IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-76,754-02 AND WR-76,754-03

EX PARTE RICHARD P. ESCH, Applicant

ON APPLICATION FOR WRITS OF HABEAS CORPUS CAUSE NO. 2006-412999 IN THE 364TH DISTRICT COURT FROM LUBBOCK 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 these applications for writs of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of injury to a child and sentenced to fifty-five years' imprisonment. The Court of Appeals affirmed the conviction in an unpublished opinion. *Esch v. State*, No. 07-09-00308-CR (Tex. App. – Amarillo del. Oct. 12, 2010).

Applicant filed an initial writ application with the convicting court requesting an out-of-time petition for discretionary review on November 2, 2011 (trial cause no. 2006-412999-A; CCA no. 76,754-01). This application was received by this Court on November 14, 2011, and relief was denied by this Court on December 21, 2011. Before the initial writ was disposed of, Applicant, through habeas counsel, filed a second writ application on November 10, 2011, challenging the conviction (trial cause no. 2006-412999-B; CCA no. 76,754-02). A week later, on November 17, 2011 and still before the initial writ was finally disposed, Applicant filed another writ application challenging the conviction, which was filed pro se (trial cause no. 2006-412999-C; CCA no. 76,754-03). The second and third writ applications were received by this Court on January 3, 2012.

The trial court recommends dismissing the second and third writ applications as premature because they were both filed during the pendency of the initial writ application. In the past, this Court has not dismissed such applications as prematurely filed but has considered them as supplements or amendments to the initial writ application. *See*, *e.g.*, *Ex parte Owens*, 206 S.W.3d 670 (Tex. Crim. App. 2006). These two writ applications should therefore have been considered part of the initial writ proceeding and should not be dismissed as premature.

The writ application filed by habeas counsel (trial cause no. 2006-412999-B; CCA no. 76,754-02) raised an ineffective assistance of trial counsel (IAC) claim. It alleges IAC for failing to consult with and call at trial medical experts who would have testified the injuries

to the child were the result of natural phenomena and not from Applicant's actions. An actual innocence claim and a sufficiency claim are also raised in the attorney writ application based on the same evidence. The application, however, is not compliant with the appellate rules because multiple grounds are raised on a single page. *See* TEX. R. APP. PROC. 73.1 and 73.2. The claims in this writ application are therefore not being considered by this Court in their current presentation, and this writ application (trial cause no. 2006-412999-B; CCA no. 76,754-02) is dismissed as non-complaint.

The writ application filed pro se is compliant (trial cause no. 2006-412999-C; CCA no. 76,754-03). It raises the same trial-IAC/medical-issue claim contained in the attorney writ and it raises an additional IAC claim alleging appellate counsel should have raised the trial-IAC/medical-issue claims on direct appeal. Although the appellate-IAC claim is without merit because the record does not appear to have been developed to raise the issues on direct appeal, *see Bone v. State*, 77 S.W.3d 828 (Tex. Crim. App.2002); *Ex parte Maldonado*, 688 S.W.2d 114 (Tex. Crim. App. 1985), there are previously unresolved material issues of fact remaining that concern the underlying trial-IAC/medical-issues claim. There is no response from trial counsel regarding his investigation and trial strategy, and the findings do not address the merits of the claim.

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 counsel responding to the claims of ineffective assistance of trial counsel and explaining his trial strategy and tactical decisions. In addition to obtaining this affidavit, the trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d) to resolve disputed issues of fact. In the appropriate case, the trial court may rely on its personal recollection. *Id*. If the trial court elects to hold a hearing and if habeas counsel does not continue to represent Applicant, the trial court 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 him at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make findings of fact as to whether the performance of Applicant's trial counsel was deficient and, if so, whether trial counsel's deficient performance prejudiced Applicant. The trial court shall also make any other findings of fact that it deems relevant and appropriate to the disposition of Applicant's claims 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, 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.

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