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

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

Can the parole board disregard applicable statutes without any judicial oversight? After today's majority opinion, the answer to this question is "Yes." Today's holding definitively tells the parole board that it may wholly disregard the Legislature's procedural requirements without any judicial oversight by this Court. I respectfully disagree with this holding. Although I agree that almost all of the parole board's decisions are wholly discretionary and not subject to judicial oversight, in rare cases such as this one involving mandatory statutory procedural requirements, I would grant either habeas or mandamus relief

to Morris Landon Johnson II, applicant. I would hold that, when, as here, an inmate is serving two sentences concurrently but he also has a yet-to-commence third sentence that will be served consecutively to the shorter of his concurrent sentences, the parole board must consider him for parole on his shorter concurrent sentence at the point at which he becomes statutorily eligible for parole on that sentence. Here, by delaying a vote on applicant's parole for his first of two stacked sentences until he is eligible for parole on his much longer concurrent sentence, the parole board's policy deprives him of the opportunity to receive parole "on paper" for his first stacked sentence, which, if granted, would allow him to commence serving his second stacked sentence sooner. This policy by the parole board is arbitrary and presents a real possibility that applicant will be confined in prison longer than he otherwise would have been had he been timely considered for parole on the first stacked sentence. Under these circumstances, I agree with applicant's contention that he is entitled to relief, either through a post-conviction writ of habeas corpus or, alternatively, through the vehicle of mandamus. I, therefore, respectfully dissent. I explain my reasoning by reviewing the factual and procedural background, the applicable statutory requirements for parole eligibility, the merits of applicant's request for habeas relief, and alternatively, the merits of relief through mandamus.

I. Background

Here, applicant has three sentences for which he is confined in prison. Although he has become eligible for parole on one of those sentences, the parole board has not considered

him for that parole, even though he has been eligible for that consideration for almost four years.

> 1. On May 16, 2013, applicant was sentenced to ten years in prison for forgery. He became statutorily eligible for parole on this sentence on January 5, 2014.
>
> 2. On August 13, 2013, applicant was sentenced to ten years in prison for possession of a controlled substance. The trial court ordered this sentence to run consecutively to the forgery sentence. Applicant has yet to commence serving this sentence. This sentence will commence either when applicant reaches calendar-time on the forgery sentence, or when he is granted parole on the forgery sentence, whichever comes first. *See* TEX. GOV'T CODE § 508.150(b).
>
> 3. On September 17, 2014, applicant was sentenced to forty years in prison for delivery of a controlled substance. The trial court ordered this sentence to run concurrently with the other two sentences. Applicant becomes statutorily eligible for parole on this sentence on December 6, 2017.

Applicant alleges that, although he has been eligible to be considered for parole on his forgery offense for four years, the parole board has declined to consider him for parole during that time. The Texas Department of Criminal Justice (TDCJ) has filed a response explaining that, under circumstances in which an inmate is serving more than one concurrent sentence, it is the parole board's policy to delay consideration of an inmate's parole on an otherwise eligible offense until he also becomes eligible for parole on his "controlling" offense, which is the offense with the longest sentence.

II. Statutes Require Each Sentence to Have Its Own Parole Eligibility Date

I agree with applicant's contentions that the parole board's refusal to timely consider him for parole on his forgery sentence runs afoul of mandatory provisions in the Government

Code that require timely parole consideration under these circumstances, and that the board's refusal to timely consider him for parole on the forgery conviction unfairly deprives him of the opportunity to begin serving his consecutive sentence for drug possession. *See* TEX. GOV'T CODE §§ 508.145(f), 508.150(a), (b). A review of the relevant provisions in the Government Code shows that each conviction must have its own parole eligibility date and be treated separately for purposes of determining parole.

