NO. 12-10-00443-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

SAUL ALBERTO SALAZAR, APPELLANT	***§***	***APPEAL FROM THE 173RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Saul Alberto Salazar appeals from the trial court's denial of relief on his application for writ of habeas corpus. In three issues, Appellant argues that the trial court applied the wrong law, that he received ineffective assistance of counsel, and that Texas Code of Criminal Procedure, Article 26.13 is unconstitutional. We dismiss for lack of jurisdiction.

BACKGROUND

Appellant pleaded guilty to the state jail felony offense of possession of a controlled substance in 2007. The trial court accepted his plea, deferred a determination of his guilt, and placed him on community supervision for a period of three years. In 2008, the State filed a motion to adjudicate his guilt, alleging that he had violated the terms of his community supervision.

Appellant pleaded true to six of the allegations in the State's motion, and the trial court found him guilty and assessed a sentence of confinement for two years. The trial court suspended that sentence and placed Appellant on community supervision for a period of three years. In 2009, the State filed a motion to revoke Appellant's suspended sentence, alleging that he had

violated the terms of his community supervision. Appellant pleaded true to those allegations, and the trial court sentenced him to confinement for ten months.

In 2010, pursuant to Texas Code of Criminal Procedure, Article 11.072, Appellant filed an application for writ of habeas corpus alleging that he was not afforded effective assistance of counsel immediately before he pleaded guilty in 2007. In his application, Appellant alleged that he is not a citizen of the United States and that his guilty plea "absolutely subject[ed] [him] to immigration removal proceedings" and to removal from the United States. His attorney told him only that his plea may result in his "removal and exclusion from the United States," and Appellant asserted that he would have refused to plead guilty to the controlled substance charge if he had received what he terms accurate advice. Appellant was prejudiced because he alleged that if he had refused to plead guilty, he "believe[s] that he would have been proven innocent at [a] trial," that the case would have been dismissed, or that he could have pleaded guilty to a charge that did not have immigration consequences. He also alleged that he was detained by the Department of Homeland Security in August 2010 and that the Department is seeking to remove him permanently from the United States because of his 2007 guilty plea.

The trial court denied relief on Appellant's application, and this appeal followed.

JURISDICTION

Appellant argues that the trial court applied the wrong habeas corpus statute, that he was denied effective assistance of counsel, and that Texas Code of Criminal Procedure, Article 26.13(a) is unconstitutional.

With respect to the first issue, Appellant argues that he filed an application for habeas corpus under Article 11.072, code of criminal procedure. He complains that the trial court treated this as an application for habeas corpus under Article 11.07, code of criminal procedure. The nature of these two procedures is important to our resolution of this case.

Applicable Law

Article 11.072 describes the procedure for an applicant who "seeks relief from an order of a judgment of conviction ordering community supervision." *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 1 (West 2005). The applicant must be on community supervision, or have been, and the application must be a challenge the validity of "the conviction for which or order in which

community supervision was imposed" or the conditions of community supervision. ***Id***. art. 11.072, § 2.

Within sixty days of the filing of the state's response to an Article 11.072 writ application, the trial court is obligated to issue a written order granting or denying relief. ***Id***. art. 11.072, § 6. A party that does not wholly prevail may appeal the trial court's determination following the customary rules for appeals. *See* ***id***. art. 11.072, § 8.

The procedure for an Article 11.07 writ application is similar, but differs in important respects. Article 11.07 "establishes the procedure for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death." TEX. CODE CRIM. PROC. ANN. art. 11.07, § 1 (West Supp. 2010). After final conviction in any felony case, the writ "must be made returnable" to the court of criminal appeals. ***Id***. art. 11.07, § 3(a). In an Article 11.07 writ proceeding, the trial court does not grant or deny relief. Instead, the court makes findings of fact and transmits those findings to the court of criminal appeals. ***Id***. art. 11.07, § 3(d). The court of criminal appeals then makes the decision as to whether relief should be granted. *See* ***id***. art. 11.07, § 5. The procedure outlined in Article 11.07 is "exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner." ***Id***.

