



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,227-01

EX PARTE GRANT WAYNE COLE, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 42638B IN THE 424TH DISTRICT COURT
FROM BURNET COUNTY**

Per curiam.

OPINION

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant pleaded guilty to possession with intent to deliver a controlled substance, and was sentenced to fifteen years' imprisonment. He did not appeal his conviction.

Applicant contends that he is "actually innocent" of the penalty level to which he pleaded guilty. Applicant pleaded guilty to possessing with intent to deliver methamphetamine in an amount of four grams or more but less than 200 grams, a first degree felony. However, after he had pleaded

guilty in this case, the results of the lab testing revealed that the quantity of the substance possessed by Applicant was only 3.52 grams. Therefore, the quantity of the substance would only have supported a second degree felony charge, not the first degree felony to which Applicant pleaded guilty. Applicant alleges that he is actually innocent of the offense as a first degree felony. However, this Court has recently noted under similar circumstances that “the term ‘actual innocence’ applies only in circumstances where the accused did not actually commit the charged offense or any possible lesser included offenses.” *Ex parte Mable*, 443 S.W.3d 129 (Tex. Crim. App. 2014). In that case, this Court granted relief on the basis of an involuntary plea.

On May 20, 2015, this Court remanded to the trial court to obtain supplementation of the habeas record with copies of the plea papers and the lab report, and to obtain findings of fact and conclusions of law as to whether Applicant’s plea was knowingly and voluntarily entered.

After remand, the trial court has determined that Applicant’s decision to plead guilty in this case was not a voluntary and intelligent choice. Applicant is entitled to relief. *Ex parte Mable*, 443 S.W.3d 129 (Tex. Crim. App. 2014).

Relief is granted. The judgment in Cause No. 42638B in the 424th District Court of Burnet County is set aside, and Applicant is remanded to the custody of the Sheriff of Burnet County to answer the charges as set out in the indictment. The trial court shall issue any necessary bench warrant within 10 days after the mandate of this Court issues.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice—Correctional Institutions Division and Pardons and Paroles Division.

Delivered: July 1, 2015
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