



## **IN THE COURT OF CRIMINAL APPEALS OF TEXAS**

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**NO. PD-0208-16**

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**EX PARTE RICHARD MARK BOWMAN, Appellant**

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**ON STATE'S PETITION FOR DISCRETIONARY REVIEW  
FROM THE FIRST COURT OF APPEALS  
HARRIS COUNTY**

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**ALCALA, J., filed a dissenting opinion in which RICHARDSON, J., joined.**

### **DISSENTING OPINION**

I respectfully dissent from this Court's judgment that reverses the judgment of the court of appeals and denies post-conviction habeas relief to Richard Mark Bowman, appellant. I disagree with this Court's majority opinion's analysis on two bases. First, unlike the majority opinion, I would not avoid reaching the issue of laches in this case where that issue was fully litigated both in the habeas court and the court of appeals and is an issue that is important to the jurisprudence of this state. Second, because I agree with the court of appeals's ultimate conclusion that appellant received ineffective assistance of counsel at his trial, I would not reverse that court's judgment granting appellant relief on that basis.

With respect to the first of these matters, in the instant petition for discretionary review that this Court has granted, the State complains about the court of appeals's rejection of its argument that this case is barred by laches, but today this Court declines to address that issue by simply concluding that appellant's ineffective-assistance complaint should be rejected on its merits. Having accepted that ground as a basis for this Court's review of this case, I would address the State's laches complaint, given that this is now the fourth time that an appellate court has been presented with the laches issue, and given that laches is an important issue that affects a large number of habeas cases in this state. In 2014, the court of appeals held that the State waived the defense of laches for failing to raise it as an issue in the habeas court. *Ex parte Bowman*, 444 S.W.3d 272, 279 (Tex. App.—Houston [1st Dist.] 2014). On discretionary review, this Court held that the State did not waive the laches defense by failing to raise it in the habeas court, and we remanded for the court of appeals to address that defense. *Ex parte Bowman*, 447 S.W.3d 887, 888-89 (Tex. Crim. App. 2014). On remand, the court of appeals addressed laches by holding that the State was not materially prejudiced by appellant's delay in seeking relief. *Ex parte Bowman*, 483 S.W.3d 726, 738 (Tex. App.—Houston [1st Dist.] 2016). The court of appeals explained that the State had failed to present the trial court with any evidence to establish that appellant's delay in seeking habeas relief would materially prejudice the State in retrying its case against him, and it further determined that appellant actually presented affirmative evidence that the State would not be materially prejudiced as a result of his delay in seeking habeas relief. *Id.* Three

appellate court decisions have discussed the equitable doctrine of laches as it applies to this case, and this Court's granting of review in this case was primarily for the purpose of addressing laches, but today this Court decides not to address that issue. Because this is an important issue of state law that affects many habeas applications, I would not decline to address the issue of laches in this case, but I would instead address that issue, adopt the reasoning of the court of appeals in its opinion on remand, and hold that habeas relief is not precluded by the application of the doctrine of laches in this case. *See id.*

Second, as to the merits of appellant's ineffective-assistance complaint, this Court's majority opinion holds in favor of the State by rejecting the trial court's factual finding that trial counsel did not obtain and review the arresting officer's payroll records because that finding lacks support in the record. This finding is pertinent because the court of appeals reversed the trial court's denial of habeas relief on the basis that this finding showed that trial counsel had not conducted reasonable pre-trial investigation and that he performed deficiently on that basis. Because I would hold that appellant's ineffective-assistance claim is meritorious regardless of whether this factual finding is supported by the record, I disagree with this Court's denial of habeas relief based on its rejection of that factual finding. Further, although I do not fully agree with its analysis, I agree with the court of appeals's ultimate conclusion that appellant's trial counsel was ineffective, and I would uphold its judgment granting him relief on that basis.

