judge Jones considered a pre-sentence investigation report (which is not included in the appellate record) and heard closing arguments from counsel. The prosecutor's argument suggests the PSI included much of the same evidence that was presented by key witnesses in Alonzo's trial. Lacaze points to nothing in the record that proves the sentencing judge had Alonzo's trial in mind rather than Lacaze's. When a trial court hears evidence relevant to one defendant, an appellate court cannot presume the court improperly considered the evidence against another defendant. *See Young v. State*, 994 S.W.2d 387, 389 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

Preservation of Error

Second, Lacaze failed to preserve error on his specific complaint. Before sentencing, his counsel filed written objections that included (1) a general objection to the appointment of a visiting judge, (2) a specific objection to the appointment of Judge Jones because he presided over Alonzo's trial, and (3) a demand for a pre-sentencing investigation report. Judge Jones granted the request for a PSI, and Judge Krocker denied the objection to the appointment of Judge Jones.

At the sentencing hearing, Lacaze's counsel made the following statement:

> To say, Your Honor, if I may, Judge, same announcement subject to the objections that I made earlier that were already ruled on. I'm sure those are carried through, I want to make sure on the record that I wasn't waiving those objections.
>
> Other than that, I have no objection to the PSI.

The only objection that was "made earlier" and denied was Lacaze's objection to the *appointment* of Judge Jones, not to the matters he might consider in sentencing Lacaze. While counsel's comments during sentencing were enough to renew his earlier objection to the appointment of a visiting judge under Government Code Section 74.053, this is not his objection on appeal. We find that the appellant has failed to preserve error.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed January 24, 2002.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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