IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,769

CARL WAYNE BUNTION, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM CAUSE NO. 588227
IN THE 178TH DISTRICT COURT
HARRIS COUNTY

HERVEY, J., filed a concurring opinion in which KEASLER and NEWELL, JJ., joined.

CONCURRING OPINION

I join the majority opinion of this Court, but I write separately to make three observations regarding Judge Alcala's suggestion urging "the Legislature to consider amending the article[1] to add a provision that would permit the possibility of a life sentence without parole under the circumstances presented by this case." Concurring Op. at 2 (Alcala, J.). Judge Alcala finds the absence of such an instruction for cases occurring

[1] TEX. CODE CRIM. PROC. art. 37.0711.

under Article 37.0711 of the Texas Code of Criminal Procedure on or after September 1, 1991, to be an inequity that the Legislature may choose to address. This argument ignores the fact that equity includes the right of the State of Texas to decide to seek the death penalty in the first place, and the right of the jurors to make an ultimate decision based on all the facts and their right to perform their duties based on the law provided by the Legislature at the time they carry out that heavy burden.

I believe that such a change in the law might violate the prohibition against ex post facto laws enshrined in the Texas and Federal constitutions, especially in cold cases and in reversals of those cases where the offense occurred before September 1, 1991 or in years between 1991 and 2005, after which Article 37.071 was amended to allow the jury only a choice of life without parole or death. And what roles do former Article 42.18, Section 8 of the Texas Code of Criminal Procedure and current Section 508.145 of the Texas Government Code play in this suggestion to the Legislature? Although Judge Alcala suggests an inmate might prefer consideration of life without parole, I cannot imagine an inmate preferring that choice to a possibility of parole in 15 years or even 40 years, and since life without parole would be a greater punishment, it runs up against ex post facto law and the fact that one cannot be sentenced to a punishment that did not exist at the time of the offense. Moreover, former Article 42.18, Section 8 and current Section 508.145 of the Texas Government Code would seem to provide an even greater pool of inmates that could be hindered by ex post facto law. And I note that we have held that

parties cannot consent to waive the prohibition against ex post facto laws. *Phillips v. State*, 362 S.W.3d 606, 611–12 (Tex. Crim. App. 2011), *overruled on other grounds*, *Ex parte Heilman*, 456 S.W.3d 159 (Tex. Crim. App. 2015). So even if the parties were to agree to reformation, ex post facto law would direct them to the punishment applicable at the time of the offense.

This is true despite our holding in *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014), in which the majority of this Court decided that a juvenile could not automatically be sentenced to life without parole and also decided that the provision was retroactive. That case can be distinguished based on the fact that *Maxwell* allowed for consideration of a lesser sentence. Life without parole is not a lesser sentence than life with the possibility of parole in 15 through 40 years.

Second, in Texas a defendant cannot waive a jury in a capital/death case. TEX. CODE CRIM. PROC. art. 1.13. Thus, reforming those cases in which a jury found death to be the appropriate punishment based on the sheer speculation that juries would be more likely to choose death rather than life with parole totally usurps the role of the jury.

Finally, in addressing inequity, what are we to make of Article 44.2511 of the Texas Code of Criminal Procedure in which the Legislature already allows for reformation of these old cases under certain circumstances? With these additional comments, questions, and considerations, I respectfully join the opinion of the majority.

Hervey, J.

Filed: January 27, 2016

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