

REVERSED AND REMANDED and Opinion Filed August 16, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00322-CR

No. 05-17-00323-CR

No. 05-17-00324-CR

EX PARTE IVAN VETCHER

**On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause Nos. W401-81746-2013-HC,
W199-81478-2013-HC, W199-82614-2013-HC**

MEMORANDUM OPINION

Before Justices Lang, Myers, and Stoddart
Opinion by Justice Myers

Ivan Vetcher appeals the trial court's orders denying relief on his applications for writ of habeas corpus. In two issues, appellant contends the trial court erred by failing to hold an evidentiary hearing on his writ applications and by failing to address additional factual claims he sought to raise in an untimely filed amendment to his applications. Concluding that the trial court erred in adjudicating the merits of appellant's writ applications, we reverse and remand.

BACKGROUND

In 2013, appellant was charged with three offenses of delivery of psilocybin and/or psilocin in an amount of four grams or more but less than 400 grams. In 2014, appellant entered open guilty pleas to the offenses and received concurrent sentences in each case of ten years' imprisonment, probated for ten years. He did not appeal the convictions. Appellant is not a

citizen of the United States. As a result of his convictions, he was detained by federal immigration authorities for removal from the United States.

On August 8, 2016, appellant filed identical applications for writs of habeas corpus in each case, contending he received ineffective assistance of counsel and raising various other complaints. Appellant filed his writ applications on forms designed for filing a writ application pursuant to article 11.07 of the code of criminal procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2015) (addressing writ procedures for applicants seeking relief from final judgments imposing confinement as punishment); *see also* TEX. R. APP. P. 73.1 (writ applications filed pursuant to article 11.07 must be on prescribed form). The form was styled, “Application for a Writ of Habeas Corpus Seeking Relief From Final Felony Conviction Under Code of Criminal Procedure, Article 11.07.” Accompanying the applications, and referenced therein, was a memorandum of law styled “Memorandum in Support of Habeas Corpus §2254¹ Pursuant to Texas Code of Criminal Procedure Art. 11.07.” In a section of the memorandum styled “Jurisdiction,” appellant makes the following contention: “Appropriate jurisdiction rests with the instant court to review a habeas corpus petition. Texas does not impose a statute of limitations for filing a habeas petition. *See* Tex. Code Crim. Proc. art. 11.07. . . .”

Because appellant is serving terms of community supervision, any habeas relief he chooses to pursue must be initiated pursuant to code of criminal procedure article 11.072. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, §1 (West 2015); *Ex parte Villanueva*, 252 S.W.3d 391, 397 (Tex. Crim. App. 2008).

A writ application filed under article 11.07 requires different procedures than a writ application filed under article 11.072. Article 11.07 establishes the procedure for adjudicating an

¹ It appears the references to “§2254” in appellant’s trial court pleadings refer to 28 U.S.C.S. § 2254 (Westlaw through Pub. L. 115-43 (including Pub. L. 115-45)). Section 2254 details the power of federal judges to grant writs of habeas corpus to persons in state custody.

application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, §1. A post-conviction writ is returnable to the court of criminal appeals. *Id.* art. 11.07, §3(a). The trial court does not grant or deny relief on the writ application; instead, it determines whether there are “controverted, previously unresolved facts material to the legality of the applicant’s confinement.” *Id.* art. 11.07, §3(c). If the trial court determines that there are no controverted facts, the application and any response to it are immediately transmitted to the court of criminal appeals. *Id.* If the trial court determines that there are controverted issues of fact, it enters an order “designating the issues of fact to be resolved” and it engages in a fact-finding process that may involve hearings or the filing of affidavits and other evidence. *Id.* art. 11.07, §3(d). The trial court makes findings of fact and forwards those findings to the court of criminal appeals which makes the decision whether to grant relief. *Id.* art. 11.07, §§3(d), 5. Article 11.07 does not provide a role for the courts of appeals. *See In re McAfee*, 53 S.W.3d 715, 717 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

