IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-59,823-07

EX PARTE JAMES DOUGLAS JONES, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NUMBER 2003-197D IN THE 421ST DISTRICT COURT
FROM CALDWELL COUNTY

***Per curiam*. YEARY, J., filed a concurring opinion. KELLER, P.J., concurred in result.**

O P I N I O N

James Douglas Jones, Applicant, pled guilty to and was convicted of aggravated assault of a peace officer with a deadly weapon. In this subsequent application for a writ of habeas corpus, Applicant seeks relief on the ground that trial counsel provided ineffective assistance. Because the factual basis for this claim was not available when Applicant filed his previous applications for habeas corpus relief, his ineffective assistance of counsel claim is not procedurally barred. Because we agree with the trial court's findings and conclusions that trial counsel provided ineffective assistance, Applicant is granted habeas corpus relief.

I - Background

Luling Police Department Officer Chris Reed attempted to stop Applicant's car for speeding. Applicant did not immediately stop driving his car, and Officer Reed pursued Applicant until Applicant reached his home. Applicant drove his car into the sloped driveway in front of his house. Officer Reed, still following Applicant, stopped his patrol car immediately behind Applicant's car. According to Officer Reed's incident report:

> I quickly exited my patrol unit to make contact with the driver. I was able to get one leg out my patrol unit when I observed the vehicle reverse lights come on and start to travel backwards towards my patrol unit. At this time I was in fear of my life because I believed that this subject was intentionally trying to cause bodily injury to my person. The vehicle then slammed into my patrol unit at a force that cause [sic] me to loose [sic] my balance and fall backwards. I was able to regain my composure due to my firm grip on the steering wheel at the time of the collision.

Rep. R. vol. 3, ex. 2, p. 7. Based on the collision between Applicant's car and Officer Reed's patrol car, Applicant was charged with aggravated assault of a peace officer with a deadly weapon. He pled guilty to that offense and also to two retaliation offenses based on his behavior after the alleged assault. Applicant was sentenced to four years' imprisonment on the retaliation offenses to be followed by ten years' deferred adjudication on the aggravated assault offense. After serving three years for the retaliation offenses, Applicant was released on parole and began his term of deferred adjudication at a substance abuse felony punishment facility. The State moved to adjudicate, and the trial court sentenced Applicant to twenty-five years' imprisonment. After Applicant's conviction became final, he began filing applications for writ of habeas corpus.

In his second *pro se* application for habeas corpus, Applicant alleged that Officer Reed's dashcam video would prove that Applicant was innocent. In response, a Caldwell County assistant

district attorney stated in a sworn affidavit that she found no evidence that a video existed in the case file. She also stated that she contacted Applicant's trial counsel, who denied any knowledge of a video. Finally, she contacted the Luling Police Department, whose records custodian checked and confirmed that no such video existed. We dismissed the application as a procedurally barred subsequent application. In his third *pro se* application for habeas corpus, Applicant alleged that the Caldwell County District Attorney's Office and his trial counsel were engaged in a conspiracy to withhold the video. We again dismissed the procedurally barred subsequent application.

A copy of the video was discovered and filed with Applicant's fourth *pro se* habeas corpus application. In this application, Applicant claims in three *pro se* grounds that the prosecutor and his trial counsel committed perjury, that he is actually innocent of the offense, and that trial counsel was ineffective for not discovering that there was a video. The habeas court appointed habeas counsel for Applicant. In a supplemental application filed by habeas counsel, Applicant raised a supplemental fourth ground that trial counsel was ineffective, that but for trial counsel's ineffective assistance Applicant would not have pled guilty to the offense, and that in a trial no rational juror would have found Applicant guilty beyond a reasonable doubt.[1]

We remanded the case to the habeas court for an evidentiary hearing and for findings of fact and conclusions of law. On remand, Applicant and the Caldwell County District Attorney's Office

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[1] Although this new ground was raised after Applicant filed his *pro se* fourth application:

> In general, when an applicant files amended or supplemental pleadings raising additional claims before we have disposed of his pending application, we consider the merits of his claims, so long as the pleadings comply with the rules and procedures in Article 11.07 and Rule of Appellate Procedure 73.1, and so long as the claims are otherwise cognizable and ripe for review.