The Government Code generally provides that an inmate is "eligible for release on parole" when the inmate's actual calendar time served plus good conduct time equals one-fourth of the sentence imposed or 15 years, whichever is less. *See* TEX. GOV'T CODE § 508.145(f). The plain language of this provision requires that parole eligibility will be calculated with respect to each sentence that has been imposed against a defendant. Consistent with the statutory language of this provision, the Board has enacted a policy that provides that "[a]n offender will be considered for parole when eligible," so long as he does not fall within certain categories of disciplinary misconduct. 37 TEX. ADMIN. CODE § 145.3(4). Under these terms in the statutory language and the board's policy, the board must determine a parole eligibility date as to each sentence and then consider an offender for parole when he is eligible for parole under that date. Nothing in these provisions permits the parole board to delay a vote on an otherwise eligible sentence, as here with respect to applicant's forgery sentence, under the rationale that an inmate is also serving another longer sentence for which he is not yet eligible for parole.

More specifically, when a trial court has ordered that sentences must be cumulated, the Government Code requires the parole board to calculate a parole-eligibility date for each sentence and to consider the inmate for parole on each sentence. *See* TEX. GOV'T CODE § 508.150(a), (b). Section 508.150(a) states, "If an inmate is sentenced to consecutive felony sentences . . . 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." *Id.* § 508.150(a). The statute further provides that a consecutive sentence will cease to operate either when the actual calendar time served by the inmate equals the sentence imposed by the court, or on the date a parole panel designates as the date the inmate "would have been eligible for release on parole if the inmate had been sentenced to serve a single sentence." *Id.* § 508.150(b)(2). Section 508.150 also states that a parole panel "may not consider consecutive sentences as a single sentence for purposes of parole." *Id.* § 508.150(c).

The Legislature's statutory scheme addressing parole consideration for consecutive sentences clearly provides for separate and timely consideration of an inmate's parole eligibility as to each sentence in a series of stacked sentences and permits an inmate to be paroled "on paper" for his first stacked sentence so that he may begin serving the second stacked sentence. Nothing within any of these provisions suggests that the parole board has the discretion to significantly delay consideration of an inmate's parole eligibility on a stacked sentence until he also becomes parole-eligible on a much longer concurrent sentence,

which is the situation here. In light of these statutory provisions, I agree with applicant's contention that the parole board was required to consider him for parole on his forgery sentence when he became eligible for it and that the almost four-year delay in that consideration violates statutory requirements.

I disagree with the response by TDCJ indicating that it is always proper for the parole board to consider an inmate for parole only after he becomes parole-eligible on his longest, or "controlling" sentence. TDCJ has explained that this policy applies even to inmates, such as applicant, who have an additional stacked sentence that cannot commence until the shorter of the active concurrent sentences has ceased to operate. As explained above, this policy fails to conform to the Legislature's statutory requirements that require a parole eligibility date as to each sentence and conflicts with the parole board's own requirements for timely parole consideration for each sentence. It also fails to conform to the statutory provisions that contemplate timely consideration of parole for each sentence in a series of stacked sentences and the possibility of an inmate receiving parole "on paper" as to his first stacked sentence so that he may commence serving his second stacked sentence sooner.

All of the relevant statutory provisions described above indicate that an inmate serving stacked sentences should be timely considered for parole as to each sentence upon becoming eligible. I, therefore, conclude that the parole board has no discretion to disregard these statutory provisions requiring consideration of an inmate's parole when he become eligible for parole on each sentence.

III. State Habeas Relief is Appropriate To Remedy the Statutory Violation

Despite the parole board's clear violation of mandatory requirements that compel timely parole consideration under these circumstances, this Court's majority opinion denies habeas relief on the basis that applicant's claim is not cognizable. As the basis for its conclusion, this Court's majority opinion reasons that applicant's claim does not implicate any constitutional right because he has no protected liberty interest in parole attainment, and it further reasons that his claim does not implicate any "fundamental right" because the right to be considered for parole is not a systemic requirement under the framework set forth in *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993). Thus, this Court's majority opinion concludes that applicant's claim asserts a mere statutory violation that is not cognizable on habeas. *See Ex parte Douthit,* 232 S.W.3d 69, 72 (Tex. Crim. App. 2007); *Ex parte McCain,* 67 S.W.3d 204, 206 (Tex. Crim. App. 2002). Contrary to the majority opinion's determination, I conclude that the type of statutory requirements involved in this case rise to the level that are appropriate for state-habeas relief.

