TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00102-CR

Miguel Medina Pastenes, Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 2 OF WILLIAMSON COUNTY
NO. 15-1167-CC2, HONORABLE DAVID L. HODGES, JUDGE PRESIDING

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

Miguel Medina Pastenes pleaded guilty to a misdemeanor charge of public lewdness in 1998 and subsequently completed two years of community supervision. Over 17 years later, Pastenes filed for habeas relief, and he now appeals from the trial court's order denying his amended application for writ of habeas corpus. *See* Tex. Code Crim. Proc. art. 11.072. In two issues, Pastenes contends that he was deprived of his right to counsel because his attorney of record was not present when Pastenes entered his plea of guilty in 1998 and that the doctrine of laches does not preclude his application for habeas relief. We will affirm the trial court's order.

BACKGROUND

Pastenes's application seeking habeas relief came more than 17 years after his conviction. Despite completing two years of community supervision, Pastenes now contends that

he is suffering the consequences of his plea of guilty and that his liberty is restrained because he is subject to removal from the United States.

Pastenes's application states that he is a citizen of Mexico, that he speaks only Spanish, and that he was arrested in Williamson County on a misdemeanor charge of public lewdness. He contends that his retained counsel, who executed a waiver of arraignment and magistrate's warning for Pastenes, was not present when Pastenes pleaded guilty to the offense. The record reflects that a "Waiver of Arraignment and Magistrate's Warning" was filed July 7, 1998,[1] and that Pastenes pleaded guilty the next day, July 8, 1998. The record further reflects that Pastenes at that time signed "Judicial Admonishments" including the statement, "I am voluntarily and knowingly waiving my right to have an attorney."

Pastenes's habeas application included an affidavit from attorney Russ Sablatura, stating that he made no court appearance for Pastenes and that he has no independent recollection of representing Pastenes beyond executing the waiver of magistration that expedited Pastenes's jail release. Sablatura explains that under "the procedures regarding jail releases at that time, a person could hire an attorney to waive appearance before a magistrate and thus bond out of jail more quickly than waiting for a formal magistration to occur." Sablatura states that he does not have a physical or electronic file to refresh his memory or offer any additional information.

Pastenes's habeas application also included an affidavit from immigration attorney Maria Cecilia Partida, which states that in 1994 Pastenes's mother petitioned for him to come to the United States "but because of numerical limitations a green card did not become available to him

[1] The record does not reflect the date that Pastenes signed this waiver, only the filing date.

until September 2015." Partida states that after Pastenes became eligible for legal residency, it was determined that his public-lewdness conviction "would create legal obstacles that may prevent him from being granted legal residency."

At the hearing on Pastenes's habeas application, the trial court admitted into evidence a notice from the Williamson County Attorney's Office stating that because of its 5-year document-retention policy, the Office no longer had any record on Pastenes. The trial court also admitted into evidence a probation termination affidavit from the Williamson County Adult Probation Department, stating that Pastenes's probation has terminated, that the Department has no documents regarding Pastenes's supervision because his probation term preceded the installation of their current casefile software system, and that the Department no longer has the "hard file" per its record retention procedure.[2]

The trial court denied Pastenes's habeas application and issued findings of fact and conclusions of law holding that Pastenes's application for writ of habeas corpus was "barred by the equitable doctrine of laches."

DISCUSSION

Standard of review for habeas applications

Pastenes contends on appeal that he is entitled to habeas relief because he was deprived of his right to counsel when he entered his plea of guilty in 1998 and that the doctrine of

[2] The court also admitted what appears to be an incomplete incident report for Pastenes's public-lewdness offense that is missing the victim's statement at the scene.

laches does not preclude his application for habeas relief. We address the latter issue first because it is dispositive. *See* Tex. R. App. P. 47.1.

We review a trial court's ruling on a habeas claim under an abuse-of-discretion standard, considering the record in the light most favorable to the trial court's ruling. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). The applicant bears the burden of establishing by a preponderance of the evidence that the facts entitle him to relief. *Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995). We afford almost total deference to the habeas court's determinations of historical fact that are supported by the record. *Ex parte Garcia*, 353 S.W.3d 785, 788 (Tex. Crim. App. 2011). This deferential review applies even when the findings are based on affidavits rather than live testimony. *Manzi v. State*, 88 S.W.3d 240, 244 (Tex. Crim. App. 2002). Where resolution of the ultimate question turns on the application of legal standards, we review those determinations de novo. *See Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), *overruled on other grounds by Ex parte Lewis*, 219 S.W.3d 335 (Tex. Crim. App. 2007); *see also Ex parte Amanze*, No. 05-16-00579-CR, 2016 Tex. App. LEXIS 12701, at *12-13 (Tex. App.—Dallas Nov. 30, 2016, pet. ref'd) (mem. op., not designated for publication).

A person convicted of a felony or misdemeanor may seek habeas relief from an order or a judgment of conviction ordering community supervision. Tex. Code Crim. Proc. art. 11.072, § 1. When the application is filed, the applicant must be, or have been, on community supervision, and the application must challenge the legal validity of: (1) the conviction for which or order in which community supervision was imposed; or (2) the conditions of community supervision. *Id*. § 2(b); *see Ex parte Ali*, 368 S.W.3d 827, 830 (Tex. App.—Austin 2012, pet. ref'd) (considering

habeas application, even after applicant completed his community supervision sentence, based on collateral legal consequences of applicant's inability to obtain citizenship or permanent resident alien status and risk of removal proceedings).

