

App. 1

APPENDIX A

[Texas Court of Criminal Appeals]

APPLICANT ARTHUR RODRIGUEZ BAUTISTA
APPLICATION NO. WR-88.492-01

**APPLICATION FOR 11.07 WRIT OF
HABEAS CORPUS AFTER REMAND**

ACTION TAKEN

**DENIED WITHOUT WRITTEN ORDER ON
FINDINGS OF TRIAL COURT AFTER HEAR-
ING.**

/s/ David C. Newell

JUDGE

06/05/19

DATE

App. 2

APPENDIX B

WRIT NO. W05-24750-Y(A)

EX PARTE	*	IN THE CRIMINAL
ARTHUR BAUTISTA,	*	DISTRICT COURT
APPLICANT	*	NO. 7
	*	DALLAS COUNTY,
		TEXAS
	*	

**TRIAL COURT'S FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

On this day came on to be considered Applicant's Application for Writ of Habeas Corpus and the State's Response. Having considered these pleadings and the official court records, as well as all exhibits, memorandum and Proposed Findings of Fact and Conclusions of Law offered by both parties, this Court enters the following findings of fact and conclusions of law.

HISTORY OF THE CASE

Applicant was convicted of murder and was sentenced to 40 years confinement. His conviction was affirmed on direct appeal. *See Bautista v. State*, No. 05-08-00905-CR (Tex. App. Dallas Aug. 27, 2009, pet. ref'd) ((not designated for publication)).

This is his first application for writ of habeas corpus.

ISSUES RAISED IN APPLICATION

Applicant asserts that the trial judge's repeated improper comments demonstrated bias in favor of the State and denied Applicant due process.

Applicant asserts that he received ineffective assistance of counsel at the guilt-innocence stage.

Applicant asserts that he was denied the effective assistance of counsel on appeal.

RELEVANT EVIDENCE

Applicant's trial counsel, Robert Udashen and Gary Udashen were called at [sic] witnesses at a hearing on July 12, 2018.

FINDINGS OF FACT

General Findings

The Court takes judicial notice of the trial court's file in Cause No. F05-24750-Y.

The Court takes judicial notice of the clerk's record from the trial. Citations to said record will be "CR".

The Court takes judicial notice of the reporter's record from the trial. Citation to said record will be "RR-".

The Court takes judicial notice of the entire contents of the Court's writ file in Cause No. W05-24750-Y(A).

App. 4

The Court takes judicial notice of the writ record from the hearing on July 12, 2018. Citations to said record will be “WR”.

The Court finds Robert Udashen and Gary Udashen are well-known, experienced and qualified defense attorneys in Dallas County. Both are among the preeminent lawyers in the area. They have always practiced criminal defense in both State and Federal courts. They handle trials, appeals and post-conviction matters. The Court finds them to be truthful and worthy of belief.

Trial Court’s Comments

This issue was not, and could have been, raised on direct appeal. As such, it is procedurally barred. However, the Court will make specific findings on this issue out of an abundance of caution.

Robert Udashen testified that he knew Judge Snipes as a prosecutor (an Assistant United States Attorney), lawyer, judge, and colleague prior to this trial. (WR: 10-11). Robert believed Judge Snipes was a smart lawyer and, as a judge, he provided people with fair trials and was not vindictive or retaliatory. (WR: 11-12). Robert was not aware of anything Judge Snipes had ever done of an improper nature to help the State, and he does not believe that Judge Snipes attempted to help the State or hurt the defendant in this case. (WR: 10-12).

App. 5

Judge Snipes, who presided over this trial, was known to expect attorneys to be prepared for trial and to not waste his or the jury's time. He ran an efficient court and conducted many trials (many more than the second place felony court in Dallas County) during his years on the bench. He wanted to dispose of cases in a timely manner. As such, he frequently attempted to "move things along" during voir dire and during trial.

1. When members of the venire indicated they could not convict a defendant based on the testimony of one witness, the Judge said, "I want to put your minds at ease. This is not a one-witness case." (RR-4: 48). In this case, the State planned to offer the testimony of Miguel Murillo and Applicant's video statement (which provided Applicant's version of events). (WR: 12-13). Even if it had been a one-witness case, Robert believed that it would have been helpful to the defense and not harmful. (WR: 13-14). Thus, there was nothing improper about the Court's statement because it was not a one-witness case.

