



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-86,302-01

EX PARTE GERALD LYNN MCALPIN, Applicant

**ON APPLICATION F1521780 IN THE 145TH DISTRICT COURT
FROM NACOGDOCHES 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 was convicted of criminal mischief and sentenced to five years' imprisonment. *See* TEX. PENAL CODE § 28.03. According to the indictment, Applicant intentionally and knowingly damaged or destroyed tangible property resulting in the aggregate pecuniary loss of \$500 or more but less than \$1,500. According to the judgment, the offense was a state jail felony, enhanced to a third degree felony with two prior state jail felonies. Applicant did not appeal the conviction.

In his habeas application, Applicant complains, among other things, that the offense for which he was convicted under the plea agreement was not a state-jail felony, but was a class A misdemeanor, so his five-year sentence is not lawful. The trial court recommends granting habeas relief. This Court agrees. Applicant was charged with the wrong degree of offense, and was admonished as to an incorrect punishment range. Applicant is entitled to relief. *Ex parte Huerta*, 692 S.W.2d 681 (Tex. Crim. App. 1985); *Ex parte Rich*, 194 S.W.3d 508, 515 (Tex. Crim. App. 2006).

Relief is granted. The judgment in Cause No. F1521780 in the 145th District Court of Nacogdoches County is set aside. Applicant is remanded to the custody of the Sheriff of Nacogdoches 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: February 8, 2017
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