



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-77,468-01

EX PARTE JAMES RANDALL DOWNS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 08-05-04962-CRW IN THE 143RD DISTRICT COURT
FROM WARD 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 aggravated kidnapping as a habitual felon and was sentenced to life imprisonment. The conviction and sentence were affirmed on direct appeal in an unpublished opinion. *Downs v. State*, No. 08-09-00069-CR (Tex. App. – El Paso del. Aug. 4, 2010). Applicant’s Petition for Discretionary Review was refused. *Downs v. State*, No. PD-1704-10 (Tex. Crim. App. del. Feb. 28, 2011).

In his habeas application, Applicant complains he was denied his right to effective assistance of trial and appellate counsel, and he alleges the State and the trial court engaged in misconduct. In regard to the ineffective assistance of trial counsel claim, there is no response from trial counsel in the record provided to this Court regarding his investigation, trial strategy, and advice to Applicant, and there are no findings from the trial court. On this IAC/trial-counsel claim only, Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Lemke*, 13 S.W.3d 791,795-96 (Tex. Crim. App. 2000). A review of the remaining claims reveals them to be without merit.

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 obtain an affidavit from Applicant's trial counsel responding to the ineffective assistance of trial counsel claims and explaining his trial strategy, tactical decisions, and advice to Applicant, where germane. In addition to obtaining this affidavit, the trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d) to resolve disputed issues of fact. In the appropriate case, the trial court may rely on its personal recollection. *Id.* 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 as to whether the performance of Applicant's trial counsel was deficient and, if so, whether trial counsel's deficient performance prejudiced Applicant. The trial court shall also make any other findings of fact 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. 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, 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: May 2, 2012

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