In this Court's unanimous 2016 decision in *Ex parte Sepeda*, this Court determined that a violation of a Government Code provision relating to an inmate's consideration for parole was appropriate for state-habeas relief, even though it did not involve a constitutionally protected liberty interest. 506 S.W.3d 25, 26-27 (Tex. Crim. App. 2016) (discussing TEX. GOV'T CODE § 508.1411). This Court addressed the parole board's failure to adequately explain its reasons for denying parole to an inmate, as required by statute. *Id*.

Although it agreed with Sepeda that the parole board had previously failed to comply with the statute, this Court ultimately denied relief to Sepeda because, by the time that this Court issued its decision, the record showed that the "Board ha[d] revised its denial letter to conform to the changes made to the statute by the legislature, which required the Board to state the reasons why the individual inmate was denied parole." *Id*. at 29. In explaining the thrust of Sepeda's complaint, this Court said, "[The] reasons for denying or approving parole are within the unfettered discretion of the Board, and [Sepeda] has not claimed otherwise. But [Sepeda] has a statutory right to be informed of the specific reasons that formed the basis for the denial of his parole." *Id*. at 28. This Court's opinion stated, "We hold that a writ of habeas corpus is the proper remedy by which to compel the Board . . . to provide a parole-denial letter in compliance with Texas Government Code § 508.1411 and that § 508.1411 does not create a liberty interest protected by due process." *Id*. at 26-27. By noting that the statute did not create a liberty interest protected by due process, this Court necessarily found no federal constitutional right to warrant habeas relief. But by noting that habeas relief was appropriate, this Court implicitly held that the statutory violation rose to the level equivalent of a constitutional violation or a violation of a fundamental right that was appropriate for state habeas relief. *Id*.

Today, this Court's majority opinion overrules *Sepeda* by reasoning that complaints pertaining to the parole board's violations of the Government Code do not implicate constitutional rights or absolute rights or prohibitions, which it suggests would be required

for the claim to be cognizable on habeas.[1] In support, the majority opinion cites to certain cases by this Court that have held that a claim asserting a bare statutory violation is not cognizable on habeas. *See, e.g.*, *Douthit*, 232 S.W.3d at 72; *McCain*, 67 S.W.3d at 209; *Ex parte Sanchez*, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996). Although that principle may be generally true with respect to most statutory-based claims, it is also true that this Court has recognized a limited right to habeas relief for some statutory violations that involve fundamental rights or matters that are essentially of the same quality as constitutional rights. This Court has demonstrated vacillating views on this subject over the years, with some cases holding that certain statutory challenges are cognizable on habeas,[2] and others holding that

---

[1] Even as recent as a few weeks ago, this Court has relied on *Sepeda* in a unanimous per curiam order remanding a case to the habeas court for findings related to the parole board's stated reasons for refusing to parole an inmate. *See Ex parte Skinner*, No. WR-26,955-06, 2017 WL 4401909, at *1 (Tex. Crim. App. Oct. 4, 2017) (per curiam) (not designated for publication). In its remand order, this Court said, "[Skinner] complains that the Parole Board's stated reasons for refusing his release to parole deny him due process and do not comply with Section 508.1411 of the Government Code. This issue was addressed by this Court in *Ex parte Sepeda.*" *Id.* Relying on our decision in *Sepeda*, this Court remanded Skinner's application for factual development because "[Skinner] has alleged facts that, if true, might entitle him to relief." *Id.* Of course, *Skinner* is not a binding decision by this Court, but it does exemplify this Court's continued adherence and application of *Sepeda* until today's sudden departure from the rule of that case.

