

Cause No. CR-2018-07544-E-WHC-1

EX PARTE	§	IN COUNTY CRIMINAL
	§	
	§	COURT NO. 5
	§	
JASON VAN DYKE	§	DENTON COUNTY, TEXAS

**ORDER INCLUDING
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court, having considered the allegations contained in Applicant's application for writ of habeas corpus under article 11.072, Applicant's responses, the answer and supplemental answers filed by the State, exhibits produced by both parties, and this Court's personal recollection, **denies** Applicant's requested relief, and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. In his application, Applicant makes a *Brady* claim and a claim of actual innocence.
2. The State provided discovery to Applicant concerning his case and Corey Momot's case.
3. On September 13, 2018, at 10:41 p.m., Applicant reported that at 10:30 p.m. he saw someone in his vehicle, and went outside with a shotgun.

4. Applicant reported that the person ran from Applicant's vehicle to a dark-colored sedan at the end of his driveway and the vehicle drove away down Spurs Trail.

5. Applicant reported that he could not tell the race or gender of the person inside his vehicle.

6. The Oak Point Department of Public Safety's officer, Shanon Roach, who took Applicant's report and was named in the Information against Applicant, observed a streetlight that provided ample lighting in the area in front of Applicant's residence.

7. Applicant had a surveillance camera to the side of his garage that was not recording at the time of the incident.

8. The alarm on Applicant's vehicle was not sounding when Officer Roach arrived at Applicant's residence, the vehicle's passenger side rear door was unlocked with the window down about 4 inches, and the other three doors were locked.

9. There were marks and damage on Applicant's vehicle from pieces of red brick found near Applicant's vehicle and in Applicant's front yard.

10. Officer Roach noticed ash on the pieces of red brick and later

located a fire pit in Applicant's backyard with matching bricks and with missing bricks.

11. Applicant denied the brick was from his yard.

12. Applicant reported that the following items were stolen out of his vehicle: camo Beretta 4400 12-gauge shotgun that was on the rear passenger-side floorboard; a Glock 29 10mm handgun that was inside a camo backpack; a camo backpack with multiple items inside of it that was on top of the shotgun on the rear floorboard; Sig P320 9mm handgun that was inside the vehicle's center console; and a black bag that contained camera equipment on the backseat floorboard.

13. There was also an additional firearm in Applicant's vehicle that was not taken.

14. Officer Roach believed that Applicant changed his story of how the alleged suspect carried off the items from Applicant's vehicle.

15. Applicant has given inconsistent statements regarding what he was doing when he was alerted to the alleged burglary of his vehicle and where the person was in relation to his vehicle when he came outside on September 13, 2018.

16. Applicant mentioned several times that he was going to make

an insurance claim and stated that he had a special rider on his home insurance that would cover the stolen firearms.

17. Applicant provided Isaac Marquardt's information to Officer Roach and informed Officer Roach that he texted Isaac about the incident.

18. Officer Roach contacted Isaac who stated that he was aware of the incident because earlier in the evening, about 6:00 p.m., he and Applicant looked for Applicant's Glock 29 10mm and Sig P320 9mm.

19. Isaac also realized he had missing belongings when they searched for the firearms around 6:00 p.m.

20. Isaac stated they never found the firearms, Isaac and Applicant went to dinner, and after dinner Isaac went to a friend's house without Applicant.

21. Officer Roach met with Isaac, checked Isaac's phone, and did not find a message from Applicant telling Isaac about the incident as Applicant had claimed he sent Isaac.

22. After speaking with Isaac, Officer Roach spoke with Applicant again and Applicant maintained that an unknown suspect took the items and did not mention looking for the items at 6:00 p.m.

23. Applicant told Officer Roach that he had not seen the Sig P320 9mm handgun in several weeks because it is kept in the center console of his vehicle and he had no reason to look for or use it.

24. When Officer Roach confronted Applicant with what Isaac said about looking for the weapons around 6:00 p.m., Applicant stated they did look for the items earlier in the day and they found the handguns.

25. Applicant later claimed that he and Isaac were looking for different items and Isaac did not know much about guns.

26. Applicant wrote a letter to the Denton County Sherriff dated September 18, 2018, wherein he claimed that he had not “laid eyes on or handled” the Sig P320 since shortly after August 25, 2018.

27. Officer Roach received surveillance footage from 120 Durango Drive, a house two doors to the south of Applicant’s home, where the camera was directed to the north toward the intersection in front of Applicant’s residence, and the video footage did not show a person getting out of a dark-colored Ford sedan, a person running back into the sedan with a bag and shotgun, or a vehicle fleeing the scene.

