Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00869-CR

EX PARTE Ricardo **GONZALES**

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2017-CR-13554
Honorable Jefferson Moore, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 15, 2020

DISMISSED IN PART; AFFIRMED

On March 15, 2016, a grand jury indicted appellant Ricardo Gonzales for three misdemeanor offenses, based on conduct alleged to have occurred on or about April 20, 2014. The trial court dismissed the indictment. On November 1, 2016, the grand jury returned a second indictment, which added a charge of aggravated assault by a public servant. The trial court dismissed the second indictment. On December 14, 2017, the grand jury returned a third indictment, which again alleged an aggravated assault charge and the three misdemeanor charges. Appellant filed a motion to quash the third indictment and an application for writ of habeas corpus, seeking dismissal of the aggravated assault charge. The trial court denied the motion and application, and appellant filed this appeal.

Appellant asks that we reverse the trial court's denial of his motion to quash and denial of his application for writ of habeas corpus and render a judgment dismissing the aggravated assault charge. He argues the trial erred by denying his motion and application because the pending aggravated assault charge is barred by a two-year statute of limitations. According to appellant, the aggravated assault charge was a new charge filed more than two years after the alleged offense date, and tolling allegations in the third indictment "do not negate the defective indictment[]." The State argues that we should affirm without reaching the merits because we lack jurisdiction to review the trial court's denial of appellant's motion to quash and because appellant's limitations claim is not cognizable through an application for writ of habeas corpus. We agree with the State, and, accordingly, dismiss this appeal as to the motion to quash and affirm the trial court's order denying appellant's application for writ of habeas corpus.

MOTION TO QUASH

As to the motion to quash, this appeal is interlocutory because there has been no judgment of conviction. *See Ex parte Alvear*, 524 S.W.3d 261, 263 (Tex. App.—Waco 2016, no pet.) (stating that an order denying a pretrial motion to quash was interlocutory); *see also Gilchrist v. State*, No. 04-19-00878-CR, 2020 WL 2132968, at *1 (Tex. App.—San Antonio May 6, 2020, no pet. h.) (mem. op., not designated for publication) ("Rulings on pretrial motions are interlocutory and consequently, not subject to immediate appeal." (citing *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005) (per curiam))). "The courts of appeals do not have jurisdiction to review interlocutory orders unless that jurisdiction has been expressly granted by law." *Apolinar v. State*, 820 S.W.2d 792, 794 (Tex. Crim. App. 1991). "No such authorization has been made for an interlocutory appeal of an order denying a motion to quash." *Ex parte Alvear*, 524 S.W.3d at 263; *accord Taylor v. State*, 268 S.W.3d 752, 755–56 (Tex. App.—Waco 2008, pet. ref'd); *Ahmad v. State*, 158 S.W.3d 525, 527 (Tex. App.—Fort Worth 2004, pet. ref'd). Therefore, we have no

jurisdiction to review the trial court's interlocutory order denying the motion to quash, and we must dismiss the appeal to the extent that it challenges the trial court's order denying the motion.[1]

WRIT OF HABEAS CORPUS

In contrast, the trial court's denial of appellant's pretrial application for writ of habeas corpus is a final appealable order. *See Ex parte McCullough*, 966 S.W.2d 529, 531 (Tex. Crim. App. 1998) (per curiam). However, "[c]ertain claims may not be cognizable on habeas corpus, i.e., they may not be proper grounds for habeas corpus relief." *Id.* Therefore, "[i]f we conclude the grounds on appeal are not cognizable, then we must affirm the trial court's denial of habeas corpus relief." *Ex parte Gutierrez*, 989 S.W.2d 55, 56 (Tex. App.—San Antonio 1998, no pet.) (per curiam).

In *Gutierrez*, we held that "habeas corpus is not the proper procedural vehicle for raising limitations." *Id.*; *see also Ex parte Gutierrez*, No. 01-98-00659-CR, 1999 WL 19190, at *1 (Tex. App.—San Antonio Jan. 20, 1999, no pet.) (mem. op., not designated for publication) (affirming the trial court's denial of the appellant's habeas application "[b]ecause limitations is not cognizable through the writ of habeas corpus"). Based on this precedent alone, the State asks that we affirm the trial court's denial of appellant's application. We decline to do so.