[2] This Court has held on multiple occasions that some statutory challenges are cognizable on habeas. *See, e.g., Ex parte Thompson*, 641 S.W.2d 239, 240 (Tex. Crim. App. 1982) (granting habeas relief on statutory claim regarding trial court's failure to conduct an examining trial for juvenile defendant, in violation of the Texas Family Code); *Ex parte McIver,* 586 S.W.2d 851, 854 (Tex. Crim. App. 1979) (granting habeas relief on claim that jury had assessed punishment that did not comport with requirements for probated sentences in the Code of Criminal Procedure); *Ex parte Rawlins*, 255 S.W.2d 877, 877 (Tex. Crim. App. 1953) (granting habeas relief for failure to provide statutorily required counsel for jury waiver); *see also Ex parte McCain*, 67 S.W.3d 204, 211, 214 (Tex. Crim. App. 2002) (Holcomb, J., dissenting) (observing that this Court's longstanding precedent has held that "some defects, even though they are 'just' statutory defects, are so egregious that they are cognizable on habeas").

they are not.[3] There is no clear unifying principle in the Court's approach in these cases. Rather, these fluctuations appear to be a product of this Court's shifting philosophy regarding how rigid or relaxed habeas cognizability rules should be at any given time. In essence, the Court's approach to such questions has been the result of a policy judgment about the purpose and nature of habeas relief, rather than a result of some change to our statutory or constitutional authority to grant habeas relief.[4]

This Court's majority opinion explains that *Sepeda* is inconsistent with our decision in *Ex parte Douthit*, which is true, but only because *Douthit* was a flip-flop on the same issue from previous precedent. *See Douthit*, 232 S.W.3d at 74. Douthit sought habeas relief on the basis that when he pleaded guilty to capital murder, the applicable mandatory statutes did not allow a defendant to waive the right to a jury trial in a capital murder case. *Id*. at 70. This Court acknowledged that prior to *Douthit*, cases such as *Ex parte Miller*, 696 S.W.2d

---

[3] This Court has held on multiple occasions that some statutory challenges are not cognizable, but in almost all of those cases the defendant was complaining about a matter on which he could have obtained relief in his direct appeal if he had asserted the challenge, which is different from the instant case in which the defendant is left without any remedy if habeas or mandamus relief is denied. *See*, *e.g.*, *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989) (denying habeas relief on claim regarding improper exclusion of juror on statutory grounds; that issue "does not involve jurisdictional defects nor [ ] fundamental constitutional considerations . . . . As such, we will not consider such a claim for the first time in an application for writ of habeas corpus."); *Ex parte Owenby*, 749 S.W.2d 880, 881 (Tex. Crim. App. 1988) (violation of Speedy Trial Act is non-jurisdictional defect which cannot be raised on habeas review).

[4] *See Ex parte Douthit*, 232 S.W.3d 69, 75-76 (Tex. Crim. App. 2007) (Price, J., dissenting) (observing that the "Legislature has thus far left the question of what is cognizable in a post-conviction writ of habeas corpus to this Court's interpretation"); *Ex parte Tuan Van Truong*, 770 S.W.2d 810, 815 (Tex. Crim. App. 1989) (Teague, J., dissenting) ("What is cognizable by way of habeas corpus is a matter to be determined by this Court. It can be judicially expanded or contracted to meet current requirements of the system. Moreover, its reach should comport with fairness.").

908 (Tex. Crim. App. 1985), permitted habeas review of fundamental defects stemming from violations of mandatory statutes. Remarkably similar to today's majority opinion's reasons for overturning *Sepeda*, the *Douthit* court said,

> [W]e should not overturn precedent lightly. But "[w]hen older precedent conflicts with a new decision that is found to be more soundly reasoned, we may resolve the inconsistency in favor of the more soundly reasoned decision." As we explained in *Paulson v. State*, the goals of the doctrine of stare decisis include "promot[ing] judicial efficiency and consistency, encourag[ing] reliance on judicial decisions, and contribut[ing] to the integrity of the judicial process." And if a prior decision "was poorly reasoned or has become unworkable, we do not achieve these goals by continuing to follow it."

Id. at 74 (citations omitted). The precise question involved in the instant case has plagued this Court's decisions for decades and, depending on the year, these types of statutory violations are cognizable on habeas, then they are not, then they are, then, apparently after today, they are not.

