

Affirmed and Memorandum Opinion filed June 23, 2016.



In The

Fourteenth Court of Appeals

NO. 14-15-00740-CR

EX PARTE RUSSELL LEVI POPE, Appellant

**On Appeal from the County Criminal Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 2027731**

M E M O R A N D U M O P I N I O N

Appellant Russell Levi Pope was convicted of driving while intoxicated (DWI) and unlawfully carrying a weapon. Appellant filed a post-conviction application for writ of habeas corpus, requesting that the trial court grant him a new trial because his counsel had failed to perfect a timely appeal of one of the convictions through no fault of appellant. After an evidentiary hearing, the trial court denied appellant's application.

In a single issue, appellant argues that the trial court should have granted habeas relief because his counsel's failure to perfect an appeal of his conviction caused a breakdown in the system that entitled appellant to an out-of-time appeal. Because the verified facts in appellant's application, even if true, do not entitle him to the relief that he requests, we overrule appellant's sole issue and affirm the trial court's order.

BACKGROUND

Appellant was charged with the misdemeanor offenses of DWI (cause number 1967710) and unlawfully carrying a weapon (cause number 196711). Appellant pled guilty to the charge of driving while intoxicated and was sentenced to one year in county jail, probated for a period of two years, and a \$250.00 fine. Appellant also pled guilty to the charge of unlawfully carrying a weapon. For that offense, the trial court sentenced appellant to four days in county jail and a \$300.00 fine.

According to appellant, his trial counsel filed a notice of appeal in cause number 1967710 but failed to file a notice of appeal in cause number 1967711. Appellant first filed and then amended an application for writ of habeas corpus, pursuant to article 11.09 of the Code of Criminal Procedure, alleging that he was improperly denied the right of appeal in cause number 1967711.¹ Appellant claims that he desired to pursue appeals from both convictions and that his trial counsel led him to believe that the notice of appeal filed in cause number 1967710 also provided notice in cause number 1967711. Appellant argues that his counsel's failure to explain his appellate rights resulted in the denial of his due process right to appeal his conviction for unlawfully carrying a weapon.

The trial court held a hearing on appellant's application for writ of habeas corpus. Appellant introduced the writ application, the judgments of conviction in both cause numbers, the trial court's certification of the defendant's right to appeal in both cause numbers, and the notice of appeal in cause number 1967710. Neither appellant nor his counsel testified or provided an affidavit. After hearing arguments from defense

¹ Article 11.09 provides:

If a person is confined on a charge of misdemeanor, he may apply to the county judge of the county in which the misdemeanor is charged to have been committed, or if there be no county judge in said county, then to the county judge whose residence of the county in which the applicant is held in custody.

Tex. Code Crim. Proc. Ann. art. 11.09 (West 2015).

counsel and the State, the trial court denied appellant's requested relief without making findings of fact or conclusions of law. This appeal followed.²

ANALYSIS

I. Standard of review

The trial court sits as the finder of fact in a habeas proceeding brought under article 11.09 of the Texas Code of Criminal Procedure. *Ex parte Martinez*, 451 S.W.3d 852, 856 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd). In such cases, the court is the sole judge of credibility and demeanor, and we may not disturb its ruling absent a clear abuse of discretion. *Id.*; see *Ex parte Garcia*, 353 S.W.3d 785, 787 (Tex. Crim. App. 2011). We consider the evidence presented in the light most favorable to the court's ruling. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). Where, as here, a trial court did not make findings of fact and conclusions of law and neither party requested them, we imply the findings necessary to support the trial court's ruling if such findings are supported by the record. *State v. Kelly*, 204 S.W.3d 808, 818–19 (Tex. Crim. App. 2006).

II. The trial court did not abuse its discretion in denying appellant's habeas application.

Appellant contends he was deprived of his right to appeal the denial of his conviction, through no fault of his own, when his counsel failed to file a timely notice of appeal of his conviction for unlawfully carrying a weapon. When a defendant's failure to file a timely appeal is caused by no fault of his own but by a breakdown in the system, he may be entitled to an out-of-time appeal to ensure that he is afforded the right to appeal. See *ex parte Riley*, 193 S.W.3d 900, 902 (Tex. Crim. App. 2006). To obtain such relief through a writ of habeas corpus, however, an applicant must allege

² When, as here, an appellant challenges the trial court's denial of relief sought in a misdemeanor post-conviction writ of habeas corpus, the appeal is properly directed to the intermediate court of appeals. *Dahesh v. State*, 51 S.W.3d 300, 302 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

facts entitling him to relief and prove his allegations by a preponderance of the evidence. *See Ex parte Richardson*, 70 S.W.3d 865, 870 (Tex. Crim. App. 2002); *see also Ex parte Parrott*, 396 S.W.3d 531, 534 (Tex. Crim. App. 2013).

