Opinion issued August 25, 2011

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00449-CR
NO. 01-09-00956-CR

FLOYD PLEASANT TARVIN, IV, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 1377072[1]

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[1] Trial court cause number 1377072 applies to both appellate cause numbers.

MEMORANDUM OPINION

In 1987, appellant, Floyd Pleasant Tarvin, IV, pleaded no contest to the misdemeanor offense of driving while intoxicated (DWI) and was assessed punishment of confinement for 30 days and a $100 fine. *See* TEX. PENAL CODE ANN. § 49.04 (West 2011). Appellant's appeal, filed nineteen years later, was dismissed. *Floyd Pleasant Tarvin, IV, v. State of Texas*, No. 01-06-00902-CR, 2008 WL 4836665, at *1 (Tex. App.—Houston [1st Dist.] 2008, no pet.). In 1994, appellant was convicted of a second misdemeanor offense of DWI. In 2001, having been twice previously convicted of DWI, appellant's third misdemeanor DWI was elevated to a felony offense. *Floyd P. Tarvin v. State of Texas*, No. 01-02-01034-CR, 2004 WL 308454, at *1 (Tex. App.—Houston [1st Dist.] Feb. 19, 2004, pet. ref'd); *see* TEX. PENAL CODE ANN. § 49.09(b) (West 2011). Appellant's 2001 felony DWI was further enhanced by prior felony convictions for involuntary manslaughter and for possession of a controlled substance with intent to deliver, and the trial court sentenced appellant to 60 years' confinement. *Floyd P. Tarvin*, No. 01-02-01034-CR, 2004 WL 308454, at *1; *see* TEX. PENAL CODE ANN. § 12.42(d) (West 2011). Appellant's conviction was affirmed on appeal. *Floyd P. Tarvin*, No. 01-02-01034-CR, 2004 WL 308454, at *1.

In 2005, appellant applied to the trial court for a post-conviction writ of habeas corpus, solely challenging the underlying 1987 misdemeanor conviction. *See* TEX. CODE CRIM. PROC. ANN. § 11.09 (West 2005). Specifically, appellant asserted that the 1987 conviction was void because the record did not reflect that he had waived his right to a jury trial. The trial court denied his application and appellant appealed, proceeding pro se.

In cause number 01-08-00449-CR, appellant presents four issues. In his first issue, appellant contends that the trial court lacked jurisdiction to rule on his application for writ of habeas corpus. In his second and third issues, appellant complains that the trial court erred by denying his application because the clerk's record in the habeas proceeding was inaccurate in that it lacked a copy of the charging instrument related to the 1987 offense. In his fourth issue, appellant contends that the district clerk violated his due process rights by failing to include the 1987 charging instrument in the clerk's record.

In cause number 01-09-00956-CR, appellant challenges the trial court's denial of his motion to reduce his appeal bond.

We affirm the trial court's judgment in cause number 01-08-00449-CR. We dismiss cause number 01-09-00956-CR as moot.

Background

By his application for habeas relief, appellant complained that the record did not reflect that he had "acknowledged, agreed and in writing 'waived his right to a jury trial'" when he pleaded no contest to the 1987 DWI offense. Appellant contended that the 1987 misdemeanor conviction is void and was therefore "unlawfully used" to elevate his 2001 conviction for misdemeanor DWI to a third degree felony.

The court reporter has informed this Court that there was not a reporter's record taken of the habeas proceeding.

The trial court denied the application for writ of habeas corpus and made the following findings of fact:

(1) "[Appellant's] guilty plea was voluntarily and knowingly entered";

(2) "[Appellant] knowingly, intelligently, voluntarily, and expressly waived trial by jury"; and

(3) "[Appellant] has failed to demonstrate a falsehood to overcome the presumption of regularity and truthfulness in the judgment."

A. Cause Number 01-08-00449-CR

In cause number 01-08-00449-CR, appellant appeals the denial of his post-conviction application for writ of habeas corpus.

1. *Appellate Jurisdiction and Standard of Review*

Appeals from the denial of relief sought by misdemeanor post-conviction applications for writs of habeas corpus are properly directed to the courts of appeals. *See Ex parte Jordan*, 659 S.W.2d 827, 828 (Tex. Crim. App. 1983); *Dahesh v. State*, 51 S.W.3d 300, 302 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd); *see also* TEX. R. APP. P. 31 (governing appeals from habeas corpus proceedings). An appeal may be had when, as here, the trial court considers and resolves the merits of appellant's habeas application related to a misdemeanor offense for which community supervision was not imposed. *Ex parte Hargett*, 819 S.W.2d 866, 869 (Tex. Crim. App. 1991); *cf. Ex parte Villanueva*, 252 S.W.3d 391, 397 (Tex. Crim. App. 2008) (stating that *Hargett* will not govern appeal from denial of post-conviction application for habeas corpus involving misdemeanor case in which community supervision was imposed).

