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

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

I join the plurality's opinion. I write further only to amplify on the plurality's explanation of why Applicant's claim is not cognizable in post-conviction habeas corpus proceedings. The short of it is that a complaint about an unauthorized cumulation order simply does not invoke the kind of systemic requirement or prohibition that we should require of a claim that is not raised for the first time until an application for writ of habeas corpus brought under the auspices of Article 11.07 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. art. 11.07. *See Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993); *Ex parte Moss*, 446 S.W.3d 786, 788-90 (Tex. Crim. App. 2014).

In *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992), the Court declared that "[a]n improper cumulation order is, in essence, a void sentence, and such error cannot be waived. A defect which renders a sentence void may be raised at any time." Today the Court appropriately overrules *LaPorte*'s holding that invalid cumulation orders are void. Plurality Opinion at 3.[1] The question we are left with is whether "an improper stacking order," though it should not necessarily be equated with an unauthorized sentence, should nevertheless be regarded as something that may be "raised at any time," including for the first time in a post-conviction application for writ of habeas corpus. Is an improper stacking order "in essence" the same as an unauthorized sentence—at least for purposes of deciding whether it should be subject to challenge for the first time in a collateral attack even though it could have been brought earlier on appeal?[2] *See Moss*, 446 S.W.3d at 788 (explaining that a claim that the trial court lacked jurisdiction is in the nature of a category one *Marin* issue, which can be raised for the first time in an initial post-conviction habeas corpus proceeding).

We have recently determined that whether a claim may be raised for the first time in post-conviction collateral attack should be a function of whether that claim invokes category

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[1] Although Judge Newell does not expressly join all of the plurality's opinion, he does expressly join in its overruling of *LaPorte*. Concurring Opinion at 2. That makes a majority of five votes to overrule *LaPorte*.

[2] We have long held that a sentence that is unauthorized because it is outside of the applicable range of punishment may be challenged "at any time," including for the first time in an Article 11.07 application for writ of habeas corpus. *Ex parte Rich*, 194 S.W.3d 508, 511-12 (Tex. Crim. App. 2006).

one of the so-called *Marin* categories of complaints: systemic requirements or prohibitions that are recognized by our criminal justice system as "essentially independent of the litigants' wishes." *See Ex parte Sledge*, 391 S.W.3d 104, 108 (Tex. Crim. App. 2013) (citing *Marin*, 851 S.W.2d at 279, for the proposition that "[i]t is, of course, axiomatic in our case law that review of jurisdictional claims are cognizable in post-conviction habeas corpus proceedings. Moreover, we have recognized them to be cognizable without regard to ordinary notions of procedural default—essentially because it is simply not optional with the parties to agree to confer subject matter jurisdiction on a convicting court where that jurisdiction is lacking."); *Moss*, 446 S.W.3d at 788-89 (citing *Marin* in support of a holding that an applicant can raise an attack on the subject matter jurisdiction of a convicting court for the first time in a post-conviction writ application, notwithstanding the rule in *Ex parte Townsend*, 137 S.W.3d 79 (Tex. Crim. App. 2004), that a claim that could have been raised on direct appeal, but was not, is forfeited for purposes of collateral attack). Whether an invalid cumulation order is cognizable when raised for the first time in a post-conviction writ application depends, according to this trend, upon whether the system has erected an absolute, nonnegotiable prohibition against the improper cumulation of sentences, such that it would not even be optional with the parties whether to cumulate those sentences.

To me, then, the question in the present case therefore boils down to whether an improper cumulation order violates some systemic requirement (multiple sentences *must* be made to run concurrently) or systemic prohibition (multiple sentences *may not* be made to

run consecutively) that is so critical to the proper functioning of the criminal justice system that we cannot tolerate any deviation from the norm, even at the behest of the parties. I do not believe it can fairly be said that a trial court's decision whether to cumulate sentences implicates a systemic requirement or prohibition in the sense that category one of *Marin* contemplates. It is, at most, a category two waiver-only right. *See* Plurality Opinion at 4 (citing *Ex parte McJunkins*, 954 S.W.2d 39, 41 (Tex. Crim. App. 1997) (op. on reh'g), for the proposition that rights conferred by Section 3.03 of the Penal Code are waiver-only rights under the *Marin* rubric).

As a matter of history and common law, the decision whether to impose separate sentences concurrently or consecutively has been assigned to the trial judge. *Oregon v. Ice*, 555 U.S. 160, 168-69 (2009). "Texas law gives a much larger role to the jury at sentencing than is traditionally the case in American law, but, in giving the judge the discretionary authority to determine whether sentences should be concurrent or consecutive, Texas follows the approach taken in almost every American jurisdiction." George E. Dix & John M. Schmolesky, 43A TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 46:146, at 244 (3d ed. 2011). "Texas is one of the few states that allow defendants the privilege, by statute, of opting for jury assessment of punishment. Even so, it is left to the trial court to determine whether multiple sentences will run consecutively or concurrently." *Barrow v. State*, 207 S.W.3d 377, 380 (Tex. Crim. App. 2006). That discretion to cumulate or not is largely—but not entirely—unfettered.