Ex parte Saenz, 491 S.W.3d 819, 824 (Tex. Crim. App. 2016).

came to an agreement whereby the State conceded that Applicant's trial counsel was ineffective. The evidentiary hearing was held, and trial counsel, Applicant, an employee at the Caldwell County District Attorney's Office, and Applicant's sister testified. The habeas court made findings and conclusions that Applicant's application was not procedurally barred as a subsequent application under the article 11.07, section 4(a)(2) exception,[2] that trial counsel provided ineffective assistance, and that Applicant was entitled to relief. We again remanded the case to the habeas court to determine whether the factual basis for Applicant's supplemental ground was discoverable through the exercise of reasonable diligence at the time he filed his previous habeas corpus applications.[3] The habeas court received affidavits filed by Applicant and his sister, and the court concluded that the factual basis was unavailable to Applicant at the time he filed his previous applications.

II - Factual Basis was Unavailable

In general, this Court may not consider the merits of or grant relief based on a subsequent application for writ of habeas corpus filed after the final disposition of an initial application challenging the same conviction. Tex. Code Crim. Proc. Ann. art. 11.07 §4(a) (West 2015 & Supp. 2016). This procedural bar to review does not apply, however, if the application contains sufficient specific facts establishing that:

> (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a

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[2] *See* Tex. Code Crim. Proc. Ann. art. 11.07 § 4(a)(2) (West 2015 & Supp. 2016).

[3] *See id.* § 4(a)(1).

reasonable doubt.

Id. § 4(a)(1), (2). A factual basis is unavailable if it was not ascertainable through the exercise of reasonable diligence on or before the date of the previous application. *Id.* § 4(c). "Reasonable diligence" means that at least some kind of inquiry was made into the matter. *Ex parte Lemke*, 13 S.W.3d 791, 794 (Tex. Crim. App. 2000).

In Applicant's case, before he pled guilty, he asked to view the video. Trial counsel represented that the video unquestionably showed that Applicant was guilty, and based on his review, trial counsel recommended that Applicant plead guilty. After Applicant pled guilty and after his conviction became final, the original video was lost. When Applicant raised the issue of the video in his second habeas corpus application, he did not have possession of or access to the video. The State, in response to his application, filed an affidavit stating that no evidence of the video existed in the case file, trial counsel denied any knowledge of a video, and the Luling Police Department's records custodian confirmed that no video existed. Indeed, at the evidentiary hearing, an employee of the Caldwell County District Attorney's Office testified that the video would have been removed from the case file three years after Applicant's conviction became final. This was done as a space-saving measure for old files before being transferred to long-term, off-site storage. As for the video, that piece of evidence would have been destroyed after being removed from the case file. Furthermore, that destroyed video would have been the original delivered from the arresting agency. Therefore, at the time of Applicant's previous applications, the original video, no longer in the case file, was destroyed and unavailable.

Applicant's sister testified at the evidentiary hearing that, unbeknownst to Applicant, a copy of the video was made by trial counsel and was given to Applicant's mother after Applicant had

already been convicted and sentenced. After Applicant was paroled on the retaliation case, he began his term of deferred adjudication on the aggravated assault case by moving into a substance abuse felony punishment facility instead of with his mother where he might have learned about or discovered the video. In an affidavit, Applicant's sister explained that when the State moved to adjudicate, the copy of the video was then given to Applicant's new counsel. That counsel, however, was replaced by a different attorney who represented Applicant at adjudication. On June 30, 2015, Applicant's sister received a letter from Applicant asking her to contact the first counsel who briefly represented him on the adjudication. In particular, Applicant wanted to know if the attorney had a copy of the video. In July, Applicant's sister contacted the attorney, who found the copy of the video a week later. After Applicant signed a release, the copy was given to Applicant's sister. In December of 2015, Applicant, through his sister, filed this *pro se* fourth application for writ of habeas corpus and a copy of the video.

Accordingly, the factual basis for Applicant's supplemental ground was not available at the time of Applicant's previous applications for habeas relief because it was not ascertainable through the exercise of reasonable diligence. Before he pled guilty and was convicted, Applicant inquired about the video to trial counsel. Applicant, in his affidavit, said that based on trial counsel's representation that the video unquestionably showed Applicant's guilt, Applicant had no reason to believe the video actually could help. At the time of Applicant's previous habeas corpus applications, the State had already destroyed its copy of the video, and trial counsel had no recollection of the video. Additionally, Applicant was unaware that a copy of the video existed. The factual basis was not previously available, and, therefore, Applicant's supplemental ground is not barred by section 4(a).

