



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-87,755-01

EX PARTE DAVID RAY BRATCHER, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 17-11167-W1 IN THE 278TH DISTRICT COURT
FROM MADISON COUNTY**

Per curiam.

OPINION

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). Applicant was convicted of aggravated robbery and sentenced to forty years' imprisonment. The Tenth Court of Appeals affirmed his conviction. *Bratcher v. State*, No. 10-08-00107-CR (Tex. App.—Waco Dec. 9, 2009).

Applicant states that appellate counsel represented him regarding his petition for discretionary review. Applicant contends that appellate counsel rendered ineffective assistance because counsel never told him that the PDR was dismissed as untimely filed and that counsel

deprived him of his right to seek discretionary review. *See Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997). The trial court finds that “[t]here is no information to believe that Applicant’s Petition for Discretionary Review was dismissed due to counsel’s representation other than a computer entry attached to Applicant’s Writ.” The habeas record reveals otherwise.

The habeas record shows that appellate counsel filed a PDR in the Tenth Court of Appeals on January 5, 2010. The PDR was forwarded to this Court on February 22, 2010. The PDR was filed in this Court on March 1, 2010. This Court struck the PDR as non-compliant on March 24, 2010, and an order was issued for counsel to redraw it within 30 days and file it in this Court. A copy of that order was attached to Applicant’s application. The order states, “The petitioner may redraw the petition. The redrawn petition and copies must be filed in the Court of Criminal Appeals within thirty days after the date of this order.”

The Tenth Court’s docket sheet, which Applicant included as an attachment to his application, shows that another PDR was filed in the Tenth Court on April 14, 2010. The trial court supplemented the habeas record with a letter counsel had sent to the Tenth Court, dated April 13, 2010, indicating that he was filing a PDR. Counsel, with candor, states in his affidavit, “The redrawn Petition for Discretionary Review, styled in the Court of Criminal Appeals, sitting in Austin, Texas, was prepared by me within the thirty (30) day time line, but was inadvertently sent by my office to the 10th Court of Appeals in Waco and should have been filed by me with the Criminal Court of Appeals in Austin.”

This Court’s docket sheet, which Applicant attached to his application, shows that a redrawn PDR was eventually filed in this Court on May 26, 2010. It was untimely and was dismissed. Along with the computer entry to which the trial court refers in its findings, there was a postcard notice

mailed to counsel on July, 23 2010. The postcard notice stated that the PDR was dismissed as untimely. A copy of the postcard notice is not in this Court's record, and it does not appear to be in the record of the Tenth Court either. Even so, these facts do not lead to the conclusion the postcard notice was not mailed to counsel, and this Court's records indicate that it was mailed to counsel.

In his affidavit, counsel does not address why he did not inform Applicant that the redrawn PDR was dismissed. Even if counsel did not receive the postcard notice from this Court for some reason, he had a duty to stay informed of the case, learn that the PDR was dismissed as untimely, and notify Applicant of the situation. *See Ex parte Wilson*, 956 S.W.2d at 26-27 (stating, "If appellate counsel's action or inaction denies defendant his opportunity to prepare and file petition for discretionary review, defendant has been denied his Sixth Amendment right to effective assistance of counsel"). The habeas record shows that Applicant was denied his right to file a *pro se* PDR through no fault of his own.

Applicant is entitled to the opportunity to file an out-of-time petition for discretionary review of the judgment of the Tenth Court of Appeals in Cause No. 10-08-00107-CR that affirmed his conviction in Cause No. 07-11167-278-06 from the 278th District Court of Madison County. Applicant shall file his petition for discretionary review with this Court within 30 days of the date on which this Court's mandate issues.

Delivered: March 28, 2018
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