Affirmed and Opinion filed October 5, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00810-CR

LINDA MENDEZ, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 808549

O P I N I O N ON MOTION FOR REHEARING

In our previous opinion, we affirmed the trial court's decision overruling Appellant's motion for new trial. On motion for rehearing, we now affirm our previous opinion and overrule Appellant's motion.

Background

On March 26, 1999, Appellant pleaded guilty to robbery and, pursuant to a plea agreement, received a sentence of 25 years confinement. One month later, Appellant timely filed a motion for new trial, with the court below setting the hearing date for June 4, 1999 - three days prior to the 75-day timetable

for such motions. The day prior to the date set for the hearing, however, Appellant's counsel learned that the trial court had not timely issued a bench warrant for Appellant. After bringing this to the trial court's attention and without objection by Appellant, the hearing was reset for June 11, 1999 - 79 days after sentencing. On June 11, 1999, the trial court announced that Appellant's motion for new trial was overruled by operation of law as the 75-day timetable for ruling on such motions had expired. Following her unsuccessful appeal, Appellant now files this motion for rehearing. We affirm our previous opinion and deny Appellant's motion for rehearing.

Discussion

The Court of Criminal Appeals has held that the right to a hearing on a motion for new trial is not an absolute right. *See Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993). Likewise, case law holds that where an appellant files a timely motion for new trial but fails to object to the trial court's untimely setting for the hearing on the same motion, the appellant waives her complaint. *See Baker v. State*, 956 S.W.2d 19, 24-25 (Tex. Crim. App. 1997). Appellant appears to acknowledge this rule but nevertheless cites the holding in *Graham v. State* for the proposition that her failure to object to the trial court's error in setting the hearing date does not waive such error as an objection would have been futile. *Graham v. State*, 710 S.W.2d 588, 591 (Tex. Crim. App. 1986).

In *Graham*, a police officer arrested the appellant on suspicion that she was driving while intoxicated. *See Id.* at 590. Once at the station, however, the police failed to administer the intoxilyzer test on appellant due to an absence of officers qualified to operate the device. *Id.* At trial, the prosecutor then asked the arresting officer whether he had "seen people that were less intoxicated than [the appellant] flunk an intoxilyzer test." *Id.* at 591. Appellant then objected to this question on the grounds that it called for speculation, with the court allowing the question based on the tests he had observed. Without further objection from appellant, the prosecutor then narrowly rephrased the question to comply with the judge's ruling to which the officer answered "yes, sir." *Id.* On appeal, the appellant argued that the trial court's ruling was error; however, the appellate court overruled the argument on grounds that the appellant failed to preserve any error by not objecting to the prosecutor's rephrased question. *Id.* The Court of Criminal

Appeals then reversed, holding that appellant's failure to object to the narrowly rephrased question following the trial judge's overruling of his objection to the original question would have been "futile." *Id*.

In our opinion, the holding in *Graham* has no application to the present case as it only addresses the evidentiary issue of preservation of error during testimony. We decline to extend this holding to matters of procedure as Appellant would have us do. Moreover, even if we were to apply the *Graham* holding to our case, Appellant fails to state why an objection to the trial court's untimely setting for rehearing would have been futile. Specifically, counsel does not tell us why Appellant's presence could not have been procured within the 75 day period set out in Rule of Appellate Procedure 21.8. Accordingly, we overrule Appellant's motion for rehearing.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed October 5, 2000.
Panel consists of Justices Amidei, Anderson and Frost.
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