



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-79,127-01

EX PARTE THOMAS JOHN DURBIN, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. W11-60823-K(A) IN THE CRIMINAL DISTRICT COURT #4
FROM DALLAS 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 entered an open plea of guilty to evading arrest or detention, and was sentenced to ten years' imprisonment.

On March 27, 2013, this Court remanded to the trial court for further information and findings addressing Applicant's claims that trial counsel failed to communicate a plea offer to Applicant prior to trial, failed to advise Applicant of his appellate rights, and failed to timely file a notice of appeal. On August 2, 2013, this Court received the supplemental record, which includes an affidavit from trial counsel and findings of fact from the trial court.

The supplemental record, however, is insufficient to fully address Applicant's allegations and to explain apparent discrepancies in the record. For example, in his affidavit trial counsel states that Applicant voluntarily elected not to accept a plea bargain offer made by the State but sought an open plea in order to obtain favorable treatment. The trial court finds that Applicant "was aware of the State's recommendation in the plea papers, as his signature appears on the plea form that includes the State's plea bargain offer." The plea form in question does not appear to contain a plea bargain offer but appears to show only that the State was recommending a 15-month state-jail sentence in connection with Applicant's open plea.

Furthermore, the offense charged in the indictment and described in the judicial confession in this case was a second degree felony, not a third degree felony. Applicant was admonished as to the punishment range for a third degree felony and the State's recommendation for a state jail felony sentence was below the minimum applicable sentence for the offense as charged and as pleaded to by Applicant.

In addition, this Court requested information on remand about whether trial counsel advised Applicant of his right to appeal in an open plea situation and, if so whether Applicant indicated a desire to appeal. In his affidavit, counsel states only that Applicant never asked him to file notice of appeal and that he would have done so had Applicant so requested. The trial court finds that Applicant was given the State required form advising him of his right to appeal. The record contains a copy of the trial court's certification of the defendant's right to appeal signed by Applicant, but the file-stamp on the certification indicates that it was filed more than a month before Applicant entered his plea. The certification does not show the date upon which it was signed by the trial court or received by Applicant. Applicant filed an untimely *pro se* notice of appeal and was appointed

appellate counsel after the appellate deadline had passed. Trial counsel does not state in his affidavit that he personally advised Applicant of his right to appeal and of the deadlines for doing so. Although the trial court's certification contains this information, there is nothing in the record to indicate when Applicant received the certification.

Because the supplemental record does not explain these discrepancies, additional facts are needed. Trial counsel shall submit a supplemental affidavit, stating specifically if and when the State made a pre-trial plea offer, and what the terms of any such offer were. Trial counsel shall state what advice, if any, he gave Applicant with respect to accepting any pre-trial plea offer, versus entering an open plea of guilty to the trial court. Counsel shall state what advice he gave Applicant with respect to the degree of offense with which he was charged, and the applicable punishment range to which he would be subject if he entered an open plea of guilty.

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 supplement the habeas record with a transcript of the plea and sentencing proceedings in this case. In addition, if there were any written plea offers made by the State and rejected by Applicant, the trial court shall supplement the record with copies of those documents. If there is a dated copy of the trial court's certification of the defendant's right to appeal, the trial court shall also supplement the record with that document, or any other document showing that Applicant was advised of the appellate deadlines and the process for obtaining appellate counsel and filing notice of appeal in a timely manner.

The trial court shall make findings of fact and conclusions of law as to if and when the State

made any specific pre-trial plea offers, whether any such offers were transmitted to Applicant, and whether Applicant accepted or rejected any such offers. The trial court shall make findings as to why the plea papers reflect a recommendation from the State of 15 months' state jail and as to why Applicant was admonished as to the punishment range for a third degree felony, rather than a second degree felony. 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: October 30, 2013
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