In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-17-00063-CR

EX PARTE RUSSELL BOYD RAE

On Appeal from the 276th District Court
Marion County, Texas
Trial Court No. F14-689-A

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Moseley

M E M O R A N D U M O P I N I O N

Relator Russell Boyd Rae filed an application for a writ of habeas corpus attacking the legal validity of his conviction for driving while intoxicated (DWI), third or more. Rae argued that a previous conviction for operating a boat while intoxicated, which placed him on community supervision, could not supply jurisdiction for his felony DWI conviction because it was not a final conviction.[1] Since the prior judgment recited that Rae was found guilty of the offense, the trial court denied Rae's application for a writ of habeas corpus. We affirm.

I. Standard of Review

An applicant seeking relief via the writ of habeas corpus must prove his claim by a preponderance of the evidence. *See Ex parte Peterson*, 117 S.W.3d 804, 818 (Tex. Crim. App. 2003) (per curiam), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335, 371 (Tex. Crim. App. 2007); *In re Davis*, 372 S.W.3d 253, 256 (Tex. App.—Texarkana 2012, orig. proceeding). In cases like this one, "when the facts are uncontested and the trial court's ruling does not turn on the credibility or demeanor of witnesses, a de novo review by the appellate court is appropriate." *Ex parte Ali*, 368 S.W.3d 827, 831 (Tex. App.—Austin 2012, pet. ref'd) (citing *Ex parte Martin*, 6 S.W.3d 524, 526 (Tex. Crim. App. 1999); *see Ex parte Brown*, 158 S.W.3d 449, 453 (Tex. Crim. App. 2005) (per curiam)).

[1]An application for a writ of habeas corpus must "attack the 'legal validity' of '(1) the conviction for which or order in which community supervision was imposed'; or '(2) the conditions of community supervision.'" *Ex parte Villanueva*, 252 S.W.3d 391, 395 (Tex. Crim. App. 2008) (quoting TEX. CODE CRIM. PROC. ANN. art. 11.072, § 2(b)(1)–(2) (West 2015)).

II. Background

"In a felony DWI case, the State must prove, in addition to the . . . elements of that primary offense, that the accused has twice previously, and sequentially, been convicted of DWI." *Strehl v. State*, 486 S.W.3d 110, 113 (Tex. App.—Texarkana 2016, no pet.) (quoting *Reese v. State*, 273 S.W.3d 344, 346–47 (Tex. App.—Texarkana 2008, no pet.) (citing TEX. PENAL CODE ANN. § 49.09(b)(2); *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007); *Beck v. State*, 719 S.W.2d 205, 210 (Tex. Crim. App. 1986)).

Here, the indictment alleged (and the State was required to prove) the following jurisdictional prior convictions: (1) that Rae was previously convicted of an offense relating to the operation of a motor vehicle while intoxicated on January 28, 1997, in cause number 87-16 in the County Court of Cass County, Texas, and (2) that Rae was previously convicted of an offense relating to the operation of a boat while intoxicated on July 6, 1993, in cause number 6513 in the County Court of Marion County, Texas. Only the second jurisdictional prior conviction is at issue here.

As a result of a plea agreement, Rae pled guilty to the DWI, third offense. Pursuant to the terms of the plea agreement, the trial court suspended Rae's sentence of ten years' imprisonment in favor of placing him on community supervision for ten years.

After the State filed an application to revoke Rae's community supervision, Rae filed an application for a writ of habeas corpus arguing that the second jurisdictional prior conviction was not a final conviction because it was "probated and never revoked." In support of this motion, Rae filed a judgment entered on July 6, 1993, demonstrating (1) that Rae pled guilty to the offense of

operating a boat while intoxicated, (2) that the trial court found Rae guilty of the offense, (3) that the trial court sentenced Rae to ninety days' confinement and ordered him to pay $1,000.00, and (4) that Rae's sentence was suspended in favor of placing him on community supervision for a period of two years.

