TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00461-CR

Ex parte Judy Morales

FROM THE COUNTY COURT AT LAW NO. 2 OF BELL COUNTY
NO. 2C14-02036, HONORABLE JOHN MICHAEL MISCHTIAN, JUDGE PRESIDING

M E M O R A N D U M   O P I N I O N

Judy Morales was charged with destroying, mutilating, or removing public information based on allegations that she improperly deleted emails from her county-issued laptop. *See* Tex. Gov't Code § 552.351.[1] In April 2014, Morales entered a plea of nolo contendere, and the trial court signed an order of deferred adjudication placing Morales on community supervision for nine months. In early 2017, Morales filed an application for writ of habeas corpus, asserting that she had received ineffective assistance of counsel and was not guilty of the offense. Morales asserted

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[1] A person commits the offense of destruction, removal, or alteration of public information if she "wilfully destroys, mutilates, removes without permission as provided by this chapter, or alters public information," which is information that is written, produced, collected, assembled, or maintained under law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body that owns, has a right to access, or spends public money for the purpose of producing, assembling, or maintaining the information. Tex. Gov't Code §§ 552.351(a) (defining offense), .002(a) (defining "public information"). Public information is "in connection with the transaction of official business" if it is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in that person's official capacity or a person or entity performing official business or a governmental function on behalf of a governmental body, and if the information pertains to the governmental body's official business. *Id.* § 552.002(a-1).

that the emails she sought to delete were not public information but instead were personal information, and she averred that if her attorney had properly advised her that the emails were not public information, she would not have entered her plea. Because she was not so counseled, she asserted, her plea was not voluntary. The trial court signed an order denying Morales's application for writ of habeas corpus as frivolous pursuant to article 11.072, section 7(a). *See* Tex. Code Crim. Proc. art. 11.072, § 7(a). As explained below, we will reverse the trial court's order denying Morales's application as frivolous and remand the cause for further proceedings.

Discussion

In reviewing an application for writ of habeas corpus filed pursuant to article 11.072,[2] if the trial court "determines from the face of an application or documents attached to the application that the applicant is manifestly entitled to no relief, the court shall enter a written order denying the application as frivolous." *Id.* The court of criminal appeals has, as yet, provided little guidance in how a trial court's finding of frivolousness under article 11.072 should be reviewed, nor is it entirely clear what the standard should be in concluding that an applicant is "manifestly entitled to no relief."

In the context of article 11.072 as a whole, the court of criminal appeals has stated, "In an article 11.072 habeas case, . . . the trial judge is the sole finder of fact. There is less leeway in an article 11.072 context [than in the context of article 11.07] to disregard the findings of a trial court." *Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011). It has also explained, "An appellate court reviewing a trial court's ruling on a habeas claim must review the record evidence

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[2] Article 11.072 governs an application for writ of habeas corpus seeking relief from an order or judgment of conviction ordering community supervision. Tex. Code Crim. Proc. art. 11.072.

in the light most favorable to the trial court's ruling and must uphold that ruling absent an abuse of discretion." *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006) (considering application under article 11.08). Further, a "trial court may consider affidavits attached to an [article 11.072] application as evidence without a hearing," *Ex parte Aguilar*, 501 S.W.3d 176, 179 (Tex. App.—Houston [1st Dist.] 2016, no pet.), and in a habeas review, we "consider the evidence presented in the light most favorable to the ruling" and defer "to the trial court's implied factual findings that are supported by the record, even when no witnesses testify and all of the evidence is submitted in written affidavit," *Ex parte Wheeler*, 203 S.W.3d 317, 325-26 (Tex. Crim. App. 2006).[3] A trial court is "free to disbelieve" an affidavit attached to a habeas application. *Ex parte Scott*, 541 S.W.3d 104, 117 n.13 (Tex. Crim. App. 2017).

There is no question but that the trial court is the fact finder in an article 11.072 habeas proceeding, may evaluate the credibility of evidence—even when set out in affidavit form, and may rely on its own personal recollections in deciding whether to grant or deny relief. *See* Tex. Code Crim. Proc. art. 11.072, § 6(b). However, the waters become less clear when the court denies an application as frivolous under section 7(a). Section 7(a) allows a court to deny an application as frivolous if "from the face of an application or documents attached to the application," it is clear that the applicant "is manifestly entitled to no relief." *Id*. § 7(a). Confusion arises from section 7(a)'s provision that the trial court can consider the application and any attached documents: Can the court

[3] *See also State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013) (reviewing court "will defer to a trial judge's factual findings that are supported by the record even when no witnesses testify and all of the evidence is submitted through affidavits, depositions, or interrogatories").

determine the credibility of any attachments in deciding frivolousness? Can the court rely on its personal recollections of the earlier proceedings in deciding frivolousness?

