IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AP-76,080

EX PARTE MICHAEL LEE SMITH, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 8325-1 IN THE 82ND DISTRICT COURT FROM FALLS 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 manslaughter and sentenced to twenty years' imprisonment. The Tenth Court of Appeals affirmed his conviction. *Smith v. State*, No. 10-97-051-CR (Tex. App. - Waco, delivered February 27, 2008, no pet.).

Applicant contends that his appellate counsel rendered ineffective assistance because counsel failed to timely file a petition for discretionary review. Counsel submitted an affidavit stating that he failed to timely file the petition for discretionary review because his staff failed to calendar the

date it was due. The trial court found that counsel inadvertently failed to file the petition, and recommends that applicant be given an opportunity to file an out-of-time petition for discretionary review.

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 Tenth Court of Appeals in Cause No. 10-07-051-CR that affirmed his conviction in Case No. 8325 from the 82nd Judicial District Court of Falls County. Applicant shall file his petition for discretionary review with the Tenth Court of Appeals within 30 days of the date on which this Court's mandate issues.

Filed: January 28, 2009
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