28. On September 28, 2018, Denton Police Officers executed a

search warrant on Corey Momot's residence in relation to an aggravated assault investigation and Momot was found in possession of Applicant's Sig P320 9mm handgun.

29. Detective David Bearden of Denton Police Department contacted Applicant about the recovery of the handgun on November 9, 2018, and November 13, 2018.

30. Applicant told Detective Bearden that he was not comfortable speaking about Isaac's statements to Detective Bearden and would not give out Isaac's phone number to Detective Bearden unless his attorney, Dominick Marsala, was willing to.

31. Mr. Marsala was a point of contact for Detective Bearden to reach Isaac according to a November 14, 2018 email from Mr. Marsala to Detective Bearden.

32. On November 15, 2018, Momot was arrested for the offense of Theft of a Firearm.

33. Applicant and Mr. Marsala were aware of the investigation into Momot because Applicant and Mr. Marsala were in contact with Detective Bearden during the investigation.

34. The State filed an information against Applicant on

December 14, 2018, for the offense of False Report to a Peace Officer committed on September 13, 2018.

35. On December 17, 2018, the State received Momot's Theft of a Firearm case.

36. On December 17, 2018, the State disclosed information regarding the investigation and arrest of Momot for theft of Applicant's firearm to Mr. Marsala.

37. In a call Applicant made to his father on January 11, 2019, while Applicant was in Denton County jail, Applicant told his father to tell Isaac not to open the door when Isaac was at Applicant's residence and to tell Isaac to "make himself scarce," and the next day Applicant asked his father if he talked to Isaac and his father said, "Yes, I have and I took care of that."

38. The State amended the information against Applicant on January 22, 2019, to include that Applicant made a false statement that was material to the criminal investigation of a peace officer when Applicant stated that he was the victim of a burglary of a motor vehicle at approximately 10:30 p.m. on September 13, 2018.

39. In preparation for Applicant's trial, the State could not locate

or procure Isaac for trial.

40. This Court found that Applicant wrongfully procured the unavailability of Isaac.

41. In preparation for Applicant's March 5, 2019, trial setting, Mr. Marsala filed applications for subpoenas for Detective Bearden and Momot.

42. Applicant pleaded *nolo contendere* to the offense of False Report to a Peace Officer on February 26, 2019.

43. Applicant's plea to the offense made him impeachable as a witness in any trial against Momot.

44. Based on Applicant's statements to the media and a filing he made in the State of Colorado, his decision to plea was based on outside factors not related to Momot's case.

45. Applicant's *nolo contendere* plea was two months after the State provided the police report on Momot and three months after law enforcement informed Applicant that they recovered Applicant's firearm.

46. ADA Sheila Bowles sent Momot's case to grand jury because the facts met the elements of the offense of Theft of a Firearm – Momot was found in possession of a firearm that he admitted he knew was

stolen, although he stated he bought the firearm from a friend of a friend.

47. ADA Bowles was only aware of the evidence in the case files and did not have independent knowledge of evidence otherwise connecting Momot to Applicant's vehicle.

48. Momot was indicted for the offense of Theft of a Firearm in March 2019.

49. Isaac provided an affidavit to Applicant on May 23, 2019, that stated that Isaac would have invoked his 5th Amendment right not to testify if he would have been called as a witness in Applicant's trial and after September 2018, Isaac saw Applicant socially, had access to Applicant's residence, and took care of Applicant's dogs when needed.

50. ADA Lauren Marshall and ADA Paul Hiemke found that Momot's actions met the elements of the felony offense of Theft of a Firearm, but could not sponsor Applicant as a witness because he judicially confessed to making a false statement to a peace officer.

51. ADA Marshall and ADA Hiemke agreed with Momot's attorney to plea Momot to a misdemeanor burglary of a motor vehicle, after prosecutors first offered a misdemeanor theft charge, in order to

prevent the situation of a trial where the complaining victim of the case was impeachable due to the complaining witness' judicial confession that he made a false statement to a peace officer.

52. At the time of Momot's plea on July 11, 2019, prosecutors were not aware of any evidence linking Momot to Applicant's vehicle other than Momot's possession of the firearm.

53. Isaac sent the State an affidavit dated August 22, 2019, which stated that Isaac saw Applicant socially on occasion from time of the false report offense until January when Applicant turned himself in to jail, Isaac took care of Applicant's dogs while Applicant was in jail, Isaac spoke with Applicant's father while Applicant was in jail, Isaac spoke with Applicant after Applicant was released from jail, Isaac spoke with Applicant's attorneys during the pendency of the case while avoiding calls from the police or other investigators, Isaac agreed to appear for Applicant's case if Applicant's attorney subpoenaed him, and Isaac spoke with Applicant "repeatedly" where Applicant urged him to tell the truth to anyone representing the State.

