



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-26,178-03

EX PARTE ARTHUR BROWN, JR.

**ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 636535-B IN THE 351ST JUDICIAL DISTRICT COURT
HARRIS COUNTY**

Per curiam. ALCALA, J., filed a dissenting opinion.

ORDER

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

Applicant was convicted of murdering more than one person during the same criminal transaction. The evidence at his 1993 trial showed that six people were shot at the Houston home of Rachel Tovar in June 1992. Four of those people – Jose Tovar, Frank Farias, Jessica

Quinones, and Audrey Brown – died. The two survivors, Rachel Tovar and “Nico” Cortez, identified Applicant and Marion Dudley as their attackers. The State presented evidence that a Smith & Wesson .357 Magnum revolver and a Charter Arms .38 revolver were used in the commission of the offense. Firearms examiner Charlie E. Anderson testified for the State that these guns fired bullets that were recovered from the bodies of the victims. Based on the witness testimony and the ballistics evidence, the State argued that Applicant shot Farias, Quinones, and Brown with the Charter Arms.

Applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant’s conviction and sentence on direct appeal. *Brown v. State*, No. AP-71,817 (Tex. Crim. App. December 18, 1996)(not designated for publication). This Court denied relief on Applicant’s initial post-conviction application for writ of habeas corpus. *Ex parte Brown*, No. WR-26,178-02 (Tex. Crim. App. June 18, 2008)(not designated for publication).¹

In his -03 application, Applicant alleges within Claim A that prosecutorial misconduct occurred at his trial when:

- State’s witness Charlie E. Anderson “testified falsely or in a materially misleading manner when he expressed his unequivocal opinion that the evidence bullets were fired from the two guns that the State recovered in Alabama and tied to [Applicant].”

¹ *Ex parte Brown*, No. WR-26,178-01, was an application for writ of mandamus, which this Court denied leave to file on March 23, 1994.

- The State “presented false identification testimony through its witness Nicholas Cortez Anzures.”
- The State “failed to turn over favorable exculpatory evidence that four armed black males driving a similar van with Alabama license plates were boasting, only days after the murders in this case, of committing murders in Houston.”

In Claim B, Applicant alleges that his trial counsel were ineffective because they “failed to investigate or unreasonably narrowed the scope of their investigation into substantial and compelling mitigating evidence that would have given the jury a reason to spare [his] life.”

On October 28, 2015, we remanded the cause for the trial court to consider one claim: Applicant’s allegation that Anderson gave false or misleading testimony at his trial. When the ballistics evidence was re-tested by two other firearms examiners, Ed Love, Jr. and Donna Eudaley, they did not identify the Smith & Wesson and the Charter Arms as the guns used in the commission of this offense. Love eliminated the Charter Arms and was inconclusive about the Smith & Wesson. Eudaley was inconclusive about both of the guns. After holding a hearing in which Anderson, Love, and Eudaley testified, the trial court adopted Applicant’s proposed findings of fact and conclusions of law and recommended that relief be granted on the remanded claim. We disagree.

In order to be entitled to post-conviction habeas relief on the basis of false evidence, Applicant must show by a preponderance of the evidence that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury’s verdict. *See Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015), *citing Ex parte Weinstein*,

421 S.W.3d 656, 659, 665 (Tex. Crim. App. 2014). We review factual findings concerning whether a witness's testimony is false under a deferential standard, but we review *de novo* the ultimate legal conclusion of whether such testimony was "material." See *Weinstein*, 421 S.W.3d at 664.

We note at the outset that none of the experts were certain what type of ammunition was used in the shootings, and both Love and Eudaley acknowledged the possibility that different ammunition could lead to different results. But even if we assume the falsity of Anderson's testimony about his ballistics testing results, which were confirmed prior to trial by secondary examiners Donald Davis and Raymond Klien, Applicant has not shown that this evidence was material at guilt/innocence or punishment.² The jury was authorized to convict Applicant of capital murder as a party to the offense. And the State presented evidence that Applicant, at the very least, intended to kill the victims or anticipated that a human life would be taken. For example, the surviving witnesses observed Applicant holding victims at gunpoint, tying them up with bedsheets, and verbally threatening to kill them. After the offense, Applicant quickly left Houston on a plane and paid his sisters to drive his van back to Alabama. One of his sisters told police that Applicant admitted to her that he had shot and killed "six Mexicans." She also testified at trial that she owned a Charter Arms .38 revolver that went missing after Applicant had been in Houston.

Under the circumstances presented in this case, Applicant is not entitled to relief on

² Davis and Klien signed affidavits that were admitted as exhibits at the habeas hearing.

the remanded claim. Based upon our own review, we deny relief on Applicant's claim that the State engaged in prosecutorial misconduct by presenting Anderson's ballistics testimony at trial.

We have also reviewed Applicant's remaining claims of prosecutorial misconduct (contained within Claim A) and ineffective assistance of counsel (Claim B). With regard to these claims, we find that Applicant has failed to satisfy the requirements of Article 11.071, § 5(a). Accordingly, we dismiss these claims as an abuse of the writ without reviewing the merits.

IT IS SO ORDERED THIS THE 18TH DAY OF OCTOBER, 2017.

