



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-72,110-03

EX PARTE DAVID T. MCGARY, AKA DAVID SANDERS, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 4006-B IN THE 46TH JUDICIAL DISTRICT COURT
FROM HARDEMAN 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 possession of a controlled substance and sentenced to ninety-nine years' imprisonment. The Seventh Court of Appeals affirmed his conviction. *McGary v. State*, No. 07-07-0503-CR - Tex. App. – Amarillo, June 23, 2008, *pet ref'd*).

Applicant contends that his counsel at trial and on appeal rendered ineffective assistance because counsel failed to investigate and challenge the validity of Applicant's arrest, failed to preserve error for appellate review by pursuing objections to an adverse ruling, and failed to

challenge the sufficiency of the evidence to connect Applicant to the drugs, both at trial and on direct appeal.

Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Lemke*, 13 S.W.3d 791,795-96 (Tex. Crim. App. 2000). In these circumstances, additional facts are needed. As we held in *Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960), the trial court is the appropriate forum for findings of fact. The trial court shall obtain an affidavit from Applicant's trial and appellate counsel responding to Applicant's claims of ineffective assistance of counsel at trial and on appeal. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d). In the appropriate case, the trial court may rely on its personal recollection. *Id.*

If the trial court elects to hold a hearing, it shall determine whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall appoint an attorney to represent Applicant at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall first supplement the habeas record with copies of the relevant documents, including the indictment, judgment, trial docket, a transcript of the trial proceedings, and any written motions filed prior to trial. The trial court shall then make findings of fact as to whether the performance of Applicant's trial and appellate attorney was deficient and, if so, whether counsel's deficient performance prejudiced Applicant. The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claim for habeas corpus relief.

This application will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. If any continuances are granted, a copy of the

order granting the continuance shall be sent to this Court. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be returned to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: May 9, 2012
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