

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-17-00207-CR
NO. 03-17-00208-CR
NO. 03-17-00209-CR**

Ex parte Bobby McVade

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NOS. D-1-DC-15-204768, D-1-DC-16-904011, & D-1-DC-16-904012
THE HONORABLE KAREN SAGE, JUDGE PRESIDING**

MEMORANDUM OPINION

Appellant Bobby McVade was arrested and charged by indictment with possession of a controlled substance, *see* Tex. Health & Safety Code § 481.115, aggravated kidnapping, *see* Tex. Penal Code § 20.04, and sexual assault, *see id.* § 22.011. Subsequently, the trial court entered an agreed order finding appellant incompetent to stand trial and committing appellant to a mental health facility for competency restoration. *See* Tex. Code Crim. Proc. arts. 46B.054, 46B.055, 46B.071, 46B.073. Approximately three months later, appellant filed a petition for writ of habeas corpus. *See* Tex. Const. art. I, § 12; Tex. Code Crim. Proc. arts. 11.01, 11.05. After conducting a hearing, the trial court denied relief. On appeal, appellant asserts that the trial court abused its discretion by denying habeas relief because his confinement in the Travis County Jail while awaiting transfer to the mental health facility violates his due process rights. We affirm the trial court's order denying relief.

BACKGROUND

As noted above, appellant stands charged by indictment with possession of a controlled substance, aggravated kidnapping, and sexual assault. On December 9, 2016, the trial court signed agreed orders of incompetency in each case, finding appellant incompetent to stand trial and committing appellant to a mental health facility for competency restoration. Because appellant is charged with “violent offenses,” the orders in the aggravated kidnapping and sexual assault cases committed appellant “to the maximum security unit of any facility designated by the Department of State Health Services for inpatient observation and treatment for a period not to exceed 120 days.”¹ *See* Tex. Code Crim. Proc. arts. 17.032(a)(4), (7), 46B.054, 46B.071(a)(1), 46B.073(b)(2), (c). In addition, the orders directed the Travis County Sheriff to take appellant into custody and deliver him to the maximum security unit of a mental health facility.² *See id.* art. 46B.075. That same day, the Travis County District Clerk issued a writ of commitment. On March 3, 2107, appellant filed a *Petition for a Writ of Habeas Corpus for Person Waiting in Jail for Competency Restoration*

¹ Both aggravated kidnapping and sexual assault are included as “violent offenses” in article 17.032 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 17.032(a)(4), (7). The agreed order in the drug possession case ordered appellant to be committed “to a mental health facility or residential care facility determined appropriate by the local mental health authority for inpatient observation and treatment for a period not to exceed 120 days,” *see id.* art. 46B.073(b)(2), as possession of a controlled substance is not designated as a “violent offense,” *see id.* art. 17.032.

² The agreed order in the drug possession case differed in that it directed the sheriff to take appellant into custody and deliver him “to a mental health facility or residential care facility determined appropriate by the local mental health authority.”

Treatment. The trial court conducted a hearing on March 22, 2017,³ and signed an order denying habeas corpus relief on March 23, 2017.

DISCUSSION

In two points of error, appellant contends that the trial court abused its discretion by denying habeas relief. He asserts that his continued confinement in jail while awaiting transfer to a mental health facility for competency restoration treatment violates his due process rights because it is “unreasonable and not rationally related to the purpose of his detention” and “is excessive, and, therefore, punitive.”⁴

Standard of Review

In reviewing a trial court’s decision on a habeas corpus application, we review the facts in the light most favorable to the trial court’s ruling and, absent an abuse of discretion, uphold the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *Ex parte Ali*, 368 S.W.3d 827, 830 (Tex. App.—Austin 2012, pet. ref’d). An abuse of discretion does not occur unless the trial court acts “arbitrarily or unreasonably” or “without reference to any guiding rules and principles,” *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016) (quoting *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990)), or unless the trial court’s decision “falls

³ Other than two exhibits—emails discussing how long appellant would be waiting to be placed in North Texas State Hospital (formerly Vernon State Hospital)—that were admitted at the writ hearing, the hearing was only the arguments of counsel.

⁴ The record reflects that appellant cannot be transferred to North Texas State Hospital until a bed becomes available in the hospital’s maximum security unit. At the time of the writ hearing, the wait was approximately 32 weeks.

outside the zone of reasonable disagreement,” *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016).

