



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-88,046-01

EX PARTE JOSEPH LEVELS, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-11-205209-A IN THE 147TH DISTRICT COURT
FROM TRAVIS COUNTY

Per curiam. YEARY, J., filed a dissenting opinion in which KELLER, P.J., and KEASLER, J., joined. RICHARDSON, J., *did not participate.*

OPINION

Pursuant to the provisions of Article 11.07 of the Texas Code of Criminal Procedure, the clerk of the trial court transmitted to this Court this application for a writ of habeas corpus. *Ex parte Young*, 418 S.W.2d 824, 826 (Tex. Crim. App. 1967). Applicant was convicted of aggravated assault with a deadly weapon and was sentenced to twenty-six years' imprisonment. He did not appeal his conviction.

Applicant alleges that his conviction was improperly enhanced by the use of a state jail felony to a habitual offender and that counsel was deficient for failing to object to the incorrect punishment range.

The first enhancement paragraph listed on the indictment treated a state jail felony as if it were a felony conviction to use as part of a habitual enhancement. This Court has held that using a state jail felony, even if the punishment for that offense had been enhanced, as if it were a felony conviction for enhancement purposes, is improper after the change in the Penal Code dated September 1, 2011. *Samaripas v. State*, 454 S.W.3d 1 (Tex. Crim. App. 2014). Applicant's sentence was therefore not properly enhanced.

Relief is granted. The punishment in Cause No. D-1-DC-11-205209 in the 147th District Court of Travis County is set aside, and Applicant is remanded to the custody of the Sheriff of Travis County to await a new punishment hearing in this cause. The trial court shall issue any necessary bench warrant within 10 days after the mandate of this Court issues.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice-Correctional Institutions Division and Pardons and Paroles Division.

Delivered: February 28, 2018
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