Section 7(a) allows the trial court to deny an application as frivolous only when the face of the application or attachments shows that the applicant is "manifestly entitled to no relief." *Id*. The majority of our sister courts that have considered how to review a denial of habeas relief in the face of a finding of frivolousness have determined that they should review de novo the court's determination that an application is frivolous on its face. *See, e.g.*, *Ex parte Baldez*, 510 S.W.3d 492, 495 (Tex. App.—San Antonio 2014, no pet.); *Ex parte Skelton*, 434 S.W.3d 709, 717 (Tex. App.—San Antonio 2014, pet. ref'd); *Ex parte Zantos-Cuebas*, 429 S.W.3d 83, 88-89 (Tex. App.—Houston [1st Dist.] 2014, no pet.).[4]

We conclude that, assuming an applicant's arguments and allegations are not disproved on the face of the application or its attachments, a trial court must ask whether, if the facts are as the applicant claims them to be, the applicant might be entitled to relief. Only if the answer is no may the application be denied as frivolous. *See Zantos-Cuebas*, 429 S.W.3d at 88-89. If the

[4] At least one court has reviewed a frivolous determination for an abuse of discretion. *Villanueva v. State*, No. 13-05-00114-CR, 2008 WL 6516465, at *2 (Tex. App.—Corpus Christi Oct. 9, 2008, pet. ref'd) (mem. op., not designated for publication); *see also Ex parte Zantos-Cuebas*, 429 S.W.3d 83, 97-98 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (Keyes, J., dissenting) (dissenting from majority's application of de novo review, rather than abuse-of-discretion standard; arguing that reviewing court should defer to trial court's implied findings on credibility; and asserting, "Nor does the majority give weight to the trial court's statutory right to rely on its own personal recollection of the prior proceedings in making its determination of whether habeas corpus relief should be granted."). And in *Ex parte Tungeln*, the court stated at the outset that it would review the trial court's frivolousness determination de novo but then considered the evidence and concluded that "we cannot say that the trial court erred or abused its discretion in denying Appellant's habeas application." No. 10-14-00329-CR, 2015 WL 4710307, at *1, 3 (Tex. App.—Waco Aug. 6, 2015, pet. ref'd) (mem. op., not designated for publication).

trial court relies upon its personal recollections or its decisions about the credibility of affidavits or other attachments in deciding that habeas relief is inappropriate, the court should deny the application with findings of fact and conclusions of law. *See* Tex. Code Crim. Proc. art. 11.072, § 7(a); *Zantos-Cuebas*, 429 S.W.3d at 91-92. As noted by the *Zantos-Cuebas* court, "Express findings of fact are of particular importance in the article 11.072 context since trial judges deciding applications are allowed to 'rely on the court's personal recollection,' the contents of which would otherwise be untraceable on the written record." 429 S.W.3d at 91-92 (quoting Tex. Code Crim. Proc. art. 11.072, § 6(b)). When a trial court relies on its recollection or credibility decisions in denying an application, without findings of fact to that effect, we cannot conduct a meaningful review, to which an applicant is entitled under section 8. *See* Tex. Code Crim. Proc. art. 11.072, § 8. We thus will review de novo the trial court's denial of Morales's application as frivolous.[5]

According to the application and its attached documents, Morales was employed at a county-affiliated entity called the HELP Centers and ran for public office in 2011. She contended in her application that she deleted or asked her assistant to delete personal emails related to her campaign for city council and that she only entered her plea because her attorney did not advise her that the emails were personal, and not public information. Morales attached her affidavit, in which she stated that her assistant had volunteered to work on Morales's campaign and had "used her

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[5] We recognize that Morales has the burden of establishing by a preponderance of the evidence the facts that would entitle her to relief. *See Guerrero*, 400 S.W.3d at 583. However, if Morales's application on its face presents an arguable basis for relief, whether she carried her burden of proof is a question for the trial court to answer by way of findings of fact and conclusions of law. *See* Tex. Code Crim. Proc. art. 11.072, § 7(a). It is not properly answered by way of a denial of the application as frivolous on its face. *See id.*

government computer to create and email fliers" for the campaign and that Morales advised her assistant to "delete those personal emails from her computer so that she would not get in trouble." She further averred that her lawyer did not advise her that the campaign emails were not public information or that the charges "only applied to deleting public information," and that if she had been so advised, she would not have pled no contest and would have insisted on going to trial.

Morales also attached a "Detailed Explanation of Incident" as recounted in November 2013 by her assistant, Matilda Tames-Paul, to the Bell County Human Resources Director. In that document, Tames-Paul stated that Morales told her to delete information "that contained all brochures, voter registration etc . . . from her 2011 run for City Council" and "demanded access to [Tames-Paul's] county computer password so that she could personally delete all files pertaining to her 2011 election." Tames-Paul stated that Morales also asked for help transferring documents from her desktop to an external hard drive and asked Tames-Paul to "'delete any files we weren't currently working on' any [sic] 'old' documents and brochures. She did not tell me what documents but I knew they were Campaign related because of the conversation." Tames-Paul admitted to "assisting as requested by Judy Morales for her 2011 City council campaign" and stated that most the work was done at the county office, using county computers and other resources; that she "was acting on the sole request and benefit of Judy Morales"; and that she "participated only because she was told to."

Based on our review of the face of Morales's application and attached documents, we cannot conclude that, as a matter of law, the emails in question were public information, and thus cannot reach a conclusion as a matter of law as to whether Morales received effective assistance of

counsel. *See* Tex. Gov't Code §§ 552.002, .003. Because the application and its attachments, on their face, do not establish that Morales was manifestly not entitled to relief, the trial court erred in denying her application as frivolous. *See* Tex. Code Crim. Proc. art. 11.072, § 7(a). We reverse the trial court's order denying Morales's application as frivolous and remand the cause to the trial court for further proceedings under article 11.072.[6]

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Cindy Olson Bourland, Justice

Before Justices Puryear, Pemberton, and Bourland

Reversed and Remanded

Filed: August 31, 2018

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[6] In reversing the trial court's order denying the application as frivolous, we make no comment as to the merits or veracity of Morales's arguments and evidence in favor of habeas relief.