the Jasuta / Schulman report

Volume 32, Number 28 ~ Monday, July 22nd, 2024 (Report No. 1,523)

TIBA's Case of the Week

Third (Austin) Court of Appeals

Case Name: ***Ex parte Gary Griffin***

- **OFFENSE**: Post-Conviction *Habeas Corpus* (Art. 11.072)
- **COUNTY**: Hays
- **C/A CASE No**. 03-21-00198-CR
- **DATE OF OPINION**: July 12, 2024 **OPINION**: Justice Edward Smith
- **DISPOSITION**: Relief Denied
- **TRIAL COURT**: 22nd D/C; Hon. Bruce Boyer
- **LAWYERS**: Terry Kirk and Keith Hampton (Defense); Jennifer Feldman (State)

(**Background Facts**): Appellant was convicted by a jury of assault on a public servant and sentenced to two years' confinement and a $2,500 fine by the trial court, which suspended imposition of the sentence and placed him on community supervision for four years. That conviction was affirmed in a 2017 unpublished opinion by this Court of Appeals. On August 31, 2020, he filed a post-conviction *habeas corpus* application under Article 11.072, C.Cr.P., claiming that his trial counsel provided ineffective assistance. The application was denied by the trial court on October 20, 2020. Notice of the denial was not given to either Appellant or *habeas* counsel, and, in sworn affidavits, both Appellant and *habeas* counsel asserted that they were not provided notice of the denial and only learned of the court's ruling when counsel called the trial court clerk's office on December 14, 2020. An email from the Clerk's office to the State, in which a deputy clerk stated that the trial court's order was uploaded to the clerk's online case files but not sent out, appears to confirm the clerk's office's failure to notify either Appellant and *habeas* counsel as required by statute.

Ed Note (**Relevant Procedural History**): *Habeas* counsel filed a second 11.072 application on March 16, 2021, 93 days after receiving notice of the trial court's denial of the first application. In the second application, he reraised his "ineffective assistance at trial" claim and also contended that his right to due process would be violated unless the trial court allowed "an out-of-time appeal of [its] order on the first writ." The trial court denied the second application without a hearing, and this appeal followed. In an unpublished opinion in April of 2023, the Court of Appeals "sustained" Appellant's claim that the trial court erred by denying the second writ application

without entering findings and conclusions. The case was remanded so the trial court could "clarify" its order denying the second writ application.

[562.051 **Right to Counsel / Out-of Time Appeal or PDR / Ineffective Assistance**]: Although Appellant did not claim he was denied the right to appeal by *habeas* counsel's deficient performance, the Court of Appeals chose to address the issue first.

Holding: [An] applicant may be entitled to an out-of-time appeal where he presents a meritorious claim that his counsel's ineffective assistance deprived him of meaningful Appellate review. See, e.g., ***Ex parte Florentino***, 206 S.W.3d 124 (Tex.Cr.App. 2006)(see , Vol. 14, No. 37; 09/18/2006); ***Ex parte Coy***, 909 S.W.2d 927 (Tex.Cr.App. 1995)(see , Vol. 3, No. 33; 09/18/2006); ***Ex parte Axel***, 757 S.W.2d 369 (Tex.Cr.App. 1988). *** [Appellant] does not allege that his *habeas* counsel was ineffective for waiting 93 days after receiving notice of the trial court's decision to file a second application requesting an out-of-time appeal. *** Thus, we may not grant him relief on that basis. ***Ex parte Pope***, No. 14-15-00740-CR (Tex.App. - Houston [14th]; 06/23/2016)(not designated for publication).

[562.052 **Cognizability of Issues / Out-of-Time Appeal or PDR / Denial of Due Process:**]: Appellant claims that the trial court erred in refusing to grant him an out-of-time appeal. He claims that "Due Process is violated unless an out-of-time appeal is allowed.

Holding: Regarding [Appellant]'s eligibility for relief under ***Ex parte Riley***, 193 S.W.3d 900 (Tex.Cr.App. 2006)(see , Vol. 14, No. 22; 06/12/2006), his appears to be a case of first impression. Neither ***Riley*** nor subsequent decisions address the present circumstances, in which a systemic breakdown led to an applicant's not receiving actual notice of a ruling until after the statutory period to appeal had run, and counsel waited over three months after receiving that notice to request an out-of-time appeal without offering any explanation for his delay. *** Although counsel is correct that there is no statutory deadline for requesting an out-of-time appeal from the denial of an article 11.072 habeas application, his disregard for his delay following the receipt of notice flies in the face of the nature of habeas relief and the ***Riley*** Court's emphatic admonitions to assiduity. Were counsel's understanding of ***Riley***'s implication correct, then as long as a systemic breakdown is sufficiently protracted to cover the expiration of a statutory appellate deadline, any subsequent delay would be excused. Yet as Judge Yeary has acknowledged, "[T]he ***Riley*** decision does not stand for the proposition that [a reviewing court] may ignore counsel's potentially deficient performance any time something unusual happens." ***Ex parte Robledo***, 592 S.W.3d 905 (Tex.Cr.App. 2020)(see , Vol. 28, No. 5; 02/03/2020)(Yeary, J., concurring). Under the facts of this case, Griffin has failed to show that he was entitled to an out-of-time appeal as a matter of due process in light of his attorney's 93-day delay in requesting the out-of-time appeal without the barest reason given for the delay.

