IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-86,719-01

EX PARTE JESSE RYAN GRIFFITH, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 2003-403,223-A IN THE 364TH DISTRICT COURT
FROM LUBBOCK COUNTY**

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

In 2003, the State indicted Applicant for theft of property valued at an amount—between $1,500 and $20,000—making the offense a state jail felony at the time. Specifically, the indictment alleged that Applicant appropriated "jewelry and a shotgun and a BB rifle" from his uncle, James Webb. Applicant pled guilty to the offense and executed a judicial confession in support of the plea asserting that he was aware of the allegations against him "and I confess that they are true." He was placed on deferred adjudication for two years and ordered to pay restitution in an amount of $3,291.28. The record also contains a "Statement of Loss or Damage" executed by Webb in August of 2003 in which he placed the value of the shotgun at more than $500 and the value of a diamond ring (presumably one piece of the "jewelry" alleged in the indictment) at greater than $2500. The diamond ring

apparently belonged to Webb's mother, Applicant's grandmother. Applicant eventually made the restitution payments, but his deferred adjudication probation was nevertheless revoked for other reasons in 2010, and he was sentenced to a year in state jail. He has since served out that sentence, but he alleges, and the convicting court has found, that there are collateral consequences that justify entertaining his post-conviction writ application.

Applicant now alleges that his original guilty plea was induced by false evidence. In an affidavit, Webb now asserts that both the shotgun and the BB gun have turned up and were apparently never unlawfully appropriated in the first place. And while Webb maintains that Applicant did in fact steal a "Mason Ring" from him back in 2003, Webb does not currently "believe" that Applicant actually stole his grandmother's diamond ring. For his part, Applicant has also offered an affidavit in which he denies having stolen the diamond ring. He does admit, however, that he stole the Mason Ring.

The convicting court recommends that we grant Applicant relief. It has made a finding of fact that Applicant did in fact appropriate the Mason Ring but that he did not appropriate any of the other items, including his grandmother's diamond ring. The convicting court recommends that we conclude that, "[e]ven though it was not the fault of any state actor, the State prosecuted Applicant based upon . . . materially false evidence." It also recommends that we find that this "false evidence was material to Applicant's decision to plead guilty." The State agrees with the recommendations and does not oppose our granting relief. And, indeed, our precedent would currently justify granting post-conviction habeas corpus relief

under such a legal theory. *See Ex parte Barnaby*, 475 S.W.3d 316, 325 (Tex. Crim. App. 2015) (when false evidence has been marshaled against a defendant who then pleads guilty, whether his plea is therefore rendered involuntary "is measured by what impact that false evidence had on [his] decision to plead guilty"). I therefore do not disagree with the Court's judgment to grant relief.

I write separately only to emphasize that Applicant has not made a claim of actual innocence. And indeed, at least with respect to the diamond ring—which by itself could have satisfied the valuation requirement to justify a state-jail felony—Applicant has not cleared the "Herculean" burden our actual innocence jurisprudence imposes. *See Ex parte Tuley*, 109 S.W.3d 388, 397 (Tex. Crim. App. 2002) (although post-conviction relief may be available to habeas applicants who pled guilty, they must establish "by clear and convincing evidence that no rational jury would convict . . . in light of the new evidence"). Moreover, even if he were able to prove to the requisite level of confidence that he did not steal the diamond ring, Applicant still does not come to us with entirely clean hands. He has admitted to facts that would at the very least confirm his guilt of theft of a lesser grade than a state-jail felony by acknowledging that he stole the Mason Ring, which would constitute "jewelry" of *some* (albeit undisclosed) value in satisfaction of the indictment allegation. *See State v. Wilson*, 324 S.W.3d 595, 598 (Tex. Crim. App. 2010) ("We hold that the term 'actual innocence' shall apply, in Texas state cases, only in circumstances in which an accused did not, in fact, commit the charged offense *or any of the lesser-included offenses*.") (emphasis added).

With these observations, I join the Court's opinion.

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