IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-80,475-01

EX PARTE ROCKY DEE HIDROGO, JR., Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. CCCR-08-03104-A IN THE 220TH DISTRICT COURT FROM COMANCHE COUNTY

***Per curiam*.**

O R D E R

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 capital murder and sentenced to life in prison. The Eleventh Court of Appeals affirmed the conviction. *Hidrago v. State*, 352 S.W.3d 27, No. 11-09-00310-CR (Tex.App.—Eastland 2011).

At trial, an accomplice testified that he dropped off Applicant to burglarize the victim's home and that when the accomplice picked him up a short time later, Applicant admitted to shooting the victim. Other inculpatory evidence linked Applicant to the crime scene. In his defense, Applicant attempted to introduce testimony regarding text messages that had not been preserved, although a

police officer did take notes regarding them. The texts indicated that the accomplice's brother had some involvement in or had committed the murder because he had made a statement against self-interest heard by the text messages' sender. The texts had been sent to Applicant's16-year-old niece from a phone belonging to another minor. Applicant wanted to introduce the substance of the text messages through witnesses who had read them, but the State objected on hearsay grounds. The trial court sustained the objections, and the rulings were upheld on direct appeal.

Applicant argues that counsel should have called to testify the minor who allegedly heard what the accomplice's brother had said as a statement against self-interest rather than attempt to offer the evidence through testimony regarding the substance of the text messages. There is no response from trial counsel regarding why he did not call the minor or another person mentioned in the text messages who also allegedly heard the statement against self-interest.

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 shall order trial counsel to respond to Applicant's claim of ineffective assistance of 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 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 the performance of Applicant's trial counsel was deficient and, if so, whether counsel's deficient performance prejudiced Applicant. 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.

Applicant also alleges that trial counsel was ineffective for failing to object to the police's non-preservation of the text messages for use at trial. It appears that counsel did make such an objection, and in any event, because the text messages constituted inadmissible hearsay, Applicant cannot show how he was harmed, so the claim lacks merit. *See Strickland v. Washington*, *supra*. Applicant also raises due process challenges regarding the non-availability of the text messages for use as evidence at trial, regarding items found in the victim's home that were excluded from evidence by the trial court, and regarding DNA evidence admitted at trial. These claims were either raised and rejected on direct appeal or should have been raised on direct appeal, so they are procedurally barred from consideration in collateral review. *See Ex parte Gardner*, 959 S.W.2d 189, 198-200 (Tex. Crim. App. 1996); *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).

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: November 27, 2013
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