



**Fourth Court of Appeals  
San Antonio, Texas**

**MEMORANDUM OPINION**

Nos. 04-20-00038-CR, 04-20-00039-CR, & 04-20-00040-CR

**EX PARTE CLOVIS DOUGLAS COOPER JR.**

From the 274th Judicial District Court, Guadalupe County, Texas  
Trial Court Nos. 19-2105-CR-B, 19-2106-CR-B, & 19-2107-CR-B  
Honorable Gary L. Steel, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice  
Liza A. Rodriguez, Justice

Delivered and Filed: May 27, 2020

**AFFIRMED**

Appellant Clovis Douglas Cooper Jr. was charged in three separate indictments with aggravated sexual assault of a child, indecency with a child by contact, and indecency with a child by exposure. Cooper filed a pretrial application for writ of habeas corpus challenging the validity of the indictments because the cases were presented to the grand jury by an attorney prior to the entry of an order by the trial court appointing that attorney as the attorney pro tem. After a hearing on the merits, the trial court denied Cooper's application. We affirm the trial court's order.

**BACKGROUND**

Cooper is charged with committing sex crimes against three children in Guadalupe County. After the Guadalupe County Attorney requested assistance from the Attorney General's Office in Cooper's indictment and prosecution, an assistant attorney general presented Cooper's cases to the

grand jury on August 1, 2019. The grand jury indicted Cooper in all three cases; however, the trial court subsequently dismissed the indictments without prejudice.

On September 3, 2019, the Guadalupe County Attorney's Office recused itself from Cooper's cases, and the trial court signed an order appointing the assistant attorney general, who already had been working on Cooper's cases, as the attorney pro tem. On September 4, 2019, the attorney pro tem presented the cases to the grand jury for a second time, and the grand jury reindicted Cooper in all three cases.

Cooper filed a pretrial application for writ of habeas corpus, arguing that the attorney pro tem's involvement in his cases before September 4, 2019, constituted an unauthorized prosecution that tainted the evidence presented to the grand jury and voided the indictments. The trial court denied Cooper's application, and Cooper filed this interlocutory appeal challenging the trial court's order.

### **COGNIZABILITY OF PRETRIAL HABEAS RELIEF**

#### **A. Standard of Review**

We review the trial court's denial of pretrial habeas relief for an abuse of discretion. *See Ex parte Estrada*, 573 S.W.3d 884, 890–91 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (citing *Ex parte Montano*, 451 S.W.3d 874, 877 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd)). In doing so, “we view the facts in the light most favorable to the trial court's ruling.” *Ex parte Arango*, 518 S.W.3d 916, 924 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *see also Ex parte Estrada*, 573 S.W.3d at 891. We will affirm under any supporting theory of law. *See Ex parte Walsh*, 530 S.W.3d 774, 778 (Tex. App.—Fort Worth 2017, no pet.); *see also Ex parte Estrada*, 573 S.W.3d at 891. For example, a trial court's denial of pretrial habeas relief will be upheld on appeal if the grounds asserted in the habeas application are not cognizable in a pretrial habeas proceeding. *See Ex parte Walsh*, 530 S.W.3d at 778 (citing *Ex parte Schoolcraft*, 107 S.W.3d 674,

676 (Tex. App.—San Antonio 2003, no pet.)). If the grounds asserted in the habeas application are not cognizable for pretrial habeas relief, we do not address the merits of the complaints. *See Ex parte Walsh*, 530 S.W.3d at 778; *see also Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010).

## **B. Arguments of the Parties**

Cooper argues that no assistant attorney general should have performed work on his cases prior to the county attorney's recusal for good cause and an order from the trial court appointing the assistant attorney general as attorney pro tem. He also argues the State did not establish good cause for the recusal. In support of his argument, Cooper cites article 2.07:

Whenever an attorney for the state is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform the duties of the attorney's office, or in any instance where there is no attorney for the state, the judge of the court in which the attorney represents the state may appoint, from any county or district, an attorney for the state or may appoint an assistant attorney general to perform the duties of the office during the absence or disqualification of the attorney for the state.

TEX. CODE CRIM. PRO. ANN. art. 2.07. Cooper further claims the assistant attorney general in the instant case tainted the evidence and created an incurable due process violation by working on the cases and presenting the indictments to the grand jury before the trial court entered the order appointing that attorney as attorney pro tem.

The State argues that Cooper has not stated a cognizable claim for pretrial habeas relief. Alternatively, the State argues no unauthorized prosecution occurred.