In reviewing a trial court's decision to grant or deny relief on a writ of habeas corpus, we review the facts in the light most favorable to the trial court's ruling and will uphold it absent an abuse of discretion. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006). We afford almost total deference to a trial court's factual findings, especially when those findings are based upon credibility and

demeanor. *Ex parte White*, 160 S.W.3d 46, 50 (Tex. Crim. App. 2004). We afford the same level of deference to the trial court's rulings on "applications of law to fact questions if the resolution of those ultimate questions" turns on an evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We review wholly legal conclusions de novo. *Id.* Unless we are unable to determine from the record what the trial court's implicit factual findings were, we defer to implicit factual findings that support the trial court's ruling. *Wheeler*, 203 S.W.3d at 324 n.23. We affirm the trial court's decision if it is correct on any theory of law applicable to the case. *Ex parte Primrose*, 950 S.W.2d 775, 778 (Tex. App.—Fort Worth 1997, pet. ref'd).

2. *Jurisdiction of the Trial Court*

In his first issue, appellant contends that the trial court lacked jurisdiction to rule on his application for habeas relief. Specifically, appellant complains that the trial court "lacked jurisdiction" because it waited 330 days to rule on his application.

Appellant's post-conviction application for habeas corpus relief is governed by Texas Code of Criminal Procedure article 11.09, which states, in pertinent part, as follows:

> If a person is confined on a charge of misdemeanor, he may apply to the county judge of the county in which the misdemeanor is charged to have been committed, or if there be no county judge in said county, then to the county judge whose residence is nearest to the courthouse of

the county in which the applicant is held in custody.

TEX. CODE CRIM. PROC. ANN. art. 11.09. The clerk's record reflects that the misdemeanor offense at issue was committed in Harris County and that appellant properly applied to the judge of the Harris County Criminal Court at Law No. 8. *See id.*

For the trial court to have jurisdiction over a habeas application in a misdemeanor case under section 11.09, the applicant must be "confined" or "restrained" by either an accusation or a conviction. *See Ex parte Schmidt*, 109 S.W.3d 480, 483 (Tex. Crim. App. 2003); *Ex parte Davis*, 748 S.W.2d 555, 557–58 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd). Collateral consequences related to a conviction, such as the use of the conviction to enhance punishment in other cases, may constitute confinement. *Tatum v. State*, 846 S.W.2d 324, 327 (Tex. Crim. App. 1993); *State v. Collazo*, 264 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *Davis*, 748 S.W.2d at 557–58.

Generally, the offense of driving while intoxicated is a Class B misdemeanor. *See* TEX. PENAL CODE ANN. § 49.04(b). The offense is elevated to a third-degree felony if it is shown that the person has been twice previously convicted of any other offense relating to the operation of a motor vehicle while intoxicated. *See* TEX. PENAL CODE ANN. § 49.09(b). Appellant's 1987 misdemeanor conviction was used

to enhance appellant's 2001 misdemeanor offense from a Class B misdemeanor to a third-degree felony. *See id.* We conclude that appellant's confinement was sufficient to invoke the trial court's habeas jurisdiction. *See Davis*, 748 S.W.2d at 557–58.

Appellant complains on appeal that the trial court lacked jurisdiction to rule on his application because 330 days were allowed to elapse between the time that he filed his application, on July 13, 2005, and the time that the court ruled on his application, on May 16, 2006. Appellant relies on the deadlines outlined in Code of Criminal Procedure article 11.07. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 § 3(c)-(d) (West Supp. 2010) (requiring that convicting court act within certain periods and then immediately forward application to Court of Criminal Appeals). Article 11.07 governs an application for habeas relief from a felony judgment. *Id.* art. 11.07 § 1. Here, appellant seeks habeas relief from his 1987 misdemeanor judgment. Therefore, as appellant acknowledges in his brief, the provisions of article 11.07 do not apply and article 11.09 does not contain similar provisions.

We overrule appellant's first issue.

3. *Clerk's Record*

Appellant's second, third, and fourth issues are related and will be addressed together. In his second and third issues, appellant contends that the trial court erred

by ruling on his application for habeas relief because the charging instrument related to his 1987 DWI misdemeanor conviction was not included in the clerk's record. In his fourth issue, appellant complains that the district clerk violated his due process rights by failing to include the charging instrument in the clerk's record.

By his application for habeas relief in the trial court, appellant contended that "the Clerk's Record . . . is void of a jury trial . . . and is void of either an oral or written 'waiver' of the right to a jury trial." Appellant does not raise this complaint on appeal. Rather, he contends that the trial court erred by ruling on his application for habeas relief without the 1987 charging instrument. Appellant asks that we order the "Clerk to produce, and forward, Appellant's 1987 DWI information to this Court" or that we order that he be "acquitted . . . due to insufficient Clerk's Record without 'mandatory' information included pursuant to TRAP 34.5(a)(2)."