In his application for writ of habeas corpus, appellant alleged that he communicated his desire to appeal both convictions to his trial counsel following the trial court's denial of his motion to suppress. Appellant claimed that his counsel led him to believe that his right to appeal his conviction under cause number 1967711 (unlawfully carrying a weapon) was perfected when counsel perfected his right to appeal the conviction under cause number 1967710 (DWI). Appellant argued that his trial counsel's failure to file separate notices of appeal and to explain to him the appeals process resulted in a breakdown in the system that deprived appellant of his right to appeal through no fault of his own. The only supporting document contained in the application was a document signed by appellant verifying that all the information contained in the writ application was true.

At the writ hearing, appellant filed six exhibits, none of which included evidence regarding the circumstances of counsel's alleged failure to appeal.³ Appellant did not call any witnesses or offer an affidavit from his trial counsel. For the reasons given below, we conclude that the verified facts in appellant's application, even if true, do not entitle him to the relief that he requests.

On appeal, appellant relies on *Ex parte Riley*, 193 S.W.3d 900 (Tex. Crim. App. 2006) and *Ex parte Alonzo*, No. WR-79573-01, 2013 WL 2731055, at *1 (Tex. Crim. App. June 12, 2013 (per curiam) (not designated for publication). In those cases, however, the failure to file a timely notice of appeal was not caused by the applicant or

³ Those exhibits are as follows: (1) Applicant's First Amended Application for a Writ of Habeas Corpus; (2) Judgment of Conviction by Court (cause number 1967710); (3) Trial Court's Certification of Defendant's Right of Appeal (cause number 1967710); (4) Notice of Appeal (cause number 1967710); (5) Judgment of Conviction by Court (cause number 1967711); and (6) Trial Court's Certification of Defendant's Right of Appeal (cause number 1967711).

counsel, but by a breakdown in the system.⁴ In contrast, appellant's verified application seeks relief due to the following errors by counsel:

[Appellant] was not informed that the disposition of the unlawful carrying of a weapon charge was not subsumed by the disposition of the dispositive motion to suppress, the entry of a guilty plea, and its subsequent appeal. . . . It was incumbent upon [counsel] to explain to [appellant] the appeals process, including his right to appeal his conviction for unlawful carrying of a weapon in cause number 1967711. The failure of appellate counsel to inform [appellant] of his right to appeal his conviction in cause number 1967711 and the timeliness in which to do so denied [appellant] the right to appeal his conviction for unlawful carrying of a weapon.

Appellant's application lacks evidence of any breakdown in the system independent from his counsel's failures to represent appellant to appellant's satisfaction. These complaints could be pursued through a claim of ineffective assistance of counsel. *See Ex parte Axel*, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988) (holding appellant received ineffective assistance of counsel and was entitled to an out-of-time appeal when trial counsel failed to "consult with and fully to advise his client concerning . . . his right to appeal from [the] judgment, the necessity of giving notice of appeal and taking other steps to pursue an appeal . . ."). Because appellant did not raise a claim of ineffective assistance of counsel in the trial court, we may not grant him relief on that basis. *See Tex. Code Crim. Proc. Ann. art. 11.09* (West 2015); *Ex parte Bone*, 25 S.W.3d 728, 730 (Tex. App.—Waco 2000, no pet.) ("We do not have original jurisdiction over an 11.09 habeas corpus application; rather, we exercise appellate jurisdiction over a trial court's ruling on such application.").

Had appellant offered evidence through affidavits or testimony at the writ hearing

⁴ In *Ex parte Riley*, appellant's attorney filed an affidavit in which he explained that he had not received the court of appeals' memorandum opinion and therefore was unable to advise the applicant of his legal options and failed to file a timely petition for discretionary review. *Riley*, 193 S.W.3d at 901. In *Ex parte Alonzo*, an unpublished case without precedential value, appellant's counsel also provided an affidavit that established appellant's failure to file a timely notice of appeal was through no fault of his own. *Alonzo*, 2013 WL 2731055, at *1.

that his counsel's failures were the result of some independent, outside cause, he may have been able to establish by a preponderance of the evidence an entitlement to an out-of-time appeal. *See Ex parte Riley*, 193 S.W.3d at 902; *Ex parte Pena*, No. 08-12-00188-CR, 2014 WL 3408423, at *2 (Tex. App.—El Paso July 11, 2014, no pet.) (mem. op., not designated for publication). Based on the record before us, however, appellant has not met his burden.

CONCLUSION

We overrule appellant's sole issue and affirm the trial court's judgment denying appellant's habeas application.

/s/ J. Brett Busby
Justice

Panel consists of Justices Christopher, McCally, and Busby.
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