

APPENDIX

RESUBMITTED DATE: July 18, 2018

Martin Salzwedel
MARTIN SALZWEDEL-PRO-SR
DATE: MAY 28, 2018

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WR-73,707-08

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SALINAS, MARTIN

Tr. Ct. No. A06-351-4

The Court has dismissed without written order this subsequent application for a writ of habeas corpus. TEX. CODE CRIM. PROC. Art. 11.07, Sec. 4(a)-(c).

Deana Williamson, Clerk

HSG-124

MARTIN SALINAS
ALLRED UNIT - TDC # 1438660
2101 FM 369 NORTH
IOWA PARK, TX 76367

IOWA 76367

APPENDIX C

APPENDIX C



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED

At 10:00 o'clock A.M.

APR 30 2010

EX PARTE MARTIN SALINAS, Applicant

LINDA UECKER
District Clerk
Kerr County, Texas

Ex parte Martin Salinas, Salinas

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. A06-351 IN THE 216TH DISTRICT COURT
FROM KERR COUNTY**

Per curiam.

ORDER

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 aggravated assault and sentenced to sixty years' imprisonment. The Fourth Court of Appeals affirmed his conviction. *Salinas v. State*, No. 04-07-00492-CR (Tex. App.—San Antonio Sep. 10, 2008 pet. ref'd.) (not designated for publication).

Applicant contends that his trial counsel rendered ineffective assistance because, *inter alia*, she prevented him from testifying in his defense and did not adequately investigate the case. Applicant suggests that better investigation would have led to presentation of evidence that would

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have supported his theory that the complainant's injuries were the result of Applicant's self-defense or defense of a third person, rather than a failed assassination attempted on behalf of the Mexican Mafia. Additionally, Applicant contends that appellate counsel rendered ineffective assistance because, *inter alia*, he did not raise the trial court's refusal to charge the jury on self-defense and the defense of third persons.

Applicant has alleged facts that, if true, might entitle him to relief. *Strickland v. Washington*, 466 U.S. 608 (1984); *Ex parte Lemke*, 13 S.W.3d 791, 795-96 (Tex. Crim. App. 2000). In these circumstances, additional facts are needed. As we held in *Ex parte Rodriguez*, 334 S.W.2d 294, 294 (Tex. Crim. App. 1960), the trial court is the appropriate forum for findings of fact. The trial court shall order Applicant's trial and appellate lawyers to respond to Applicant's claims of ineffective assistance of counsel. The trial court may use any means set out in TEX. CODE CRIM. PROC. art. 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 wishes to be represented by counsel, the trial court shall appoint an attorney to represent Applicant at the hearing. TEX. CODE CRIM. PROC. art. 26.04.

The trial court shall make findings of fact as to whether the performance of Applicant's attorneys was deficient and, if so, whether the deficient performance prejudiced Applicant. The trial court shall make specific findings of fact as to whether trial counsel advised Applicant of his right to testify on his own behalf, and if so, whether she prevented him from exercising that right. If the trial court finds Applicant's right to testify in his defense was violated, the trial court shall determine whether this violation prejudiced the defense under *Strickland v. Washington*, 466 U.S. 608 (1984). *X*
The trial court shall make specific findings of fact as to whether trial counsel failed to discover and present evidence supporting Applicant's theory of the case. The trial court shall also make specific

findings of fact as to whether trial counsel preserved complaints concerning the court's failure to include self defense and/or defense of third persons instructions in the jury charge. If such claim was preserved, the trial court shall determine whether appellate counsel's failure to raise the issue was ineffective assistance of counsel. The trial court shall also make any other findings of fact and conclusions of law that it deems relevant and appropriate to the disposition of Applicant's claims for habeas corpus relief.

This application will be held in abeyance until the trial court has resolved the fact issues. The issues shall be resolved within 90 days of this order. If any continuances are granted, a copy of the order granting the continuance shall be sent to this Court. A supplemental transcript containing all affidavits and interrogatories or the transcription of the court reporter's notes from any hearing or deposition, along with the trial court's supplemental findings of fact and conclusions of law, shall be returned to this Court within 120 days of the date of this order. Any extensions of time shall be obtained from this Court.

Filed: April 28, 2010
Do not publish

FILED 6-24 2010
@ 10:50 A M

NO. A06-351

LINDA UECKER
District Clerk, Kerr County Tx

EX PARTE

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IN THE 216TH DISTRICT

MARTIN SALINAS

0

COURT OF KERR COUNTY,

TEXAS

By S. Linda M. Avery Deputy

FINDINGS AND CONCLUSIONS

In compliance with the Order of the Court of Criminal Appeals dated April 28, 2010, docket number WR-73,707-01, ancillary to the above styled and numbered cause, a hearing was conducted on the 22nd day of June, 2010 for the purpose of making findings of fact as to whether the trial and appellate attorneys of Applicant, Martin Salinas, rendered ineffective assistance. Upon the evidence and arguments of Applicant and the State, the Court makes the following findings.

