



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-35,259-03

EX PARTE MARVIN DWAYNE BROWN, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. F-1058542-P IN THE 203RD DISTRICT COURT
FROM DALLAS COUNTY**

Per curiam.

ORDER

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 possession of a controlled substance with intent to deliver and was sentenced to fifty years' imprisonment. The Fifth Court of Appeals affirmed his conviction. *Brown v. State*, No. 05-11-00247-CR (Tex. App.—Dallas 2012, no pet.).

In a single ground, Applicant contends that appellate counsel rendered ineffective assistance because she failed to raise jury charge error. Appellate counsel responded in a sworn affidavit, and the trial court found her affidavit credible and recommended that we deny this application. We

believe, however, that the record is not sufficient to resolve Applicant's claim.

Applicant has alleged facts that, if true, might entitle him to relief. *Smith v. Robbins*, 528 U.S. 259 (2000); *Ex parte Patterson*, 993 S.W.2d 114, 115 (Tex. Crim. App. 1999). In these circumstances, additional facts are needed. As we held in *Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960), the trial court is the appropriate forum for findings of fact. The trial court may order appellate counsel to further respond to Applicant's claim. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d).

If the trial court elects to hold a hearing, it shall determine whether Applicant is indigent. If Applicant is indigent and wishes to be represented by counsel, the trial court shall appoint an attorney to represent him at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make further findings of fact and conclusions of law as to: (1) whether trial counsel properly preserved jury charge error; (2) whether there was some evidence presented at trial that would have permitted a rational jury to find that, if Applicant was guilty, he was guilty only of possession of a controlled substance; (3) what evidence presented at trial showed that Applicant was guilty of possession of a controlled substance with intent to deliver; (4) whether appellate counsel's decision not to raise jury charge error was deficient; and (5) if appellate counsel's decision was deficient, whether there is a reasonable probability that the result on appeal would have been different. The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claim.

This application will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or

deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be forwarded to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: June 12, 2013

Do not publish