IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-90,980-01 & WR-90,980-02

EX PARTE OTIS MALLET JR., Applicant

ON APPLICANT'S APPLICATION FOR A WRIT OF HABEAS CORPUS IN CAUSE NOS. 1164940-A & 1248132-A FROM THE 338TH DISTRICT COURT OF HARRIS COUNTY

RICHARDSON, J., filed a concurring opinion, in which HERVEY, NEWELL, and WALKER, JJ., joined.

CONCURRING OPINION

I concur with this Court's order granting relief to Applicant and write separately to highlight the ways in which Applicant has met, if not exceeded, the standard for actual innocence.

In 2011, Applicant was convicted of two first-degree felonies and sentenced to eight years confinement in TDCJ. It is uncontroverted that the only evidence used to convict Applicant was the perjured testimony of former Detective Gerald Goines of the Houston Police Department. The State's entire case, as noted in its closing argument, hinged on Goines' credibility—Goines was "the case." Applicant has maintained his

innocence from the time he was indicted and has consistently insisted that Goines lied. The State and trial court agree that Applicant should be found actually innocent based on a complete lack of evidence to convict him.

In January of 2019, during the time that Applicant was serving his eight-year sentence, Goines was involved in a nationally-publicized, botched, "no-knock" drug raid where Houston Police Department officers killed the two occupants of the raided home. The unfortunate deaths of those individuals were specifically referred to in the writ hearings. The officers were executing a search warrant based on a false affidavit signed by Goines. After Goines was indicted in both state and federal courts for his role in those deaths, the Houston Police Department reviewed all of the cases in which Goines had been involved since 2008. One such case was Applicant's. The investigations into Goines showed his propensity to be untruthful in his undercover drug assignments. There should be no question here that Applicant is entitled to a finding of actual innocence. Indeed, to deny him relief will threaten the very standards we have created to uphold justice and equity in our courts.

In *Ex parte Elizondo*, we explained that to be declared actually innocent, "an applicant must prove by clear and convincing evidence that no reasonable juror would have convicted him based on the newly discovered evidence." 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). So it is here. Applicant has maintained his innocence, demanded a jury trial, put on a vigorous defense, testified at trial, called witnesses whose testimony supports his claim that arresting officer Goines was untruthful, and after his conviction and appeal also hired a writ lawyer. Both the State prosecutor responsible for convicting Applicant and

the trial court agree that Applicant is entitled to actual innocence. Applicant has gone beyond what is required of him under *Elizondo*.

The only testimony that suggests Applicant possessed drugs is that of Goines, which we know now to be false. Goines testified that he paid $200 to Applicant's brother, who gave the money to Applicant who retrieved crack cocaine from a blue can, that Applicant's brother then delivered back to Goines. Goines testified that as officers moved in to make their arrest, Applicant removed the blue can from his truck and put it in his neighbor's backyard. Goines also testified that he used "police money" for which no accounting was necessary. Applicant's new attorneys discovered a sworn expense report filed by Goines that shows Goines did not use $200 in April 2008 to purchase narcotics, and another report from May 2008 that shows he allegedly paid a police informant $200 for information which led to Applicant's arrest. These facts, which were not in the police report and were not testified to at trial, contradict Goines' testimony. Moreover, the offense report indicates that the drug-sniffing dogs did not alert on Applicant's truck from which the drugs were allegedly removed.

All of the other witnesses testified to the exact opposite—that they did not find or see any drugs on Applicant's brother or on Applicant. When asked if he saw Applicant with any drugs at all, Officer Raleigh Jordan answered, "No," and when asked if he saw Applicant's brother that night, he answered, "No." In fact, when asked if he saw any transaction at all, Officer Jordan also responded, "No." Likewise, when Officer Kendric Stringfellow was questioned about whether he found "any contraband on [Applicant], any drugs, anything of that nature," he stated, "No." Sharmi Patel, an employee in the crime lab of the Houston Police Department also testified that she tested the drugs but did not