I. FINDINGS OF FACT

A. Ineffective Assistance of Trial Counsel

1. Preventing Applicant from Testifying

At the request of Applicant's trial attorney, an attorney with greater experience as a criminal defense attorney assisted Applicant's attorney during the trial. Applicant informed the attorneys that he wanted to testify. During a break in the trial, the assisting attorney, in the presence of Applicant's attorney, informed Applicant of his right to testify in his defense. Applicant was informed that it was his decision, but that the attorneys recommended that he not testify because of his prior convictions and affiliation with the Mexican Mafia. Applicant's attorney verbally expressed her concurrence with the assisting attorney's advice, and Applicant accepted the advice.

Applicant's defensive theory was self-defense and the defense of a third person. Other than that he did not stab the complainant through a gate, the testimony Applicant would have given in his defense is unknown, and whether Applicant's testimony, if believed, would have been sufficient, as a matter of law, to raise an issue of self-defense under Penal Code Sec. 9.31 or 9.32 (Vernon 2009 Supp.), or defense of third person under Penal Code Sec. 9.33 (Vernon 2003) is unknown.

2. Inadequate Investigation

a. Failure to Interview and Call Potential Witnesses

Applicant contends that his trial attorney's performance was deficient because she failed to call Louis Ramirez, who drove Applicant to the scene

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of the offense and was present at the time of the offense, to testify that Applicant acted in self-defense or in defense of a third person. Other than Applicant's conclusory statement that Ramirez would have testified that Applicant was not "the first aggressor," the specific relevant facts to which he would have testified are unknown. Applicant's trial attorney interviewed Ramirez prior to trial, and concluded that his testimony would not be helpful to Applicant's theory of defense.

The only other potential witness who was in a position to testify in support of Applicant's defensive theory is Paige Sutton who is the third person in whose defense Applicant purportedly acted in assaulting the complainant. Paige Sutton was interviewed by the investigator who was appointed by the trial court in response to the request of Applicant's attorney, and, from the interview, Applicant's attorney believed that Sutton would testify favorably. When called at trial by Applicant's attorney, however, Sutton was uncooperative and evasive, and failed to testify as expected.

b. Failure to Visit Scene of Offense

Applicant contends that the gate through which the State's witnesses testified Applicant first cut or stabbed the complainant should have contained blood stains if that version of the incident were accurate. Conversely, Applicant contends that if the gate did not contain blood stains, the credibility of the State's witnesses would be impaired, and the credibility of his defensive theory would be enhanced. Applicant contends that his trial attorney's performance was deficient because she failed to visit the scene and inspect the gate. Applicant's attorney was appointed approximately six weeks after the date of the offense. Whether it was reasonable to believe that the gate, after that period of time, would contain blood stains is unknown. The knife wound sustained by the complainant was to his upper left shoulder, which made it possible that he was stabbed over the top of, rather than through, the gate. As mentioned in item #2,a, above, Paige Sutton did not testify that Applicant acted in self-defense or in defense of a third person, and it is unknown whether Louis Ramirez or Applicant would have testified to facts that would have supported those defenses. Because evidence of blood stains would have been merely corroborative of Applicant's defensive theories, without evidence supporting the defensive theories, evidence of blood stains would have had no probative value.

c. Examination of Knives

Applicant contends that his trial attorney's performance was deficient because she did not examine or have an expert examine the knife that he used and the knife that the complainant used to determine the particular injuries inflicted by each knife. Applicant argues that this evidence would have supported his defensive theories. Whether the blades or other characteristics of the knives would have produced that evidence is unknown. Also, as mentioned in #2,a, above, any such evidence would be merely corroborative of Applicant's theories of defense, and without evidence supporting those theories, such evidence would have had no probative value. Both knives were admitted in evidence at trial, and were available for the jury's examination and comparison, and photographs depicting Applicant's and the complainant's injuries were admitted at trial.

d. Failure to Interview Medical Personnel

Applicant's attorney reviewed the hospital records pertaining to the treatment of Applicant's injuries. Those records reported that some wounds sustained by Applicant were defensive wounds. Applicant contends that his attorney's performance was deficient because she did not interview the hospital personnel who treated Applicant for the purpose of having them testify to such wounds. Applicant asserts that the existence of those wounds would show that he acted in self-defense. Whether any health-care provider would be able to testify that in reasonable medical probability Applicant sustained the defensive wounds when the complainant initiated the altercation, or after it was initiated by Applicant is unknown. Unless the wounds would show that Applicant defended himself from the complainant's assault, evidence of the wounds would have had no probative value.