The 1987 charging instrument is not included in the habeas record. Appellant contends that the mere absence of the charging instrument constitutes a violation of "mandatory" Rule 34.5(a)(2) and that we are now compelled to acquit him.

Rule 34.5(a)(2) provides that, with exception not applicable here, the record in a criminal case "must" include a copy of the indictment or information. TEX. R. APP. P. 34.5(a)(2). Rule 34.5(e), which governs lost clerk's records, provides a method for substitution. TEX. R. APP. P. 34.5(e).

Texas Code of Criminal Procedure article 21.25, which controls over Rule 34.5, governs when an indictment or information is lost or destroyed. TEX. CODE CRIM. PROC. ANN. art. 21.25 (West 2009); *Glover v. State*, 740 S.W.2d 94, 97–98 (Tex. App.—Dallas 1987, no pet.). Article 21.25 provides that, "[w]hen an indictment or information has been lost, mislaid, mutilated or obliterated, the district or county attorney *may* suggest the fact to the court; and the same shall be entered upon the minutes of the court. In such case, another indictment or information *may* be substituted . . . ." TEX. CODE CRIM. PROC. ANN. art. 21.25 (emphasis added). Article 21.25 "apparently *permits*" post-conviction substitution when a charging instrument has been mislaid. *State v. Dotson*, 224 S.W.3d 199, 205 & n.24 (Tex. Crim. App. 2007) (emphasis added). Nothing in article 21.25 requires such substitution.

After original presentment, even if the charging instrument is lost and the procedural requirements of article 21.25 are not satisfied, the trial court is not divested of jurisdiction and appellant's constitutional rights are not implicated. *Carrillo v. State*, 2 S.W.3d 275, 278 (Tex. Crim. App. 1999) ("Nothing in the constitution or statutes suggests that continued presence of the indictment [or information] in the file or courtroom is necessary *in order to maintain already*

vested jurisdiction.”). An appellant who wishes to complain that the procedural requirements of Article 21.25 were not satisfied must raise the issue. *See Carrillo v. State*, 29 S.W.3d 262, 263–64 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d). Because appellant did not raise the issue in his application for habeas relief, the issue is not preserved for appeal.

Further, even when a defect in a proceeding is raised, “a collateral attack by habeas corpus may be invoked only where the error renders the proceedings absolutely void.” *Ex parte Sadberry*, 864 S.W.2d 541, 543 (Tex. Crim. App. 1993). Appellant has not shown that a violation of Rule 34.5(a)(2) or article 21. 25, at this stage of the proceedings, rises to a constitutional dimension or renders the proceedings void. *See Ex parte McCain*, 67 S.W.3d 204, 210 (Tex. Crim. App. 2002) (stating that violation of mandatory procedural statute is not cognizable on writ of habeas corpus).

The purpose of a charging instrument is to put a defendant on notice of what he is to defend against by telling him the time, place, identity, and manner and means of the commission of the alleged offense. *See* TEX. CONST. art. 5 § 12; *Phillips v. State*, 178 S.W.3d 78, 81 (Tex. App.—Houston [1st Dist.] 2005, pet. ref’d). Hence, the contents of the charging instrument would have no bearing on the trial court’s consideration of the issue presented by appellant in his application for habeas relief,

that is, whether the record reflects that he waived his right to a jury trial. A jury trial waiver would not be contained in the State's charging instrument.

We overrule appellant's second, third, and fourth issues.

B. Cause Number 01-09-00956-CR

In cause number 01-09-00956-CR, appellant appeals the denial of his motion to reduce his appeal bond.

In 2006, appellant moved the trial court to reduce the $1,000,000 bond that had been set pending the appeal of the denial of his post-conviction application for writ of habeas corpus. The trial court granted relief in part, reducing his bond from $1,000,000 to $250,000. Three years later, on October 27, 2009, appellant moved for a further reduction to $1,000. The trial court denied the motion and appellant appealed, contending that the trial court had abused its discretion by denying his motion for a reduction in his appeal bond "for a 24 year old misdemeanor DWI."

Having affirmed the trial court's judgment on appellant's post-conviction application for writ of habeas corpus, the issue is moot. *See Bennet v. State*, 818 S.W.2d 199, 200 (Tex. App.—Houston [14th Dist.] 1991, no pet.).

Accordingly, the appeal in cause number 01-09-00956-CR is dismissed as moot.

Conclusion

We affirm the trial court's judgment in cause number 01-08-00449-CR. We dismiss the appeal in cause number 01-09-00956-CR as moot. All pending motions are dismissed as moot.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.

Do not publish. TEX. R. APP. P. 47.2(b).