

No. 19-7190

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

Ernesto Benavides, Jr. - Petitioner Pro Se

vs.

Lorie Davis, Director T.D.C.-J-ID-Respondent(s)

ON PETITION FOR A WRIT OF CERTIORARI TO

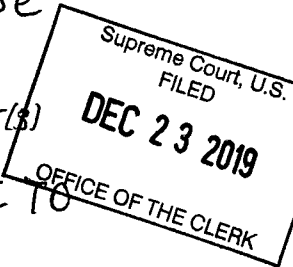
Court of Criminal Appeals of Texas

PETITION FOR WRIT OF
CERTIORARI

Ernesto Benavides, Jr.

9055 SPUR 591 (NEAL UNIT)

Amarillo, Texas 79107



Questions Presented

1. Is Petitioner entitled to Habeas Relief when State courts have denied right to a meaningful appeal of his motion to suppress evidence, under Jackson v. Denno, 378 U.S. 368 (1964), that occurred prior to trial?
2. Has Petitioner been denied effective assistance of trial Counsel if he expressed a desire to appeal to his trial Counsel but, trial Counsel failed to file notice of appeal?
3. After a Petitioner expresses his desire to appeal a pre-trial motion to suppress evidence but, relies on Counsel to appeal even though he enters a conditional plea that an appeal would be taken but, then at sentencing the judge admonishes that no appeal can be taken, is that ineffective assistance of petitioner's trial counsel for not telling the court about appeal intended even though that under Texas Rule of appellate procedure Rule 25.2(a)(2)(A) no permission from the court is needed to appeal the pre-trial motion but, counsel fails to file the appeal anyway?
4. In Texas, where Court of Criminal Appeals prefers that Ineffective assistance of Trial Counsel be raised in collateral proceeding but, counsel failed to file appeal in the first place, and petitioner "Pro Se" files his initial application for writ of habeas corpus, and does not raise ineffective assistance of trial counsel but, only grounds that should have been raised on direct appeal, Does the Court erroneously deny the application due to a procedural bar or, on the

merits because no appeal was taken timely due to counsel's deficient performance?

5. When Petitioner's trial counsel fails to timely file appeal, and Petitioner's conviction is finalized, and Petitioner files state application without counsel, and the application is denied, then petitioner seeks Federal relief, and attorney general's office misleads the Federal courts that Court of Criminal appeals denied application on the merits of the claims but, the Court of Criminal appeals denied the application without a written order because that's what it does on procedurally barred applications but, it's a mere label, has the state violated due process of the 14th amendment even though that petitioner's conviction was final but, the finality could be modified through granting of out-of-time appeal?

6.^{a)} When a state intermediate court of appeals issues mandate, and state law is well established that conviction is not final for habeas purposes until appeal court issues mandate even though its appeal has been dismissed for lack of jurisdiction because it's untimely, has the conviction been modified to access habeas purposes? (As in 28 U.S.C. § 2244(d)(1)(A) and 7.C.C.P. art. 11.07)

b) When intermediate court of appeals issues mandate with opinion noting that appeal has been dismissed for lack of jurisdiction but, a habeas corpus is the remedy to cure the defect, then an application for writ of habeas corpus is filed to Court of Criminal appeals but, Court dismisses application as subsequent instead of granting out-of-time appeal, has petitioner been deprived of his sixth Amendment right to appeal?

List of Parties

☒ All Parties appear in the caption of the case on Cover Page.

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(~~Denial~~) (Dismissal)

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Other

In The
Supreme Court of The United States
Petition for Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

Opinions Below

☒ For cases from state courts:

- The opinion of the highest state court to review the merits appears at Appendix B to the petition and is unpublished.
- The opinion of the Court of Appeals for the 13th District of Texas was mailed to the Texas' courts in an application for Writ of Habeas Corpus and Petitioner does not have a copy. The opinion noted that the remedy for the defect (untimeliness) was a Writ of Habeas Corpus. However a copy of mandate and notices appear on Appendix E. (Court of Appeals, Thirteenth district of Texas Case no. 13-19-00197-CR) unpublished.

Jurisdiction

The date on which the highest state court decided my case was 12/11/2019 a copy of that decision appears at Appendix G.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Constitutional and Statutory Provisions involved

- 6th Amendment right to meaningful Appeal. U.S. Const. VI Amendment. *Lewis v. Johnson*, 359 F.3d 646 (3d Cir. 2004)
- 28 U.S.C. 2244(d)(1)(A): A petitioner has a one year "period of limitation" in which to file a § 2254 petition ... § 2244(d)(1)(A) the date on which the judgment became final by conclusion of "direct review"...
- 28 U.S.C. 2244(d)(2) The time during which a "properly filed application" for State ...
- Tex. Code of Crim. Pro. article 11.07 sec. 3(a): After final conviction in any felony case, the writ must be made ...
- (b) An application for writ of habeas corpus filed after final conviction in a felony case ... *Ex parte Webb*, 270 S.W.3d 108 (Tex. Crim. App. 2008) (conviction is not final ... until court of appeals has issued its mandate ...)
- Tex. Rule of Appellate Procedure Rule 25.2 (2)(4): In a plea bargain case ... in which defendant's plea was guilty ... a defendant may appeal only: those matters that were raised by written motion filed and ruled on before trial. *Chavez v. State*, 183 S.W.3d 675 (Tex. Crim. App. 2006).

