



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-91,266-01

EX PARTE ROBERT LEE FAUKNER, IV, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 2015-0556-A IN THE 217TH DISTRICT COURT
FROM ANGELINA COUNTY**

Per curiam. YEARY and SLAUGHTER, JJ., concurring.

ORDER

Applicant pleaded guilty to online solicitation of a minor and was sentenced to three years' imprisonment. He did not appeal his conviction. Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

Applicant contends, among other things, that his plea was involuntary because trial counsel erroneously allowed him to plead guilty to an offense set out in a statutory provision that had been declared unconstitutional by this Court. *See Ex Parte Lo*, 424 S.W.3d. 10 (Tex. Crim. App. 2013). Of particular concern is the fact that the indictment in this case contained a notation in the heading that the charge, "Penal Code §33.021(b)(1) Online Solicitation of Minor = UNCONSTITUTIONAL

10/2013." Nevertheless, the indictment alleged an offense under Section 33.021(b)(1) and Applicant was allowed to plead guilty to the very offense described in that portion of the statute which had been declared unconstitutional. Although the statute was amended to correct the overbreadth which had rendered it unconstitutional, the amended statute did not become effective until after the date of the offense in this case and therefore could not be applied to the conduct for which Applicant was charged.

Applicant has alleged facts that, if true, might entitle him to relief. *Hill v. Lockhart*, 474 U.S. 52 (1985); *Ex parte Argent*, 393 S.W.3d 781 (Tex. Crim. App. 2013). Accordingly, the record should be developed. The trial court is the appropriate forum for findings of fact. TEX. CODE CRIM. PROC. art. 11.07, § 3(d). The trial court shall order trial counsel to respond to Applicant's claims. In developing the record, the trial court may use any means set out in Article 11.07, § 3(d). If the trial court elects to hold a hearing, it shall determine whether Applicant is indigent. If Applicant is indigent and wants to be represented by counsel, the trial court shall appoint counsel to represent him at the hearing. *See* TEX. CODE CRIM. PROC. art. 26.04. If counsel is appointed or retained, the trial court shall immediately notify this Court of counsel's name.

The trial court shall make findings of fact and conclusions of law as to whether trial counsel's performance was deficient and Applicant would have insisted on a trial but for counsel's alleged deficient performance. The trial court may make any other findings and conclusions that it deems appropriate in response to Applicant's claims.

The trial court shall make findings of fact and conclusions of law within ninety days from the date of this order. The district clerk shall then immediately forward to this Court the trial court's findings and conclusions and the record developed on remand, including, among other things,

affidavits, motions, objections, proposed findings and conclusions, orders, and transcripts from hearings and depositions. *See* TEX. R. APP. P. 73.4(b)(4). Any extensions of time must be requested by the trial court and obtained from this Court.

Filed: July 1, 2020

Do not publish