IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-78,077-02

EX PARTE JAMES BOYD HARRIS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 1223792-B IN THE 232ND DISTRICT COURT FROM HARRIS COUNTY

YEARY, J., filed a concurring opinion in which KELLER, P.J., and SLAUGHTER, J., joined.

CONCURRING OPINION

Applicant was convicted of possession with intent to deliver cocaine, over 400 grams, and sentenced to 25 years' imprisonment. Nearly 10 years after his trial, nearly 9 years after his appeal was concluded, and nearly 8 years after filing his first post-conviction application for writ of habeas corpus, Applicant filed his first subsequent post-conviction application for writ of habeas corpus contending that he is "actually innocent." Today, the Court grants relief, agreeing with the trial court's determination that Applicant has established by clear and convincing evidence that he is actually innocent. I cannot agree with the Court in this case.

On direct appeal, the First Court of Appeals summarized the testimony at Applicant's trial as follows:

> Houston Police Department ("HPD") Officer C. Aranda testified that at approximately 2:30 p.m. on June 17, 2009, while on patrol with a "Differential Response Team," he and HPD Officer E. Pierson drove to the 2300 block of Kirk Street after receiving several complaints about the area. He observed a woman approach a house in an area that he knew was a "possible" "area of illegal activity." After he and Pierson exited their patrol car, Pierson followed the woman to the back of the house, where a door was open, and Aranda went to the front of the house, where he saw two men open the door. Aranda explained that one of the men, who he later identified as appellant, "took off running." Although Aranda pursued the man for approximately twenty-five to thirty yards, he was unable to apprehend him. When Aranda returned to the house, he heard the other man "in the bushes or next to [the] house," but was unable to find him. Aranda then entered the house, which "smelled of urine and feces," and saw "lots of marijuana," "some crack cocaine and some powdered cocaine," three weapons, scales, razor blades, and baggies containing white powder. He opined that the house was "a cook house," where people go to "cook up their dope." Aranda then spoke with Lisa Evans, the woman they had seen approaching the house, and "Mr. Manning," Evans's husband and "lookout." Evans provided a statement in which she described the man that Aranda had pursued, and her description matched the appearance of appellant. Manning also identified appellant as the same man, who is known as "Man." Aranda explained that he had "no doubt" that appellant is the person that he had seen run out of the house. Aranda also found two cellular telephones at the house, one belonging to a "Man" and one belonging to "E." Aranda explained that based on the witness statements, he was able to identify "Man" as appellant.
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> Officer Pierson testified that on June 17, 2009, while on patrol with Officer Aranda, after he had seen a woman approach two houses, he exited the patrol car and followed her to the back of the house. The door to the house was open, and this allowed Pierson to see two African-American males standing at the kitchen counter. Pierson noted that one of the men was wearing a "muscle shirt," had a "slim, muscular" build, and had "extensive tattoos on [his] chest and arm," and Pierson identified this man as appellant. Pierson did not have the opportunity to see appellant's face at the house that day because he was initially looking at the men's hands, and the men, in "a split second," noticed Pierson, turned around, and headed towards the front door. Pierson noted that the build and height of the man that he had seen at the house was consistent with appellant's appearance. On the kitchen counter, Pierson found everything necessary for "cooking illegal narcotics," including scales, razors, whisks, beakers, containers, bags with substances,

white substances, and "cookie formed" crack cocaine packaged ready to sell. He also found marijuana, a pistol, a shotgun, and a rifle. Pierson detained Evans, did a quick "sweep" of the house, and waited for Aranda to return. Shortly after, LaShanda Cambric knocked on the front door of the house, and, when the officers opened the door, they saw her standing there with money in her hand, which she "very furtively stuck" in her pants. Pierson opined that the quantity of cocaine along with the paraphernalia found at the house indicated a "high-level operation," in which the seller was not just someone "selling it on the street[,] but somebody making it [and] putting it together to distribute to others who are then going to sell it on the street."

On cross-examination, Officer Pierson admitted that "from looking at the faces," he could not identify anyone at the house, and he, in his report, stated that he was "unable to positively identify" appellant as a "suspect." The officers did find at the house two cellular telephones, "one number going to E, and one number going to Man." Pierson explained that the officers, through Evans and Cambric, were able to determine that the individual known as "Man" was appellant. Evans's "boyfriend," who had "made a phone call," corroborated that appellant is "definitely the man known as Man," who "had been at the house for a longtime cooking" and selling narcotics.

Amanda Phillips, a criminalist with the HPD crime lab, testified that she performed an analysis on the substances found in the house. She determined that one substance was cocaine weighing approximately 572 grams.

