IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-85,192-01

Ex parte MORRIS LANDON JOHNSON II, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. CR13895A IN THE 266TH DISTRICT COURT FROM ERATH COUNTY

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

According to Parole Board policy, when an inmate has concurrent sentences, the Board does not consider him for release to parole until he becomes eligible under the sentence with the latest parole-eligibility date. Applicant has two ten-year sentences running consecutively and a forty-year sentence running concurrently with them. He contends that the Parole Board's policy will cause his second consecutive sentence to start running later than it should. We conclude that Applicant's claim is not cognizable on habeas corpus and that he has not shown the violation of a ministerial duty that would warrant relief on mandamus. Consequently, we deny relief.

I. BACKGROUND

Over a period of sixteen months during 2013 and 2014, Applicant was convicted of forgery,

then possession of a controlled substance, and then delivery of a controlled substance. He was sentenced to ten years on the forgery case, then ten years on the possession case, stacked on the forgery sentence, and finally forty years on the delivery case, to run concurrently with the other sentences. The concurrent sentence with the latest parole-eligibility date is Applicant's forty-year sentence. He claims that the Parole Board ought to conduct a parole review of each sentence as it becomes eligible, as if it were the only sentence, which would result in parole review when his ten-year forgery sentence would, on its own, become parole-eligible. He argues that doing so would give him a chance to be paroled on the forgery sentence earlier, and so start the running of his possession sentence earlier, than if the first review is based on his eligibility on the forty-year sentence.

II. ANALYSIS

In general, habeas relief is available only for "jurisdictional defects and violations of constitutional and fundamental rights."[1] At least absent statutory direction to the contrary,[2] we have said that habeas relief is not available for mere statutory violations.[3] We have not clearly explained what "fundamental rights" might be cognizable on habeas that are neither jurisdictional nor constitutional, but we have suggested that such a right would have to qualify as an absolute right or prohibition under category one of *Marin*'s[4] three-category error-preservation framework.[5]

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[1] *Ex parte Moss*, 446 S.W.3d 786, 788 (Tex. Crim. App. 2014) (quoting *Ex parte McCain*, 67 S.W.3d 204, 207 (Tex. Crim. App. 2002). *See also* Ex *parte Carter*, 521 S.W.3d 344, 349 (Tex. Crim. App. 2017) (plurality op.).

[2] *See* TEX. CODE CRIM. PROC. art. 11.073.

[3] *Ex parte Douthit*, 232 S.W.3d 69, 72 (Tex. Crim. App. 2007).

[4] *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993).

[5] *Moss*, 446 S.W.3d at 788.

In *Ex parte Sepeda*, however, we held that habeas corpus "is the proper remedy" to compel the Parole Board to comply with a statute regarding parole-denial letters.[6] In the same breath, we also said that the statute did not create a liberty interest protected by due process.[7] Any statement in *Sepeda* about habeas being the proper remedy was, arguably, *dicta* because by the time we issued the opinion, the Board had revised its denial letter to conform to the statute and the inmate had already received the relief he sought.[8] But in any event, we conclude that *Sepeda*'s statement that habeas is an appropriate vehicle for a claim based purely on statute is at odds with well-established habeas law, and we now disavow it. Although we do not overrule precedent lightly, we may do so when the prior decision "was poorly reasoned or has become unworkable."[9] The statement in *Sepeda* conflicts with every other case of fairly recent origin that has addressed whether statutory violations should be considered on postconviction habeas.[10] *Sepeda* is an anomaly in our habeas jurisprudence,

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[6] 506 S.W.3d 25, 26-27 (Tex. Crim. App. 2016).

[7] *Id.* at 27.

[8] *See id.* at 27, 29.

[9] *See Douthit*, 232 S.W.3d at 74.

[10] *See id.* at 71-74; *McCain v. State*, 67 S.W.3d 204, 209-10 (Tex. Crim. App. 2002); *Ex parte Graves*, 70 S.W.3d 103, 116-17 (Tex. Crim. App. 2002); *Ex parte Sanchez*, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996). *Sepeda* also conflicts with the conclusion of at least a plurality of the Court in the more recent case of *Ex parte Carter*. *See Carter*, 521 S.W.3d at 349 (plurality op.) ("Carter's improper-cumulation claims are also not cognizable for a much simpler, basic reason: they assert bare statutory violations.").

Judge Alcala's dissent says that this Court flip-flops on whether statutory violations are cognizable, depending on what year it is. But aside from *Sepeda*, the dissent cites no published opinions recognizing the cognizability of mere statutory violations since 1996, when *Sanchez* was decided. And the only reliance on *Sepeda* that the dissent cites is a remand order. But we have occasionally remanded on a claim only to later conclude that the claim was not cognizable. *See Carter*, 521 S.W.3d at 346, 350 (majority op.) (case was remanded, but improper cumulation claim was ultimately found to be not cognizable). Any decision in a remand order that a claim may be, or

and we reject it now. We turn then, to whether—without *Sepeda*—Applicant's claim is cognizable on postconviction habeas.