Statement of the Case

This case involves attorney errors that amount to deprivation of an entire judicial proceeding, an appeal.

Petitioner was stopped on a pretextual traffic violation where police had a subjective motive to obtain a consent to search a residence.

Consent to search the residence was obtained from petitioner shortly after the traffic stop, and a third party signed the consent form at the residence. Consent was signed by two parties.

Petitioner testified and objected at a pre-trial motion to suppress evidence. Petitioner called witnesses to testify but, state objected, and petitioner was deprived of compulsory process. The issue of voluntariness arose at the proceeding under *Jackson v. Denno*, 378 U.S. 368 (1964).

After motion to suppress evidence was denied, petitioner expressed his desire to appeal.

Counsel advised petitioner to enter a plea, waive procedural safeguards and appellate rights. To avoid mistaken verdict, Motion was appealable.

Under Texas law (Rule of Appellate procedure Rule 25.2(a)(2)(A)) No permission is needed to appeal a Pre-trial motion to suppress evidence following a plea.

Trial counsel failed to grant practicable assistance in pursuing appellate rights entitling petitioner to appeal. *Ex parte Axel*, 757 S.W.2d at 373 (Tex. Crim. App.); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Lewis v. Johnson*, 359 F.3d 646 (3d Cir. 2004).

Texas law provides that the habeas courts does not have jurisdiction until conviction is final and appeal court issues mandate. *Ex parte Johnson* 12 S.W.3d 472, 473 (Tex. Crim. App.); Texas Code of Criminal procedure article 11.07, section 3 (Finality of Conviction).

This is true even when an appeal is dismissed for lack of jurisdiction because it was not timely filed. *Ex parte Johnson* 12 S.W.3d 472 (Tex. Crim. App. 2000).

Petitioner Filed first state application in August, 2014, and state raised procedural bar defense due to not filing direct appeal and exhausting remedies in appeals court. pg 2, 3, *Ex parte-Recommendation*. (Appd.

A) Petitioner had filed Pro Se without the assistance of counsel and raised only two grounds. The state argued that those grounds should have been argued on direct appeal, not on application for writ of habeas Corpus. (See Appendix A-)

The Court of Criminal Appeals of Texas denied the application without a written order. Texas Criminal Appeals Court, WR-82,033-01. An application procedurally defaulted is considered denied on the merits. It's labeled on the merits, but does not entail a final disposition to trigger a bar under Tex. Code. criminal Proc. art. 11.07 sec. 4. *Ex parte Torres*, 943 S.W.2d 409 (Tex. Cr. App. 1997); *Ex parte Thomas*, 953 S.W.2d 286 (Tex. Crim. App. 1997). (See Appendix B-)

The attorney general's office misled the Federal District Court that the Court of Criminal Appeals of Texas ruled on the merits of the two grounds in the first state application when the Court of Criminal appeals denied application without written order. See Report and Recommendation of the Magistrate Judge, pg 7, 8, footnote on pg 8, and compare with denial of Court

of Criminal appeals of Texas WR-82,033-01. (Appendix B&D)

The Analysis, part C, of the Merits is also erroneous. It states that the guilty plea waived all non-jurisdictional defects but in Texas law, what I am arguing is the appeal for the pretrial motion to suppress evidence which is appealable under Texas Rule of appellate procedure Rule 25.2(2)(A) after entering a plea. *Chavez v. State*, 183 S.W.3d 675 (Tex. Crim. App. 2006). (Appendix D- pgs 7.)

My petition was denied in Federal District Court and C.O.A. as well. pgs 8, Report and Recommendation. (Appendix D)

Writ of Certiorari was refused. I have diligently pursued this claim without counsel.

Therefore, I learned that that first application for state was not properly filed under the statutory language of 28 U.S.C. § 2244(d)(2); I had not exhausted all state remedies, And this fact was also under agreement with Texas Code of Criminal Procedure article 11.07 section 3(a): "After final conviction in any felony case, the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas"; and *Ex parte Webb*, 270 S.W.3d 108 (Tex. Crim. App. 2008) ("A conviction in which an appeal has been taken is not final for purposes of Art. 11.07 until the court of appeals has issued its mandate to the trial court"); *Ex parte Johnson*, 12 S.W.3d 472 (Tex. Crim. App. 2002) (even so when appeal is dismissed for lack of jurisdiction do to untimely appeal).

