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

KELLER, P.J., delivered the opinion of the court as to part II.C. in which KEASLER, HERVEY, YEARY, and KEEL, JJ., joined and otherwise announced the judgment of the court and filed an opinion in which HERVEY, YEARY, and KEEL, JJ., joined. KEASLER, J., filed a concurring opinion. ALCALA, J., filed a dissenting opinion in which RICHARDSON, NEWELL, and WALKER, JJ., joined.

Applicant claims that the Double Jeopardy Clause was violated when the State obtained multiple convictions against him in a single trial. He raises this claim for the first time in this subsequent habeas application under Article 11.07.[1] We hold that this *multiple-punishments* double-jeopardy claim does not satisfy the innocence-gateway exception. Furthermore, because the double-jeopardy principles used to resolve the "new" case upon which applicant relies were not new, he has

[1] TEX. CODE CRIM. PROC. art. 11.07.

not satisfied the new-legal-basis exception. Because an exception to the prohibition against subsequent applications has not been satisfied, we dismiss these applications.

I. BACKGROUND

Applicant shot five people at the 1998 Mardi Gras celebration in Galveston. He was charged with one count of murder and four counts of attempted capital murder. Nava was the victim alleged in the murder count and he was the second victim alleged in each of the attempted capital murder counts. At a single trial, applicant was found guilty of all five charges and sentenced to life imprisonment in each case, with the sentences to run concurrently.[2]

In 2001, applicant filed a number of habeas applications in which he alleged ineffective assistance of counsel and jury instruction error in these cases. While these applications were on remand to the trial court, applicant filed more habeas applications. We denied relief on these later applications in November 2001, and on the initial applications in May 2002. The current habeas applications were filed in the trial court on July 15, 2015.

II. ANALYSIS

A. Subsequent-Application Bar Generally

After the final disposition of an initial application that challenges a conviction, we may not consider the merits of a subsequent habeas application for that conviction unless the applicant satisfies an exception to the statutory prohibition against subsequent applications.[3] The current

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[2] Applicant was also convicted of assault on a public servant and sentenced to ten years' imprisonment, but that conviction is not at issue in this case.

[3] TEX. CODE CRIM. PROC. art. 11.07, § 4 ("If a subsequent application for a writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court *may not consider the merits of* or grant relief based on the subsequent application unless" one of the exceptions is met.) (emphasis added). We do not consider the question that divided judges on this

applications were filed after the final disposition of initial applications that challenged the convictions at issue.[4] The question, then, is whether there is an exception to the subsequent-application bar.

B. Innocence-Gateway Exception

One such exception is the "innocence gateway" exception, which requires a showing by a preponderance of the evidence that "but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt."[5] This language requires, at the very least, that the alleged constitutional violation occur at or before a finding of guilt.[6] A claim

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Court in *Ex parte Marascio*, 471 S.W.3d 832 (Tex. Crim. App. 2015), whether double-jeopardy claims that could have been raised on direct appeal are cognizable on habeas corpus. *Compare id.* at 833-40 (Keasler, J., concurring) (contending that such claims are not cognizable) *with id.* at 855-59 (Alcala, J., dissenting) (contending that such claims are cognizable). Even a holding that a claim is not cognizable because it could have been raised on appeal is considered to be a disposition on the merits for purposes of the § 4 bar. *See Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997) ("A disposition is related to the merits if it decides the merits or makes a determination that the merits of the applicant's claims can never be decided.") (citing *Hawkins v. Evans*, 64 F.3d 543, 547 (10th Cir. 1995), for the proposition that a "disposition is considered 'on the merits' if the court refuses to determine the merits because of state procedural default"). Because cognizability is a merits question for the purpose of § 4, we must consider the § 4 bar before considering a cognizability question. The concurrence contends that we miss the opportunity to define a unifying principle of cognizability for habeas claims, but the legislature has explicitly prohibited us from considering the merits of a claim if § 4 is not met. We would disregard that explicit legislative command if we were to consider the cognizability of applicant's claim.

