



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-76,050-01

EX PARTE JAMES PEMBERTON STEWART IV, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 2007CRN11-D1 IN THE 49TH DISTRICT COURT
FROM WEBB 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 writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of murder and sentenced to fifty years' imprisonment. The Fourth Court of Appeals affirmed his conviction. *Stewart v. State*, No. 04-08-00274-CR (Tex. App.—San Antonio July 22, 2009) (unpublished).

This case was remanded on three ineffective assistance claims, an actual innocence claim, a false evidence claim, and a newly discovered evidence claim. After the trial court held a live hearing, Applicant supplemented his writ application with an additional ineffective assistance of counsel claim, in which he argues that counsel was ineffective for not requesting an instruction on

the duress defense. The trial court made findings on the ineffective assistance of counsel claims relating to the punishment phase of the trial and recommended vacating Applicant's sentence and granting a new punishment hearing. However, the trial court did not make findings on several claims that relate to the guilt phase of the trial, including Applicant's supplemental ground.

Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Ghahremani*, 332 S.W.3d 470 (Tex. Crim. App. 2011); *Ex parte Chavez*, 213 S.W.3d 320, 324-326 (Tex. Crim. App. 2006). 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. If necessary, the trial court shall obtain a response from Applicant's trial counsel addressing Applicant's unresolved claims of ineffective assistance of counsel. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d).

It appears that Applicant is represented by counsel. If the trial court determines he is not represented by counsel and elects to hold a hearing, it shall then 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 trial attorney was deficient and, if so, whether counsel's deficient performance prejudiced Applicant. Specifically, the trial court shall make findings as to whether counsel should have discovered Victoria Flores and, if so, the trial court shall make an assessment of Flores's credibility. If counsel should have discovered and presented Flores's testimony, the court shall make specific findings as to whether this failure harmed Applicant. The trial court shall also

make findings addressing Applicant's supplemental ineffective assistance of counsel claim. In that regard, the trial court shall make specific findings as to whether the defensive evidence at trial raised the affirmative defense of duress. If so, the trial court shall make specific findings detailing the substance of that evidence.

The trial court shall make findings of fact and conclusions of law as to whether Victoria Flores's affidavit and proposed testimony is newly discovered evidence and, if so, whether it is sufficient to prove that Applicant is actually innocent. *Ex parte Tuley*, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002) (citing *Ex parte Elizondo*, 947 S.W.2d 202, 207 (Tex. Crim. App. 1996)); *Ex parte Brown*, 205 S.W. 3d 538, 545-46 (Tex. Crim. App. 2006).

The trial court shall also make specific findings of fact and conclusions of law addressing whether Jorge Guerra's statements are "newly discovered evidence" and, if so, whether they "cast substantial doubt upon the reliability of the sentencer's assessment of a particular term of years." *Ex parte Chavez*, 213 S.W.3d 320, 324-326 (Tex. Crim. App. 2006).

The trial court shall also make specific findings of fact and conclusions of law addressing whether the State sponsored false evidence that Applicant was part of a gang. If the trial court finds that false evidence was introduced, the court shall make findings as to whether the Applicant has shown by a preponderance of the evidence that the error contributed to his conviction or punishment, whether the issue could have been raised on appeal, and whether the State knowingly sponsored false evidence. *Ex parte Ghahremani*, 332 S.W.3d 470, 477-78 (Tex. Crim. App. 2011); *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Crim. App. 2009).

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. If any continuances are granted, a copy of the order granting the continuance shall be sent to this Court. 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 returned to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: October 23, 2013
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