Early on, trial courts in Texas were *required* by statute to cumulate (stack) separate sentences; they had no discretion to do otherwise. *See*, *e.g.*, *Smith v. State*, 34 Tex. Crim. R. 123, 123-24, 29 S.W. 774, 775 (1895) ("Nor is there anything in the alleged error of the court making the sentence in this case cumulative of that pronounced against appellant in a preceding conviction. This action of the court is expressly enjoined by statute, and therefore the court did not err in this respect. Code Cr. Proc. [Article] 800 [1879]."); *Cullwell v. State*, 70 Tex. Crim. R. 596, 598, 157 S.W. 765, 766 (1913) (quoting Article 862 of the 1911 Code of Criminal Procedure, which was identical to former Article 800). The Legislature revised the statute in 1919, however, to authorize trial courts to impose either consecutive or concurrent sentences, at their discretion. Acts 1919, 36th Leg., ch. 20, § 1, p. 25, approved Feb. 19, 1919 (amending Article 862 of the 1911 Code of Criminal Procedure). *See*, *e.g.*, *Carney v. State*, 573 S.W.2d 24, 27 (Tex. Crim. App. 1978) ("There is no 'right' to a concurrent sentence; whether punishment will run concurrently or cumulatively is within the discretion of the trial judge."). That provision may presently be found in Article 42.08(a) of the Code of Criminal Procedure, and it is echoed in Section 3.04(b) of the Penal Code. TEX. CODE CRIM. PROC. art. 42.08(a); TEX. PENAL CODE § 3.04(b). Thus, trial judges in Texas have had the authority to *cumulate* sentences from the beginning;[3] and, since 1919, they have also had the authority to order separate sentences to run *concurrently*. From 1919 on, there

[3] Indeed, "[t]he historical record further indicates that a judge's imposition of consecutive, rather than concurrent, sentences was the prevailing practice." *Oregon v. Ice*, 555 U.S. at 169.

was no requirement or prohibition whatsoever with respect to the imposition of multiple sentences; it was up to the judge, in his unfettered discretion, to make the normative decision whether to impose them concurrently or consecutively. *See Barrow*, 207 S.W.3d at 380 (explaining that the trial judge's cumulation decision "is purely a normative decision, much like the decision of what particular sentence to impose within the range of punishment authorized by the jury's verdict").

That changed—but only to a very limited extent—in 1974. For the first time, in Chapter 3 of the 1973 Penal Code, the Legislature provided for the consolidation for trial of certain offenses, namely, those arising from the "same criminal episode." Acts 1973, 63rd Leg., ch. 387, § 1, p. 883, eff. Jan. 1, 1974. "Same criminal episode" was originally defined narrowly to include only the repeated commission of property offenses, but in 1987, the Legislature significantly expanded upon that definition, to provide for the consolidation for trial of offenses representing "the repeated commission of the same or similar offenses[,]" whether or not they were property offenses. Acts 1987, 70th Leg., ch. 387, § 1, p. 1900, eff. Sept. 1, 1987. A defendant was given the absolute option of insisting upon a severance, and hence, separate trials. But this choice came at a cost. If the defendant would agree to the consolidation, he could insist upon the imposition of concurrent rather than consecutive sentences, thus taking the normative decision away from the trial judge. This was his incentive to agree to consolidation. If, instead, he insisted on severing the separate offenses for trial, the statutory scheme reinstated the trial judge's unfettered discretion to make the

normative decision on his own. *See* George E. Dix & John M. Schmolesky, 43 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 38:33, at 426 (3d ed. 2011) ("In effect, concurrency of sentences is the defendant's 'reward' for not asserting his or her right to severance of the charges."). Subsequent amendments to Chapter 3 have reinstated the trial judge's discretion to impose either cumulative or concurrent sentences even when certain types of offense have been consolidated for trial, regardless of whether the defendant agrees to the consolidation of offenses or insists on severance;[4] but it remains the case that, for many Penal Code offenses for which the defendant consents to consolidated trials, he may insist upon the imposition of concurrent sentencing upon conviction.

