



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

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

EX PARTE ROGER DALE CARTER, Applicant

**ON APPLICATIONS FOR WRIT OF HABEAS CORPUS
CAUSE NOS. 09-03-02825-CR-(1) & 09-03-02827-CR-(1)
IN THE 359TH DISTRICT COURT FROM MONTGOMERY COUNTY**

**NEWELL, J., filed a concurring opinion in which HERVEY, J.,
joined.**

We previously held in *Ex parte Townsend* that a defendant cannot raise a claim that the trial court lacked authority to cumulate or “stack” his sentences for the first time in a post-conviction application for a writ of habeas corpus. 137 S.W.3d 79, 81 (Tex. Crim. App. 2004). In this case, Applicant seeks to challenge the trial court’s cumulation order for the first time in a post-conviction application for a writ of habeas corpus. In light of *Townsend*, I agree with the Court’s order denying habeas corpus relief.

However, prior to our decision in *Townsend*, we held in *LaPorte v. State* that a complaint about an improper cumulation order may be raised at any time because the improper order results in a void sentence. 840 S.W.2d 412, 415 (Tex. Crim. App. 1992). We have long held that a defect which renders a sentence void may be raised at any time. *Ex parte Beck*, 922 S.W.2d 181, 182 (Tex. Crim. App. 1996) (per curiam); *see also Ex parte McIver*, 586 S.W.2d 851, 854 (Tex. Crim. App. 1979) (habeas corpus relief will issue to a person in custody under a sentence which is void because the punishment is unauthorized). It seems like we necessarily overruled this portion of *LaPorte* when we held in *Townsend* that a challenge to an improper cumulation order cannot actually be raised at any time; it must be raised on direct appeal. But if we did not, the Court expressly overrules that portion of *LaPorte* today. I join these aspects of the Court's opinion.

I also agree that Applicant's ineffective assistance claim does not fault counsel for her failure to object at trial to the trial court's cumulation order. The trial court reviewed the pleadings and the affidavit of Applicant's trial counsel and entered a finding of fact that Applicant did not claim that his attorney was ineffective for failing to challenge the cumulation of his sentences at trial or on appeal. Having reviewed the

pleadings and the affidavit of trial counsel, I believe this finding is supported by the record. *Ex parte Thompson*, 153 S.W.3d 416, 417-18 (Tex. Crim. App. 2005) (holding that Court should defer to findings if they are supported by the record). Given that Applicant is not challenging the improper cumulation order as a subset of his ineffective assistance claim, I agree with the Court's decision to deny relief on that ground as well. Otherwise, I would have granted relief on Applicant's ineffective assistance claim.

With these thoughts I concur.

Filed: June 7, 2017

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