IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-94,138-01

EX PARTE REGINALD BERNARD GASTON, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 895072-A IN THE 208TH DISTRICT COURT FROM HARRIS COUNTY

***Per curiam*. NEWELL, J., concurred.**

O R D E R

Applicant was convicted of aggravated robbery and sentenced to twenty-six years' imprisonment. The First Court of Appeals affirmed his conviction. *Gaston v. State*, No. 01-02-00742-CR (Tex. App.—Houston [1st] Jun. 19, 2003) (not designated for publication). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

This application was file-stamped in Harris County on July 28, 2010. An order designating issues was signed by the trial judge on August 16, 2010. This application was not received by this Court until September 8, 2022. There is no indication in the record of any action by the trial court after the order designating issues was signed. Nor is there any indication as to why this application

was pending in Harris County for so long without any action by the clerk or the trial court.

Applicant contends, among other things, that he is actually innocent. He provides an affidavit from his co-defendant stating that Applicant's only role in the offense was trying to stop it from happening. Applicant has alleged facts that, if true, might entitle him to relief. *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). Accordingly, the record should be developed. The trial court is the appropriate forum for findings of fact. TEX. CODE CRIM. PROC. art. 11.07, § 3(d).

As a preliminary matter, the trial court shall make findings of fact as to why no action was taken by the trial court or the clerk between the entry of the order designating issues and the forwarding of the application to this Court. The trial court shall obtain a response from Applicant as to whether Applicant still wants to pursue this application, and shall include that response in the supplemental record. If the trial court is unable to obtain such a response from Applicant, the trial court shall detail the efforts that were made to obtain a response from Applicant. The trial court shall then return the application to this Court.

If Applicant indicates that he does want to pursue this application, the trial court shall order trial counsel to respond to Applicant's claim. In developing the record, the trial court may use any means set out in Article 11.07, § 3(d). If the trial court elects to hold a hearing, it shall determine whether Applicant is indigent. If Applicant is indigent and wants to be represented by counsel, the trial court shall appoint counsel to represent him at the hearing. *See* TEX. CODE CRIM. PROC. art. 26.04. If counsel is appointed or retained, the trial court shall immediately notify this Court of counsel's name.

The trial court shall make findings of fact and conclusions of law as to whether Applicant

is actually innocent of aggravated robbery. The trial court shall make specific findings as to the credibility of the statements made in the affidavit by Applicant's co-defendant Anthony Arceneaux. The trial court may make any other findings and conclusions that it deems appropriate in response to Applicant's claim.

The trial court shall make findings of fact and conclusions of law within ninety days from the date of this order. The district clerk shall then immediately forward to this Court the trial court's findings and conclusions and the record developed on remand, including, among other things, affidavits, motions, objections, proposed findings and conclusions, orders, and transcripts from hearings and depositions. *See* TEX. R. APP. P. 73.4(b)(4). Any extensions of time must be requested by the trial court and obtained from this Court.

Filed: December 07, 2022
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