2. When members of the venire indicated they could not consider probation for murder, the Judge asked the ADA to give "the mercy killing old folks hypothetical" (RR-4: 69-71). Robert believed that Judge Snipes was merely trying to make sure that they covered the full range of punishment with the panel. Further, this comment was not prejudicial. Even after the hypothetical was given, many of the veniremen still had problems giving probation which did not prevent those jurors from being challenged for cause. (WR: 14-15).

App. 6

3. When members of the venire expressed concern that innocent people had been convicted and that the number of exonerees from Dallas was “just ridiculous”, the Judge said, “. . . yes, we’ve had problems in this county in the past, but the current administration under Mr. Watkins is working very, very hard to make sure that that doesn’t happen in the future.” (RR-4: 112). It was common knowledge at the time that District Attorney Craig Watkins was doing things differently than previous administrations. (WR: 16). Robert believed Judge Snipes was attempting to keep the panel from focusing on the exonerations and keep jury selection on track. (WR: 16).

4. When a venireperson asked defense counsel whether the prosecutors coached the witnesses “before they even get on the stand”, as “they do it on CSI”, the Judge said that he would “guarantee that none of these four lawyers do that.” (RR.-4: 124-125). This was a neutral comment in that it applied equally to the prosecutors and the defense attorneys. (WR: 17, 20).

5. The Judge told the jurors that he would buy their lunch the next day because “it has been my experience that is you can get to know each other outside this whole jury process, it will help you once you decide to start deliberating in reaching a unanimous verdict in this case, which is what everybody here wants.” (RR-4: 221). Judge Snipes’ comment that he wanted a unanimous verdict was not improper. It was the truth as the State wanted a unanimous guilty verdict and the defense wanted a not guilty verdict. (WR: 21).

App. 7

6. The Judge repeated answers of the State's witness, Miguel Murillo. The Judge repeated that Murillo said that Applicant said, "I'm gonna cut this punk-ass bitch"; that Murillo's house "has been shot at before"; and that Murillo "fears death". (RR-5: 26, 41-42). Robert explained that Murillo often mumbled, was hard to understand, and his answers were not always clear and distinct. (WR: 22-23). Judge Snipes was not attempting to emphasize bad testimony but he repeated things that were had [sic] to hear, follow, or understand. (WR: 23-24). This was not prejudicial or improper.

7. The Judge interrupted Murillo's testimony, declared a recess and said that he was allowing the prosecutor to ask some leading questions "because I believe it's necessary to develop the testimony of this witness" and "to make th presentation effective for the ascertainment of the truth." Judge Snipes also stated that Murillo was "extremely unsophisticated" and "not educated." (RR-5: 75-76). As Robert testified, Murillo was "slow" and it took him a long time to answer questions. (WR: 26). Snipes recommendation resulted in a more efficient presentation of Murillo's testimony which was more effective for the jury. (WR: 26-28).

8. Defense counsel objected to the prosecutor asking a detective how Murillo's inconsistent statements played into his investigation. The Judge responded that he would allow some testimony but did not want the prosecutor to make the detective "into a human lie detector and invading the province of the jury, if you know what I mean." (RR-7: 45-46). Robert testified that he did not see Judge Snipes' comment as

App. 8

objectionable. (WR: 30). Robert testified that Judge Snipes was not saying that [someone] failed or passed a polygraph. (WR: 30). Robert believed that Judge Snipes was using the phrase “in a more generic sense that a jury would understand that this officer can’t be allowed to serve as a human lie detector, and I think the jury would understand what that meant.” (WR: 30).

Defense counsel testified that he could have made objections to all of the comments writ counsel asked about but “in the course of the trial, it didn’t seem warranted.” (WR: 31). Robert did not believe that any of the comments were prejudicial. (WR: 31). Robert stated, “If we had objected to him repeating the comments [of Murillo], that would have just emphasized it again for the jury those particular comments that you’re saying shouldn’t be used.” (WR: 31). When asked if the objections could have been made by approaching the bench, Robert stated, “I think even in that situation if we pop up and approach the bench right after the judge does that, the jury is going to understand what’s going on. . . . Juries aren’t stupid, and they know why you’re approaching the bench and what you’re discussing. I think it just emphasizes what just happened.” (WR: 31). Robert indicated that had he approached the bench and made an objection, it would have been overruled. (WR: 31). When asked if overruling the objection would have preserved the issue for appeal, Robert responded, “Yes, except I don’t see it as a good appellate issue, so I’m not sure what you’re preserving.” (WR: 32).

