



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-16-00477-CR**

EX PARTE MARCO MCCAIN

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FROM THE 431ST DISTRICT COURT OF DENTON COUNTY  
TRIAL COURT NO. F-2012-1619-B (WHC 1)

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**MEMORANDUM OPINION<sup>1</sup>**

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Appellant Marco McCain appeals from the trial court's denial of his application for writ of habeas corpus. See Tex. Code Crim. Proc. Ann. art. 11.072, § 8 (West 2015). We affirm the trial court's order. See Tex. R. App. P. 31.3.

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<sup>1</sup>See Tex. R. App. P. 47.4.

## I. BACKGROUND

McCain was charged by information and pleaded guilty to misdemeanor assault causing bodily injury to a family member, Amber McCain, in Collin County. See Tex. Penal Code Ann. § 22.01(a)(1), (b) (West Supp. 2016). On February 7, 2008, the Collin County trial court deferred adjudicating McCain's guilt and placed him on community supervision for fifteen months. See Tex. Code Crim. Proc. Ann. art. 42.12, § 5(a) (West Supp. 2016). Six months later, the State filed a petition to finally adjudicate McCain's guilt based on his violations of the terms and conditions of his community supervision. See *id.* art. 42.12, § 5(b). On April 3, 2012, McCain pleaded true to the petition to adjudicate; therefore, the trial court adjudged him guilty of assault causing bodily injury to Amber McCain, revoked his community supervision, and sentenced him to twenty days' confinement.<sup>2</sup> See *id.*

Before his community supervision was revoked in Collin County, McCain committed the offense of assault causing bodily injury to a family member, Tiyona Wesley, in Denton County on February 7, 2012. On July 30, 2012, a grand jury indicted McCain with felony assault causing bodily injury to Tiyona Wesley, which was enhanced based on his prior conviction of assault causing bodily injury to Amber McCain in Collin County. See Tex. Penal Code Ann. § 22.01(b)(2).

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<sup>2</sup>The record does not explain the delay between the State's petition to adjudicate and the trial court's revocation.

On October 19, 2012, McCain entered into a plea-bargain agreement with the State and pleaded guilty to the Denton County indictment. McCain also signed a judicial confession that he was guilty of the charged offense. The trial court found McCain guilty, sentenced him to five years' confinement, suspended imposition of the sentence, and placed McCain on community supervision for a period of six years. See Tex. Code Crim. Proc. Ann. art. 42.12, § 3(a). On March 22, 2013, the State filed a motion to revoke McCain's community supervision based on his multiple violations of its terms and conditions. See *id.* art. 42.12, § 21.

On October 17, 2016, McCain filed a habeas corpus application in the Denton County trial court arguing that (1) there was no evidence that Tiyona Wesley was a family member as defined by statute, (2) the evidence did not support the trial court's finding that the failure-to-report violation was true based on McCain's due diligence, (3) the Collin County assault conviction was not a final conviction eligible to enhance the Denton County assault offense to a felony, and (4) the bond hearing was flawed. See *id.* art. 11.072, § 2. On October 28, 2016, McCain pleaded not true to the motion to revoke, but the trial court found that McCain had violated several terms and conditions of his community supervision, revoked his community supervision, and sentenced him to five years' confinement.<sup>3</sup> See *id.* art. 42.12, § 23. McCain appealed the revocation

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<sup>3</sup>As with the Collin County conviction, there is no record explanation for the time that elapsed between the State's petition to revoke and the revocation.

and five-year sentence, and the appeal is pending in this court. *McCain v. State*, No. 02-16-00446-CR.

On November 8, 2016, the trial court entered findings and conclusions regarding McCain's habeas corpus application and denied the application without holding a hearing. See *id.* art. 11.072, §§ 6–7. McCain filed a notice of appeal from the denial, and we ordered the appeal submitted without further briefing. See Tex. R. App. P. 31.1.

## II. STANDARD OF REVIEW AND AVAILABILITY OF PROCEDURE

An applicant seeking habeas corpus relief must prove his claim by a preponderance of the evidence. See *Ex parte Torres*, 483 S.W.3d 35, 43 (Tex. Crim. App. 2016); *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App.), *cert. denied*, 549 U.S. 1052 (2006). In reviewing the trial court's ruling on a habeas corpus application, we view the facts in the light most favorable to the trial court's ruling and will uphold it absent an abuse of discretion. See *id.*

The statutory remedy allowing habeas corpus relief in community-supervision cases is limited and exclusive.<sup>4</sup> See *State v. Guerrero*, 400 S.W.3d 576, 582 (Tex. Crim. App. 2013). It applies to defendants who are or have been placed on community supervision for a misdemeanor or a felony. See Tex. Code

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<sup>4</sup>As the State pointed out in the trial court, McCain's citation to article 11.08 in his application was a misnomer because he filed it before his community supervision was revoked. See *Torres*, 483 S.W.3d at 42. Therefore, his application, which was filed before his Denton County community supervision was revoked, was properly considered under article 11.072. *Kniatt*, 206 S.W.3d at 663.

