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

KEASLER, J., delivered the judgment of the Court and an opinion, in which KELLER, P.J., and HERVEY, and YEARY, JJ., joined and NEWELL, J., joined in part. YEARY, J., filed a concurring opinion. NEWELL, J., filed a concurring opinion, in which HERVEY, J., joined. ALCALA, J., filed a dissenting opinion, in which RICHARDSON, J., joined. RICHARDSON, J., filed a dissenting opinion. KEEL, J., concurred. WALKER, J., dissented.

O P I N I O N

In these habeas corpus applications, Roger Carter asserts the trial judge improperly cumulated, or "stacked," his burglary sentence and credit-card-abuse sentences. We filed and set Carter's applications to address whether his claims are cognizable in a habeas corpus proceeding. Because Carter could have appealed his bare statutory violation and record-based claims, we conclude they are not cognizable and deny Carter's applications.

I.

In two separate indictments, Carter was charged with burglary of a habitation and two counts of credit card abuse. Each indictment contained enhancement paragraphs. Without a plea bargain with the State, Carter pleaded guilty to all offenses and true to the enhancement paragraphs. Finding the enhancements to be true, the judge sentenced Carter to fifty years' confinement for the burglary and five years' confinement for each credit card abuse count. The judge ordered Carter to serve the credit-card-abuse sentences simultaneously, but only after the burglary sentence's expiration. The court of appeals rejected Carter's challenges to the judge's sentencing him as a habitual offender, and it affirmed the judgments.[1]

Approximately five years after the court of appeals' mandate issued, Carter filed these applications for writs of habeas corpus asserting that, among other things, his sentences were improperly ordered to run consecutively. This Court remanded Carter's applications for findings of fact and conclusions of law on this ground.[2] The habeas judge found that Carter's improper-cumulation claim "is based on the record and could have been, but was not, raised on direct appeal." Because Carter could have raised this claim on direct appeal, the judge

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[1] *Carter v. State*, Nos. 09-09-00358-CR & 09-09-00372-CR, 2010 WL 4156443 (Tex. App.—Beaumont Oct. 20, 2010, no pet.) (mem. op., not designated for publication).

[2] *Ex parte Carter*, Nos. WR-85,060-01 & WR-85,060-02 (Tex. Crim. App. Jun. 26, 2016) (not designated for publication).

concluded that the claim was not cognizable in a habeas corpus proceeding. Accordingly, the judge recommended denying Carter's improper-cumulation claim.

II.

When a defendant is found guilty of more than one offense arising out of the same criminal episode and those offenses are prosecuted in a single criminal action, Texas Penal Code § 3.03(a) states, in relevant part, that "the sentences shall run concurrently."[3] In *LaPorte v. State*, this Court held that a defendant is prosecuted in "a single criminal action" whenever allegations and evidence of more than one offense arising out of the same criminal episode—as Texas Penal Code Chapter 3 defines that term—are presented in a single trial or plea proceeding.[4] A single trial or plea proceeding may exist regardless of whether the allegations are found in a single charging instrument or several or the State provided notice of its intent to try several charging instruments together.[5] The *LaPorte* Court further held 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."[6]

While we reaffirm *LaPorte*'s statutory interpretation of "a single criminal action," we overrule the opinion's holding that sentences subject to an improper cumulation order are

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[3] TEX. PENAL CODE § 3.03(a) (West Supp. 2016).

[4] 840 S.W.2d 412, 414–15 (Tex. Crim. App. 1992).

[5] *Id.* (overruling *Caughorn v. State*, 549 S.W.2d 196 (Tex. Crim. App. 1977)).

[6] *Id.* at 415.

themselves "void." *LaPorte* arrived at this conclusion by mistakenly conflating the sentences with the cumulation order. In a bare improper-cumulation order context, the infirmity lies in the order setting how the sentences will be served, not in the assessed sentences themselves. Labeling as void sentences falling within the statutorily prescribed range of punishment is inaccurate. An improper cumulation order may be remedied by reformation on appeal or, in the proper circumstance, a judgment *nunc pro tunc*.[7] Because the improper cumulation order is subject to such remedies, the sentences cannot properly be declared void.[8]

We further conclude that *LaPorte*'s holding that an improper-cumulation claim "may be raised at any time" does not control an improper-cumulation claim's cognizability in the habeas corpus context. This Court's opinion in *Ex parte McJunkins* would have supported Carter's assertion of an improper-cumulation point of error on appeal.[9] The *McJunkins* opinion reaffirmed *LaPorte*'s holding insofar as LaPorte's improper-cumulation claim was properly before the Court in that case, not because his sentences were void, but by placing the rights § 3.03 conferred to a defendant into *Marin v. State*'s procedural-default rubric.[10] The *McJunkins* Court held that § 3.03 confers a *Marin* waiver-only right—a right that must

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[7] *Rhodes v. State*, 240 S.W.3d 882, 888 (Tex. Crim. App. 2007).