## **C. Applicable Law**

Pretrial habeas is an extraordinary remedy that only applies in limited cases, primarily to prevent illegal detention and trial when a defendant has some right to not be tried. *See Ex parte Ingram*, 533 S.W.3d 887, 892 (Tex. Crim. App. 2017); *Ex parte Gonzalez*, 525 S.W.3d 342, 346 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Examples of appropriate pretrial habeas claims

include double jeopardy, time bars, excessive bail, and facially unconstitutional charges. *See Ex parte Ingram*, 533 S.W.3d at 892 (double jeopardy); *Ex parte Ellis*, 309 S.W.3d at 79 (facial unconstitutionality); *Ex parte Smith*, 178 S.W.3d 797, 802 (Tex. Crim. App. 2005) (time bar); *Ex parte McIntyre*, 558 S.W.3d 295, 303 (Tex. App.—Fort Worth 2018, pet. ref'd) (bail). Examples of inappropriate pretrial habeas claims include evidence suppression, speedy trial, and sufficiency of the indictment. *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010) (noting a pretrial habeas application may not be used to assert a right to a speedy trial or challenge the sufficiency of the indictment); *McKeand v. State*, 430 S.W.3d 572, 573 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (per curiam) (evidence suppression). “Due process claims are not generally cognizable for pretrial habeas relief.” *Ex parte Walsh*, 530 S.W.3d at 778 (citing *In re Shaw*, 204 S.W.3d 9, 16 (Tex. App.—Texarkana 2006, pet. ref'd)).

Due process claims are not cognizable for pretrial habeas relief because such claims are not tied to a right against prosecution, and an appeal provides an adequate remedy for such claims after conviction. *See In re Shaw*, 204 S.W.3d at 16; *see also Ex parte Rathmell*, 717 S.W.2d 33, 48 (Tex. Crim. App. 1986); *Ex parte King*, 134 S.W.3d 500, 504 (Tex. App.—Austin 2004, pet. ref'd). A defendant’s due process arguments about the admissibility of the State’s evidence, for example, will not prevent indictment and are not appropriate for interlocutory appeal. *See Costello v. United States*, 350 U.S. 359, 363 (1956); *see also Ex parte King*, 134 S.W.3d at 501–03; *Ex parte Mattox*, 683 S.W.2d 93, 96 (Tex. App.—Austin 1984, pet. ref'd).

Similarly, a due process claim based on an attorney pro tem not being properly appointed under Article 2.07 is not cognizable in a pretrial habeas proceeding. *See Ex parte Walsh*, 530 S.W.3d at 779 (concluding that an argument against a prosecutor’s authority to pursue a case does not lead to a void indictment and is therefore not eligible for pretrial habeas consideration); *cf. State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 926 (Tex. Crim. App. 1994) (permitting State’s

mandamus relief after trial court disqualified prosecutors because the State had no other legal remedy). As stated, pretrial habeas relief is reserved for extraordinary claims, such as claims that would result in immediate release. *See Ex parte Walsh*, 530 S.W.3d at 782. Whether the assigned prosecutor is the correct prosecutor does not affect a defendant's eligibility to be charged and tried. *Id.* Therefore, such a claim, even if meritorious, would not result in immediate release from prosecution and is not appropriate for pretrial habeas review. *See id.*

#### **D. Analysis**

Cooper bases his request for pretrial habeas relief on a suppression argument, claiming the evidence presented to the grand jury was tainted, thereby violating his due process rights. His due process claim is not cognizable as a pretrial habeas claim. *See In re Shaw*, 204 S.W.3d at 16; *Ex parte King*, 134 S.W.3d at 501–03. Similarly, his second argument that the assistant attorney general was not properly appointed as attorney pro tem is also not cognizable in a pretrial habeas proceeding. *See Ex parte Walsh*, 530 S.W.3d at 782 (“[A]ppellant has not established that he is entitled to immediate release from confinement (by dismissal of the charges against him) if he prevails on the merits of his constitutional and statutory claims concerning the deputation of [Texas State Securities Board]’s attorneys and their participation in his investigation or prosecution, nor have we found such authority.”). Therefore, the trial court did not abuse its discretion when it denied Cooper’s application for pretrial writ of habeas corpus. *See id.* at 778.

#### **CONCLUSION**

Because Cooper has not stated a cognizable claim for pretrial habeas relief, we affirm the trial court’s order.

Patricia O. Alvarez, Justice

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