Article 11.072 establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a judgment under which the applicant is either serving a term of community supervision or has completed a term of community supervision. TEX. CODE CRIM. PROC. ANN. art. 11.072, §1. The applicant must challenge either the validity of his or her conviction imposing community supervision or else the conditions of his or her community supervision. *Id.* art. 11.072, §2(b). A writ of habeas corpus issues by operation of law upon the filing of the application. *Id.* art. 11.072, §4. If the State chooses to file a response, it must be filed within thirty days after the application was served on the State, with the possibility of one thirty-day extension upon a showing of good cause. *Id.* art. 11.072, §5. To resolve any fact issues, the trial court “may order affidavits, depositions, interrogatories, or a hearing, and may

rely on the court's personal recollection." *Id.* art. 11.072, §6. Within sixty days of the filing of the State's response, the trial court must issue a written order granting or denying relief on the merits. *Id.* If the trial court determines that the applicant is manifestly not entitled to relief, its dispositive order should state that the application is frivolous; in all other cases, the trial court's written order must include findings of fact and conclusions of law. *Id.* art. 11.072, §7. Either the applicant or the State may appeal the trial court's determination to the court of appeals. *Id.* art. 11.072, §8.

After appellant filed his writ applications, the record reflects confusion on the part of the interested parties to the case over how to handle the matter. On August 10, 2016, the trial court clerk forwarded copies of appellant's writ applications to the State, describing each in an accompanying letter as an "Application for Writ of Habeas Corpus (11.072 V.A.C.C.P.)". Despite the trial clerk's characterization of the applications, the State and the trial court initially treated the applications as article 11.07 writs. On August 29, 2016, the State filed with the trial court a response styled "State's Request for Order Designating Issues" in which the State generally denied appellant's allegations, stated its position that there were "controverted issues of material fact to Applicant's incarceration," and requesting the trial court to enter an order designating issues. *See id.* art. 11.07(b), (c) (requiring the State to file a response within fifteen days of receiving the application and giving the trial court twenty days after the trial court's response to determine whether there are "controverted, previously unresolved facts material to the legality of the applicant's confinement.").

On that same day, the trial court issued an order designating issues. *See id.* art. 11.07(c). The trial court found that there were controverted facts requiring resolution regarding two issues: (1) whether trial counsel was ineffective; and (2) whether appellant's guilty plea was involuntary. The trial court determined that the issues should be resolved by affidavit and it

ordered trial counsel to file, by October 17, 2016, an affidavit addressing twenty-one specified questions about trial counsel's experience, recall of the cases in question, advice to appellant regarding deportation and the State's plea offer. There is no analogue in article 11.072 to the order designating issues requirement of article 11.07(c).

The State did not file a timely response nor did the trial court issue a final ruling within the time frame required by article 11.072. Instead, the State waited until February 14, 2017 to file in each case an untimely "Response to Article 11.072 Application for Writ of Habeas Corpus." On that same day, the trial court issued an order styled "Findings of Fact and Recommendation" in which it made fact findings and conclusions of law—although the conclusions of law were not designated as such—denied relief on appellant's writ applications, and denied a large number of pending motions and requests appellant had filed seeking to expand the scope of his habeas applications. On March 27, 2017, appellant filed notices of appeal addressed to the Court of Criminal Appeals. The trial court clerk transmitted the notices of appeal to this court.

JURISDICTION

Before addressing the merits of appellant's contentions, we must first consider whether we have jurisdiction to proceed with our review. Because appellant filed his applications pursuant to article 11.07, the trial court should have followed the procedures set forth in article 11.07 and forwarded its recommendations to the court of criminal appeals which, upon receipt of the writ applications, would have dismissed the writ applications without prejudice to refile writ applications under article 11.072. *See Ex parte Hiracheta*, 307 S.W.3d 323, 325 (Tex. Crim. App. 2010); *Ex parte Glass*, 203 S.W.3d 856, 857 (Tex. Crim. App. 2006) (Johnson, J., concurring in dismissal of habeas corpus). In these cases, however, the State and the trial court used a mixture of procedures from articles 11.07 and 11.072 in the habeas proceedings and the

trial court's final order, in substance at least, appears to be an order under article 11.072. Because the trial court chose to address the merits of appellant's writ applications and deny relief upon them, this Court has jurisdiction to review the propriety of the order. *See Ex parte Hargett*, 819 S.W.2d 866, 868–69 (Tex. Crim. App. 1991).

STANDARD OF REVIEW

An applicant seeking post-conviction habeas corpus relief bears the burden to prove his or her claim by a preponderance of the evidence. *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016). In reviewing an order denying relief on an article 11.072 post-conviction writ, the trial court is the sole finder of fact, and “we afford almost total deference to a trial court's factual findings when they are supported by the record, especially when those findings are based on credibility and demeanor.” *Id.* We view the facts in the light most favorable to the trial court's ruling, and we will uphold the trial court's ruling absent an abuse of discretion. *See Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). If the resolution of the ultimate question turns on an application of legal standards, we review the determination de novo. *See Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003) (per curiam), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007).

