IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-76,082-03

EX PARTE CARLTON MCEWEN, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. D-1-DC-08-904053-C IN THE 403RD DISTRICT COURT FROM TRAVIS COUNTY

NEWELL, J., filed a concurring opinion in which WALKER J., joined.

I join the Court's decision to grant Applicant a new punishment hearing in his indecency with a child by exposure case while leaving Applicant to serve out his remaining four life sentences for indecency with a child by contact. When Applicant raised claims about his trial attorney's performance in all of his cases, we remanded to obtain a response from counsel and findings of fact from the habeas court. Despite the passing of Applicant's trial attorney, the habeas court was still able to evaluate Applicant's claims and make findings and conclusions. The habeas court

recommends denying habeas corpus relief in all but one of Applicant's cases. Based on the habeas court's work, the Court grants relief in only one case, and in the punishment phase, consistent with the habeas court's recommendation because in that one case Applicant was improperly sentenced outside the applicable sentencing range.

Moreover, after this Court remanded the case, the State acknowledged that it had erroneously enhanced Applicant's third-degree felony indecency by exposure case with a prior offense that could not be used to enhance that case under the applicable statute.[1] The State also acknowledged that there were no other prior convictions that could have been used to enhance Applicant's sentence.[2] I see no reason to preserve an illegal sentence when both parties and the habeas court acknowledge and recommend fixing it. I trust that the State, when it considered its response, was sophisticated enough to make an argument to deny relief

---

[1] TEX. PENAL CODE § 12.42(c)(2) (listing offenses under Penal Code § 21.11(a)(1) as enhanceable to a life sentence based upon prior felony convictions, but not Penal Code § 21.11(a)(2)), TEX. PENAL CODE § 12.42(g)(1) (allowing the use of prior convictions resulting in an unrevoked probation to be used for enhancement purposes for offenses listed under § 12.42(c)(2)); *see also, e.g., Ex parte Langley*, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992) ("It is well-settled that a probated sentence is not a final conviction for enhancement purposes unless it is revoked."); *Ex parte Beck*, 922 S.W.2d 181, 182 (Tex. Crim. App. 1996) (granting habeas corpus relief on an illegal sentence claim where State enhanced a state jail felony offense that could not be enhanced under the statute at the time the applicant committed the offense).

[2] *Cf., Ex parte Parrott*, 396 S.W.3d 531, 536 (Tex. Crim. App. 2013) (holding that habeas corpus applicant was not harmed by illegal sentence because he had other prior convictions that the State could have used to enhance his sentence).

based upon laches. I respect the decision not to do so.[3]

Our precedent allows courts to raise a claim of laches *sua sponte*.[4] It does not require it. But the call to deny relief based upon the doctrine of laches when the State, the defense, and the habeas court all agree that one of Applicant's sentences is illegal suggests to me that this Court may need to reconsider our precedent in this regard. With these thoughts, I join the Court's order.

Filed: June 24, 2020

Publish

[3] TEX. CODE CRIM. PROC., art. 2.01 ("It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.").

[4] *Ex parte Smith*, 444 S.W.3d 661, 663 (Tex. Crim. App. 2014).