



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-75,853-04

EX PARTE CHARLES HAMILTON, JR., Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-09-904060-B IN THE 299TH DISTRICT COURT
FROM TRAVIS 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 burglary of a habitation and sentenced to life imprisonment. Appellate counsel filed an *Anders* brief, and Applicant was advised of his right to examine the appellate record and to file a *pro se* response brief. No *pro se* brief was filed, and the Third Court of Appeals affirmed his conviction. *Hamilton v. State*, No. 03-09-00500-CR (Tex. App. – Austin, July 15, 2010).

Applicant contends, *inter alia*, that he wanted to file a *pro se* response brief and that he requested a copy of his trial records in order to prepare a brief, but did not receive his trial records

until after the Court of Appeals had affirmed his conviction.

On January 11, 2012, this Court remanded to the trial court to obtain affidavits and findings addressing Applicant's habeas allegations. This Court ordered the trial court to make findings as to whether Applicant indicated a desire to examine the appellate record in order to file a *pro se* appellate brief, and if so, whether and when Applicant was provided with copies of the record.

After remand, the trial court entered findings of fact and conclusions of law, finding *inter alia* that Applicant did indeed request a copy of his records in order to prepare a *pro se* brief, but that he sent his request to the Court of Appeals, which received it on April 9, 2010. The trial court finds that Applicant did not receive his trial records until after the Court of Appeals had issued its opinion because he did not timely send a request to the trial court or the district clerk for his records, but requested them from the Court of Appeals instead.

It is not clear how a *pro se* appellant would know how to obtain a copy of his trial records in order to file a *pro se* response brief, unless appellate counsel informs the appellant of how to obtain these records, or provides them to the appellant him or herself.

Applicant has alleged facts that, if true, might entitle him to relief. *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Lemke*, 13 S.W.3d 791, 795-96 (Tex. Crim. App. 2000). 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 appellate counsel to file an affidavit stating precisely what advice he gave Applicant with respect to his right to inspect the records and file a *pro se* response brief to counsel's *Anders* brief. If appellate counsel did advise Applicant of these rights, appellate counsel shall state whether he advised Applicant of how to obtain

access to his trial records, and specifically as to in which court Applicant should file such a request. 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 make findings of fact and conclusions of law as to whether the performance of Applicant's appellate counsel was deficient and, if so, whether counsel's deficient performance prejudiced Applicant. The trial court shall make findings as to whether Applicant was advised of how to obtain access to his trial records in order to prepare a *pro se* response brief, and if so, whether he was advised correctly. The trial court shall make findings as to why the Court of Appeals could not provide Applicant with a copy of his trial records pursuant to Applicant's request to that court. 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: February 13, 2013
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