IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-30,077-01

EX PARTE MARK ROBERTSON, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. W89-85961-NL-(A) IN CRIMINAL DISTRICT COURT NO. 5 DALLAS COUNTY

***Per curiam*. NEWELL, J., filed a concurring opinion. KELLER, P.J., filed a dissenting opinion in which KEEL, J., joined. YEARY and SLAUGHTER, JJ., dissent.**

O R D E R

We have before us a suggestion that the Court reconsider on its own motion Applicant's 1997 application for a writ of habeas corpus.

In 1991, a jury found Applicant guilty of the August 1989 capital murder of 81-year-old Edna Brau (murder in the course of committing or attempting to commit robbery). The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set Applicant's

punishment at death.[1] This Court affirmed Applicant's conviction and sentence on direct appeal. *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993).

In his initial application for a writ of habeas corpus filed in 1997, Applicant raised six claims. In his second claim, Applicant alleged that his trial counsel "did not want African-Americans on the jury" and reached an agreement with the prosecution to excuse African-American venire members. Consequently, Applicant maintained, all of the African-American venire members were excused and he stood trial before an all-Caucasian jury. He argued that counsel's actions violated "the principles of *Batson v. Kentucky*"[2] and his Sixth Amendment right to effective counsel. The trial court held an evidentiary hearing in 1997 to address this claim and other matters. In 1998, the trial court entered findings of fact and conclusions of law finding that Applicant failed to prove the existence of the alleged agreement by a preponderance of the evidence and recommended that this Court deny relief. This Court adopted the trial court's findings and denied relief on all of Applicant's claims. *Ex parte Robertson*, No. WR-30,077-01 (Tex. Crim. App. Nov. 18, 1998) (not designated for publication).

Applicant filed a subsequent writ application, and this Court ultimately granted him relief on punishment because he had received an unconstitutional nullification issue at trial. *Ex parte Robertson*, No. AP-74,720 (Tex. Crim. App. Mar. 12, 2008) (not

---

[1] Unless otherwise indicated, all future references to "articles" are to the Texas Code of Criminal Procedure.

[2] *Batson v. Kentucky*, 476 U.S. 79 (1986).

designated for publication). After the completion of a new punishment trial, a jury answered the special issues submitted pursuant to Article 37.0711, and the trial court, accordingly, set Applicant's punishment at death. This Court affirmed Applicant's sentence on direct appeal. *Robertson v. State*, No. AP-71,224 (Tex. Crim. App. Mar. 9, 2011) (not designated for publication). This Court denied Applicant relief on his initial habeas application filed after his new death sentence. *Ex parte Robertson*, No. WR-30,077-03 (Tex. Crim. App. Jan. 9, 2013) (not designated for publication).

In April 2019, Applicant filed a motion to stay his execution and a suggestion that we reconsider, on our own motion, his 1997 writ application in light of new legal authority. *See, e.g., Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017); *Buck v. Davis*, 137 S Ct. 759 (2017); *Ripkowski v. State*, 61 S.W.3d 378, n.48 (Tex. Crim. App. 2001). On April 8, 2019, we entered an order staying Applicant's execution pending a further order from this Court.

On our own initiative, we now re-open Applicant's -01 writ application to reconsider his *Batson* claim. *See* TEX. R. APP. P. 79.2(d) (providing that a motion for rehearing a denial of habeas corpus relief "may not be filed"; however, "[t]he Court may on its own initiative reconsider the case").[3] This is an "unusual" measure that we

---

[3] *See also Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019) (stating that, in the decades since *Batson*, the Supreme Court has "vigorously enforced and reinforced the decision" and "extended *Batson* in certain ways"); *Pena-Rodriguez*, 137 S. Ct. 855; *Buck*, 137 S Ct. 759; *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231 (2005); *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322 (2003).

undertake only under extraordinary circumstances. *See Ex parte Moreno*, 245 S.W.3d 419, 420, 427 (Tex. Crim. App. 2008).

We remand this case to the convicting court for further fact finding regarding Applicant's second ground for relief. On remand, the trial court shall obtain an official court reporter's transcript and all exhibits from the 1997 evidentiary hearing and all other evidence filed during Applicant's initial-writ proceedings related to his second ground. The trial court shall also attempt to locate other relevant evidence from Applicant's 1991 trial, including the venire members' questionnaires and any agreements executed by counsel during jury selection. The trial court may allow the parties to submit additional briefing and evidence and present live testimony, if the court deems it necessary. The trial court shall enter new findings of fact and conclusions of law regarding Applicant's second ground in light of legal authorities, the parties's pleadings, and all of the relevant evidence and information in this habeas case.

The trial court shall complete its fact finding and enter findings of fact and conclusions of law within 120 days of the date of this order. Immediately after the habeas judge signs the findings of fact and conclusions of law, the district clerk must forward to this Court a supplemental record containing the findings and conclusions, all materials received by the trial court, and transcripts of any hearings. The habeas judge must obtain any extensions of time from this Court.

IT IS SO ORDERED THIS THE 1ST DAY OF JULY, 2020.

Publish