This Court's majority opinion determines that, because trial counsel could not

remember whether he had obtained the payroll records and there was no definitive evidence to show this one way or the other, the habeas court could not properly make an affirmative factual finding that counsel failed to obtain the payroll records. But it appears to me that counsel's performance was inadequate as to the payroll records whether or not he had actually obtained and reviewed them prior to trial. On the one hand, if the evidence showed that counsel had obtained and reviewed the payroll records, then he should have actually used those records more effectively to defend appellant at trial with the evidence that the arresting officer had a financial bias. On the other hand, if the evidence showed that counsel had not obtained and reviewed the payroll records, then, as the court of appeals determined in its analysis, that would reveal that counsel's investigation was inadequate in this respect. However you slice it, whether he did or did not obtain the payroll records, counsel's performance was deficient with respect to his handling of the payroll records.

In an Article 11.072 habeas proceeding, as here, the trial judge is the sole finder of fact, and we afford almost total deference to a trial court's factual findings when they are supported by the record, especially when those findings are based upon credibility and demeanor. *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013). This Court previously has observed that factual determinations made in an Article 11.072 habeas proceeding are to be afforded the highest level of deference by an appellate court. *See Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011) (observing that, in context of Article 11.072 application, the court of appeals and this Court "are truly appellate courts,"

and, thus, as compared to an Article 11.07 habeas proceeding, there is “less leeway” to disregard trial court’s factual findings). Generally, in an Article 11.072 habeas application where the resolution of the ultimate issue turns on an evaluation of credibility and demeanor, the denial of a habeas application is within the trial court’s discretion and may be overturned only if the appellate court finds that the trial court abused its discretion. *Ex parte Aguilar*, 501 S.W.3d 176, 178 (Tex. App.—Houston [1st Dist.] 2016, no pet.). But, if the resolution of the ultimate question turns only on the application of legal standards, we review those determinations de novo. *Id.* (“The generally-applied abuse of discretion standard is not appropriate when the decision does not turn on the credibility or demeanor of witnesses.”); *see also Ex parte Mello*, 355 S.W.3d 827, 832 (Tex. App.—Fort Worth 2011, pet. ref’d) (“If the resolution of the ultimate question turns on an application of legal standards, we review the determination de novo.”).

The habeas court in this case determined in its findings of fact and conclusions of law that the arresting officer was the only witness to give the opinion that appellant was intoxicated and that that testimony was “substantially” relied upon by the State to establish appellant’s intoxication. The habeas court, however, also determined that counsel’s choice not to more aggressively impeach the officer was reasonable, given that (1) counsel had presented the jury with some information regarding the officer’s financial motive to make DWI arrests, and (2) counsel had made a reasonable decision to pursue a trial strategy that was primarily focused on undermining the dash-cam videotape depicting appellant

immediately prior to his arrest. The trial court found that appellant “cannot show that but for the alleged failings of the defense counsel, the result would have been different.” The latter two determinations are conclusions of law that do not turn on an evaluation of credibility and demeanor, and thus they are subject to de novo review on appeal. As I have explained above, regardless of whether counsel failed to obtain the records or obtained the records and decided not to use them, in my view, counsel’s performance fell below an objective standard of reasonableness because the impeachment evidence was readily available and of such a quality that it might have substantially undermined the officer’s credibility. Under those circumstances, no reasonably competent attorney would have failed to obtain and use the records. As to prejudice, given that the habeas court determined that the officer’s testimony was substantially relied upon to establish appellant’s intoxication, I conclude that there is a reasonable probability of a different outcome had counsel presented this evidence. Accordingly, I agree with the court of appeals’s ultimate conclusion that appellant’s trial counsel was ineffective either for failing to conduct an adequate investigation or for failing to present significant impeachment evidence against the officer.

I would reach both the issues in the State’s petition for discretionary review, hold that this case is not barred by laches, and uphold the court of appeals’s judgment granting appellant post-conviction habeas relief. I, therefore, respectfully dissent from this Court’s judgment.