54. The August affidavit also stated that Isaac would invoke his

5th Amendment rights to not testify had he been called as a witness in a trial against Applicant.

55. The State received Isaac's August 22 affidavit on August 27, 2019, and emailed the affidavit to Mr. Marsala that day.

CONCLUSIONS OF LAW

1. The grounds alleged by Applicant can be resolved through Applicant's and the State's filings, offered exhibits and affidavits, and this Court's personal recollection. *See* Tex. Code Crim. Proc. art. 11.072, § 6(b); *Ex parte Cummins*, 169 S.W.3d 752, 757 (Tex. App.—Fort Worth 2005, no pet.).

2. Applicant carries the burden of proof in this application for writ of habeas corpus. *See Ex parte Medina*, 361 S.W.3d 633, 640 (Tex. Crim. App. 2011); *Ex parte Wilson*, 716 S.W.2d 953, 956 (Tex. Crim. App. 1986); *Ex parte Fassi*, 388 S.W.3d 881, 886 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Cummins*, 169 S.W.3d at 757-58.

3. Applicant's first ground, claiming a *Brady* violation, is **denied** because the State was not in violation of *Brady* where the State

disclosed the information regarding Momot and Applicant's recovered gun prior to Applicant pleading in this case and Applicant was actually aware of the information regarding Momot and the recovery of Applicant's gun before his plea. *See Pena v. State*, 353 S.W.3d 797, 810 (Tex. Crim. App. 2011).

4. This Court **denies** Applicant's second ground claiming actual innocence because Applicant has not brought forth newly discovered evidence. *See Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006); *Ex parte Mello*, 355 S.W.3d 827, 830-31 (Tex. App.—Fort Worth 2011, pet. ref'd); *Ex parte Gonzalez*, 323 S.W.3d 557, 559 (Tex. App.—Waco 2010, pet. ref'd); *see also Herrera v. Collins*, 506 U.S. 390 (1993).

5. Alternatively, even if there was newly discovered evidence, this Court **denies** Applicant's actual innocence claim because this Court presumes that Applicant's order of deferred adjudication is valid, Applicant has not reached the proof required to show he was actually innocent when his plea and the evidence of his guilt are weighed against Momot's conviction and Isaac's affidavits, a reasonable juror could have found Applicant guilty of making a false statement to a police officer in

light of the alleged new evidence, and Applicant has not made the “Herculean” showing that he is unquestionably innocent. *See Ex parte Mayhugh*, 512 S.W.3d 285, 296 (Tex. Crim. App. 2016); *Brown*, 205 S.W.3d at 545; *Ex parte Tuley*, 109 S.W.3d 388, 392-93 (Tex. Crim. App. 2002); *Ex parte Franklin*, 72 S.W.3d 671, 677-78 (Tex. Crim. App. 2002); Tex. Pen. Code § 37.08(a)(1); *see also Lewis v. State*, No. 12-16-00042-CR, 2016 Tex. App. LEXIS 7685, at *1-2, 5-6, 8-9 (Tex. App.—Tyler July 20, 2016, no pet.) (mem. op., not designated for publication); *Dennis v. State*, No. 02-13-00422-CR, 2014 Tex. App. LEXIS 7280, at *12-13, 2014 WL 3029011 (Tex. App.—Fort Worth July 3, 2014, no pet.) (mem. op., not designated for publication).

6. Judicial estoppel does not apply here because the State is not taking inconsistent positions. *See Hall v. State*, 283 S.W.3d 137, 156 (Tex. App.—Austin 2009, pet. ref’d); *see also Ferguson v. Bldg. Materials Corp. of Am.*, 295 S.W.3d 642, 643 (Tex. 2009).

7. Applicant has not carried his burden of proof in regards to his *Brady* or actual innocence claims. *See Medina*, 361 S.W.3d at 640; *Wilson*, 716 S.W.2d at 956; *Fassi*, 388 S.W.3d at 886; *Cummins*, 169 S.W.3d at 757-58.

8. This Court **denies** Applicant's requested relief.

February, 2020.

SIGNED on this, the 11th day of ~~December 2019~~.



JUDGE PRESIDING

RECEIVED
Patricia Bonner, Deputy
12/9/2019
Denton County, County Clerk