In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00323-CR

EX PARTE DAVID NEAL DUNCAN, APPELLANT

On Appeal from the 47th District Court
Randall County, Texas
Trial Court No. 22,989, Honorable Kelly Moore, Presiding

July 12, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

David Neal Duncan appeals from an order denying his application for writ of habeas corpus. The writ was filed under article 11.072 of the Texas Code of Criminal Procedure. Duncan sought to nullify a "Supplemental Order Amending Conditions of Probation." Through the latter, the trial court expressly "amended" the "conditions of probation" imposed on Duncan after his conviction, sentencing, and placement on community supervision. The amendment added the condition requiring him to pay restitution to his theft victims. Duncan's attempt to avoid that condition was rejected, though. According to the trial court, he "did not comply with the mandatory requirements of Article 11.072, Sec. 3. (b) of the Code of Criminal Procedure."

Before us, Duncan posits that he need not comply with article 11.072, § 3(b) of the Code for various reasons. First, he suggests that he is not attacking a condition of his probation but rather an aspect of his sentence; this is purportedly so because restitution may only be ordered as part of the sentence. Second, he suggests that "a restitution order not orally pronounced in the defendant's presence creates a void sentence, which may be attacked at any time: including *now.*" (Emphasis in original). Through his third argument he avers that "even if a motion to amend [the conditions of probation] must be filed before [a] writ application is filed, the statute does not require the probationer to secure a ruling on the motion to amend before filing a writ." His last contention encompasses the notion that "the rule regarding error preservation specifically applies only to appeals to higher courts, not to habeas actions filed in the same trial court as a prefatory motion must be." We overrule each and affirm.

The standard of review applicable in an appeal involving article 11.072 of the Code of Criminal Procedure is abused discretion. *Salinas v. State*, No. 03-12-00117-CR, 2015 Tex. App. LEXIS 2826, at *5 (Tex. App.—Austin Mar. 26, 2015, no pet.) (mem. op., not designated for publication); *Ex parte Jessep*, 281 S.W.3d 675, 678 (Tex. App.—Amarillo 2009, pet. ref'd). Thus, we defer to the trial court's factual determinations but consider *de novo* its determination of legal issues. *Salinas v. State,* 2015 Tex. App. LEXIS 2826, at *5. Furthermore, we may affirm the decision for reasons unmentioned by either party under that standard. *See State v. Esparza*, 413 S.W.3d 81, 92 (Tex. Crim. App. 2013).

Next, article 11.072 "establishes the procedures for an application for a writ of habeas corpus in a felony or misdemeanor case in which the applicant seeks relief from

an order or a judgment of conviction ordering community supervision." TEX. CODE CRIM. PROC. ANN. art. 11.072, § 1 (West 2015). Article 11.072 also provides that the application "must challenge the legal validity of . . . the conviction for which or order in which community supervision was imposed[,] or . . . the conditions of community supervision." *Id.* § 2(b)(1), (2). So too does it state that someone "seeking to challenge a particular condition of community supervision but not the legality of the conviction . . . or the order in which community supervision was imposed must first attempt to gain relief by filing a motion to amend the conditions of community supervision." *Id.* § 3(b). Yet, the statute limits attacks upon a condition of community supervision only to those founded upon "constitutional grounds." *Id.* § 3(c).

Underlying Duncan's first two issues is the proposition that restitution can only be assessed as part of a sentence, and not as a condition of probation. He is mistaken. A trial judge may order restitution as a condition of probation. *See Beedy v. State*, 250 S.W.3d 107, 112 (Tex. Crim. App. 2008) (reiterating a prior holding wherein the Court of Criminal Appeals held that a trial judge has the authority to order restitution as a condition of community supervision); *Lemos v. State*, 27 S.W.3d 42, 48 (Tex. App.—San Antonio 2000, pet. ref'd) (stating that a court may order a variety of terms and conditions of probation, including a condition that the defendant make restitution or reparation in any sum the court shall determine). And, contrary to his suggestion, our opinion in *Sauceda v. State*, 309 S.W.3d 767 (Tex. App.—Amarillo 2010, pet ref'd), did not hold otherwise. Indeed, *Sauceda* did not involve the assessment of restitution as a condition of probation but rather as a term of Sauceda's actual sentence after

conviction. And, because it was part of his actual sentence, it had to be pronounced in open court. *Id.* at 769-70.

Next, irrespective of what Duncan calls it, he attacked and is attacking a condition of his probation, not the order in which community supervision was imposed. He did and does not argue that the order imposing community supervision is invalid; he simply questions the validity of one condition imposed by the trial court. And, the condition was restitution. Consequently, he was obligated to "first attempt to gain relief by filing a motion to amend the conditions of community supervision." TEX. CODE CRIM. PROC. ANN. art. 11.072, § 3(b). While such a motion was filed, the trial court had yet to rule on it when Duncan sought relief under article 11.072. Admittedly, the statute says nothing about the need to secure a ruling on its motion. Yet, statutes must be read in a manner that avoids absurdity. *Pruett v. State*, 510 S.W.3d 925, 927-28 (Tex. Crim. App. 2017). And, it would be absurd to read article 11.072, § 3(b) as simply requiring one to move the trial court to amend the conditions of community supervision imposed upon him but not wait for a ruling.

Indeed, the procedural steps attendant to obtaining a writ of habeas corpus are specified in article 11.072. One need only read them to realize that they can be rather time consuming. Requiring an applicant to first move to amend the conditions of his probation permits the court to cut-to-the-chase and, thereby, avoid unnecessarily expending judicial resources. It affords a potentially quicker and easier path to an end. That rationale alone is enough to prevent us from accepting Duncan's argument that an applicant need only file a motion but not wait for a ruling. So, we construe article

11.072, § 3(b) as not only requiring a motion but also a ruling on that motion. The latter has not occurred here.

Finally, and as previously mentioned, an applicant may challenge a condition of his community supervision under article 11.072 only on constitutional grounds. TEX. CODE CRIM. PROC. ANN. art. 11.072, § 3(c). Duncan did not do that here. Rather, he argued in his application that a defendant is entitled to have legal counsel present during sentencing. Such was not provided here when the trial court ordered him to pay restitution, he concluded. Yet, as we also discussed above, the restitution ordered here was not assessed as part of his sentence but as a term of community supervision. And, more importantly, Duncan did not argue that the right to legal counsel mandated the presence of counsel when the trial court establishes or amends conditions of probation. So, Duncan failed to comply with article 11.072, § 3(c). He failed to base his attack upon the condition of probation here involved upon some cognizable constitutional ground.

The order denying Duncan's application for a writ of habeas corpus under article 11.072 of the Texas Code of Criminal Procedure is affirmed.

Brian Quinn
Chief Justice

Do not publish.