



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-78,203-03

EX PARTE IRVIN RAY DAVIS, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 1193809-B IN THE 184TH 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 murder and sentenced to thirty-five years' imprisonment. The First Court of Appeals affirmed his conviction. *Davis v. State*, No. 01-10-00539-CR (Tex. App. – Houston [1st Dist.] June 29, 2010).

Applicant contends that his appellate counsel rendered ineffective assistance because counsel failed to advise him of his right to petition *pro se* for discretionary review. Appellate counsel did send Applicant a letter advising him that his conviction and sentence had been affirmed, enclosing a copy of the appellate opinion, and advising him that she did not believe there was any basis for

filing a petition for discretionary review. Appellate counsel recommended to Applicant that he pursue relief by way of Article 11.07 habeas corpus.

Based on appellate counsel's letter, the trial court finds that appellate counsel complied with the requirements of *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997) by advising Applicant that his appeal was affirmed and that he could file a petition for discretionary review. This finding is not supported by the record. Although appellate counsel advised Applicant that she did not believe that a petition for discretionary review would have merit, the letter does not show that appellate counsel advised Applicant of his right, nevertheless, to file a *pro se* PDR.

Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997). In these circumstances, additional facts are needed. Pursuant to *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 respond to Applicant's claim of ineffective assistance of counsel on appeal. Specifically, appellate counsel shall state whether she advised Applicant of his right to file a *pro se* PDR, regardless of whether or not counsel believed that such a PDR would have merit. If she advised Applicant of his right to file a *pro se* PDR at some time before the court of appeals affirmed his conviction, appellate counsel shall provide a copy of the document in which she provided Applicant with this information. 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 Applicant's appellate counsel timely informed Applicant that he has a right to file a *pro se* petition for discretionary review. 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: March 20, 2013
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