



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-79,596-01

EX PARTE CHRIS L. VASQUEZ, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 2008-420,480-A IN THE 140TH DISTRICT COURT
FROM LUBBOCK 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 forty-five years' imprisonment. The Seventh Court of Appeals affirmed his conviction. *Vasquez v. State*, No. 07-10-00325-CR (Tex. App.—Amarillo 2011, pet. ref'd).

Applicant contends, among other things, that trial and appellate counsel rendered ineffective assistance. The trial court recommended that we grant Applicant an out-of-time appeal, concluding that appellate counsel was deficient for not arguing that the restitution order was improper. We believe that the record should be further developed. We are not able to determine from the record

whether this issue was preserved for appeal and, if not, could have been preserved. Nor are we able to determine who, trial or appellate counsel, should have preserved the issue, if capable of preservation.

Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 668 (1984); *Ex parte Patterson*, 993 S.W.2d 114, 115 (Tex. Crim. App. 1999). 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 may order further responses from trial and appellate counsel. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 11.07, § 3(d). 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 him at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make further findings of fact and conclusions of law as to: (1) whether the improper restitution order was preserved as an issue for appeal; (2) whether the issue was capable of preservation, *see Burt v. State*, No. PD-1280-11, 2013 Tex. Crim. App. LEXIS 704 (Tex. Crim. App. Apr. 17, 2013);¹ (3) if capable of preservation, whether trial or appellate counsel was responsible for doing so; and (4) whether trial or appellate counsel rendered ineffective assistance. 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.

¹On this record, counsel could have conceivably objected to the improper restitution order for the first time in a timely motion for new trial. *Issa v. State*, 826 S.W.2d 159, 161 (Tex. Crim. App. 1992).

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: June 26, 2013
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