IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,230

EX PARTE JOHNATHAN TOLIVER, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 241-1849-06 IN THE 241ST DISTRICT COURT FROM SMITH 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 a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of delivery of a controlled substance and sentenced to life imprisonment. The Twelfth Court of Appeals affirmed his conviction. *Toliver v. State*, No. 12-06-00388-CR (Tex. App.–Tyler, March 19, 2008, no pet.).

Applicant contends that his appellate counsel rendered ineffective assistance because counsel failed to advise him of his right to petition for discretionary review *pro se.* We remanded this application to the trial court for findings of fact and conclusions of law.

Appellate counsel filed an affidavit with the trial court. Based on that affidavit, the trial court has entered findings of fact and conclusions of law that appellate counsel failed to advise Applicant of his right to petition for discretionary review *pro se.* The trial court recommends that relief be granted. *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 Twelfth Court of Appeals in Cause No. 12-06-00388-CR that affirmed his conviction in Case No. 241-1849-06 from the 241st Judicial District Court of Smith County. Applicant shall file his petition for discretionary review with the Twelfth Court of Appeals within 30 days of the date on which this Court's mandate issues.

Applicant's remaining claims are dismissed. *Ex parte Torres*, 943 S.W.2d 469 (Tex. Crim. App. 1997).

Delivered: September 23, 2009
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