> **Concurring / Dissenting Opinions**: Justice Gisela Triana dissented, disagreeing with the majority opinion on both theories. She argued that, if Appellant " has no remedy for obtaining an out-of-time appeal, despite there being both a breakdown in the

system and dilatory action by counsel, then I believe Griffin has suffered a grave injustice."

Sidebars

(**John G. Jasuta**) What a bunch of garbage. I wonder if we shouldn't remember that the applicant/Appellant is not a soccer ball to be kicked around by various lawyers, and even judges. Be that as it may, this writer's misunderstanding of ***Riley*** is monumental.

(**Michael Falkenberg**) The trial court denied an 11.072 writ. The clerk's office did not give notice of the decision in time to perfect appeal. The applicant was entitled to an out-of-time appeal due to this "breakdown in the system" under ***Riley***, period. That it took 93 days to file a new writ asking for that relief was wholly irrelevant to resolution of the issue. The Court confused and conflated different strands of the controlling law to invent an uncertain statute of limitations, unprecedented in state *habeas* practice. If there is no rehearing *en banc* to allow the whole court to fix this, I can only hope the CCA grants PDR, reverses, and summarily grants an out-of-time PDR under ***Riley***. Quickly.

(**Michael Stauffacher**) I agree with Michael's take on this completely. The court messed this up on every level!! ***Riley***, since it was handed down, has been used as the vehicle at the CCA to get habeas applicants relief due to a "breakdown in the system." It is the case used when the CCA doesn't want to lay blame on an appellate attorney, but the applicant is not at fault. The granting of relief on this basis was so ubiquitous at the CCA that writ staff even came up with a standard form for ***Riley*** grants. This guy is entitled to relief. Period. If not on rehearing, then at the CCA. And, as Michael, I hope said relief is granted quickly.

(**David A. Schulman**) Given that the three commentators leading this discussion, each of whom was the Chief Habeas Attorney at the Court of Criminal Appeals, collectively know more about *habeas corpus* in Texas than anyone in the Universe, I thought about **not** weighing in on this case. However, the Court's holding is so horribly wrong that I couldn't not comment. After a thorough examination of this case, I think somebody at the Court of Appeals should be very embarrassed. Considering the issue involved is one which every *habeas* expert to whom I have spoken since the opinion was delivered (including gurus Jasuta, Stauffacher, and Falkenberg) agree that (a) the resolution is simple, and (b) the applicant/Appellant is absolutely entitled to an out-of-time appeal, one has to ask why it took the Court 3-years and 3-months to reach resolution? Additionally, Justice Smith is 100% wrong in his assertion that an applicant should be denied relief under ***Riley*** if his attorney is partially at fault for the delay. That's complete and utter nonsense. Moreover, in this case, by the time first *habeas* counsel learned that the trial court had denied the first *habeas* application, it was **already** too late to give notice of appeal. It really didn't matter if first *habeas* counsel filed the second *habeas* application 93 days later or 1 day later. It was already too late to file a **timely** notice of appeal. In short, *habeas* counsel was NOT in any way ineffective. Second, for the proposition that an applicant should be denied relief

under ***Riley*** if his attorney is partially at fault for the delay, Justice Smith relied on Judge Yeary's concurring opinion in ***Ex parte Robledo***, 592 S.W.3d 905 (Tex.Cr.App. 2020)(see ☙, Vol. 28, No. 5; 02/03/2020). It is also interesting that Justice Smith noted that ***Riley***'s "unpublished progeny" "have no precedential value," but neglected to note, or simply hasn't read ***Riley***'s "unpublished progeny" and doesn't know that, through its unpublished case law, the CCA greatly expanded and relaxed ***Riley***'s holding. Further, there is no support for the idea Judge Yeary expressed in ***Robledo***. As I said in my Sidebar to that case, "even if counsel was deficient in his performance vis-a-vis filing the [document involved], it is unnecessary to determine if that is/was the case, because "Whatever happened, it wasn't the Applicant's fault . . .." The same is true here. Nearly 4-years after the failure to notify the first *habeas* counsel of the trial court's denial, Justice Smith denies Mr. Griffin the right to prosecute an out-of-time appeal, despite the fact that, "whatever happened, it wasn't the Applicant's fault." Justice Triana is absolutely correct, this holding creates a grave injustice. It must be corrected as quickly as possible.

(**Troy McKinney**) I agree wholeheartedly with everyone's comments. On a side note, both the Texas Rules of Civil Procedure 306a and the Texas Rules of Appellate Procedure 4.2 (civil case no notice of judgment), 4.5 (no notice of appellate court decision), and 4.6 (no notice of denial of motion for forensic DNA testing) provide mechanisms to extend the time to file a motion for new trial, a notice of appeal or a motion for rehearing or PDR when neither the party nor the lawyer have actually received notice. There is not, however, any other similar provision of the Code of Criminal Procedure for general criminal cases or *habeas* writs. These, unfortunately, are left to pure due process claims, as was raised in ***Riley*** and the second writ in this case. The COA decision in this case is arbitrary and carves out a time requirement for a writ seeking the out of time appeal of the first writ without any basis for where it drew the line. It is, essentially, a *laches* finding without any evidence or legal basis to support it. The majority blew it big time.