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ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

I would adopt the portion of the trial court's findings of fact and conclusions of law recommending that Arthur Brown, applicant, be granted habeas relief from his conviction or, alternatively, his punishment. This Court's majority order appears to accept as correct the trial court's findings and conclusions that the firearms evidence introduced at applicant's trial was false, or at least, misleading, but it nonetheless denies habeas relief on the basis that this evidence was not material. In contrast, I agree with the habeas court's determination that this evidence was not only false or misleading but also material. I, therefore, respectfully

dissent from this Court's order disregarding the habeas court's findings and conclusions. Because this Court's majority order and I agree that the firearms evidence was false or misleading, my dissenting opinion focuses on the dispute over whether the evidence was material to applicant's conviction or punishment.

I briefly review the firearms evidence that was introduced at applicant's trial and at the habeas hearing, and the habeas court's relevant findings of fact and conclusions of law. At trial, firearms expert C.E. Anderson testified that bullets, identified as EB1 through EB8, were recovered from six victims and that those bullets were matched to two guns linked to applicant. Anderson testified that he could "say absolutely" that EB1 and EB3 were fired from the Smith & Wesson and that EB2, EB5, EB6, and EB8 were fired from the Charter Arms. At the habeas hearing, evidence was presented and the habeas court determined that no evidence supports these conclusions made by Anderson. The habeas court found that Anderson's determination was "plainly wrong and false" with respect to his testimony that the Smith & Wesson had fired EB1 and EB3. The habeas court also found that Anderson's determination was "plainly false" with respect to his testimony that the Charter Arms fired EB2, EB5, EB6, and EB8. Given these conclusions by the habeas court, there is no firearms evidence showing that applicant was the shooter, and there appears to be no dispute that Anderson's trial testimony was false or misleading.

The dispute in this case concerns whether the false or misleading evidence was material to applicant's conviction or punishment. This Court's majority order surmises that

even if applicant was not a shooter during the offense, the jury charge permitted the jury to convict him as a party to the offense, and thus the firearms evidence was immaterial to his conviction and punishment. This Court's majority order discusses the evidence showing applicant's role in the commission of the offense that would establish his guilt even in the absence of evidence that he was a shooter by noting that, for example, "the surviving witness observed Applicant holding victims at gunpoint, tying them up with bedsheets [sic], and verbally threatening to kill them." But that analysis oversimplifies this case by failing to consider the weakness of the remaining evidence of guilt. Although it is correct to say that some evidence other than the firearms evidence shows applicant's guilt as a party to this offense, it is also true, as found by the trial court's findings of fact and conclusions of law, that this other evidence of guilt was exceedingly weak when examined without the support of the erroneous firearms evidence.

As the trial court's findings and conclusions observe, the credibility of the State's witnesses was vigorously challenged at trial. Eyewitness and complainant Rachel Tovar provided conflicting accounts of the events to the police. Eyewitness and complainant Nico Cortez was unable to identify applicant in a photo spread when police visited him in the hospital. Additionally, Cortez identified applicant at applicant's trial, but he was unable to describe or identify applicant at the trials of the co-defendants. An eyewitness, Daniel Leija, said that he had been at Tovar's house earlier in the evening and had seen applicant there, but he initially picked someone other than applicant in a photo spread and identified applicant

only after a police officer told him to look again. Another witness, Candelario Hernandez, could not identify applicant. Witness Bervis Ned changed details of his story at trial. Applicant's sisters each reported that they were pressured by police to make statements that conformed with the police officers' theory of the case. Applicant's sister, Carolyn Momoh, claimed that her statements that applicant confessed that he shot and killed six people and that she had owned a Charter Arms .38 revolver that was missing after the offense were false and products of coercion. I also note here that, even if applicant's sister's statement could connect applicant to a Charter Arms revolver, the firearms evidence, when properly considered in light of the habeas evidence, did not show that this type of revolver was used during this offense.

Given the importance of the firearms evidence that has now been proven to be false or misleading, the habeas court made a conclusion of law that the erroneous firearms evidence materially impacted the outcome of the guilt or innocence portion of the trial. I agree with the habeas court's conclusion that applicant is entitled to habeas relief on this basis. The habeas court stated that, given that the defense subjected the State's case to considerable challenge with respect to the credibility of these witnesses, there is a reasonable likelihood that the false firearms evidence and the State's emphasis on this evidence at trial and during closing argument affected the jury's deliberations and, ultimately, its verdict. *See Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014) (false testimony is material if there is a reasonable likelihood that it affected the judgment of the jury). Given the

weaknesses in the State's case when viewed in the absence of the firearms evidence, the habeas court would not be irrational in determining that the erroneous firearms evidence likely tainted the jury's view of the otherwise weak and conflicting evidence of applicant's guilt either as the shooter or as a party to this offense. I, therefore, respectfully disagree with this Court's majority order's determination that the firearms evidence is immaterial under the theory that applicant was guilty as a party to this offense.

This Court's majority order does not separately analyze this case with respect to whether applicant should obtain a new punishment hearing due to the false or misleading evidence in the event that he does not receive a new guilt or innocence trial. Alternatively, therefore, I conclude that, even if applicant's guilt could be sustained as a party to this capital murder, a jury could have rationally answered the special issues differently depending on whether applicant was guilty as a shooter or only as a party. Because a defendant's role as a shooter or as a party would likely affect the sentence that a jury may determine as appropriate for capital murder, the false or misleading evidence that suggested that applicant was a shooter requires a new sentencing hearing. Thus, as an alternative to granting an entirely new trial, I would grant relief in the form of a new punishment hearing.

I respectfully disagree with this Court's denial of habeas relief in all respects. I would either grant habeas relief in the guilt phase of trial, or I would grant relief in the form of a new trial on punishment. Alternatively, I would file and set this case for a more detailed review of the evidence. For these reasons, I respectfully dissent.

Filed: October 18, 2017
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