[8] *See id.*

[9] 954 S.W.2d 39, 41 (Tex. Crim. App. 1997) (op. on reh'g).

[10] 954 S.W.2d 39, 40–41 (Tex. Crim. App. 1997) (op. on reh'g) (referring to *Marin v. State*, 851 S.W.2d 275, 278–280 (Tex. Crim. App. 1993)).

be implemented unless affirmatively waived.[11] *McJunkins* noted that the record in *LaPorte* did not contain a waiver, and therefore LaPorte's claim was viable on appeal.[12]

LaPorte's broad holding—notably made in the context of an appeal—conflicts with this Court's established habeas corpus jurisprudence. Relying heavily on the axiom "The Great Writ should not be used in matters that should have been raised on appeal," this Court in *Ex parte Townsend* held that "[e]ven a constitutional claim is forfeited if the applicant had the opportunity to raise the issue on appeal. This is because the writ of habeas corpus is an extraordinary remedy that is available only when there is no other adequate remedy at law."[13] Because of its sweeping language, *Townsend* is viewed as a defining point in our habeas corpus jurisprudence, but its holding was hardly new: If an applicant could have appealed the issue he now asserts on habeas, the merits of his claim should not be reviewed.[14]

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[11] *See id.*

[12] *See id*. at 41.

[13] *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004) (citations omitted); *accord Ex parte Nelson*, 137 S.W.3d 666 (Tex. Crim. App. 2004).

[14] *See generally Ex parte Wilcox*, 79 S.W.2d 321, 321 (Tex. Crim. App. 1935) ("Habeas corpus is an extraordinary writ, and the general rule is that it does not lie where relief may be had, or could have been procured by resort to another remedy. It is also settled that use of the writ will not be permitted as a substitute for appeal.") (citations omitted); *Ex parte Groves*, 571 S.W.2d 888, 890 (Tex. Crim. App. 1978) ("It is well-settled 'that the writ of habeas corpus should not be used to litigate matters which should have been raised on direct appeal.'"); *Ex parte Gardner*, 959 S.W.2d 189,199 (Tex. Crim, App. 1996); 2 THOMAS CARL SPELLING, A TREATISE ON EXTRAORDINARY RELIEF IN EQUITY AND AT LAW, § 1151 (Boston, Little, Brown & Co. 1893); 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 49 (Boston, Little, Brown & Co. 1918).

Townsend was sentenced to ten years' confinement to be served in the Texas Department of Criminal Justice's Special Alternative Incarceration Program ("Boot Camp").[15] After Townsend successfully completed Boot Camp, the judge suspended Townsend's sentence and placed him on probation for the remainder of his term.[16] While on probation, Townsend was found guilty of murder and sentenced to sixty years' confinement. On the same day Townsend was sentenced for the murder, the judge revoked Townsend's probation and imposed a sentence of ten years' confinement to begin after the sixty-year sentence.[17] Townsend challenged the cumulation order in an application for a writ of habeas corpus. Concluding that Townsend had an adequate remedy on direct appeal but failed to exercise it, we held he forfeited his claim on collateral review.[18] In *Townsend*, we denied the improper-cumulation claim and reaffirmed "our decisions holding that, when a defendant has an adequate remedy at law for his claim, he may not raise the claim in an application for a writ of habeas corpus."[19]

Like Townsend, Carter could have pursued his improper-cumulation claims on appeal instead of raising them for the first time in this habeas corpus proceeding. In fact, Carter did

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[15] *Ex parte Townsend*, 137 S.W.3d at 80.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 81.