ANALYSIS

Although we have jurisdiction to review the trial court's order, we will not reach the merits of appellant's issues. Appellant filed a writ application pursuant to article 11.07. He is not entitled to seek relief under that article. *See Villanueva*, 252 S.W.3d at 397.

At least one appellate court has held, in an unpublished opinion, that jurisdiction over the merits of an article 11.07 writ application is conferred on the court of appeals where the parties have agreed to treat the 11.07 writ application as a writ application filed under article 11.072. *See Ex parte Martinez*, No. 13-10-00085-CR, 2012 WL 1142882, at *1 n.1 (Tex. App.—Corpus

Christi–Edinburg Apr. 5, 2012, no pet.) (mem. op. on reh’g) (not designated for publication).² There is no evidence of such an agreement in appellant’s cases. In another decision, an appellate court determined it had jurisdiction over the merits when the writ applications did not expressly reference article 11.072, but that article clearly applied because the applicants were on community supervision and their writ applications challenged the legal validity of their convictions. *See Ex parte Ali*, No. 03-10-00206-CR & No. 03-10-00207-CR, 2010 WL 5376860, at *2 (Tex. App.—Austin Dec. 16, 2010, no pet.) (not designated for publication). In the present cases, article 11.072 would apply to appellant’s cases, but unlike *Ali*, appellant specifically invoked article 11.07 as the basis for his writ applications. We note that in his concurrence in *Glass*, Justice Johnson observed that when an applicant files a writ application under article 11.072, if the trial court, the State, and trial court clerk erroneously treat the application as an 11.07 writ, the application should be dismissed. *See Glass*, 203 S.W.3d at 857.

Because appellant filed his writ applications under the wrong statute; the trial court and the parties did not agree to treat the applications as filed under the correct statute; and neither the trial court nor the State followed the procedures required to treat the applications as correctly filed under article 11.072; we conclude the trial court abused its discretion in rendering judgment on the merits of appellant’s 11.07 writ applications. *See* TEX. CODE CRIM. PROC. ANN. arts. 11.07, § 3, 11.072, §§5, 7; *Hiracheta*, 307 S.W.3d at 325; *Glass*, 203 S.W.3d at 857 n. 1.

² Unpublished opinions have no precedential value but may be cited. TEX. R. APP. P. 47.7.

We reverse the trial court's orders denying relief on appellant's writ applications and remand these cases to the trial court for further proceedings consistent with this opinion.

/Lana Myers/
LANA MYERS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

EX PARTE IVAN VETCHER

No. 05-17-00322-CR

On Appeal from the 199th Judicial District
Court, Collin County, Texas
Trial Court Cause No. W401-81746-2013-
HC.

Opinion delivered by Justice Myers. Justices
Lang and Stoddart participating.

Based on the Court's opinion of this date, the order of the trial court denying relief on appellant's application for writ of habeas corpus is **REVERSED** and the cause is **REMANDED** for further proceedings consistent with this opinion.

Judgment entered this 16th day of August, 2017.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

EX PARTE IVAN VETCHER

No. 05-17-00323-CR

On Appeal from the 199th Judicial District
Court, Collin County, Texas
Trial Court Cause No. W199-81478-2013-
HC.

Opinion delivered by Justice Myers. Justices
Lang and Stoddart participating.

Based on the Court's opinion of this date, the order of the trial court denying relief on appellant's application for writ of habeas corpus is **REVERSED** and the cause is **REMANDED** for further proceedings consistent with this opinion.

Judgment entered this 16th day of August, 2017.



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

EX PARTE IVAN VETCHER

No. 05-17-00324-CR

On Appeal from the 199th Judicial District
Court, Collin County, Texas
Trial Court Cause No. W199-82614-2013-
HC.

Opinion delivered by Justice Myers. Justices
Lang and Stoddart participating.

Based on the Court's opinion of this date, the order of the trial court denying relief on appellant's application for writ of habeas corpus is **REVERSED** and the cause is **REMANDED** for further proceedings consistent with this opinion.

Judgment entered this 16th day of August, 2017.