I filed in the 13th Court of Appeals of Texas and the Court

dismissed for lack of jurisdiction due to untimeliness and issued an opinion, which was filed in State District Court with a prior application, that was dismissed as subsequent by the Court of Criminal Appeals of Texas (WR-82,033-08).

The opinion noted that the cure for the defect was a writ of habeas corpus but, that cure was beyond their jurisdiction. That was the opinion of the 13th Court of appeals of Texas case No. 13-19-00197-CR.

The mandate and some notices are attached to this petition. (Appendix E)

Thinking that my application for writ of habeas (WR-82,033-08) Corpus had overlapped the court of appeals issuance of mandate and therefore dismissed, I filed the last one (WR-82,033-09) but, it was also dismissed as subsequent.

Therefore, this petition is seeking a review of the last State court to review the case I requested an out-of-time Appeal due to Counsels deficient performance in not filing an appeal for Motion to Suppress evidence under Tex. Rule appellate procedure Rule 25.2 (2)(A). That hearing is constitutional under Jackson v. Denno, 378 U.S. 368 (1964), and statutory under ^{Tex.} Code Crim. Procedure 38.22 section 6. See DYkes v. State, 649 S.W.2d 633, 636 (Tex. Crim. App. 1983); Bonham v. State, 644 S.W.2d 5, 8 (Tex. Crim. App. 1983).

Under Texas Constitution the Appellate Courts review a consent to search under the Clear and Convincing evidence standard and apply the totality of the circumstances to determine voluntariness. I am challenging that and compulsory process since my witness

was not allowed to testify.

The appeal was exhausted in appeal court and mandate was issued this September 18th 2019.

The Court of Criminal Appeals of Texas is misapplying the law and depriving me of 6th Amendment right to a meaningful appeal of a constitutionally required proceeding, the evidentiary hearing under Jackson v. Denno, 378 U.S. 368 (1964).

Therefore, I meekly request this court to grant relief and reverse the Court of Criminal Appeals ~~Denial~~ "Dismissal without a written order" of application WR-82,033-09 and remanded with instructions that it issue a writ of habeas corpus conditioned upon the states reinstatement of right of first appeal within 45 days from entry of the Court of Criminal Appeals granting writ. Lewis v. Johnson 359 F.3d 646 (3d. Cir. 2004).

Reasons For Granting The Petition

The motion to suppress evidence was conducted prior to plea entry. The matter involves issue on voluntariness pursuant to Jackson v. Denno, 378 U.S. 368 (1964), and denial of compulsory process under Washington v. Texas, 388 U.S. 14, 19 (1967). Both issues are constitutional, and the pre-trial hearing it self is constitutional and statutory. The Trial judge must enter findings of fact and conclusions of law or the appeal court will abate appeal for the court to enter such findings. Wicker v. State, 740 S.W.2d 779 (Tex. Crim. App. 1987). This is the "clear cut and reliable determination of voluntariness" Denno (1964) requires before evidence is admitted. It is a statutory and constitutional requirement, see Dykes v. State, 649 S.W.2d 633, 636 (Tex. Crim. App. 1983).

Under Texas Law this motion is appealable under ~~Tex. Code of Criminal Pro.~~ Texas Rule of Appellate Procedure Rule 25.2(a)(2)(A). The fact that trial counsel failed to file for appeal under that statute shows deficient performance under Strickland v. Washington, 466 U.S. 668 (1984), and Roe v. Flores-Ortega, 528 U.S. 470 (2000).

The statute makes an appeal for the pre-trial motion practicable even though a plea is entered. Chavez v. State, 183 S.W.3d 675 (Tex. Crim. App.) (2006).

When petitioner filed initial application for writ of Habeas Corpus in State Court (WR-82,033-01) he filed Pro Se, without the assistance of counsel. Petitioner was denied but, his conviction was not final for habeas purposes because Court of appeals had not issued the mandate yet. Ex parte Johnson, 12 S.W.3d 472 (Tex. Crim. App. 2000).

Under the statutory language of § 2244, the application in State Court and petitions in Federal Court were not properly filed yet.

The mandate issued by the Court of appeals in September 18, 2019 marks the finality of the conviction. Ex parte Johnson, 12 S.W.3d 472 (Tex. Crim. App. 2000).

The last application filed in state courts was properly filed under Tex. Code. Crim. Pro. article 11.07 and § 2244. This petition for certiorari is within the 1-year limitation period for § 2244 and within the 90 day limitation period for petition of writ of certiorari.

Since State courts found application barred and it was properly filed it falls under the exception of Trevino vs. Thaler, 133 S.Ct. 1911 (2013).

For these reasons the Petition should be Granted.

Conclusion

Wherefore, Petitioner Pro Se, Prays this Court agree with the Foregoing Petition, that an appeal for Motion to Suppress evidence conducted prior to trial is necessary, and thus, The petition for a writ of certiorari should be granted.

Respectfully submitted,
(s) Ernesto Benavides Jr.

Date: 12/19/2019