III. Analysis

Rae argues that because no evidence showed that his community supervision was revoked, the State could not use his prior conviction for operating a boat while intoxicated as a predicate. In support of this position, Rae cites several cases for the proposition that "[i]t is well-settled that a probated sentence is not a final conviction for enhancement purposes unless it is revoked." *Ex parte Langley*, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992) (citing *Ex parte Murchison*, 560 S.W.2d 654, 656 (Tex. Crim. App. 1978)). As further explained below, these cases, which discuss enhancement of punishment, do not apply to the question of when a jurisdictional prior conviction may be used to raise the level of offense of a DWI to a felony.

Under Section 12.42(c) of the Texas Penal Code, a defendant must have "previously been finally convicted" of a prior offense if it is to be used to enhance punishment. TEX. PENAL CODE ANN. § 12.42(c) (West Supp. 2016). Citing to this Section, and to *Langley* and *Murchison*, Rae argues that his conviction for operating a boat while intoxicated was not final because his community supervision was never revoked. Section 49.09 applies to this case, not Section 12.42.

In direct contrast to Section 12.42(c), Section 49.09 provides that DWI "is a felony of the third degree if it is shown on the trial of the offense that the person has previously been convicted" two times of any intoxication offense. TEX. PENAL CODE ANN. § 49.09(b)(2) (West Supp. 2016).

The plain language of Section 49.09 merely required the State to prove that Rae was "twice previously convicted for offenses related to operating a motor vehicle, aircraft, or watercraft while intoxicated,"[2] and nothing more. *See Gibson v. State*, 995 S.W.2d 693, 694 (Tex. Crim. App. 1999).[3]

The State accomplished this feat because the judgment for operating a boat while intoxicated established that Rae was found guilty of the offense and was placed on regular community supervision instead of deferred adjudication community supervision.[4] *See Ex parte Serrato*, 3 S.W.3d 41, 43 (Tex. Crim. App. 1999) (per curiam); *see also Nixon v. State*, 153 S.W.3d 550, 552 (Tex. App.—Amarillo 2004, pet. ref'd); *Willis v. State*, No. 11-02-00242-CR, 2003 WL 22064030, at *1 (Tex. App.—Eastland Sept. 4, 2003, pet. ref'd) (not designated for publication) (concluding that a 1991 conviction was "final" for purposes of Section 49.09 because it adjudicated defendant's guilt).[5] Accordingly, we overrule Rae's sole issue on appeal.

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[2]The term "[o]ffense of operating a watercraft while intoxicated" means "(C) an offense under Section 31.097, Parks and Wildlife Code, as that law existed before September 1, 1994." TEX. PENAL CODE ANN. § 49.09(c)(3)(C) (West Supp. 2016). It is undisputed the Rae's previous conviction met this definition.

[3]Section 12.42 serves a different purpose than Section 49.09. *Gibson*, 995 S.W.2d at 696.

[4]Rae also argues that Section 49.09(d) requires a final conviction. That Section states: "For the purposes of this section, a conviction for an offense under Section 49.04, 49.045, 49.05, 49.065, 49.06, 49.07, or 49.08 that occurs on or after September 1, 1994, is a final conviction, whether the sentence for the conviction is imposed or probated." TEX. PENAL CODE ANN. § 49.09(d). Because his prior conviction was an offense set forth in former Texas Parks and Wildlife Code, Rae concludes that his 1993 conviction was not a final conviction. However, "TEX. REV. CIV. STAT. art. 6701*l*-1(h) (1991)," which was the applicable statute at the time of Rae's 1993 conviction, provided, "For the purposes of the article, a conviction for an offense that occurs on or after January 1, 1984, is a final conviction, whether or not the sentence for the conviction is probated." *Rizo v. State*, 963 S.W.2d 137, 139 (Tex. App.—Eastland 1997, no pet.). "Effective September 1, 1994, Article 6701*l*–1 was repealed, and operating while intoxicated offenses were defined by" Section 49.09. *Id.* Thus, even assuming a "final" conviction is required, we would find that obligation met.

[5]Although this unpublished case has no precedential value, we may take guidance from it "as an aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

IV. Conclusion

We affirm the trial court's denial of Rae's application for a writ of habeas corpus.

Bailey C. Moseley
Justice

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