Crim. Proc. Ann. art. 11.072, § 2(b). A defendant may seek such relief if he challenges the constitutionality of a condition of community supervision or attacks the legal validity of the conviction (in regular community-supervision cases) or order (in deferred-adjudication cases) and if the community supervision has not been revoked at the time he files the application. See *id.* art. 11.072, §§ 1, 3(c); 43B George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 58.31 (3d ed. 2011). Importantly, a defendant may not raise by habeas corpus what could be raised in a direct appeal from the conviction or order. See Tex. Code Crim. Proc. Ann. art. 11.072, § 3(a); *id.* art. 42.12, § 23(b); *Manuel v. State*, 994 S.W.2d 658, 661 (Tex. Crim. App. 1999). And “[v]iolations of statutes, rules, or other non-constitutional doctrines are not recognized” on habeas corpus. *Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002).

### III. APPLICATION

Most of McCain’s claims raised in the trial court were not cognizable in an article 11.072 habeas corpus proceeding. A sufficiency claim such as McCain’s, which does not raise actual innocence, is not appropriately raised in an article 11.072 application.<sup>5</sup> See *Ex parte Reed*, 402 S.W.3d 39, 42–44 (Tex. App.—

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<sup>5</sup>Even if we addressed his sufficiency argument, he would be entitled to no relief. McCain pleaded guilty to the Denton County assault and signed a judicial confession in which he specifically stated he was guilty of the offense “as alleged in the charging instrument” and in which he “confess[ed] that [he] did unlawfully commit the said offense in Denton County, Texas[,] on the date alleged in the charging instrument.” McCain did not argue that his guilty plea was involuntary

Houston [14th Dist.] 2013, pet. ref'd). McCain's claim that his due-diligence defense precluded the trial court from finding the failure-to-report allegation true must be raised in his direct appeal from the revocation, which is pending in this court. See Tex. Code Crim. Proc. Ann. art. 11.072, § 3(a). Finally, McCain's attacks on a prior bail proceeding are not properly raised in the context of article 11.072. See *id.* art. 11.24 (West 2015).

McCain's remaining claim was that his Collin County, deferred-adjudication judgment was improperly used to enhance his punishment for the Denton County assault. At first blush, this claim seems to be either one alleging the violation of a statute or one that could have been raised in an appeal from the community-supervision judgment; thus, it generally would not be cognizable on habeas corpus. See *Graves*, 70 S.W.3d at 109. But McCain pleaded guilty to the Denton County assault, leading to the imposition of community supervision, which prevented an appeal from the community-supervision judgment; therefore, this claim arguably is cognizable on habeas corpus. See Tex. R. App. P. 25.2(a)(2), (d); *Ex parte Knight*, 401 S.W.3d 60, 64 n.2 (Tex. Crim. App. 2013). Further, he argued that his counsel was constitutionally ineffective for failing to object to the enhancement paragraph. This constitutional argument was appropriately raised in his article 11.072 application. Even so, this claim is

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or the result of ineffective assistance of counsel. McCain's guilty plea had the effect of admitting all material facts alleged in the indictment, including the family-member status of Tiyona Wesley. See *Ex parte Jessup*, 281 S.W.3d 675, 679 (Tex. App.—Amarillo 2009, pet. ref'd).

specifically rebutted by the assault statute itself, which includes a deferred-adjudication judgment rendered on a defendant's guilty plea in the definition of "conviction" for the purposes of enhancement. See Tex. Penal Code Ann. § 22.01(f)(1). McCain failed to prove this claim by a preponderance.

#### **IV. CONCLUSION**

McCain either raised claims that are not cognizable in an article 11.072 application, or he failed to show his entitlement to relief by a preponderance of the evidence. Therefore, the trial court did not abuse its discretion by denying the application. See Tex. Code Crim. Proc. Ann. art. 11.072, § 7(a). We affirm the trial court's order denying McCain's application.

/s/ Lee Gabriel

LEE GABRIEL  
JUSTICE

PANEL: GABRIEL, KERR, and PITTMAN, JJ.

DO NOT PUBLISH  
Tex. R. App. P. 47.2(b)

DELIVERED: February 2, 2017