



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-54,631-03

EX PARTE BOBBY J. CATE, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 2001-436,240 IN THE 364TH DISTRICT COURT
FROM LUBBOCK COUNTY**

Per curiam.

ORDER

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 writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex.Crim.App. 1967). Applicant was convicted of aggravated sexual assault and was sentenced to life imprisonment. The conviction and sentence were affirmed on direct appeal. *Cate v. State*, 124 S.W.3d 922 (Tex.App.–Amarillo 2004). Applicant's Petition for Discretionary review was refused, and his initial writ application challenging the conviction was denied. *See Cate v. State*, No. PD-0251-04 (Tex.Crim.App. del. Jun. 3, 2004); *Ex parte Cate*, No. WR-54,631 (Tex.Crim.App. del. Aug. 31, 2005).

Applicant has filed a subsequent application for a writ of habeas corpus. In it, he raises several claims based on newly conducted DNA testing performed on hairs found at the crime scene. He primarily asserts the DNA testing shows he is actually innocent of the aggravated sexual assault because the hairs were proven to belong to another person. He also complains of his direct appeal review on a basis unrelated to the DNA testing.

The trial court had held a hearing regarding the DNA testing and found the results did not demonstrate actual innocence. This finding is supported by the record and applicable law. *See Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex.Crim.App. 1996); *Ex parte Franklin*, 72 S.W.3d 671, 675 (Tex.Crim.App. 2002); *Ex parte Reed*, 271 S.W.3d 698, 733 (Tex.Crim.App. 2008). Because the claims based on the DNA evidence were previously unavailable to Applicant when his initial writ challenging the conviction was filed, they are not barred from consideration in this subsequent habeas proceeding. *See* TEX. CODE CRIM. PROC. art. 11.07 § 4(a)(1). After reviewing these claims, this Court is unpersuaded that Applicant is entitled to relief. The claims based on the newly available DNA tests are therefore denied. Applicant's remaining claims not based on the newly available DNA tests are dismissed as subsequent in accordance with Article 11.07, Section 4, of the Code of Criminal Procedure.

Filed: March 28, 2012
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