IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-72,774-03

EX PARTE WALTER TRUETT MALONE, AKA WALTER MALONE, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 1-88-640 IN THE 114TH DISTRICT COURT
FROM SMITH COUNTY

***Per curiam*.**

O R D E R

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 driving while intoxicated and sentenced to four years' imprisonment. He did not appeal his conviction.

In the -01 application, the initial application filed in this case, Applicant claimed that trial counsel was ineffective. We dismissed that application because Applicant's sentence had discharged and nothing in the record indicated that Applicant was suffering collateral consequences from his conviction. TEX. CODE CRIM. PROC. art. 11.07, § 3(c). Applicant now claims that he was denied his right to a speedy trial and that trial counsel rendered ineffective assistance.

Article 11.07, § 4(a) provides:

> If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or
> >
> > (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

TEX. CODE CRIM. PROC. art. 11.07, § 4(a). Not every disposition from this Court is a "final disposition." A "final disposition" of an initial application "must entail a disposition relating to the merits of all the claims raised. Dispositions relating to the merits should be labeled 'denials' while dispositions unrelated to the merits should be labeled 'dismissals,' but, regardless of the label given to a previous disposition, we will look to the substance of that disposition to determine whether a subsequent writ is barred by § 4." *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997). The trial court found, and the State responded,[1] that this is a subsequent application and that Applicant made no attempt to explain why he should be excepted from the requirements in § 4. The dismissal of Applicant's initial application was unrelated to the merits of his ineffective assistance

[1]In its response, the State also argued that § 4(a) states: "If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a Court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts" that satisfy the requirements in (1) or (2). This, as we explained in *Ex parte Lynch*, WR-70,250-02 (Tex. Crim. App. May 5, 2010) (unpublished), is not consistent with the plain language of § 4(a), which requires that there be a "final disposition" and that the initial application challenge the same conviction.

of counsel claim; it was not a "final disposition" for purposes of § 4. Applicant's claims are not barred by § 4.

Article 11.07, § 3(c) provides that "confinement means confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus." TEX. CODE CRIM. PROC. art. 11.07, § 3(c). "That an applicant is not in the actual physical custody of the government at the time of filing does not preclude his application nor deprive the trial court of jurisdiction to consider it." *Ex parte Harrington*, 310 S.W.3d 452, 457 (Tex. Crim. App. 2010). The trial court found that Applicant has "further failed to provide any evidence to show that his sentence in this case has not been discharged as was determined by the Court of Criminal Appeals when dismissing his first writ application under this cause number." Under the plain language of § 3(c), Applicant was not required to make this showing. A showing of a collateral consequence, without more, is sufficient to establish "confinement" under § 3(c). *Harrington*, 310 S.W.3d at 457. Because Applicant made this showing, the trial court had jurisdiction to consider the merits of his claims.

After considering the merits of Applicant's claims, we conclude that they are without merit. Relief is denied.

Filed: May 23, 2012
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