Analysis

Appellant argues that he sought relief pursuant to Article 11.072, but that the trial court erred and used the procedure for an Article 11.07 writ. Appellant accurately points out that the State's pleadings and the trial court's order make reference to Article 11.07 and that the trial court's order makes reference to the question of whether there are controverted or previously unresolved facts at issue. The language about unresolved facts comes from Article 11.07, Section 3(c), and is not found in Article 11.072.

However, Appellant did get the benefit of the most distinguishing features of an Article 11.072 writ. The trial court ruled on his application, required for Article 11.072 writs but reserved to the court of criminal appeals for Article 11.07 writs. Furthermore, the trial court certified his right to appeal to this court, something that is required for an Article 11.072 writ and not permitted for an Article 11.07 writ.

The problem is that an Article 11.072 writ is not appropriate for this case because Appellant has a final felony conviction, is not on community supervision, and is not collaterally attacking a community supervision judgment. Appellant complains of his counsel's performance

immediately before the judgment placing him on deferred adjudication was entered, but Appellant is not serving that term of community supervision, and he never completed that term of community supervision. Instead, he is restrained by his final conviction for this offense. By its own terms, Article 11.07 is the "exclusive" procedure for cases after a "conviction." *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, § 5; *see also* ***id***. art. 11.07, § 1 ("This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death."). A writ of habeas corpus challenging such a conviction must be brought pursuant to Article 11.07, which governs the procedure following a final conviction. *See, e.g.*, ***Holmes v. State***, No. 10-05-00119-CR, 2005 Tex. App. LEXIS 2821, at *1-2 (Tex. App.–Waco Apr. 13, 2005, no pet.) (mem. op., not designated for publication) (holding that appellate court had no jurisdiction to review ruling on an application for writ of habeas corpus filed after a final felony conviction).[1]

By contrast, the court of criminal appeals has written that the legislature "intended Article 11.072 to provide the exclusive means by which the district courts may exercise their original habeas jurisdiction . . . in cases involving an individual who is either serving a term of community supervision or who has completed a term of community supervision." *See* ***Villanueva v. State***, 252 S.W.3d 391, 397 (Tex. Crim. App. 2008).

Appellant is not serving a term of community supervision, and he did not complete a term of community supervision. Pursuant to Article 11.07, the court of criminal appeals has exclusive jurisdiction to grant postconviction relief on a final felony judgment. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07, § 5; ***Ex parte Adams***, 768 S.W.2d 281, 287 (Tex. Crim. App. 1989); ***Ex parte Martinez***, 175 S.W.3d 510, 512-13 (Tex. App.–Texarkana 2005, orig. proceeding) (court of appeals lacks jurisdiction to consider originally filed postconviction application for writ of habeas corpus); *see also* ***Ex parte Green***, 644 S.W.2d 9, 9 n.1 (Tex. Crim. App. 1983) (trial court lacked

[1] The court of criminal appeals regularly considers, under Article 11.07, writ applications where the applicant was placed on deferred adjudication community supervision following a guilty plea, was later adjudicated and found guilty, and is raising a claim about the initial guilty plea. *See, e.g.*, ***Ex parte Insall***, 224 S.W.3d 213, 214 (Tex. Crim. App. 2007) (challenge to voluntariness of guilty plea after deferred adjudication revoked and applicant sentenced to imprisonment); ***Ex parte Delaney***, 207 S.W.3d 794, 795-96 (Tex. Crim. App. 2006) (challenge to waiver executed at initial plea that resulted in deferred adjudication of guilt); *see also* ***Ex parte Elliott***, No. WR-76,151-01, 2011 Tex. Crim. App. Unpub. LEXIS 555, at *1-2 (Tex. Crim. App. Aug. 24, 2011) (mem. op., not designated for publication) (applicant received deferred adjudication, was later adjudicated, and brought collateral attack on initial plea pursuant to Article 11.07); ***Ex parte Welsh***, No. WR-74,374-03, 2011 Tex. Crim. App. Unpub. LEXIS 486 (Tex. Crim. App. June 29, 2011) (mem. op., not designated for publication) (same).

jurisdiction to grant postconviction relief). Because Appellant seeks relief by way of an application for writ of habeas corpus from a final felony conviction, we lack jurisdiction to consider the issues raised in his appeal.

DISPOSITION

We ***dismiss*** this appeal for lack of jurisdiction.

SAM GRIFFITH
Justice

Opinion delivered November 30, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)