IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-85,447-01

EX PARTE JEREMY WADE PUE, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. CR2008-214-1 IN THE 207TH DISTRICT COURT COMAL COUNTY

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

CONCURRING OPINION

I join the majority opinion but write separately to offer the following observations in response to the dissenting opinion.

First, *Hill v. State*, 633 S.W.2d 520 (Tex. Crim. App. 1982) (op. on reh'g), is inapplicable here. The defendant in *Hill* mounted a collateral attack on the validity of his prior conviction; he did not merely challenge its use as an enhancement; and he raised no trial objection to its use. *Id*. at 523. Applicant is not challenging the validity of the prior

conviction; he is only challenging its use as an enhancement; and he objected to its use as such at trial.

Second, the dissenting opinion argues inconsistently. On the one hand, it purportedly would grant relief from a sentence that is outside the non-enhanced range of punishment even if raised for the first time on habeas. *Ex parte Pue*, No. WR-85,447-01 slip op. at 3 (Tex. Crim. App., Feb. 28, 2018) (Yeary, J., dissenting). On the other hand, however, the dissent advocates limiting habeas relief to cases in which the sentencing error was not apparent from the direct appeal record. *Id*. at 3-4. With that limitation, the non-enhanced third degree felon sentenced to life would not get relief because the sentencing error would be apparent from the direct appeal record.

Even assuming that the dissent would grant relief to the non-enhanced third degree felon sentenced to life, it would not grant relief to a third degree felon sentenced to life because of an improper enhancement. *Id*. at 2. It is inconsistent to grant relief in one circumstance but not the other. If a non-enhanced sentence that is outside the applicable range is intolerable, then so is an improperly enhanced sentence that is outside the applicable range.

Finally, the dissent misreads *Mizell v. State*, 119 S.W.3d 804 (Tex. Crim. App. 2003). For example, the dissent claims that *Mizell* recognizes a duty of trial court judges "to refrain from sentencing a defendant to a punishment beyond the statutorily applicable range." *Pue*, slip op. at 10 (Yeary, J., dissenting). But *Mizell* was a jury punishment case,

119 S.W.3d at 805, and as such had nothing to say about a trial judge's duty in assessing punishment. Nor did *Mizell* maintain that our "justice system simply will not tolerate any upward deviation" from the range of punishment, *Pue*, slip op. at 11 (Yeary, J., dissenting), because there was no upward deviation. The jury in *Mizell* instead engaged in a downward deviation, assessing neither jail time nor fine after convicting the defendant of a Class A misdemeanor. 119 S.W.3d at 805. *Mizell* simply held that a sentence that is outside the range of punishment is illegal and may be challenged for the first time on appeal or habeas. *Id*. at 806.

Applicant was convicted of a third degree felony. He had only one eligible enhancement. The applicable range was two to 20 years. *See* TEX. PENAL CODE § 12.42(a) (third degree felony enhanced once is punishable as a second degree felony). His sentence of 30 years was outside that range and for that reason was illegal. Therefore, he is entitled to relief.

Filed: February 28, 2018

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