IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-68,962-01

EX PARTE TRACY RAY GIBSON, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. F14962-2007-A IN THE 145TH DISTRICT COURT
FROM NACOGDOCHES COUNTY**

***Per curiam*.**

O P I N I O N

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). This Court originally denied the application without written order on January 9, 2008. However, it has since come to light that the denial was erroneous, and this Court therefore reconsidered the denial on the Court's own motion.

Applicant pleaded guilty pursuant to an indictment which named the offense as aggravated robbery but alleged the elements of robbery, enhanced by a prior felony conviction. Pursuant to a plea agreement, Applicant was sentenced to twenty years' imprisonment. He did not appeal his

conviction.[1]

Applicant contends, among other things, that his trial counsel rendered ineffective assistance because counsel did not investigate and discover that the facts did not support a charge of aggravated robbery. Applicant also alleges that trial counsel did not explain to him the elements of the offense of aggravated robbery. We remanded this application to the trial court for findings of fact and conclusions of law.

Trial counsel filed an affidavit with the trial court. In the affidavit, trial counsel notes that he was appointed and first met with Applicant on the same day Applicant entered his plea of guilty in this case and two other cases. Trial counsel states that he discussed the charges with Applicant, and advised him of the punishment ranges applicable to each charge. Trial counsel advised Applicant of the effect of the prior conviction alleged for enhancement purposes. Trial counsel reviewed the files of the District Attorney and discussed with Applicant the facts contained in the files. Plea negotiations were conducted, and an agreement was reached on that same day. Trial counsel states that he advised Applicant that they could ask for a trial setting to give counsel more time to investigate the charges, and advised Applicant that he did not have to enter a plea at that first appearance. Trial counsel states that he discussed the offenses alleged "and any lesser included offenses" with Applicant, and advised him of the facts that would have to be proved by the State in each case. Trial counsel's affidavit does not address the question of whether he noticed or advised Applicant that the allegations in the indictment did not support a charge of aggravated robbery, but alleged only the elements of robbery. Nor does the affidavit state that there was evidence which

[1]Applicant did try belatedly to file a direct appeal, but the appeal was dismissed for want of jurisdiction. *Gibson v. State*, No. 12-12-00403-CR (Tex. App. – Tyler, December 5, 2012)(not designated for publication).

would have supported a charge of aggravated robbery had the error in the indictment been pointed out and the case been re-indicted.

Applicant alleges that he would not have pleaded guilty in this case in exchange for a twenty-year sentence had he known that the correct punishment range applicable to the offense was five to ninety-nine years' or life imprisonment, as opposed to fifteen to ninety-nine years' or life imprisonment, as he was admonished.

Applicant is entitled to relief. *Ex parte Huerta*, 692 S.W.2d 681 (Tex. Crim. App. 1985). Because the prosecutor, defense counsel and the trial court were all under the mistaken belief that Applicant was charged with aggravated robbery with a single enhancement, Applicant was not advised of the correct punishment range for the offense to which he was pleading guilty. Nor was he correctly advised of the facts which the State would have to prove to convict him of aggravated robbery. Therefore, his decision to plead guilty cannot be said to have been knowingly and intelligently made with a full understanding of the facts and the law applicable to the case.

Relief is granted. The judgment in Cause No. F14962-2007 in the 145th District Court of Nacogdoches County is set aside, and Applicant is remanded to the custody of the Sheriff of Nacogdoches County to answer the charges as set out in the indictment. The trial court shall issue any necessary bench warrant within 10 days after the mandate of this Court issues.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice–Correctional Institutions Division and Pardons and Paroles Division.

Delivered: January 13, 2016
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