Incompetency to Stand Trial

A criminal defendant who is legally incompetent may not be put to trial without violating due process. *Turner v. State*, 422 S.W.3d 676, 688 (Tex. Crim. App. 2013); *see Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (“We have repeatedly and consistently recognized that ‘the criminal trial of an incompetent defendant violates due process.’”) (quoting *Medina v. California*, 505 U.S. 437, 453 (1992)); *Turner*, 422 S.W.3d at 688–89 (“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial.”) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975)). In order to be competent to stand trial, a criminal defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and must have a “rational as well as factual understanding of the proceedings against him.” *Turner*, 422 S.W.3d at 689 (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)). To ensure protection of this due process right, Texas has codified the constitutional standard for competency, *see* Tex. Code Crim. Proc. art. 46B.003(a)(1), (2) (adopting constitutional standard for competency), and established statutory procedures for making competency determinations in criminal courts, *see id.* arts. 46B.001–46B.055, as well as statutory procedures to be followed after a finding of incompetence, *see id.* arts. 46B.071–46B.171.

Under article 46B.071 of the Code of Criminal Procedure, once a defendant is found incompetent to stand trial, the trial court has two options aimed at restoring the defendant's competency. *See id.* art. 46B.071. The court must either (1) commit the defendant to a mental health facility or residential care facility under article 46B.073 for examination and treatment aimed at restoring the defendant's competency, or (2) release (or continue the release of) the defendant on bail under article 46B.072 for participation in an outpatient treatment program aimed at restoring competency. *Id.* art. 46B.071; *see also id.* arts. 46B.072 (providing for release on bail for outpatient treatment), 46B.073 (providing for commitment to facility for treatment). Release on bail is not permitted, however, if the defendant is charged with a "violent offense" listed in article 17.032 of the Code of Criminal Procedure, other than assault, or if the indictment alleges an affirmative finding under article 42A.054(c) or (d), regarding the use of a deadly weapon during the commission of the offense. *Id.* art. 46B.073(c). In that circumstance, the trial court must commit the defendant "to the maximum security unit of any facility designated by the Department of State Health Services, to an agency of the United States operating a mental hospital, or to a Department of Veterans Affairs hospital" for a period not to exceed 120 days⁵ "for further examination and treatment toward the specific objective of the defendant attaining competency to stand trial."⁶ *Id.* art. 46B.073(b)(2), (c). Pursuant to article 46B.075, a commitment order issued under article 46B.073 "must place the

⁵ The 120-day time period applies to a defendant charged with a felony offense. *See id.* art. 46B.073(b)(2). If the defendant is charged with a misdemeanor offense, the time period of commitment is not more than 60 days. *See id.* art. 46B.073(b)(1).

⁶ The court may order only one initial period of restoration and one extension in connection with the same offense. *Id.* art. 46B.085(a). After an initial restoration period and an extension are ordered, any subsequent court orders for treatment must be issued under the provisions concerning civil commitment. *Id.* art. 46B.085(b).

defendant in the custody of the sheriff for transportation to the facility . . . in which the defendant is to receive treatment for purposes of competency restoration.” *Id.* art. 46B.075.

The Writ of Habeas Corpus

The writ of habeas corpus is an extraordinary writ. *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001); *Ex parte Hopkins*, 610 S.W.2d 479, 480 (Tex. Crim. App. 1980); *Ex parte Powell*, 558 S.W.2d 480, 481 (Tex. Crim. App. 1977); *Ex parte Groves*, 571 S.W.2d 888, 890 (Tex. Crim. App. 1978). The purpose of a writ of habeas corpus is to provide a vehicle by which a confined person may challenge and receive relief from his unlawful confinement or restraint. *See* Tex. Code Crim. Proc. art. 11.01 (“The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty.”); *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002) (“The purpose of a writ of habeas corpus is to obtain a speedy and effective adjudication of a person’s right to liberation from illegal restraint.”) (citing *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (“the very purpose of the writ of habeas corpus [is] to safeguard a person’s freedom from detention in violation of constitutional guarantees”)); *see also In re Allen*, 366 S.W.3d 696, 701 (Tex. 2012) (“The purpose of a writ of habeas corpus is to obtain a speedy and effective adjudication of a person’s right to liberty from unlawful or unconstitutional restraint.”).