While *Gutierrez* supports our decision, in the years since *Gutierrez*, the Court of Criminal Appeals has acknowledged that exceptions may exist to the rule that limitations claims are not cognizable through a writ of habeas corpus. In *Ex parte Tamez*, 38 S.W.3d 159 (Tex. Crim. App. 2001), the Court of Criminal Appeals acknowledged that it had recognized exceptions to the rule that, "when there is a valid statute or ordinance under which a prosecution may be brought, habeas

[1] Our holding would not preclude appellant from appealing the trial court's order denying his motion to quash after a final judgment of conviction. *See Smith*, 178 S.W.3d at 801 ("[T]he denial of a pretrial motion may be appealed only after conviction and sentencing.").

corpus is generally not available prior to trial to test the sufficiency of the complaint, information, or indictment." *Id.* at 160. According to the Court of Criminal Appeals, "[a]mong these [exceptions] is that if the pleading, on its face, shows that the offense charged is barred by limitations, then it is appropriate that habeas corpus relief be granted." *Id.* Four years later, in *Smith*, the Court of Criminal Appeals "chipped away" at the exception recognized in *Tamez* "by holding that a limitations challenge was not cognizable if it involved just a 'reparable' pleading defect." *Ex parte Doster*, 303 S.W.3d 720, 725 (Tex. Crim. App. 2010) (citing *Smith*, 178 S.W.3d at 804). As the court explained in *Smith*:

> When a charging instrument shows on its face that prosecution is barred by the statute of limitations and that pleading is not reparable, a defendant may seek relief from a time-barred prosecution by a pretrial petition for a writ of habeas corpus. If, on the other hand, the information or indictment does contain a tolling allegation, any errors, omissions, or defects in that tolling language must be raised in a pretrial motion to dismiss or they are waived. These reparable defects cannot be raised by a pretrial petition for a writ of habeas corpus and are not subject to interlocutory appeal.

Smith, 178 S.W.3d at 799.[2]

Appellant's limitation claim, however, does not fit the exception recognized in *Tamez* and *Smith*. "Under the . . . exception, only the face of the pleading is considered when determining whether relief is warranted." *Tamez*, 38 S.W.3d at 161. Here, the face of the challenged third indictment does not show that the aggravated assault claim is barred by limitations. The third indictment states: "On or about [the] 20th [d]ay of April, 2014, [appellant] . . . did intentionally, knowingly or recklessly cause bodily injury to [complainant] . . . ." The indictment includes a tolling allegation, which states: "And it is further presented that from March 15, 2016 through April 20, 2017 an indictment charging the above offense conduct was pending in a court of

[2] The Court of Criminal Appeals has since questioned whether the exception recognized in *Tamez* and *Smith* remains valid. *See Doster*, 303 S.W.3d at 725 (declining to resolve "whether pretrial habeas remains a viable avenue for raising a limitations challenge or whether pretrial habeas can ever be used to raise a mere statutory claim").

competent jurisdiction . . . ." The tolling allegation continues: "And it is further presented that from November 1, 2016 an indictment charging the above offense conduct was pending in a court of competent jurisdiction . . . ." The third indictment was filed on December 14, 2017.

The face of the third indictment does not show that the aggravated assault charge is barred by the asserted two-year statute of limitations because the indictment includes tolling allegations that, if valid, would toll the limitations period and make the charge timely filed. *See Smith*, 178 S.W.3d at 802 ("There are . . . exceptions to the statute of limitations, one of which is that '[t]he time during the pendency of an indictment, information, or complaint shall not be computed in the period of limitation.'" (citing TEX. CODE CRIM. PROC. ANN. art. 12.05(b))). Here, if we include the tolling allegations, less than two years elapsed between the date of the alleged offense and the date the State filed the third indictment. "[I]f the State's pleading includes a 'tolling paragraph,' 'explanatory averments,' or even 'innuendo allegations,' this suffices to show that the charged offense is not, at least on the face of the indictment, barred by limitations." *Id.* at 803 (footnote omitted). Because the indictment includes tolling allegations that would render the charge timely filed, appellant may not utilize a pretrial writ of habeas corpus to challenge the third indictment. *See id.* at 804–05 (holding an appellant's challenge to a tolling provision was not cognizable through a writ of habeas corpus where the appellant argued that an indictment did not specifically allege the same offense as a prior indictment); *see also Ex parte Ahmad*, No. 2-05-338-CR, 2007 WL 80013, at *4 (Tex. App.—Fort Worth Jan. 11, 2007, pet. ref'd) (not designated for publication) (holding an appellant's challenge to the tolling allegations was not cognizable through a writ of habeas corpus where the appellant argued that a prior indictment did not allege a valid offense that could toll the limitations period); *cf. Alvear*, 524 S.W.3d at 266 (holding the trial court erred by denying an application for writ of habeas corpus because the charging instrument, which did not

include a tolling allegation, showed on its face that prosecution was barred by the statute of limitations).[3]

We overrule appellant's issue that the trial court erred by denying his application for writ of habeas corpus.

CONCLUSION

We dismiss this appeal to the extent that it challenges the trial court's order denying appellant's pretrial motion to quash. We affirm the trial court's order denying appellant's application for writ of habeas corpus.

Rebeca C. Martinez, Justice

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[3] Appellant argues: "[T]he second and third indictments, on their face, are time barred because amending the indictment from assault to aggravated assault falls outside the two-year statute of limitations." However, appellant's argument looks at neither indictment on its face but, instead, at the change from one indictment to the next.