IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. WR-86,964-01 AND WR-86,964-02

EX PARTE DOMINICK DARON NACOSTE, Applicant

ON APPLICATIONS FOR WRITS OF HABEAS CORPUS
CAUSE NOS. 15-03-02292-CR AND 15-02-01465-CR IN THE 221ST DISTRICT COURT
FROM MONTGOMERY COUNTY

***Per curiam*. KELLER, P.J., concurred.**

O P I N I O N

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 these applications for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant originally pleaded guilty to of one charge of possession of a controlled substance and one charge of engaging in organized criminal activity in exchange for eight years' deferred adjudication community supervision. He later pleaded "true" to violating the terms of his community supervision, and was adjudicated guilty and sentenced to five years' imprisonment in both cases, to run concurrently. He did not appeal his convictions.

Applicant contends that his trial counsel rendered ineffective assistance, rendering his pleas involuntary, because trial counsel failed to advise Applicant that the evidence did not support the possession of a controlled substance charge.

The record indicates that the indictment in the -02 case charging Applicant with possessing codeine in an amount of 400 grams or more, an enhanced first degree felony, was handed down on April 2, 2015. A laboratory report indicating that the substance possessed by Applicant contained promethazine rather than codeine was issued on July 1, 2015. Possession of promethazine, a dangerous drug, is a misdemeanor offense. However, Applicant pleaded guilty to the first degree felony offense of possession of codeine in an amount of 400 grams or more and the third degree felony offense of engaging in organized criminal activity on August 25, 2015. He pleaded "true" to the motion to adjudicate in both cases on May 25, 2016.

On July 26, 2017, this Court remanded these matters to the trial court to obtain affidavits from Applicant's trial counsel and adjudication counsel, stating whether they were aware of the existence of the lab report showing that the substance possessed by Applicant did not contain codeine, and to obtain affidavits from the prosecutors at the original plea and at adjudication, stating whether they disclosed the lab report to the defense prior to Applicant's pleas. In addition, the prosecutors were asked, if they were unaware of the lab report when Applicant pleaded guilty, to state whether, if they had known that the evidence did not support the first degree felony charge in the -02 case a more lenient offer would have been extended on the -01 engaging in organized criminal activity case.

The supplemental records contain affidavits from three prosecutors, and from Applicant's attorneys at the plea and adjudication. The affidavits show that the trial prosecutor received a copy

of the lab report via e-mail on August 21, 2015, and forwarded the report to a legal assistant on August 24, 2015 without reviewing it. It is not clear whether the report was placed in the prosecutor's files, and whether it was therefore accessible to defense counsel pursuant to the D.A.'s open file policy before Applicant entered his pleas. However, trial counsel states that he never saw the report and therefore did not know that the evidence did not support the first degree felony charge of possession of a controlled substance.

The prosecutor who extended the plea offer in the engaging in organized criminal activity case states in her affidavit that she did not see the lab report, but if she had been aware that the evidence did not support the first degree felony charge in the -02 case, she would almost certainly have made a more lenient offer in the engaging in organized criminal activity case.

According to their respective affidavits, neither the prosecutor nor Applicant's counsel at adjudication were aware of the lab report at the time Applicant pleaded "true" to motions to adjudicate him guilty.

The trial court has determined that the prosecutors both at the original plea and at adjudication did not knowingly fail to disclose favorable evidence to the defense. The record supports this finding, although it is difficult to understand why none of the prosecutors reviewed the laboratory report after it had been received. The trial court also finds that Applicant's adjudication counsel was appointed only to address the adjudication, and was therefore not deficient for failing to discover the laboratory report. This finding is also supported by the evidence. However, the trial court finds that because of the uncertainty as to when the laboratory report was actually placed in the prosecution's file, it cannot be determined whether trial counsel's investigation was deficient. The trial court recommends that relief be granted in both cases on the basis that the evidence did not

support the conviction for possession of a controlled substance, and that Applicant's pleas of guilty and "true" were not knowingly and voluntarily entered.

We agree that Applicant is entitled to relief in both cases on the basis that his pleas of guilty were not knowingly and voluntarily entered. However, we also find that trial counsel was ineffective for failing to investigate and advise Applicant regarding the sufficiency of the evidence and the decision to plead guilty. If the laboratory report was in the prosecution's file prior to Applicant's guilty plea, trial counsel should have reviewed the report. If the report was not in the prosecution's file, trial counsel should have requested a copy of the laboratory report or investigated the evidence supporting the charge[1] before advising Applicant to plead guilty to an enhanced first degree felony offense.

We find, therefore that trial counsel's performance was deficient in that counsel failed to independently investigate and advise Applicant, and that such deficient performance prejudiced Applicant. Relief is granted. The judgments in Cause Nos. 15-03-02292-CR and 15-02-01465-CR in the 221st District Court of Montgomery County are set aside, and Applicant is remanded to the custody of the Sheriff of Montgomery County to answer the charges as set out in the indictments. 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.

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[1]The police report in the -02 case indicated that when Applicant was stopped by police he was asked what the substance he possessed was, and he told them that it was promethazine. Assuming that trial counsel reviewed the police report, he should have been on notice that there was an issue with regard to the substance possessed by Applicant.

Delivered: January 31, 2018
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