III - Ineffective Assistance of Counsel

Under *Strickland v. Washington*, a defendant claiming constitutionally ineffective assistance must make two showings. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, he must show that counsel's performance was deficient, despite the strong presumption that counsel's performance was adequate. *Id.* at 687, 689. To prevail, he must identify the acts or omissions that are beyond the result of reasonable professional judgment and he must establish, to the satisfaction of the Court, that these acts or omissions were outside the wide range of professional competence. *Id.* at 690.

Next, under *Strickland*, the defendant must show that counsel's deficient performance prejudiced the defense. *Id.* at 687. Specifically, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The video from Officer Reed's patrol car shows his short pursuit of Applicant. Shortly after Officer Reed stops behind Applicant's car, Applicant's car begins moving backward and collides with Officer Reed's patrol car. Contrary to Officer Reed's incident report, the reverse lights on Applicant's car do not appear to come on. Additionally, there is little time for Officer Reed to either fully exit his patrol car, as stated in the probable cause affidavit, or even partially exit his patrol car, as stated in his incident report.

The habeas court held an evidentiary hearing. At the hearing, trial counsel viewed the video of the offense and agreed that the collision looked like an accident rather than an intentional act or threat of bodily injury. Trial counsel also could not remember what he told Applicant before he pled

guilty, though at the hearing he said that he generally explained culpability to his clients. He agreed that the video was exculpatory, given that the incident report was inconsistent with the video. But when asked why Applicant pled guilty given the video, trial counsel responded:

> I can't tell you specifically what we talked about. If I was just speculating–you know, usually those–I leave those decisions up to my clients, I mean, ultimately. I try not to substitute my judgment for theirs. There might have been reasons at that time. I don't–I can't speak–I don't want to speak for Mr. Jones at all. But for whatever reasons, that was the decision that we made.

Rep. R. vol. 2, 33.

Applicant testified at the hearing that after he put his car in park, it began to roll backwards. He denied putting it in reverse or intending to hit the police cruiser. Applicant also testified that he first learned there was a video during plea negotiations. He said that trial counsel mentioned that there was a video showing that Applicant deliberately rammed his car into a police officer's car while the officer was trying to get out. Applicant further testified that he was not able to watch the video, and trial counsel did not bring the video to the jail. When questioned by the State, Applicant said he asked to watch the video. Applicant also reiterated that trial counsel said that the video unquestionably showed that Applicant actually tried to run over the police officer, and trial counsel advised that it would be in Applicant's best interest to take the plea bargain. The trial court found Applicant's testimony credible.

Given counsel's admission that the video was exculpatory, Applicant's credible testimony about his request to view the video and counsel's advice about the video and the decision to plead guilty, and based upon our own review of the video, counsel's performance in misrepresenting the content of the video and advising Applicant to plead guilty was deficient.

The second part of the *Strickland* inquiry is whether a defendant was prejudiced by counsel's

deficient performance. *Strickland*, 466 U.S. at 687. The prejudice prong is met when there is a reasonable probability–a probability sufficient to undermine confidence in the outcome–that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. In this case, Applicant testified at the evidentiary hearing that:

> Had I known that the officer said he was outside of the car with his gun drawn and I tried to back over him, I would have told [counsel] I wanted to go to trial with that.

Rep. R. vol. 2, 46. The trial court made the same conclusion. This Court is equally convinced. We cannot confidently say that the proceeding would not have been different: that Applicant, armed with accurate information from counsel that the dashcam video directly contradicts the incident report, still would have pled guilty to the offense. It is reasonably probable that Applicant would have insisted on a trial. Therefore, we find that counsel's deficient performance prejudiced the defense.

IV - Conclusion

In conclusion, the Court finds that the factual basis for Applicant's claim was not available at the time he filed his previous habeas corpus applications. On the merits of Applicant's claim that his trial counsel was ineffective, counsel provided Applicant with incorrect advice and information about the content of the dashcam video, and there is a reasonable probability that Applicant was prejudiced as a result. Applicant is entitled to relief, the judgment of conviction in Cause No. 2003-197D from the 421st Judicial District Court of Caldwell County is hereby set aside, and Applicant is remanded to the custody of the Sheriff of Caldwell County to answer the charges as set forth in the indictment.

Delivered: January 24, 2018
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