



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-65,427-03

EX PARTE FRANKIE LANE POLK, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 1175958 IN THE 351ST DISTRICT COURT
FROM HARRIS 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 sexual assault and sentenced to ninety-nine years' imprisonment. The Fourteenth Court of Appeals affirmed the judgment of conviction as reformed. *Polk v. State*, No. 14-09-00131-CR (Tex. App.—Houston [14th Dist.] Aug. 26, 2010 pet. dismiss'd).

Applicant contends, among other things, that trial counsel rendered ineffective assistance because he failed to: (1) discover that Applicant had been placed on probation for a robbery conviction alleged as a punishment enhancement; (2) present evidence that the DNA profile of an

unknown female was found in the crotch area of the underwear the complainant wore; (3) retain an expert on DNA evidence; and (4) interview the complainant's mother. The trial court considered Applicant's first claim but not his others. It concluded that trial counsel was not deficient for failing to discover that Applicant had been placed on probation and that the error, if any, was harmless, if such an error can be subjected to harmless error analysis. We believe that trial counsel should respond to Applicant's claims and that the trial court should determine whether Applicant was prejudiced under the standard set out in *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

Applicant has alleged facts that, if true, might entitle him to relief. *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 shall order trial counsel to respond to Applicant's claims. 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 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 claims 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: October 10, 2012
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