Evans testified that she went to the house to purchase some crack cocaine when an officer arrived. She explained that two people were inside the house, "Man" and "E." Evans did not know Man's name, but stated that he is not appellant and appellant "wasn't even there." Evans explained that she went to purchase "dope" from "Man," but once the officers entered the home, the two men who had been inside "went through the house" and did not return. Evans, after her arrest, gave to the police officers a statement in which she admitted that she had worked for "Man" approximately six times, he used her to watch the back door of the house and "direct customers . . . who are looking for dope," and he is five feet and ten inches tall and has many tattoos. At trial, however, Evans denied that she had worked for "Man," and she explained that she "just put what the officer told me to put" in her statement. Evans stated that she knows appellant, he was not at the house on the day in question, and she would not want anything bad to happen to appellant.

> Arbrae Hutchison, appellant's neighbor, testified that on June 17, 2009, he was with appellant and the two men worked around his house and yard. He explained that they "were together all that day."

Harris v. State, No. 01-10-00319-CR, 2011 WL 2089684, at *2–6 (Tex. App.—Houston [1st Dist.] May 19, 2011) (mem op., not designated for publication).

Other evidence presented at Applicant's trial included testimony that a Pit Bull dog was discovered by officers at the house where the contraband was found, and that Applicant was known to own a Pit Bull dog. Also, two cars were observed near the house on the day of the offense: (1) a Dodge Charger registered to James Noble (at the time of trial Officer Aranda did not know who this was), and (2) a Cadillac registered to Patricia Harris, Applicant's sister. Harris testified at trial for Applicant, and she claimed that she sold her car to "Ernest," whom she knew as "Big E," about a year and a half before trial. She claimed that, in June 2019 when this offense occurred, Ernest was driving the vehicle. And, Iris Williams, who also testified for Applicant at trial, explained that she had been a long-time resident on Kirk Street and, about 12 years earlier, she knew that Applicant had lived on the same street where the crime occurred, at 2313 Kirk Street.

Applicant has now presented a fairly substantial case on habeas that the person known as "Man" *might not* have been Applicant. Evidence has been presented showing that another person, with an arguable connection to this crime, is also known by the name "Man." The habeas evidence demonstrates that Orlando Noble—the brother of James Noble (who was the registered owner of one of the two cars observed on the day of the crime at the house where the crime occurred)—bears a strong resemblance to Applicant, as measured by approximate height and weight, facial hair, and tattoos.

In an interview with the Harris County District Attorney's Office Conviction Integrity Unit, Orlando Noble denied being at the house where the contraband was found in this case, but he confirmed that people call him "Man." He explained that his mother called him "little man" while he was growing up, and that was shortened to "Man" later. Also, a printout dated June 7, 2013, from the HPD Gang Tracker database, shows identifiers for Orlando Noble as having tattoos similar to those on Applicant and that Orlando's middle name is "Mann." And a police report has been produced showing that Applicant had been seen, on at least one occasion near the time of the offense in this case, driving a Black 1998 Infinity.

Joshua Somers, the prosecutor in Applicant's case, testified that, before trial, Applicant's attorneys informed him that Applicant was not the person known as "Man," but that a person known as Orlando Noble was "Man." They even brought Evans and Manning—not to be confused with "Mann"—to relay the same information to Somers. But Somers reached out to an Officer Lopez, who worked narcotics, and Lopez confirmed both that the "word on the street" was that Applicant *was* "Man" and that Officer Aranda was confident in his own identification of Applicant.

Somers explained that, at some point, he had Aranda look at a photograph of Orlando Noble and that Aranda did not recognize Orlando as the person he saw running from the house where the contraband was found on the evening of the offense. Somers also explained that, although a recent criminal history report run on Orlando Noble in a Harris County criminal justice system called JIMS shows that Orlando Noble's middle name is "Mann," when he ran a criminal history on the same system in 2010, it did not show any middle name for Orlando Noble. He claimed that, because this case, in his opinion, was a

"one witness case" hinging on the credibility of Officer Aranda's identification, he made many attempts to confirm Aranda's certainty about his identification of Applicant.

For his part, Officer Aranda—who identified Applicant at his trial and testified there was "no doubt" that Applicant was the person he saw running from the house where the contraband was found—testified at the habeas hearing that he did not recall being asked by Somers to identify a photograph of Orlando Noble before trial, and he did not remember hearing that name before the hearing on habeas. He also testified that he did not know that Orlando was known by the street name "Man," or about the similar appearance of Orlando to Applicant, or—even though she testified to it at trial—that Patricia Harris had sold her car to a person known as "E." And, he confirmed, it would have been helpful to know about those things.

Now, ten years after the event, Aranda is not as sure anymore that Applicant is the person he saw. Still, he continues to insist that, "based on [his] investigation [he] still think[s] it's possible [the person he saw] could be [Applicant]," but several things have caused him to waiver in his confidence about that initial identification. Aranda testified at the habeas hearing in this case: "Like I said anything is possible. Maybe I was mistaken."