App. 9

The Court's comments did not serve to assist the State in this prosecution. The comments were not comments on the weight of the evidence nor did they divulge the Judge's opinion of the case. The comments were made in an effort to present an efficient case and not waste the jury's time. Some of the comments were just as beneficial to the defense as the prosecution. The comments did not violate Applicant's due process rights.

Ineffective Assistance of Trial Counsel

1. Defense counsel did not object to the Judge's allegedly improper comments during the trial. The Court does not find the comments to be improper and thus counsel cannot be ineffective for failing to object. Robert testified that he did not believe Judge Snipe's [sic] comments were calculated to benefit the State or prejudice the defense. (WR: 10, 32, 36). This was a strategic decision on counsel's part.

2. Defense counsel did not file a motion in limine or object to references to the incident as "the murder" and the deceased as the "victim"; and once, referred to the deceased as the victim himself. Robert did not file said motion as he did not believe the terms were determinant in trial. (WR: 43). Clearly, it was the State's opinion that Applicant committed murder as that was what he was charged with. Whether the jury believed the shooting was murder or self-defense, the victim was still a victim.

App. 10

3. Defense counsel did not file a motion in limine or object to police opinion testimony that the officers did not believe applicant. These statements were made during Applicant's police interrogation and as such, were admissible in the context of video interrogation. (WR: 44-46).

4. Defense counsel failed to request a lesser included offense instruction on I manslaughter which was raised by the testimony. Robert specifically discussed this with Applicant. Counsel advised Applicant that manslaughter would be a lesser punishment but it also provided the jury an opportunity to compromise on the verdict. (WR: 50). Applicant decided he did not want the manslaughter instruction because he did not want the jury to find him guilty of any offense. (WR: 50).

5. Applicant did not testify. Defense counsel did not object when the prosecutor argued, "Now there was only two people left alive from this incident and you heard from the witness stand from Mickey [Murillo]" and "We can't get into the man's mind and why he did what he did . . . ". When considered in the context in which they were made, these statements were not a comment on Applicant's failure to testify. (WR: 5-55).

Counsel's performance was not deficient and did not prejudice the defense. Applicant received effective assistance of counsel.

App. 11

Ineffective Assistance of Counsel on Appeal

Appellate counsel failed to raise an issue that the Judge's allegedly improper comments during the trial demonstrated bias in favor of the State and denied Applicant due process of law. Robert testified that he was aware of the *Blue* case at the time of the appeal, but did not raise this issue because he did not consider the Judge's comments to be prejudicial. (WR: 40).

Appellate counsel was not deficient and did not prejudice the defense.

CONCLUSIONS OF LAW

Applicant has not been denied any of the rights guaranteed him by the United States Constitution or the Texas Constitution.

Applicant is legally confined and restrained.

COURT'S RECOMMENDATION

This Court recommends that this writ of habeas corpus be DENIED.

ORDERS OF THE COURT

In implementing the Court's Finding of Fact and Conclusions of Law, the Clerk will:

1. Prepare a transcript of papers in this cause and transmit the Court's Order and the Findings of Fact and Conclusions of Law, including the judgment

App. 12

and indictment, all plea papers, if any, and the Court of Appeals opinion, if any, to the Court of Criminal Appeals as provided by TEX. CODE CRIM. PROC. ANN. art. 11.07.

2. Send a copy of this Order and the Findings of Fact and Conclusions of Law to the Applicant's counsel, Randy Schaffer, 1021 Main, Suite 1440, Houston, TX 77002, and to counsel for the State, Jaclyn O'Connor Lambert Assistant District Attorney, 133 N. Riverfront Blvd. LB-19, Dallas, TX 75207 by depositing same in the U.S. Mail.

Signed and entered February 4, 2019.

/s/ Chika Anyiam
JUDGE
