



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-80,097-01

EX PARTE BENNY LEE MONTGOMERY, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. CR34858 IN THE 238TH DISTRICT COURT
FROM MIDLAND COUNTY**

Per curiam.

OPINION

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 possession of cocaine and sentenced to twenty years' imprisonment. The Eleventh Court of Appeals affirmed his conviction. *Montgomery v. State*, No. 11-09-00253-CR (Tex. App.—Eastland Nov. 18, 2010) (unpublished).

Applicant contends that his appellate counsel rendered ineffective assistance because counsel advised him that he would file a petition for discretionary review on Applicant's behalf, but later made a strategic decision not to file, forfeiting Applicant's right to petition *pro se* for discretionary

review without consulting with him. We remanded this application to the trial court for additional findings of fact and conclusions of law.

Appellate counsel filed an affidavit with the trial court. Based on that affidavit, the trial court has entered findings of fact and conclusions of law that appellate counsel failed to fully inform Applicant of his strategy, forfeiting Applicant's right to discretionary review without consulting him. The trial court recommends that relief be granted. *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997).

We find, therefore, that Applicant is entitled to the opportunity to file an out-of-time petition for discretionary review of the judgment of the Eleventh Court of Appeals in Cause No. 11-09-00253-CR that affirmed his conviction in Cause No. CR34858 from the 238th District Court of Midland County. Applicant shall file his petition for discretionary review with this Court within 30 days of the date on which this Court's mandate issues.

Delivered: March 19, 2014
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