Laches applies to habeas applications

Habeas is governed by the elements of equity and fairness, and those elements require a consideration of an applicant's unreasonable delay. *Ex parte Bowman*, 447 S.W.3d 887, 888 (Tex. Crim. App. 2014). The common-law doctrine of laches is defined as

> neglect to assert right or claim which, taken together with lapse of time and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. Also, it is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law, should have been done.

Ex parte Perez v. State, 398 S.W.3d 206, 210 (Tex. Crim. App. 2013) (internal citations omitted). Courts apply laches as a bar to relief when a habeas applicant's unreasonable delay has prejudiced the State, thereby rendering consideration of his claim inequitable. *Id.* at 219. The Court of Criminal Appeals has stated that when determining whether laches will bar a habeas application, courts should "keep, at the fore, the State's and society's interest in the finality of convictions, and consider the trial participants' faded memories and the diminished availability of evidence." *Ex parte Smith*, 444 S.W.3d 661, 666 (Tex. Crim. App. 2014). Laches is determined using a "sliding scale," wherein "the extent of the prejudice the State must show bears an inverse relationship to the length of the applicant's delay." *Ex parte Perez*, 398 S.W.3d at 217. The rationale for the sliding-scale approach is based on the common-sense understanding that the longer a case has been delayed, the more likely it is that the reliability of a retrial has been compromised. *Id*. at 218. Trial

courts "may draw reasonable inferences from the circumstantial evidence to determine whether excessive delay has likely compromised the reliability of a retrial." *Id*. at 217. Delays of "more than five years may generally be considered unreasonable in the absence of any justification for the delay." *Id*. at 216 n.12.

Because delay alone is insufficient to establish the bar of laches, courts should consider factors including: (1) the length of applicant's delay in requesting equitable relief; (2) the reasons for the delay; (3) the degree and type of prejudice borne by the State resulting from applicant's delay; and (4) whether the delay may be excused. *Ex parte Bowman*, 447 S.W.3d at 888; *see also Ex parte Reyna*, 435 S.W.3d 276, 280 (Tex. App.—Waco 2014, no pet.) (affirming order denying habeas relief based on 20-year delay in filing habeas application and prejudice to State from destruction of arrest records, destruction of breath-test records, and death of trial court judge). Delay may be excused when the record shows that: (1) an applicant's delay was not unreasonable because it was due to a justifiable excuse or excusable neglect; (2) the State would not be materially prejudiced as a result of the delay; or (3) the applicant is entitled to equitable relief for other compelling reasons, such as new evidence that shows he is actually innocent of the offense. *Ex parte Smith*, 444 S.W.3d at 667. Laches is a question of fact and, in article 11.072 cases such as this one, the trial judge is the sole finder of fact. *See Ex parte Bowman*, 447 S.W.3d at 888.

Pastenes's habeas application is barred by laches

The record here supports the trial court's determination that Pastenes's application is barred by laches. The court's findings addressed the length of the delay in requesting equitable relief, Pastenes's stated reason for the delay, the degree and type of prejudice to the State resulting

from Pastenes's delay, and the court's rejection of Pastenes's excuse for the delay. Specifically, the court found that Pastenes waited over 17 years to file his application and that time has prejudiced the State—Pastenes's lawyer does not have a file for Pastenes's case or even much of a recollection of having represented Pastenes; the County Attorney's case file has been destroyed; the related probation file has been destroyed; and the court staff has changed. *See Perez*, 398 S.W.3d at 217 ("In considering whether prejudice has been shown, a court may draw reasonable inferences from the circumstantial evidence to determine whether excessive delay has likely compromised the reliability of a retrial.").

Pastenes's only stated reason for the delay was that he did not suffer harm and was not "restrained in his liberty" until September 2015, when he figured out that his conviction could bar him from green-card eligibility. The trial court was not persuaded by Pastenes's excuse, concluding that he first suffered harm from his conviction when he was required to comply with the conditions of his probation, not almost two decades later. *Cf. Ex parte Tavakkoli*, No. 09-14-00358-CR, 2015 Tex. App. LEXIS 2032, at *10-11 (Tex. App.—Beaumont Mar. 4, 2015, pet. ref'd) (mem. op., not designated for publication) (rejecting habeas applicant's challenge to laches determination in which he claimed that his right to relief was not ripe until he was placed under deportation proceedings). The trial court also concluded that Pastenes could have consulted with an immigration attorney and discovered the immigration consequences of his conviction any time during the intervening 17 years and that the consequences of Pastenes's conviction "did not come to exist in September of 2015 when Applicant first consulted an attorney—they already existed after Applicant's conviction for public lewdness." Finally, the court concluded that

Pastenes's 17-year delay in filing his habeas application was unreasonable and that the unreasonable delay resulted in prejudice to the State.

Having reviewed this record in the light most favorable to the trial court's ruling and with proper deference to the trial court's findings, we conclude that Pastenes has not met his burden of showing that the facts entitle him to relief and has not shown that the trial court abused its discretion by denying his application for writ of habeas corpus. *See Kniatt*, 206 S.W.3d at 664; *Ex parte Thomas*, 906 S.W.2d at 24; *see also Ex parte Reyna*, 435 S.W.3d at 280. Based on our resolution of this issue, we need not address Pastenes's first issue. *See* Tex. R. App. P. 47.1.

CONCLUSION

We affirm the trial court's order denying Pastenes's application for writ of habeas corpus.

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: July 6, 2017

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