know who the drugs belonged to. Moreover, witness Donna Jean Massey, who was living at the location of and present during Applicant's arrest, testified that she had been outside for about 15 or 20 minutes before the arrest and never even saw Applicant with a can, never saw any drugs or drug transaction, never saw Applicant's brother hand drugs to an officer, and never saw Applicant hand any drugs to his brother; the only thing she saw in Applicant's hand was a phone. Witness Lester Eugene Locking, Applicant's neighbor who witnessed Applicant's arrest, testified that he had been outside talking with witness Massey for 15 minutes before the officers showed up and that he was sure he did not see Applicant walk from his truck into the backyard carrying a cookie can or a can with drugs in it and that he never saw Applicant selling drugs to anybody. Applicant's brother testified that when officers pulled him over and searched him, all they found was 35 cents in his pocket. He denied having met or spoken with Goines, having received $200 from Goines to give to Applicant, having approached Applicant to buy cocaine for undercover officer Goines, and having seen Applicant with a blue can. He also refused to take a plea that would incriminate his brother and testified that he eventually took a plea because he was told he would be able to get out of jail. Finally, Applicant himself testified that he did not have any drugs on him or in his truck, that he did not know anything about a blue container, and that he was at the house because he ran his scrap metal business from there and had a receipt for all of the cash in his pocket. He has maintained his innocence throughout, and at sentencing, Applicant's attorney reiterated Applicant's innocence. Simply put, the existence of exclusively false evidence equates to the lack of any actual evidence to sustain a conviction.

At the hearing on Applicant's post-conviction writ, the trial prosecutor in Applicant's case testified by affidavit that Goines was the State's primary witness at trial, and "[s]imply put, there was no case without him." She also testified that she was unaware of the expense reports for April 2008 and May 2008, and "[had she] known about them prior to trial, [she] would have disclosed them to defense counsel" and "would have asked a supervisor to dismiss the cases." In fact during the first writ hearing, the State requested a continuance to have the canister inspected for Applicant's fingerprints, since Goines claimed Applicant had his fingers all over the canister. That inspection concluded Applicant's prints were not on the canister. Following that inspection, in the final writ hearing, the representative for the state reemphasized that Officer Goines was the only witness who claimed to see Applicant in the neighbor's backyard where the blue can was found. Finally, the State also represented, "we agree that Otis Mallet is actually innocent. And this is a rarity to date in our system. . . . I want to emphasize to the Texas Court of Criminal Appeals my interest at our overriding prosecutorial and the people's interest in seeking justice, not just convictions. And the injustice that was done in this case deserves relief."

It is telling that Goines—the State's sole fact witness at trial and the only witness who said he saw a drug deal on the date of Applicant's arrest—refused to testify by asserting the Fifth Amendment at the hearing on Applicant's post-conviction writ when asked to explain facts pertinent to the underlying offense. In referring to the state and federal indictments, the habeas judge noted, "It is so sad that two people had to lose lives – and I'm referencing the other cases – in order to shed light to many injustices associated with Goines." She also stated the Court's conclusion that "Goines falsely provided

testimony regarding the use of police money and questionably affected the judgment of the jury. And lastly, that this Court will – will suggest to the Texas Court of Criminal Appeals that [Applicant is] actually innocent. The Court concludes that Mr. Mallet meets the Herculean burden to demonstrate that he is actually innocent."

The habeas court's thorough findings of fact and conclusions of law, as well as the court of appeals' reliance on Goines' testimony, serve to bolster Applicant's actual innocence claim. The habeas court found that "[w]ithout Officer Goines' testimony, no reasonable juror could have convicted Mr. Mallet and the State would not have survived a motion for a directed verdict." In addition, the court found that "the only witness who testified that Otis Mallet or his brother were involved in a drug transaction was Officer Goines." The court highlighted that the prosecution's closing focused on Goines' credibility and reputation, and the prosecution—not knowing that Goines was lying—argued that "the case came down to who was telling the truth: the police and Officer Goines, or Mr. Mallet and the defense witnesses." The court emphasized that "based on the new facts discussed below, the Court finds that Officer Goines [sic] testimony was false," and "Officer Goines [sic] refusal to testify in support of his previous testimony advances that he testified falsely in Mr. Mallet's case." Finally, the court pointed out "that there is no credible evidence linking Mr. Mallet to the blue can, the possession of crack cocaine, or the transfer of crack cocaine. Without Officer Goines' testimony, and considering the new evidence currently before the Court, no reasonable juror could have convicted Mr. Mallet of either possession or of the delivery of crack cocaine." The opinion of the court of appeals likewise strengthens Applicant's claim as it acknowledges that the

jury found Goines' testimony to be true and we now know that his testimony was entirely false.

Police misconduct is at the heart of this case. Applicant has proven that the sole witness to the crime is a police officer who willfully and knowingly perjured himself in order to secure Applicant's conviction and then asserted the Fifth Amendment right not to testify in the writ hearing. For more than twenty years, we have held that in order to establish actual innocence, an applicant must satisfy the criteria set out in *Elizondo*. This is neither the case nor the time to raise the bar on applicants seeking a finding of actual innocence, especially when the State and trial court are recommending actual innocence relief. To hold otherwise would not only undermine the Court's precedent and make actual innocence an impossibility for a claimant, but it would call into question the principles of fairness and impartiality on which our legal system is based.

With these thoughts, I concur in the Court's order.

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