IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AP-76,064

EX PARTE JASPER EARL FOSTER, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. CR-04-870-A-1 IN THE 22ND DISTRICT COURT FROM HAYS COUNTY

***Per curiam*.**

O P I N I O N

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 writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of murder and sentenced to eighty years' imprisonment after he was found to be a habitual offender. The Third Court of Appeals affirmed his conviction. *Foster v. State*, No. 03-05-801-CR (Tex. App. - Austin, delivered May 17, 2007, no pet.).

Applicant contends that his appellate counsel rendered ineffective assistance because counsel failed to timely notify Applicant that his conviction had been affirmed. On remand counsel

submitted an affidavit stating that the appellate opinion was delivered May 17, 2007, and he sent notice to Applicant on July 25, 2007, that the appeal had been affirmed. The trial court found that counsel's affidavit sufficiently supplements the record and addresses the issues raised by Applicant's writ. That affidavit shows that counsel did not timely notify Applicant that his appeal had been affirmed or that he could file a pro se petition for discretionary review. *Ex parte Wilson*, 956 S.W.2d 25 (Tex. Crim. App. 1997).

We find, therefore, that Applicant is entitled to the opportunity to file an out-of-time petition for discretionary review of the judgment of the Third Court of Appeals in Cause No. 03-05-801-CR that affirmed his conviction in Case No. CR-04-870 from the 22nd Judicial District Court of Hays County. Applicant shall file his petition for discretionary review with the Third Court of Appeals within 30 days of the date on which this Court's mandate issues.

Delivered: January 14, 2009
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