



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-62,221-03

EX PARTE GERALD WAYNE JONES, JR., Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 0722835D IN THE CRIMINAL DISTRICT COURT 1
FROM TARRANT 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 two counts of aggravated sexual assault of a child and originally sentenced to five years for each count, probated for ten years. His probation was later revoked, and he was sentenced to five years' imprisonment for each count, to be served consecutively. He did not appeal his conviction, although he did appeal from the revocation of his probation.

Applicant contends, *inter alia*, that the jury charge in this case allowed for non-unanimous verdicts, and that his trial counsel rendered ineffective assistance because counsel failed to object

to the jury charge. Applicant also alleges that the prosecutor instructed the jurors that they not have to agree unanimously as to which of the alternate methods of committing the offenses were proved beyond a reasonable doubt.

Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *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. Trial counsel has submitted one affidavit responding to Applicant's claims of ineffective assistance of counsel. However, that affidavit is factually inaccurate, and does not directly address the jury unanimity issue. The trial court shall order trial counsel to respond to Applicant's claim of ineffective assistance of counsel. Specifically, counsel shall state whether or not he was aware of a potential jury unanimity issue arising from the disjunctive jury charges in both counts one and two. Counsel shall state whether he objected to the charge, objected to the prosecutor's argument, or moved that the State be required to elect which incident it intended to rely upon for a conviction in each count. 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 Applicant at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall first supplement the record with copies of the indictment, the jury charge, and a transcript of the closing arguments made by both parties at the guilt/ innocence phase. The trial court shall make findings of fact and conclusions of law as to whether the performance of Applicant's trial counsel was deficient and, if so, whether counsel's deficient performance prejudiced

Applicant. 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 for habeas corpus relief.

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: January 30, 2013
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