IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,646-01

EX PARTE CHRISTOPHER ESTRADA, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 13-CR-2096-G IN THE 319TH DISTRICT COURT FROM NUECES COUNTY

ALCALA, J., filed a concurring opinion.

CONCURRING OPINION

I concur in this Court's judgment that grants relief to Christopher Estrada, applicant, in accordance with the habeas court's recommendation that the record establishes a double-jeopardy violation. *See Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000). Applicant, however, has also pleaded ineffective assistance of trial counsel based on counsel's failure to raise a double-jeopardy complaint in the trial court, but the habeas court did not make findings of fact and conclusions of law addressing that claim. I observe that, even if the dissenting opinion were correct that applicant may have forfeited his double-

jeopardy claim by failing to raise it at some earlier juncture, in that event, the proper course would be to remand this case to the habeas court for it to appoint counsel so that this *pro se* applicant may pursue his ineffective-assistance claim based on trial counsel's failure to object on double-jeopardy grounds in the trial court. *See Ex parte Garcia*, No. WR-83,681-01, slip op. at 8, 21 (Tex. Crim. App. Apr. 6, 2016) (Alcala, J., dissenting) (observing that appointment of habeas counsel for *pro se* applicants may be necessary "in order to ensure that defendants' substantial claims of ineffective assistance of trial counsel are afforded meaningful consideration on post-conviction review"; need for appointed counsel may arise in "any case in which either the pleadings or the face of the record gives rise to a colorable, nonfrivolous claim").

The record in this case shows that applicant was arrested and received two charges for evading arrest: one as a Class A misdemeanor, and one as a third-degree felony.[1] The underlying facts showed that applicant attempted to flee from the police, first in his vehicle, and later, after abandoning the vehicle, on foot. The Class A misdemeanor charge pertained to his evading arrest on foot, whereas the third-degree-felony charge pertained to his evading arrest in a motor vehicle. In August 2013, applicant was found guilty of the misdemeanor charge and sentenced to time served. In December of that same year, the third-degree-felony charge went to trial. In that trial, the trial court found applicant guilty of the felony offense, and it sentenced him to five years' imprisonment. As the Court correctly concludes today,

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[1] *See* TEX. PENAL CODE § 38.04.

applicant's successive prosecution for the felony evading-arrest offense was barred by double jeopardy. *See Hobbs v. State*, 175 S.W.3d 777, 781 (Tex. Crim. App. 2005) (holding that defendant's conduct of abandoning his vehicle when police officer attempted to stop him and then fleeing on foot constituted one continuous offense of evading arrest); *Ex parte Herron*, 790 S.W.2d 623, 624 (Tex. Crim. App. 1990) (barring successive prosecution for the same offense after conviction and multiple punishments for the same offense).

In addition to his claim alleging a double-jeopardy violation based on the successive prosecution that occurred in this case, applicant asserts that his trial counsel was constitutionally ineffective for failing to complain of the double-jeopardy issue in the trial court. His application states,

> Defendant's attorney was less than effective and violated the defendant's constitutional protected right to "receive effective assistance" of counsel by failing to offer a "double jeopardy" defense. . . . [The trial attorney was] either aware of the "double jeopardy" issue involving protection against two offenses that are the same and failed to advocate a defense on behalf of the defendant, or he was ineffective for his lack of knowledge of the law, which would have "prevented" the applicant from being twice convicted for the same offense under one Penal Statute. The ruling from the Texas Court of Criminal Appeals which precluded the State from convicting twice for the same [offense under Section 38.04] was handed down in Feb. 2005. The applicant was convicted in 2013. There is no justification for this attorney's failure to offer a "double jeopardy" defense and his actions, or lack thereof, cause the defendant to be convicted of a felony offense and sent to prison for a offense "barred by jeopardy."

The habeas court did not address this claim in its findings and conclusions, believing

applicant to be entitled to relief on the basis of double jeopardy.[2] The record is thus not fully developed at this stage with respect to applicant's ineffective-assistance claim. Nevertheless, assuming that applicant's pleading is accurate in stating that trial counsel failed to raise a double-jeopardy complaint in the trial court, then his trial counsel was likely ineffective. As this Court has explained, a defendant demonstrates ineffective assistance under these circumstances by showing that the trial judge would have erred in overruling counsel's objection. *See*, *e.g.*, *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996). Here, it appears that the trial court would have committed reversible error in overruling such an objection from counsel on double-jeopardy grounds, and thus, to the extent that counsel failed to object, he was likely ineffective.

I note here that this Court has recently struggled in determining which double-jeopardy claims, if any, should be cognizable in a post-conviction habeas proceeding. *See*, *e.g.*, *Ex parte Marascio*, 471 S.W.3d 832 (Tex. Crim. App. 2015) (mem. op.). The instant case demonstrates that at least some of these double-jeopardy claims raised on habeas might be more easily addressed as ineffective-assistance-of-counsel claims, particularly in situations where the double-jeopardy violation is clear from the record and established under our existing law. Under such circumstances, either trial or appellate counsel, or both, may be deemed constitutionally ineffective for failing to raise the double-jeopardy issue in an

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[2] *See* Trial Court's Findings of Fact and Conclusions of Law, at 1 (finding that "there is no necessity for an evidentiary hearing or further expansion of the record because there is ample evidence in the record to rule" on applicant's double-jeopardy claim; because "the double jeopardy violation is apparent from the face of the record," relief should be granted).

earlier proceeding. By addressing such claims on the basis of ineffective assistance of counsel, this Court might avoid difficult questions surrounding the cognizability of double-jeopardy claims on habeas and permit the granting of relief in situations in which applicants are clearly entitled to it.

In light of the foregoing considerations, I conclude that, even if this Court were to hold that applicant's double-jeopardy claim was procedurally barred, the proper course in that event would be to remand this case to the habeas court for appointment of counsel in the interests of justice so that applicant may pursue his nonfrivolous ineffective-assistance claim. *See Garcia*, No. WR-83,681-01, slip op. at 16, 21 (Alcala, J., dissenting). Because this Court takes the alternative and equally correct course of granting applicant relief on the merits of his double-jeopardy claim, I concur in the Court's judgment.

Filed: April 13, 2016

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