IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-49,980-12 through -16

EX PARTE KEITH MICHAEL ST. AUBIN, Applicant

ON APPLICATIONS FOR WRITS OF HABEAS CORPUS
CAUSE NOS. 98CR0358 THROUGH 0362
IN THE 10TH DISTRICT COURT OF GALVESTON COUNTY

KEASLER, J., filed a concurring opinion.

CONCURRING OPINION

Because I cannot join much of the Court's reasoning, I join only Part II.C. of its opinion and concur in the judgment. Based on my views of a double-jeopardy claim's non-cognizability, the Court's resolution of Michael St. Aubin's double-jeopardy claims under Code of Criminal Procedure Article 11.07, § 4 is largely academic. It is not clear to me how a non-cognizable claim could ever satisfy § 4(a)(2)'s "innocence gateway."[1] Resolving St.

[1] TEX. CODE CRIM. PROC. art. 11.07, § 4(a)(2) (West 2015) (permitting the Court to consider claims in a subsequent application only if "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.").

Aubin's claims under § 4 based on the type of double-jeopardy claim he asserts poses larger implications concerning this Court's interpretation of Article 11.07 as it relates to initial and subsequent applications.

I.

In *Ex parte Marascio*, I asserted that, because double-jeopardy claims in most instances are record claims available on appeal, they should not be cognizable in an application for habeas corpus.[2] I reassert the argument here.

We have long recognized the principle that habeas corpus proceedings may not be used for claims that should have been raised on appeal.[3] If a claim was available on appeal but was not asserted in the court of appeals, an applicant has generally forfeited his claim and the claim may not be heard in a collateral attack.[4] But this rule must permit two exceptions: (1) claims that by their nature require subsequent record development; and (2) claims asserting a violation of an absolute requirement or prohibition—critical components to the proper functioning of our adjudicatory process—that we categorized as immune from

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[2] *Ex parte Marascio*, 471 S.W.3d 832, 834 (Tex. Crim. App. 2015) (Keasler, J., concurring).

[3] *See generally Ex parte Wilcox*, 79 S.W.2d 321, 321 (Tex. Crim. App. 1935); *Ex parte Gardner*, 959 S.W.2d at 199 (quoting *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.'").

[4] *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004).

procedural default in *Marin v. State*,[5] our watershed decision on procedural default and error preservation.[6]

Ex parte Moss is a recent example of the latter.[7] Moss challenged the trial court's jurisdiction to revoke her community supervision. After revocation, Moss absconded and her direct appeal was dismissed.[8] Moss asserted her jurisdictional complaint for the first time in a habeas corpus application. Noting that jurisdiction is a systemic requirement that operates independent of litigants' wishes, this Court held that the merits of Moss's claim could be entertained irrespective of the Court's embrace of procedural default in the habeas corpus context.[9]

Double-jeopardy rights fall outside of *Marin*'s most vaunted category because they may be waived, and therefore they cannot be absolute rights or prohibitions by definition—they are more appropriately labeled waiver-only rights.[10] We have previously

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[5] *See Marin v. State*, 851 S.W.2d 275, 280 (Tex. Crim. App.1993), *overruled on other grounds by Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997).

[6] *Ex parte Marascio*, 471 S.W.3d at 835–36 (Keasler, J., concurring).

[7] *Ex parte Moss*, 446 S.W.3d 786, 788–89 (Tex. Crim. App. 2014).

[8] *Id.* at 788.

[9] *Id.* at 789; *see Sledge v. State*, 391 S.W.3d 104, 108 (Tex. Crim. App. 2013) ("[W]e 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.").

[10] *See Ex parte Marascio*, 471 S.W.3d at 838–40 (Keasler, J., concurring); *Marin*, 851 S.W.2d at 278–79 (holding waiver-only rights may not be forfeited by inaction, but

held that a defendant may affirmatively waive his right to the Fifth Amendment's double-jeopardy protections.[11] While a guilty plea alone does not waive a defendant's double-jeopardy rights, the record of a proceeding may indicate that a defendant effectuated a waiver by agreeing to subject himself to double jeopardy if it benefits him.[12] In *Ex parte Birdwell*, we held "that the applicant agreed to subject himself to a second trial for the same offense, and to receive a lesser sentence which he had already earned enough credit to have discharged."[13] Because double-jeopardy rights may be waived, they cannot be placed in *Marin*'s first category.

Further, finding that double jeopardy is an absolute right or prohibition would stifle the ability of the State and a defendant to engage in free negotiations and arrive at mutually beneficial resolutions of criminal cases. If a defendant chooses to subject himself to a potential double-jeopardy violation because, in his judgment, it results in a beneficial outcome of a pending case instead of standing on his double-jeopardy rights, he should be

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are waivable if the waiver is affirmatively, plainly, freely, and intelligently made).

