



## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-72,265-04

**EX PARTE KEVIN ERIC ROSS, Applicant**

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS  
CAUSE NO. F-1060411-N IN THE 195TH DISTRICT COURT  
FROM DALLAS 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 a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of theft and sentenced to imprisonment for four years. His appeal was dismissed. *Ross v. State*, No. 05-11-00923-CR (Tex. App.—Dallas 2011, no pet.).

Based on the record before this Court, Applicant pleaded guilty pursuant to a plea bargain and was placed on deferred adjudication probation for four years.<sup>1</sup> He then filed a notice of appeal.

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<sup>1</sup>The plea papers say Applicant pleaded open and the trial court's certification says this was not a plea bargain case, but the State recommended a cap of four years. A recommended cap

The State filed a motion to adjudicate, and Applicant agreed pursuant to a “plea agreement”<sup>2</sup> to withdraw his notice of appeal in exchange for his plea of guilty in a new case and his plea of true in the present case. The trial court signed a second certification stating that Applicant’s case was a plea bargain and that Applicant had no right to appeal. Applicant filed a second notice of appeal, and it was dismissed.

Applicant now contends, among other things, that appellate counsel, who was appointed after Applicant filed his second notice of appeal, rendered ineffective assistance by advising him that his case was a plea bargain and the court of appeals had no jurisdiction. Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Patterson*, 993 S.W.2d 114, 115 (Tex. Crim. App. 1999). 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 order appellate counsel to respond to Applicant’s claim. 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

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on a sentence is a type of sentence-bargaining. *Shankle v. State*, 119 S.W.3d 808, 813 (Tex. Crim. App. 2003).

<sup>2</sup>Although the plea papers for the adjudication of guilt proceeding say “PLEA AGREEMENT” in the heading, Rule 25.2(a)(2) of the Rules of Appellate Procedure does not contemplate pleas of true. *Dears v. State*, 154 S.W.3d 610, 613 (Tex. Crim. App. 2005). Nor has the Legislature authorized binding plea agreements in the context of revocation proceedings. *Gutierrez v. State*, 108 S.W.3d 304, 309-10 (Tex. Crim. App. 2003).

attorney to represent him at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

After reviewing appellate counsel's response, the trial court shall make further findings of fact and conclusions of law as to whether appellate counsel's advice was deficient and, if so, but for this advice, Applicant was denied his right to appeal. 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. 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 forwarded to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: May 15, 2013  
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