[19] *Id.* at 82.

appeal his sentences, albeit on other grounds. But nothing prevented him from raising on direct appeal the record-based claims he now asserts. Because the judge imposed cumulative sentences at punishment and the cumulation order appeared in the original judgments, Carter did not need to resort to collateral proceedings to supplement the record to support his claims. And as a *Marin* category two, waiver-only right, Carter's improper-cumulation claims were not subject to procedural default by inaction and could have been argued in his appeal.[20] Unlike *Marin* category-one requirements and prohibitions, Carter's claims may not be asserted for the first time in an application for a writ of habeas corpus.[21] By failing to assert his claims in the court of appeals, Carter forfeited them for habeas corpus purposes. His improper-cumulation claims, therefore, are not cognizable on collateral review.[22]

Carter's improper-cumulation claims are also not cognizable for a much simpler, basic reason: they assert bare statutory violations. Continuing to extend *LaPorte*'s holding to collateral review cases overlooks our own admonition that "[a] writ of habeas corpus is available only for relief from jurisdictional defects and violations of constitutional or

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[20] *See Ex parte McJunkins*, 954 S.W.2d at 40–41.

[21] *Cf. Ex parte Moss*, 446 S.W.3d 786, 788 (Tex. Crim. App. 2014) (holding that a claim of lack of jurisdiction is not subject to *Townsend*'s holding because jurisdiction is a *Marin* category one systemic requirement that operates independent of litigants' wishes); *Ex parte Sledge*, 391 S.W.3d 104, 108 (Tex. Crim. App. 2013) (noting that jurisdictional claims are routinely reviewed on initial applications even if raised for the first time in collateral proceeding).

[22] *See Ex parte Townsend*, 137 S.W.3d at 81.

fundamental rights."[23] Carter's habeas corpus applications allege that the judge abused her discretion by "stacking" his sentences because "[a]ll three charges were of the same criminal episode." From our reading of Carter's applications and their use of § 3.03's "same criminal episode" language,[24] we interpret Carter's complaint to be based on a violation of § 3.03. He does not allege a constitutional violation and he cannot identify a constitutional right to concurrent sentences.

In *Ex parte McCain*, this Court held that a violation of Texas Code of Criminal Procedure Article 1.13(c), requiring a trial judge to appoint counsel to a defendant before the defendant may waive a jury trial, was not cognizable on habeas corpus.[25] Although Article 1.13(c) was a mandatory statute, this Court held that the failure to appoint counsel before McCain's jury waiver did not encompass a fundamental or constitutional error.[26] While procedural errors or statutory violations may be reversible error on direct appeal, they are not necessarily fundamental or constitutional errors that entitle an applicant to habeas corpus relief.[27] The *McCain* Court further noted that "most provisions in the Code of Criminal

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[23] *Ex parte McCain*, 67 S.W.3d 204, 207 (Tex. Crim. App. 2002) (citing, among other cases, *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989).

[24] TEX. PENAL CODE § 3.03(a) (providing the general rule that, "When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, . . . [the sentences shall run concurrently]").

[25] *Id.* at 206.

[26] *Id.* at 210.

[27] *Id.*

Procedure are 'mandatory' in that they state a trial court 'must' or 'shall' do something in a particular matter."[28] Despite § 3.03(a)'s command that sentences shall run concurrently, its violation is not cognizable on habeas corpus.[29]

III.

Having concluded that Carter's improper-cumulation claims are not cognizable on collateral review, we reject them. Carter's applications also assert that he was denied ineffective assistance of counsel. He alleged twenty-three individual bases for his ineffective-assistance-of-counsel claim. Despite liberally interpreting Carter's *pro se* applications, we cannot find any contention, whether inartfully pleaded or not, that trial counsel was deficient for failing to object to consecutive sentencing. Although we embrace liberal interpreting *pro se* applications, as a court of law we may not create claims that the Court *sua sponte* believes meritorious when they are not arguably present in an applicant's pleadings. We further conclude that Carter's ineffective-assistance-of-counsel claim and remaining claims are without merit. Carter's applications are denied.

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[28] *Id.*

[29] *See also Ex parte Douthit*, 232 S.W.3d 69, 74 (Tex. Crim. App. 2007) (violations of former prohibition on jury waivers in capital cases); *Ex parte Sadberry*, 864 S.W.2d 541, 543 (Tex. Crim. App. 1993) (violations of mandatory provision concerning signing of written jury waiver contained in art. 1.13 not cognizable on writ of habeas corpus); *Ex parte Tovar*, 901 S.W.2d 484, 485 (Tex. Crim. App. 1995) (failure to give mandatory admonishments regarding deportation required under Art. 26.13(a)(4) is cognizable on writ of habeas corpus only if trial judge wholly failed to give warnings and defendant's plea was constitutionally involuntary as a consequence).

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