



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-78,928-03

EX PARTE BENJAMIN GONZALES LOPEZ, JR., Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. 2010CR6848-W1 IN THE 187TH DISTRICT COURT
FROM BEXAR COUNTY**

Per curiam.

ORDER

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 pursuant to a plea agreement of aggregate theft and was sentenced to ten years' imprisonment.

Applicant was alleged to have stolen four motorcycles: one in Hays County, two in Bexar County, and one in Bell County. Police found them hidden in a storage shed in Bexar County. Applicant was convicted of the Hays County theft on September 9, 2010, in the 22nd District Court of Hays County. He was later convicted on March 9, 2011, in Bexar County, of aggregate theft,

which is the subject of this writ application. The Bexar County indictment alleged the theft of the Hays County motorcycle and both Bexar County motorcycles, aggregating their values to determine the total amount stolen, but it omitted reference to or the value of the motorcycle stolen in Bell County. *See* TEX. CODE CRIM. PROC. art. 13.08 (allowing property theft to be prosecuted in county where theft occurred or in county where the stolen items are taken). So it appears that Applicant is being punished twice for the Hays County motorcycle theft, which constitutes a double jeopardy violation. *See Brown v. Ohio*, 432 U.S. 161 (1977); *Gonzales v. State*, 304 S.W.3d 838 (Tex. Crim. App. 2010). The trial court recommends granting relief, but this Court holds that the alleged error is procedurally barred from habeas review under the facts of this case.

Applicant raised no double jeopardy objection before the trial court. Normally, record based claims such as Applicant's claim may not be reviewed in habeas. *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989); *Ex parte Gardner*, 959 S.W.2d 189 (Tex. Crim. App. 1996). Similarly, claims of error are not reviewed on direct appeal unless there was an objection before the trial court. TEX. R. APP. PROC. 33.1; *Jiminez v. State*, 32 S.W.3d 233 (Tex. Crim. App. 2000). This Court, however, has not always followed the general procedural default rules with double jeopardy claims due to the fundamental nature of the right. *Gonzalez v. State*, 8 S.W.3d 640, 642-3 (Tex. Crim. App. 2000) (recognizing "The overriding principles expressed by this case-law are that, because of the fundamental nature of double jeopardy protections, a double jeopardy claim may be raised for the first time on appeal or even for the first time on collateral attack"); *Ex parte Denton*, ___ S.W.3d ___, Nos. AP-76,801 and AP-76,802 at *5 (Tex. Crim. App. del. May 22, 2013). A double jeopardy claim will be reviewed on direct appeal or in habeas, even when not preserved, when the undisputed

facts show the double jeopardy violation is clearly apparent on the face of the record and when enforcement of usual rules of procedural default serves no legitimate state interest. *Id.*

In Applicant's case, although the double jeopardy violation appears to be clear when the Bexar County record is reviewed along with the documents from the Hays County record, the error is not apparent on the face of the Bexar County record alone, which it must be to overcome the procedural bar resulting from Applicant's failure to lodge an objection before the trial court. *See id.*; *Ex parte Knipp*, 236 S.W.3d 214, 216 n. 3 (Tex. Crim. App. 2007). Thus, because extra-record reference must be made to a prosecution in a different county that was separate from the prosecution in this case, Applicant's unpreserved double jeopardy violation raised for the first time in this habeas proceeding is not clearly apparent in the record of conviction. Applicant's bare, double jeopardy claim is therefore procedurally barred from review.

Applicant also asserts that trial counsel was ineffective for failing to perceive the double jeopardy issue, but because Applicant opted to represent himself at trial, he may not complain that he received ineffective assistance of counsel. *Robinson v. State*, 16 S.W.3d 808, 813 n. 6 (Tex. Crim. App. 2000). Applicant's final claim that his plea agreement was not followed is without merit. All relief is denied.

Filed: June 12, 2013

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