In the Court of Criminal Appeals of Texas

Nos. WR-91,197-01 & WR-91,197-02

EX PARTE JONATHAN HOSS KIBLER,

Applicant

On Applications for Writs of Habeas Corpus
In Cause Nos. F-2002-1689-D & F-2002-1690-D
From the 362nd District Court
Denton County

YEARY, J., filed a concurring opinion.

I agree with most of the Court's plurality opinion today, but there are several passages with which I simply cannot agree. First, I object to the way the plurality frames its approach to statutory interpretation. Plurality Opinion at 7, 19–20. And second, I disagree with the plurality's perpetuation of what I consider to be an incorrect construction of Section

12.42(d) of the Texas Penal Code. Plurality Opinion at 15–16 (discussing TEX. PENAL CODE § 12.42(d)). As a result, even though I agree with the plurality's ultimate holding, and most of its rationale, I can ultimately only concur in the result it reaches.

I. LEGISLATIVE INTENT

The plurality frames its approach to statutory construction in terms of effectuating the collective intent of the legislature. *See* Plurality Opinion at 7 ("When we interpret statutes, we seek to *effectuate the collective intent* or purpose of the legislators who enacted the legislation.") (emphasis added); *id.* at 19–20 ("The legislative choice to use less explicit language in Article 62.101 suggests that *the legislature did not intend* to preclude reliance upon the receipt of a conviction for indecency with a child and another reportable conviction or adjudication in the same proceeding when determining the expiration of a duty to register as a sex offender.") (emphasis added). I do not agree that statutory interpretation should be a matter of judges discerning amorphous legislative intent. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 394 (2012) ("[R]eferences to *intent* have led to more poor interpretations than any other phenomenon in judicial decision-making."). We should not be "seek[ing] to effectuate" anyone's "intent or purpose" unless that simply means construing and giving meaning to the words that are "the literal text of the statute in question[.]" *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); *see also Lang v. State*, 561 S.W.3d 174, 187–88 (Tex. Crim. App. 2018) (Yeary, J., dissenting) ("I continue to believe that, if the literal language and structure of a statute render it of sufficient

clarity that its proper construction cannot be reasonably doubted, it would improperly encroach upon the Legislative Department for this Court to engage in further construction of it.").

Courts seeking to ascertain legislative intent beyond the plain statutory text risk injecting the judiciary's estimation about policy choices into every possible matter involving statutory interpretation, degrading the Legislature's constitutional prerogative to make the law. In this case, the statute's words—"before or after"—mean what they say, not something else the Legislature perhaps may have intended them to mean. TEX. CODE. CRIM. PROC. art. 62.101(a)(4). To the degree that *Boykin* says what the plurality relies on it for, and with specific reference to the part of that opinion with which I take issue here, I believe *Boykin* should be abrogated. We should stop saying that our purpose is to effectuate legislative intent.

II. PENAL CODE § 12.42(D)

The plurality also quotes two prior cases interpreting "how Section 12.42(d) [of the Penal Code] operates[.]" Plurality at 15–16 & n.33 (citing *Tomlin v. State*, 722 S.W.2d 702, 705 (Tex. Crim. App. 1987) (en banc), and *Jordan v. State*, 256 S.W.3d 286, 290–91 (Tex. Crim. App 2008)). By doing so, the plurality continues to perpetuate an incorrect interpretation of Section 12.42(d)—that the felony on trial must have been *committed* after the second enhancing felony became *final*. This interpretation is a perfect example of reading a requirement into a statute that simply does not exist in its text.[1] *See Ex parte Westerman*,

[1] Section 12.42(d) reads:

570 S.W.3d 731, 737, 738 (Tex. Crim. App. 2019) (Yeary, J., dissenting) ("Nothing in Section 12.42(d) requires that 'the offense for which defendant presently stands accused' must be committed after the second (more recent) enhancing conviction becomes final.") (citing *Tomlin*, 722 S.W.2d at 705).

I agree with the plurality that "Article 62.12(a)(4) *contains no language requiring* that the underlying offenses be committed sequentially[,]" that "the imposition of two or more convictions be in a specific order relative to the commission of the underlying offenses[,]" or "that the defendant receive each conviction on a different day or in a separate proceeding." Plurality Opinion at 13–14 (emphasis added). I only wish that, over the years, the Court had similarly construed Section 12.42(d) of the Penal Code, according to its plain literal terms.

III. CONCLUSION

But for these objectionable and, moreover, superfluous passages, I could have joined the plurality opinion. Instead, I must respectfully

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> Except as provided by Subsection (c)(2) or (c)(4), if it is shown on the trial of a felony offense other than a state jail felony punishable under Section 12.35(a) that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction the defendant shall be punished by imprisonment in the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 25 years. A previous conviction for a state jail felony punishable under Section 12.35(a) may not be used for enhancement purposes under this subsection.

TEX. PEN. CODE § 12.42(d).

concur only in its result.

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