[4] *See Ex parte Evans*, 964 S.W.2d 643, 646 (Tex. Crim. App. 1998) (a challenge to the conviction, for the purpose of § 4, involves claims regarding "the final consummation of the prosecution," "the judgment or sentence that the accused is guilty as charged," or "a judgment of guilty and the assessment of punishment."); *Torres*, 943 S.W.2d at 472-74 (a denial on the merits of all claims raised is a final disposition of a habeas application for the purpose of § 4).

[5] TEX. CODE CRIM. PROC. art. 11.07, § 4(a)(2).

[6] *See Ex parte Blue*, 230 S.W.3d 151, 161 (Tex. Crim. App. 2007) ("Upon satisfactory proof at trial that a capital murder defendant is mentally retarded or was a juvenile, no rational juror would answer any of the special issues in the State's favor, if only for the simple reason that the statutory

based on the "successive prosecutions" strand of double-jeopardy jurisprudence satisfies such a requirement. This is so because a successive-prosecutions violation involves two separate criminal proceedings.[7] If the offenses in the two proceedings are the same for double jeopardy purposes, then the second proceeding should never have occurred—the issue of the applicant's guilt would never have been submitted to a jury.[8] In *Ex parte Milner*, the double jeopardy claim was clearly a successive-prosecutions claim.[9] It is not clear whether *Ex parte Knipp* involved a successive-prosecutions claim or a multiple-punishments claim.[10] Even if it involved a multiple-punishments

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special issues would not be submitted to the jurors in the first place.") (construing innocence of the death penalty exception for capital cases). Whether the statutory language requires more than that—e.g. a showing of factual as opposed to legal innocence—is an issue we need not address in this opinion. *See Selsor v. Kaiser*, 22 F.3d 1029, 1035 (10th Cir. 1994) (holding that a showing of factual innocence, as opposed to legal innocence, required to invoke federal innocence-gateway exception).

[7] *See Brown v. Ohio*, 432 U.S. 161, 165 (1977) ("The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.") (internal quotation marks omitted).

[8] *Id.*; *Abney v. United States*, 431 U.S. 651, 662 (1977) ("Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.") (emphasis in original).

[9] *See Ex parte Milner*, 394 S.W.3d 502, 505 (Tex. Crim. App. 2013) ("Applicant plead guilty to the attempted capital murders in Cause Nos. 2404 and 2405 . . . was assessed consecutive life sentences in each cause. The three pleas were entered in separate proceedings conducted consecutively on the same day."); *id.* at 504 ("Applicant has proven that he is actually innocent of the second conviction for attempted capital murder.").

[10] *See Ex parte Knipp*, 236 S.W.3d 214, 214-15, 217 (Tex. Crim. App. 2007) (offenses were in separate indictments with separate cause numbers).

claim, though, Knipp's claim differed from typical multiple-punishments claims where, for instance, two offenses have overlapping elements that render them "the same" for double jeopardy purposes. In *Knipp*, the State simply made a mistake in charging Knipp twice for one drug delivery.[11] The offense upon which we granted relief under Art. 11.07 §4(a)(2) never occurred at all. At the very least, it would be incorrect to say that *Knipp* held that a multiple-punishments claim necessarily meets the innocence-gateway exception.

The reasoning that applies to a successive-prosecutions double-jeopardy claim does not apply to a multiple-punishments double-jeopardy claim. When the convictions occur at a single criminal trial, the role of the double-jeopardy guarantee "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."[12] The Supreme Court has explicitly recognized that the State has the right to prosecute and *obtain jury verdicts* on two offenses in a single trial, even if the offenses are the same for double jeopardy purposes.[13]

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[11] *Id.* at 216 ("The State apparently mistook the gross weight in the DEA lab report as being the weight of methamphetamine delivered in some other delivery than that reported by Det. Womack, which was indicted as Count 2 in Cause No. 03-12-08654-CR, and again indicted Applicant in this cause. . . . Applicant has accompanied the meritorious double-jeopardy claim in his subsequent writ with a prima facie showing of actual innocence of delivering between 4 and 200 grams of methamphetamine on or about September 12, 2003, as alleged in the indictment in this case.").