[11] *Ex parte Birdwell*, 7 S.W.3d 160, 164 (Tex. Crim. App. 1999) (holding that applicant waived his double-jeopardy right to be free from a second prosecution because the record of this proceeding shows that the applicant agreed to subject himself to a second trial for the same offense); *Ex parte McJunkins*, 954 S.W.2d 39, 41 (Tex. Crim. App. 1997).

[12] *Ex parte Birdwell*, 7 S.W.3d at 163–64 (citing *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975) and *United States v. Broce*, 488 U.S. 563, 575 (1989)).

[13] *Id.* at 164; *see Jeffers v. United States*, 432 U.S. 137, 153 (1977) (holding that Jeffer's affirmative request for separate trials "deprived him of any right that he might have had against consecutive trials.").

free to do so.[14] In a negotiated plea bargain, a defendant already expressly gives up a whole host of rights, including the right to a jury trial, the right to require the State to prove guilt beyond a reasonable doubt, the right to confront and cross-examine witnesses, and the right to be sentenced by a judge considering the entire range of punishment in certain circumstances.[15] It makes little sense to elevate double-jeopardy rights to a station so sacrosanct that the defendant himself—for whom those rights exist—may not intentionally forego them.

In a single trial, St. Aubin was tried and convicted for the murder of Oscar Nava; the attempted capital murder of Christina Gonzales, Michael Lopez, Juan Garcia, and Luis Martinez; and an assault on a public servant. The underlying aggravating factor for each of the attempted capital murders was Oscar Nava's murder. The jury assessed life sentences for the murder and attempted capital murder convictions, and ten years for the assault on a public servant conviction. St. Aubin challenged his convictions on appeal and in initial habeas corpus applications, but he never complained that the convictions violated double jeopardy. He raises his double-jeopardy claims for the first time in these subsequent applications.

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[14] *See Ex parte Birdwell*, 7 S.W.3d at 160 (holding that applicant waived his double-jeopardy right to be free from a second prosecution because the record of the proceeding shows that the applicant agreed to subject himself to a second trial for the same offense).

[15] *Grado v. State*, 445 S.W.3d 736, 740 (Tex. Crim. App. 2014); *see Mendez v. State*, 138 S.W.3d 334, 344 (Tex. Crim. App. 2004).

St. Aubin's failure to assert his available double-jeopardy claims on appeal renders those claims forfeited regardless of whether they are alleged in an initial or subsequent habeas corpus application.[16] St. Aubin's multiple-punishment double jeopardy claims neither require factual development nor assert *Marin* category-one violations of an absolute requirement or prohibition. Accordingly, the Court should declare St. Aubin's double-jeopardy claims non-cognizable regardless of the particular double-jeopardy strand they assert and regardless of whether they appear in an initial or subsequent application.[17] Because St. Aubin asserts non-cognizable federal constitutional violations in his subsequent applications, I would dismiss the claims without an analysis of whether such claims meet § 4(a)(2).

II.

The Court misses an opportunity to define a unifying principle for the cognizability of habeas corpus claims. Instead, the Court resolves St. Aubin's applications by parsing the particular strand of double-jeopardy jurisprudence his claims advance and whether that particular strand satisfies the temporal requirement the Court summarily declares § 4(a)(2) requires.[18] Despite the Court's legally correct differentiation of multiple-punishments and successive-prosecution double-jeopardy rights, it gets the Court no closer to developing a

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[16] *See Ex parte Marascio*, 471 S.W.3d at 840 (Keasler, J., concurring).

[17] *Id.*

[18] *Ante*, op. at 3–4.

cohesive theory of cognizability.

The Court's reasoning suggests that a non-cognizable federal constitutional claim could, in theory, overcome the § 4(a)(2) "actual innocence" subsequent application bar. Yet, the same non-cognizable federal constitutional claim asserted in an initial application would not entitle the same applicant to a true merits review.[19] In *Ex parte Torres*, we stated that § 4 demonstrated a legislative intent to limit an applicant to "one bite of the apple" subject only to limited exceptions.[20] It then makes little sense to suppose, as this Court does today, that perhaps the right claim, cognizable or not, could satisfy the § 4(a)(2) exception. St. Aubin's applications are more intuitively decided on cognizability. Why proceed with a § 4 analysis that, even if satisfied, requires this Court to reject the claim because it is not cognizable?

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[19] *See, e.g.*, *Ex parte Grigsby*, 137 S.W.3d 673, 674 (Tex. Crim. App. 2004) (denying a challenge to the legality of a search and seizure because Applicant forfeited his claim by failing to raise it on direct appeal); *Ex parte Kirby*, 492 S.W.2d 579, 580–81 (Tex. Crim. App. 1973).

[20] *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997).