Does that contingent ability to insist upon concurrent sentencing rise to the level of a systemic requirement or prohibition in contemplation of *Marin*? To be sure, the last sentence of Section 3.03(a) of the Penal Code uses mandatory language: when the conditions of Chapter 3 are met, "the sentences shall run concurrently." But the use of mandatory language in a statute does not invariably signal a legislative understanding that the thing required is an indispensable feature of the criminal justice system. *Cf. Ex parte Douthit*, 232 S.W.3d 69, 72 (Tex. Crim. App. 2007) (quoting *Ex parte McCain*, 67 S.W.3d 204, 206 (Tex. Crim. App. 2002), for the proposition that "this Court has repeatedly held that . . . deviations from 'mandatory' statutes are not cognizable on a writ of habeas corpus"). Frankly, I do not

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[4] Acts 1995, 74th Leg., ch. 596, § 1, p. 3435, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 667, § 2, p. 2251-53, eff. Sept. 1, 1997.

know whether it is correct to say that the mandatory language of Section 3.03(a) has created (1) a conditional *right* of the defendant to insist on concurrent sentencing, or, instead (2) a limitation on the trial judge's otherwise broad *authority* to impose cumulative sentencing.

But I do not think this ambiguity in terminology ultimately makes a difference to how we answer the question of which *Marin* category we should place it in. Regardless of whether Section 3.03(a) creates a right of the defendant or a limitation on the trial court's authority, it is a matter that the Legislature has essentially made optional with the parties. The State can avoid the "mandatory" limitation on the trial judge's authority to cumulate sentences by simply opting not to consolidate trials. And the defendant has the option to insist on the severance of trials if he thinks that is to his best advantage, though he thereby loses the Section 3.03(a) ability to insist upon concurrent sentences. Nothing about Chapter 3 of the Penal Code changes the fact that, for the better part of a hundred years in Texas, the decision whether to cumulate sentences has been left to judicial discretion. Nor does the relatively trivial limitation on that discretion, embodied in Chapter 3, remotely suggest that there exists in the criminal justice system *either* a nonnegotiable requirement of concurrent sentencing *or* an absolute prohibition against cumulated sentences. Thus, there is no justification for designating an improper cumulation order—like an unauthorized sentence[5]—to fall within *Marin*'s first category.

Over the years, this Court has occasionally proclaimed that improper cumulation

[5] *See* note 2, *ante*.

orders are simply not subject to challenge in habeas corpus proceedings. *See Ex parte Crawford*, 36 Tex. Cr. R. 180, 182, 36 S.W. 92, 92-3 (1896) ("The entry of cumulative punishments in the final judgment and sentence certainly cannot be treated as void, and, not being void, [the applicant] cannot avail himself of the remedy of habeas corpus."); *Ex parte Snow*, 209 S.W.2d 931, 933 (Tex. Crim. App. 1948) (op. on reh'g) (quoting *Crawford*); *Ex parte Hatfield*, 238 S.W.2d 788, 791 (Tex. Crim. App. 1951) (citing *Snow* for the proposition that "[t]he entry of cumulative punishment in a sentence is not void, and habeas corpus will not avail to correct the entry thereof"). Notwithstanding that fact, the Court has frequently considered the merits of such claims when brought by inmates on collateral attack, oftentimes granting relief. *See generally Ex parte Lewis*, 414 S.W.2d 682 (Tex. Crim. App. 1967) (collecting cases); *Ex parte Ashe*, 641 S.W.2d 243 (Tex. Crim. App. 1982). We have most recently held (post-*LaPorte*) that only a cumulation order that is so deficient that the prison system cannot properly implement it may be regarded as "void"—and thus, cognizable—for purposes of post-conviction habeas corpus review. *See Ex parte San Migel*, 973 S.W.2d 310, 311 (Tex. Crim. App. 1998) (holding that an applicant must show that a cumulation order is so lacking in specifics that the prison system "in not properly cumulating his sentences" before it will be found to be "void," and therefore challengeable, in post-conviction habeas corpus proceedings). Short of that extreme scenario, I do not regard challenges to cumulation orders to be of sufficient gravity to justify entertaining them in post-conviction collateral attack.

To the extent that *LaPorte* supports the blanket proposition that a post-conviction habeas applicant should be able to challenge the trial court's authority to enter a cumulation order for the first time in a collateral attack, the Court is right to overrule it. Trial courts in Texas have always had the authority to enter cumulation orders, and Section 3.03(a)'s minimal encroachment upon that authority is not so critical to the efficacy of the criminal justice system that we should regard it as adequate justification for extraordinary relief. The plurality is right to conclude that, under *Ex parte McJunkins*, 954 S.W.2d 39, 41 (Tex. Crim. App. 1997) (op. on reh'g), Applicant could have challenged the cumulation order for the first time on direct appeal. Plurality Opinion at 4. Having failed to do so, Applicant has forfeited the claim in a post-conviction collateral attack. *Townsend*, 137 S.W.3d at 81.

With these additional observations, I join the plurality opinion.

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