[12] *Brown*, 432 U.S. at 165.

[13] *Ball v. United States*, 470 U.S. 856, 865 (1985) (After finding two offenses to be the same for double-jeopardy purposes: "We emphasize that while the Government may seek a multiple-count indictment against a felon for violations of §§ 922(h) and 1202(a) involving the same weapon where a single act establishes the receipt and possession, the accused may not suffer two convictions or sentences on that indictment. If, upon the trial, the district judge is satisfied that *there is sufficient proof to go to the jury on both counts, he should instruct the jury as to the elements of each offense. Should the jury return guilty verdicts for each count*, however, the district judge should enter judgment on only one of the statutory offenses.") (emphasis added).

Because the protection against double jeopardy does not prohibit multiple jury verdicts of guilt within a single trial, it cannot be said that "but for a violation of the protection against double jeopardy, no rational juror would have found the applicant guilty of both offenses." A rational juror might well be able to find a defendant guilty of both offenses, and doing so would not violate the Constitution. It is only upon entry of a judgment for multiple offenses, after sentencing, that a multiple-punishments violation even occurs. A multiple-punishments violation occurs after sentencing, so a necessary precondition for the innocence-gateway exception—that a constitutional violation occur at or before a finding of guilt—is typically not met.[14] The only possible exception would be the unusual type of claim at issue in *Knipp* where a duplicate offense is mistakenly charged. Applicant's multiple-punishments claim does not fall within the unusual fact situation at

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[14] The dissent claims that we reject the State's "waiver of procedural default", but we have held that procedural default cannot be waived. In *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002), we rejected the State's confession of error in the Supreme Court because it was "contrary to our procedural law for presenting a claim on appeal." And in *Darcy v. State*, 488 S.W.3d 325, 327-28 (Tex. Crim. App. 2016), we held that error preservation is a systemic requirement, which would indicate that it is not subject to waiver. Moreover, § 4 prohibits any court from even considering the merits of a claim in a subsequent application absent an enumerated exception, *see supra* at n.3, and waiver by the State is not enumerated as an exception in § 4. *See* TEX. CODE CRIM. PROC. art. 11.07, § 4.

The dissent further claims that the double-jeopardy violation in applicant's case occurred when he was convicted rather than when he was punished. The dissent is incorrect, because applicant's claim is of the "multiple punishments" variety, *see supra* at part II.B. *Evans*, cited by the dissent, does not address the timing of when a double-jeopardy violation occurs. *See Evans v. State*, 299 S.W.3d 138, 141 (Tex. Crim. App. 2009) ("In this context the State may seek a multiple-count indictment based on violations of different statutes, even when such violations are established by a single act; but the defendant may be convicted and sentenced for only one offense. A double jeopardy violation occurs even when, as in the case before us, the sentences are concurrent and the impermissible conviction does not result in a greater sentence.") (citation omitted). More to the point, the innocence-gateway exception in § 4 requires that no rational juror could have found the applicant guilty beyond a reasonable doubt, *see supra* at n.5 and accompanying text, and the Supreme Court in *Ball* recognized that the State could legitimately obtain a jury determination of guilt for offenses that are the same for double jeopardy purposes and that a constitutional violation occurred only if the judge entered judgment on both offenses. *See supra* at n.13.

issue in *Knipp*, so his claim fails to meet the "at or before a finding of guilt" precondition for invoking the innocence-gateway exception.

