



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-74,004-03

EX PARTE KEVIN BENTI DAVIS, JR., Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. CR-28107 IN THE 217TH DISTRICT COURT
FROM ANGELINA 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 aggravated robbery and sentenced to twelve years' imprisonment. The Sixth Court of Appeals affirmed his conviction. *Davis v. State*, No. 06-10-00186-CR (Tex. App. – Texarkana, March 11, 2011, *no pet.*).

Applicant contends, *inter alia*, that the State withheld favorable evidence from the defense and presented perjured testimony at trial, and that his trial counsel rendered ineffective assistance because counsel failed to investigate or interview witnesses, compelled Applicant to waive his right to a jury trial, and failed to prepare a defense because Applicant had not been able to pay his fees.

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 trial counsel to respond to Applicant's claims of ineffective assistance of counsel, and shall order the trial prosecutor to respond to his claim that the State withheld favorable evidence from the defense and presented false testimony at trial. Specifically, trial counsel shall state what investigation he conducted in this case, and whether he interviewed witnesses or prepared a defense. Counsel shall state whether he compelled Applicant to waive a jury trial because he was not being paid enough to conduct a jury trial. Counsel shall also state whether he was provided with any prior written statements by Applicant's co-defendants or by the complainant in this case.

The trial prosecutor shall state whether there existed any agreement between the State and Applicant's co-defendant Brandon Johnson in exchange for Johnson's testimony at Applicant's trial. If there was such an agreement, the prosecutor shall state whether it was disclosed to the defense. If there was no agreement, the prosecutor shall explain why there was discussion of such an agreement at the beginning of Brandon Johnson's trial. The trial prosecutor shall also state whether there were cell phone records obtained from the phones confiscated from Brandon Johnson, and if so, whether those records were provided to the defense in Applicant's case. The trial prosecutor shall state whether the State was in possession of any evidence or information with respect to whether the complainant had met or knew Applicant prior to the date of the offense, and if so, whether such evidence was disclosed to the defense.

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 a complete copy of the trial record, including the transcript of the trial and of any pre-trial hearings, copies of any pre-trial motions, and any written discovery provided to the defense in this case. The trial court shall then make findings of fact as to whether there were prior inconsistent statements made by Applicant's co-defendant Brandon Johnson, and if so, whether the existence of such statements was disclosed to the defense. The trial court shall make findings as to whether Brandon Johnson had any agreement with the State in exchange for his testimony at the time of Applicant's trial, and if so, whether such agreement was disclosed to the defense. If no such agreement was in place at the time of Applicant's trial, the trial court shall make findings as to why the prosecutor at Johnson's trial discussed the existence of a plea agreement for a lesser charge in exchange for testimony.

The trial court shall also make findings of fact as to whether the complainant's testimony at Applicant's trial was contradicted by his testimony at Brandon Johnson's trial, and if so, the trial court shall supplement the habeas record with the portions of the complainant's testimony at Johnson's trial which is inconsistent with his testimony at Applicant's trial.

The trial court shall make findings of fact and conclusions of law as to whether the performance of Applicant's trial counsel 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. 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: September 12, 2012
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