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.

O R D E R

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]."

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[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

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[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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