3. Failure to Offer Tapes of 9-1-1 Calls

Paige Sutton called 9-1-1 two days prior and one day prior to the date of the offense, and Applicant's attorney obtained copies of the three tape recordings of those calls. During direct examination of Paige Sutton, Applicant's attorney was able to introduce one of the tapes, and have it played to the jury, but because of Sutton's uncooperativeness, she did not offer the other tapes. Applicant contends that his attorney's performance was deficient because of her failure to introduce all three recordings. Applicant argues that the recordings would have supported his theory that he assaulted the complainant in defense of Sutton. The content of the two unoffered recordings is unknown, and whether they would have provided evidence in support of Applicant's defensive theory cannot be determined. Irrespective of the content of the recordings, it is unknown whether Applicant, at the time of the assault, reasonably believed Sutton was being threatened with unlawful force or unlawful deadly force by complainant, and that he reasonably believed that his intervention was immediately necessary to protect Sutton, as required by Penal Code Sec. 9.33 (Vernon 2003).

4. Failure to Object to Extraneous Matters, and Request Limiting Instructions

Applicant contends that his attorney's performance was deficient because she failed to object to certain "extraneous matters," and failed to request limiting instructions concerning those matters. Applicant's attorney objected to the State's evidence of Applicant's Mexican Mafia affiliation on the grounds that such evidence was irrelevant and unfairly prejudicial. The trial court admitted the evidence, and the Court of Appeals affirmed the trial court's ruling. *Salinas v. State*, No. 04-07-00492-CR (Tex. App. - San Antonio Sep. 10, 2008, pet. ref'd.) (not designated for publication). The nature of the other matters is unknown; whether they were inadmissible cannot be determined, and whether, if admissible, they were admissible for only limited purposes cannot be determined.

5. Request for Jury Instruction on Defensive Theories

At the charge conference, Applicant's attorney requested that the jury be instructed on the law of self-defense and defense of a third person, and submitted a form of charge contained in McClung, TEXAS CRIMINAL JURY CHARGES. The trial court denied the requested instruction in writing.

B. Ineffective Assistance of Appellate Counsel

Applicant contends that his appellate attorney's performance was deficient for failure to attack the trial court's refusal to instruct the jury on self-defense and defense of a third person. Applicant did not present any evidence at trial that he acted in self-defense or in defense of a third person.

II. CONCLUSIONS

A. Ineffective Assistance of Trial Counsel

1. Preventing Applicant from Testifying

Applicant's trial attorney's performance was not deficient for preventing Applicant from testifying. Applicant was informed of his right to testify in his own defense, and that it was his decision whether to testify. Applicant decided to not testify.

2. Inadequate Investigation

Applicant's attorney's performance was not deficient for failing to adequately investigate in the respects alleged. Whether the results of any of the alleged matters would have produced evidence favorable to Applicant is purely conjectural. Any such speculative evidence would have been merely corroborative of evidence that Applicant acted in self-defense or defense of a third person. There was no evidence that Applicant acted in self-defense or in defense of a third person. Therefore, such speculative evidence would have had no probative value.

3. Failure to Offer Tapes of 9-1-1 Calls

Applicant's attorney's failure to introduce two of the three recordings of Paige Sutton's 9-1-1 calls was not shown to be deficient because the content of those recordings was not revealed. Further, the recordings appear to be irrelevant because there was no evidence that Applicant acted in defense of Paige Sutton.

4. Failure to Object to Extraneous Matters, and Request Limiting Instruction

Applicant's attorney's failures to object to "extraneous matters," and request limiting instructions were not shown to be deficient because the nature of such matters was not revealed, and their inadmissibility or limited admissibility was not shown.

5. Request for Jury Instruction on Defensive Theories

Applicant's attorney's performance was not deficient for failing to request a jury instruction on Applicant's defensive theories. Applicant's attorney requested an instruction on the law of self-defense and defense of a third person, and submitted a proposed instruction in writing.

6. Prejudice

Because it is concluded that Applicant's attorney's performance was not deficient in any of the respects alleged, no conclusion is expressed with reference to prejudice.

B. Ineffective Assistance of Appellate Counsel

Applicant's appellate attorney's performance was not deficient for failing to assert error for the trial court's failure to instruct the jury on the law of self-defense and defense of a third person. There was no evidence that Applicant acted in self-defense or in defense of a third person. Asserting such error, therefore, would have been frivolous and futile.

SIGNED this 24th day of June, 2010.

Robert R. Barton

Robert R. Barton
Judge Presiding

Copies to:

- ✓ Hon. Clay Steadman
- ✓ Hon. Guy James Gray
- ✓ Hon. Lucy Pearson
- ✓ Hon. Patrick Maguire
- ✓ Hon. Lucy Wilke

6-24-10