We first determine that Applicant's claim does not allege a constitutional violation. A Texas inmate does not have a liberty interest in release on parole.[11] And the Supreme Court has made clear that procedural statutes do not by themselves create liberty interests—there must be a substantive liberty interest that the procedural statute is designed to protect for due process to be implicated.[12] Without a liberty interest in parole, procedural requirements concerning the timing of parole reviews do not implicate due process. And because no other constitutional right is even arguably at stake in this case, Applicant has failed to show a constitutional basis for habeas relief.

Applicant has also not shown a jurisdictional defect or a violation of some other category one *Marin* right. Even if consideration for parole were deemed to be a procedural right, it hardly qualifies as an absolute entitlement that cannot be waived.[13]

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is, cognizable is not final and is subject to revision.

[11] *Ex parte Retzlaff*, 135 S.W.3d 45, 49 (Tex. Crim. App. 2004).

[12] *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. If officials may transfer a prisoner 'for whatever reason or for no reason at all,' there is no such interest for process to protect. The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.") (citations omitted). *See also Ex parte Montgomery*, 894 S.W.2d 324, 328 (Tex. Crim. App. 1995) ("[T]he liberty guaranteed by the due process clause is substantive, and an individual cannot demand 'process' for its own sake if no substantive interest exists.").

[13] *See Marin*, 851 S.W.2d at 279 ("Of course, the system also includes a number of requirements and prohibitions which are essentially independent of the litigants' wishes. Implementation of these requirements is not optional and cannot, therefore, be waived or forfeited by the parties.").

Any postconviction relief from a failure to conduct a timely parole review would have to be *via* mandamus. We have occasionally treated a habeas application as an application for mandamus relief when the circumstances warranted it.[14] But even assuming this Court has authority to issue a writ of mandamus against the Parole Board, mandamus would not lie here. To be entitled to mandamus relief, a party must have a clear right to the relief sought.[15] The relevant statute seems to specify only that, if an inmate has consecutive sentences, a parole review for a particular sentence be conducted "during each sentence."[16] The Parole Board's Rule 145.3(4) states, "An offender will be considered for parole when eligible" and when other criteria not at issue here are met. Applicant seems to construe the words "when eligible" in the rule to mean "when eligible on a particular offense." But another construction, and the one that seems most natural to us, is that it means "when eligible for parole" and that an offender is eligible for parole only when he has reached the parole eligibility date on the longest concurrent sentence. This also appears to be the construction employed by the Board of Pardons and Paroles, and, as an administrative construction not made in anticipation of litigation, it is entitled to deference.[17]

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[14] *See In re Daniel*, 396 S.W.3d 545, 546, 549 (Tex. Crim. App. 2013).

[15] *Powell v. Hocker*, 516 S.W.3d 488, 494-95 (Tex. Crim. App. 2017).

[16] *See* TEX. GOV'T CODE § 508.150(a) ("If an inmate is sentenced to consecutive felony sentences under Article 42.08, Code of Criminal Procedure, a parole panel shall designate during each sentence the date, if any, the inmate would have been eligible for release on parole if the inmate had been sentenced to serve a single sentence."). Of course, § 508.150(c)(1) states that a parole panel may not consider consecutive sentences as a single sentence for purposes of parole. Our opinion does not change that. The complicating, and determining, factor here is the length of the concurrent sentence in Applicant's case.

[17] *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2010) ("If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, as there is here, we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent with

We deny relief.

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the language of the statute, regulation, or rule"); *Public Utility Com. v. Gulf States Utilities Co.*, 809 S.W.2d 201, 207 (Tex. 1991) ("The Commission's interpretation of its own regulations is entitled to deference by the courts. Our review is limited to determining whether the administrative interpretation 'is plainly erroneous or inconsistent with the regulation.'") (citations omitted). *See also Rocha v. State*, 16 S.W.3d 1, 27 n.5 (Tex. Crim. App. 2000) (Holland, J., dissenting) ("[A]dministrative agency constructions of governing statutes, or in this case a treaty, performed outside the adversary system are worthy of deference.") (quoting *Lombera-Camorlinga*, 2000 U.S. App. LEXIS 3378, 2000 WL 245374 at *14 (Thomas, J., dissenting)). We also note that there is a potential downside for an inmate to obtaining parole on a shorter concurrent sentence before he becomes eligible on a longer concurrent sentence. If an inmate were "paroled" on the shorter sentence and later revoked, then he could lose credit for the time spent on parole, even if that time were in fact spent in prison, which could, depending on the inmate's particular circumstances, lengthen the total actual time he spends in prison. *See* TEX. GOV'T CODE § 508.283.