C. "New Legal Basis" Exception

Another exception to the bar against subsequent applications is the "new legal basis" exception, which requires a showing that "the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the . . . legal basis for the claim was unavailable on the date the applicant filed the previous application."[15] Applicant relies upon *Ex parte Milner* for the proposition that he has suffered a double jeopardy violation. It is true that *Milner* was decided after applicant filed his prior applications and it involved the same types of charges as those at issue in this case: a murder and multiple attempted murders that all alleged the killing of the same victim.[16] But Milner received relief under the innocence-gateway exception. In *Milner*, we expressly declined to address whether the new-legal-basis exception was satisfied.[17]

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[15] TEX. CODE CRIM. PROC. art. 11.07, § 4(a)(1).

[16] *See Milner*, 394 S.W.3d at 504. *Milner* differs from the present case in that the attempted-capital-murder counts alleged attempted *serial* murders under TEX. PENAL CODE § 19.03(a)(7)(B) (murders pursuant to the same scheme or course of conduct) while applicant's attempted-capital-murder counts alleged attempted *mass* murders under TEX. PENAL CODE § 19.03(a)(7)(A) (murders committed in the same transaction). This difference between the two cases does not affect our analysis. *See Milner*, 394 S.W.3d at 508 (court failed to see a differentiation between the two types of multiple-murder capital murders for double-jeopardy purposes).

[17] 394 S.W.3d at 505.

We conclude that it was not. Neither *Milner* nor *Saenz*,[18] on which *Milner* partially relied,[19] satisfy the new-legal-basis exception. To show that he is entitled to consideration of a subsequent application on the basis of new law, an applicant must show that "the legal basis was not recognized by *and could not have been reasonably formulated from* a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before" the date of the previous application.[20] Although this Court had not previously addressed a double-jeopardy claim involving the type of charges before us until the decision in *Milner*, the principles of double-jeopardy law that were used to resolve *Milner* (and *Saenz*) were not new, but were familiar principles articulated in earlier cases from the Supreme Court and this Court. *Milner*, in fact, cited and relied upon well-established caselaw from the Supreme Court and this Court that articulated how to analyze multiple-punishment double jeopardy claims (*Ball v. United States* and *Ex parte Ervin*) and unit-of-prosecution issues (*Sanabria v. United States* and *Ex parte Hawkins*).[21] *Saenz* likewise relied upon the familiar analyses set forth in *Sanabria*, *Hawkins*, and *Ervin*.[22] The double-jeopardy claim applicant makes could have been, and in *Milner* and *Saenz* was,

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[18] *Saenz v. State*, 166 S.W.3d 270 (Tex. Crim. App. 2005).

[19] *See Milner*, 394 S.W.3d at 506 n.12, 507-08 & n.18 & nn.21-27, 509 n.31 (discussing or citing *Saenz*).

[20] TEX. CODE CRIM. PROC. art. 11.07, §4(b) (emphasis added). *See also Ex parte Hood*, 211 S.W.3d 767, 775 (Tex. Crim. App. 2007), *different result reached on reconsideration by*, 304 S.W.3d 397 (Tex. Crim. App. 2010).

[21] *See Milner*, 394 S.W.3d at 507 nn.15-17 (citing *Ball v. United States*, 470 U.S. 856, 861 (1985); *Sanabria v. United States*, 437 U.S. 54 (1978); *Ex parte Hawkins*, 6 S.W.3d 554 (Tex. Crim. App. 1999); *Ex parte Ervin*, 991 S.W.2d 804, 807 (Tex. Crim. App. 1999)).

[22] *Saenz*, 166 S.W.3d at 272 (citing *Sanabria*, *Hawkins*, and *Ervin*).

reasonably formulated from double-jeopardy decisions from the Supreme Court and this Court that existed before applicant filed his earlier applications.[23]

D. Disposition

In summary, applicant's multiple-punishments double-jeopardy claims meet neither the innocence-gateway nor the new-legal-basis exception to the subsequent-application bar. Finding no other potentially applicable exception, we hold that the subsequent-application bar applies and that we may not consider the merits of applicant's claims. We dismiss the current applications under TEX. CODE CRIM. PROC. art. 11.07, § 4.

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[23] *See supra* at the two immediately preceding footnotes.