

Affirmed and Majority and Concurring Opinions filed March 10, 2016.



In The

Fourteenth Court of Appeals

NO. 14-15-00338-CR

EX PARTE BRIAN F. ROBERTS

**On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 883239-A**

CONCURRING OPINION

The trial court concluded: “In all things the applicant fails to show that counsels’ conduct fell below the objective standard of reasonableness and that but for counsels’ alleged deficient conduct there is a reasonable probability that the result of the proceeding would have been different.” The evidence supports that conclusion. It is unnecessary for us to apply laches to resolve this appeal.

The majority finds prejudice to the State from the passage of time and the destruction of the marijuana. The offense report still exists and indicates that two police officers were involved in the arrest. We have no evidence that those two

officers are unable or unavailable to testify about the arrest, and it is well-established that a police officer can testify that what was seized was marijuana, without having tested it or putting it into evidence. *See Osbourn v. State*, 92 S.W.3d 531, 537–39 (Tex. Crim. App. 2002); *Boothe v. State*, 474 S.W.2d 219, 221 (Tex. Crim. App. 1971).

The trial court reviewed the underlying clerk’s record, and before the trial of the case in 2001, the State filed a notice of intent to use expert testimony, naming five officers and an HPD chemist. There was no evidence that these witnesses were unable or unavailable to testify.

The majority also relies on the fact that appellant’s primary lawyer¹ has died and that the lawyer’s office no longer has a file on the case, making it more difficult for the State to respond to the writ. But this did not prejudice the State—the trial court was able to review all of the evidence and conclude that counsels’ conduct did not fall below the standard of care.

I see no impediment to the State’s re-trial of appellant. Without an impediment to re-trial, we should not apply laches. Because the majority does, I do not join its opinion, but I respectfully concur in its judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, McCally, and Busby. (Busby, J., majority).
Publish — Tex. R. App. P. 47.2(b).

¹ His son, who testified at the hearing, filed pleadings on behalf of the appellant and was listed as co-counsel.