



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-77,371-01 AND 77,371-02

EX PARTE RICKY LYNN MARSH, Applicant

ON APPLICATIONS FOR WRITS OF HABEAS CORPUS
CAUSE NOS. 6919 AND 6920 IN THE 223RD DISTRICT COURT
FROM GRAY 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 possession of a controlled substance with intent to deliver and possession of certain chemicals with intent to manufacture a controlled substance and was sentenced to concurrent terms of forty and twenty years' imprisonment, respectively. The Seventh Court of Appeals affirmed the convictions in unpublished opinions. *Marsh v. State*, Nos. 07-06-0263-CR and 07-06-0264-CR (Tex. App. – Amarillo del. Apr. 17, 2007).

In his writ applications, Applicant raises several claims including claims of ineffective assistance of trial and appellate counsel. Applicant complains his trial counsel was deficient at a motion to suppress hearing because counsel failed to challenge, under *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978), the factual inaccuracies and/or false statements in the police officer’s affidavit in support of the search warrant. Applicant also alleges trial counsel was deficient for not having Applicant attend the suppression hearing to testify and refute the State’s version of events, and he complains appellate counsel should have raised the issue of his absence from the suppression hearing on direct appeal, arguing his presence was required under the Due Process and Confrontation clauses of the Constitution unless voluntarily waived.¹ See *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *United States v. Wade*, 388 U.S. 218, 224-26 (1967); *Garza v. State*, 633 S.W.2d 508, 511-12 (Tex. Crim. App. 1982); *Maryland v. Craig*, 497 U.S. 836, 846 (1990); TEX. CODE CRIM. PROC. art. 28.01 § 1. Particular to the conviction for possessing anhydrous ammonia with the intent to use it in manufacturing methamphetamine, Applicant argues trial counsel failed to present available evidence to rebut the statutory presumption the container seized contained anhydrous ammonia and to rebut the State’s claim the anhydrous ammonia was used for unlawful purposes. Applicant alleges he lawfully possessed the container and used its contents in his auto repair business.

Applicant has alleged facts that, if true, might entitle him to relief. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *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

¹ Applicant further complains appellate counsel should have raised issues of ineffective assistance of trial counsel on direct appeal, but it appears such arguments would have been premature. See *Bone v. State*, 77 S.W.3d 828 (Tex. Crim. App. 2002).

appropriate forum for findings of fact. The trial court shall order trial counsel and appellate counsel to respond to Applicant's claims of ineffective assistance and explain applicable strategy and tactical decisions. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d).

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 make findings of fact and conclusions of law as to whether the performance of Applicant's trial counsel and his appellate counsel was deficient and, if so, whether the deficient performance prejudiced Applicant. The trial court shall also make any other findings of fact and conclusions of law 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 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 23, 2012
Do not publish