It is now clear that Applicant's identification on the day of the offense as the person known as "Man" boiled down to a statement given to Aranda by Ronald Manning. Evidence at Applicant's trial suggested that Ronald Manning was the husband of Lisa Evans (the lady who the officers saw and followed to the house where the contraband was eventually discovered). Nothing in the record that I have found seems to clear up why Manning would have initially concluded (perhaps wrongly) that Applicant was the person known as "Man." Evidence shows that, even prior to the evening when the contraband was

discovered in the house: (1) Applicant was a person known to Evans, (2) Applicant previously lived, at least, on the block where the crime in this case occurred, and (3) Applicant still returned to the neighborhood on occasion, ostensibly to visit his children. These facts demonstrate that Applicant has a connection to the people and places surrounding the crime, even if only circumstantially. I am also aware of no evidence that any of the people identified as possible suspects in this case owned a Pit Bull dog like the one discovered by officers at the scene of the crime, other than Applicant.

Applicant's claim is largely based on evidence tending to corroborate one important piece of information that is not at all new: that the person described by Evans and Manning on the evening of the offense as "Man" could have been Orlando Noble and not Applicant. Somers testified that Applicant's counsel approached him before trial and told him that "Man" was not Applicant, but Orlando Noble instead. This information was in the possession of Applicant and his counsel at the time of trial, and yet, they did not use it then to establish Applicant's innocence in front of the jury.

That said, the fact that the HPD Gang Tracker database and Harris County's JIMS database now confirm the striking similarities in appearance between Applicant and Orlando Noble is new. The fact that one of the two cars observed near the house where the contraband was found was registered to a person who turned out to be Orlando Nobles' brother is new. The evidence contradicting the trial testimony that Evans and LaShanda Cambric told officers that Applicant *was* "Man" is new. And Aranda's ten-years-later newfound uncertainty about his eye-witness identification of Applicant as one of the two men he saw emerge from the house where the contraband was found, and as the one whom he chased, is new.

Having considered all that has been presented so far, I conclude that the evidence developed on habeas has, to a large degree, muddied confidence in the identification evidence that Applicant's jury must have relied upon to find him guilty. And, in light of that, it seems reasonable to conclude that a rational factfinder, knowing all that we know today, would not find Applicant guilty. Applicant is entitled to relief from his conviction.

I hesitate to join any claim, however, that Applicant has demonstrated his "actual innocence," by any measure. Applicant has certainly done damage to the idea that any rational factfinder might be capable of concluding beyond a reasonable doubt that he is guilty, but serious questions remain. The most glaring question I still have, and which I have already stated, is why would Manning have told officers on the evening when they discovered the contraband in the house that "Man" was Applicant? Add to that, what was the source of the "word on the street" that Officer Lopez relied upon to confirm to prosecutor Somers that Applicant was known as "Man"? But there are other questions as well. Why didn't Applicant's counsel do more to develop evidence at trial that Orlando Noble was the real person known as "Man"? When and why were the criminal history databases updated to include Orlando Noble's childhood nickname as his official middle name? When did Orlando Noble get his tattoos? Is there any evidence showing who might have owned the Pit Bull dog found at the house where the contraband was located, if it was someone other than Applicant?

Evidence stipulated to by Applicant and admitted during the punishment phase of his trial also demonstrated that Applicant had amassed ten criminal convictions in Harris County before he was ever charged in this case, including: (1) a misdemeanor conviction for display of a fictitious/counterfeit certificate, (2) a misdemeanor conviction for criminal

trespass, (3) a misdemeanor conviction for terroristic threat, (4) a misdemeanor conviction for assault, (5),(6),&(7) two misdemeanors and one felony conviction for evading arrest, (8) a misdemeanor conviction for possession of paraphernalia, (9) a misdemeanor conviction for possession of marijuana, and (10) a felony conviction for possession of cocaine. Of course, none of those convictions independently, or even cumulatively, establishes his guilt for the crime he was alleged to have committed in this case. But the number and type of his prior convictions demonstrates that he is not exactly an upstanding, law-abiding citizen who stays away from drugs and behaves himself in Harris County to begin with. He may, in fact, be innocent of the crime he was convicted of in this case. He also might not be.

Having defeated the persuasive force of the evidence that must have been relied upon to find him guilty, Applicant is entitled to relief from his conviction. He should, therefore, once again be described by this Court, and all other Courts that might in the future consider an accusation against him, as "presumed innocent." *Ex parte Mallet*, 602 S.W.3d 922, 926 (Yeary, J., concurring) ("The *presumption* of innocence that belongs to every person before a conviction has certainly been restored.") (emphasis in original).

With these additional remarks, I respectfully concur in Court's judgment.

FILED: September 15, 2021
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