IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-85,060-01 & -02

EX PARTE ROGER DALE CARTER, Applicant

ON APPLICATION FOR WRITS OF HABEAS CORPUS
CAUSE NOS. 09-03-02825-CR & 09-03-02827-CR
IN THE 359TH DISTRICT COURT FROM MONTGOMERY COUNTY

RICHARDSON, J., filed a dissenting opinion.

DISSENTING OPINION

Today, this Court holds that Applicant's illegal sentence claim is procedurally barred. The majority reached this result despite Applicant's ineffective assistance of counsel claims, which, given due consideration, could serve as a ground to excuse the procedural default, and entitle Applicant to relief as a freestanding claim. But, we will never know because this Court does not remand this case so that the habeas court can further evaluate Applicant's unbarred ineffective assistance of counsel claims. Respectfully, I disagree with the majority opinion and join Judge Alcala's dissent.

Following Applicant's open plea of guilty to burglary of a habitation and two counts

of credit card abuse, he was sentenced to 55 years confinement. The trial court judge ordered Applicant's 50-year sentence for burglary to run consecutively with his two concurrent five-year sentences for the credit card abuse. There is no disagreement that Applicant's sentences were improperly stacked—the statute *mandates* that his sentences run concurrent.[1] The trial court judge should have been aware of this. While the initial error was on the trial court judge, everyone else with a law degree missed it too—the prosecutor, Applicant's trial counsel, and his appellate counsel. Although this critical mistake was made by the trial court judge, the prosecutor, trial counsel, and appellate counsel, Applicant is the one who will be paying for that mistake by serving an extra five years behind bars. It took Applicant *representing himself* to bring this error to the trial court's attention—Applicant raised the improper stacking issue through his *pro se* application for writ of habeas corpus. Yet, today, this Court says too bad—too little, too late.

The State urges, and the majority agrees, that this claim is procedurally barred because Applicant did not object to the stacking order at trial nor did he raise the issue on appeal. And, despite the fact that Applicant did raise over 20 ineffective assistance of counsel claims in his writ application, the habeas court found that "[A]pplicant has not claimed that either his trial or appellate counsel was ineffective for failing to challenge the cumulation of his sentences at trial or on direct appeal." Thus, the habeas court recommends, and the majority

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[1] TEX. PENAL CODE § 3.03(a) ("the sentences shall run concurrently").

agrees, that relief should be denied.

"Appellate courts have a duty to liberally construe *pro se* pleadings."[2] However, it appears that the habeas court did not give a liberal construction to Applicant's claims. I agree with Judge Alcala that this writ application should be remanded, Applicant should be appointed counsel to amend his writ application, and the habeas court should address the issue of whether Applicant's trial counsel and appellate counsel were ineffective for failing to catch the trial court's invalid cumulation order.

I am perplexed that we are in support of the State's argument that a procedural bar applies when potentially meritorious ineffective assistance of counsel claims remain unresolved. This exact position was not so well-received by the Supreme Court over a decade ago.[3] In *Dretke v. Haley*,[4] the State of Texas admitted that the sentence was illegal, but it maintained that it should be upheld because of a procedural bar—all while ignoring a potential ineffective assistance of counsel claim.[5] The Justices responded to the State's argument with puzzlement:

JUSTICE KENNEDY: Can . . . can you tell me . . . I don't want to derail

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[2] *Ex parte Scott*, 496 S.W.3d 793, 795 (Alcala, J., concurring) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam)).

[3] *See generally Dretke v. Haley*, 541 U.S. 386 (2004).

[4] 541 U.S. 386 (2004).

[5] The first time the State acknowledged (or conceded) that the applicant in *Dretke* had a "viable and 'significant' ineffective assistance of counsel claim" was at oral argument before the Supreme Court. *Id.* at 394. In this case, without oral argument, the State avoided this misstep.

the argument . . . you've conceded that this sentence is unlawful?

SOLICITOR GENERAL: Yes, Justice Kennedy

JUSTICE KENNEDY: Well, then why are you here? Don't . . . is there some rule that you can't confess error in your state or?

SOLICITOR GENERAL: No, Justice Kennedy, but the State is here, because the State is concerned about the impact on the procedural default rule, in particular the Fifth Circuit's decision.

JUSTICE KENNEDY: Well, so a man does 15 years so you can vindicate your legal point in some other case? I . . . I just don't understand why you don't dismiss this case and move to lower the sentence.

* * *

JUSTICE O'CONNOR: Well, let me ask you this. Why . . . why isn't there still an inadequate assistance of counsel claim out there, and why shouldn't the court address that before it gets into the question that it dealt with?

SOLICITOR GENERAL: Justice O'Connor, I think there is a very strong argument that there was inadequate assistance of counsel.

JUSTICE O'CONNOR: Well, why don't we vacate and remand and let them deal with that?[6]

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[6] Oral argument at 4, *Dretke v. Haley*, 541 U.S. 386 (2004) (No. 02-1824), https://www.supremecourt.gov/oral_arguments/argument_transcripts/02-1824.pdf [hereinafter *Dretke* Oral Argument].

Wisely and justly, the Supreme Court in *Dretke* remanded the federal writ so that the lower court could further evaluate the applicant's ineffective assistance of counsel claim.[7]

The *Dretke* case clearly highlights that, when applicants have potentially meritorious ineffective assistance of counsel claims, there would be "cause to excuse the procedural default."[8] In fact, Justice Stevens commented during the *Dretke* oral argument that he had always thought there was "a manifest injustice exception to the procedural default rule."[9] In this case, enforcing a prison sentence that is five years longer than legally allowed is a manifest injustice. As the Supreme Court did in *Dretke*, and for the reasons outlined in Judge Alcala's dissenting opinion, which I join, I believe this application should be remanded to the trial court. Therefore, respectfully, I dissent.

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[7] *Dretke*, 541 U.S. at 394, 396 (vacating and remanding after concluding that the lower court did not "address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default").

[8] *Id.* at 394.

[9] *Dretke* Oral Argument, *supra* note 6, at 5.