History should tell this Court that this hard-line approach that no statutory violation is ever cognizable on state habeas is unworkable and that this approach has never withstood the test of time. This hard-line approach is untenable particularly when, as here, a defendant is left without any opportunity to litigate or remedy his valid complaint about the violation of mandatory statutory provisions. A defendant who has a valid complaint that the parole board will not even consider him for parole on a case for which he is parole eligible may have to serve additional time in prison merely because this Court will not act on his claim that the parole board has violated mandatory statutory requirements. This continued disregard of applicable mandatory statutory provisions by the parole board is precisely why

this Court created this limited right of review in *Sepeda*, and why that case was correctly decided by a unanimous decision of this Court. I, therefore, would not overturn the precedent in *Sepeda* that permits consideration of complaints about violations of statutory-based non-discretionary acts by the parole board under limited circumstances in which the board's violation could lengthen an inmate's term of confinement and the inmate has no other trial or appellate remedy. I would hold that this is one of those rare cases in which the statutory right at issue is cognizable on state habeas and I would grant relief to applicant.

IV. Alternatively, Mandamus Relief is Appropriate

Even assuming that this Court's majority opinion correctly concludes that applicant's claim is not cognizable in a post-conviction habeas proceeding, I respectfully disagree with its assessment that his claim cannot be considered through the vehicle of mandamus due to the lack of a clear right to relief. In other situations, this Court has treated matters that would not otherwise be cognizable on habeas as presenting a viable basis for mandamus relief. *See, e.g., In re Daniel*, 396 S.W.3d 545, 549 (Tex. Crim. App. 2013). And, as I have explained above, the relevant statutes and board policies make clear that the parole board has no discretion to treat applicant's forgery and drug-delivery sentences as a single sentence for purposes of determining his parole eligibility—rather, each sentence triggers a distinct parole eligibility date and must be considered independently. *See* TEX. GOV'T CODE § 508.145(f); 37 TEX. ADMIN. CODE § 145.3(4). This is particularly true in the context of an inmate who has a yet-to-commence consecutive sentence. The Government Code expressly contemplates

the possibility of release on parole "on paper" as to a defendant's first stacked sentence so that he may commence serving his second stacked sentence sooner. TEX. GOV'T CODE § 508.150(a), (b)(2). As an alternative to habeas relief, applicant's complaint constitutes an appropriate basis for mandamus relief because, here, applicant has a clear right to relief under the relevant statutes and board policies and no other adequate remedy at law. *See In re Bonilla,* 424 S.W.3d 528, 533 (Tex. Crim. App. 2014) (a clear right to relief is shown when the facts and circumstances dictate but one rational decision under unequivocal, well-settled, and clearly controlling legal principles; an issue of first impression can sometimes qualify for mandamus relief); *In re State ex rel. Weeks,* 391 S.W.3d 117, 122 (Tex. Crim. App. 2013). Alternatively, therefore, if habeas relief is not permitted due to this Court's decision to overrule *Sepeda*, I would grant applicant mandamus relief.

V. Conclusion

The pertinent statutes and regulations do not permit the parole board to calculate a single parole eligibility date for multiple offenses, nor do they permit the board to delay a parole vote on an eligible offense until an inmate is also parole eligible on a much longer concurrent sentence. By refusing to consider applicant for parole based on his eligibility date for his ten-year forgery sentence, and by instead delaying a parole vote for that offense until he is eligible for parole on his forty-year sentence, the parole board has deprived applicant of the possibility of beginning to serve his cumulated ten-year sentence for drug possession. This is an arbitrary deprivation of applicant's statutory right to be considered for parole on

each offense after a specified period, and it may result in him being imprisoned for longer than other similarly situated inmates serving single sentences under materially identical circumstances. Given these circumstances, I cannot agree with the Court's conclusion that applicant is entitled to neither habeas nor mandamus relief. I, therefore, respectfully dissent.

Filed: November 22, 2017

Publish