Chapter 11 of the Code of Criminal Procedure contains provisions that apply in general to habeas corpus proceedings, as well as some sections that detail procedures to be used for relief from particular types of judgments, orders, or proceedings under certain circumstances. *See* Tex. Code Crim. Proc. arts. 11.01–11.04, 11.07–11.65. When an application does not fall within one of the specific statutory provisions relating to a certain type of judgment, order, or proceeding,

a habeas corpus remedy may nevertheless be available under the Texas Constitution and article 11.05. *Ex parte Valdez*, 489 S.W.3d 462, 463 (Tex. Crim. App. 2016). A habeas application that is not governed by one of the provisions applying to specific types of judgments, orders, or proceedings is often referred to as a “Constitutional writ” or an “Article 11.05 writ.” *Id.* at 463–64.

Analysis

Appellant filed his petition for writ of habeas corpus complaining about his pretrial confinement and restraint pursuant to the trial court’s competency restoration commitment order. However, appellant did not seek release from confinement or restraint. The record demonstrates that he instead sought transfer to the maximum security unit of the designated mental health facility for competency restoration in compliance with the commitment order. At the writ hearing, appellant’s counsel argued:

This Court has entered a valid order that is not being obeyed, and we ask the Court to enforce its order and order the sheriff to transport him to the Vernon [sic] or to the mental health facility designated by the State Board or State Department of Mental Health.

...

We would ask the Court to either order the sheriff to take him to Vernon and order Vernon to accept him -- and we will prepare an order to that effect if the Court does not approve or like the one that we have provided -- or that you release him from this unlawful confinement[.]

...

So I do think that you have the right to release him and that his confinement is illegal and he must be released either to Vernon or in his own custody on his own recognizance.

...

Let me just say this: What we're asking for is that you order Vernon to take him. We would expect a state agency to follow the lawful order of this court. And then if they did not, you can proceed with some type of contempt proceeding against them. That was what we -- an alternative to that was to release him.

While counsel included a few cursory mentions of release at some points during his argument, the thrust of appellant's argument at the writ hearing was that the Department of State Health Services is disobeying the trial court's commitment order:

So what we have is an order that was not only agreed to and [duly] executed by [the judge], but also a writ of commitment that are not being obeyed by the Department of State Health Services.

...

"[T]he only thing we're talking about . . . is whether or not the State department of Mental Health Services [sic] is following or disobeying this Court's orders."

Moreover, in his brief on appeal, appellant states,

In this case, Appellant does not seek release to the community nor does he challenge his commitment to a maximum security mental health facility; on the contrary, he wishes to get to a maximum security mental health facility as quickly as possible to be evaluated and treated more expediently.

And, in his Summary of Argument, appellant asserts that he "must be immediately transferred to the maximum security unit of a DSHS mental health facility for competency restoration treatment."

Further, he concludes his brief by requesting, in his prayer for relief, reversal of the trial court's

denial of habeas corpus relief “so that he may be immediately transferred to a maximum security unit of a DSHS mental health facility for competency restoration evaluation and treatment.”

In short, appellant sought enforcement of the trial court’s commitment order. A writ of habeas corpus is not the appropriate vehicle for the remedy appellant seeks. *See Ex parte Weise*, 55 S.W.3d at 619 (“[A] pretrial writ application is not appropriate when resolution of the question presented, even if resolved in favor of the applicant, would not result in immediate release.”); *see also Ex parte Ingram*, — S.W.3d. —, No. PD-0578-16, 2017 WL 2799980, at *2 (Tex. Crim. App. June 28, 2017) (“Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant’s favor, would not result in immediate release.”); *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010) (“Aside from double-jeopardy issues, pretrial habeas is not appropriate when the question presented, even if resolved in the defendant’s favor, would not result in immediate release.”); *see, e.g., Ex parte Stewart*, 71 S.W.3d 540, 541 (Tex. App.—Amarillo 2002, no pet.) (applicant was not entitled to habeas corpus relief because decision in his favor would not result in immediate release as he only sought reassignment from psychiatric unit to general prison population and withdrawal of his involuntary medication).

Furthermore, while appellant claimed that his confinement and restraint is “unlawful,” he did not challenge the validity of the commitment order that imposed the current confinement and restraint on him. *See* Tex. Code Crim. Proc. arts. 11.21 (“confinement” includes but is not limited to “the actual corporeal and forcible detention of a person”), 11.22 (“restraint” means “the kind of control which one person exercises over another, not to confine him within certain limits, but to

subject him to the general authority and power of the person claiming such right”). Appellant initially averred at the writ hearing that there was no “lawful” or “valid” order confining him in the Travis County Jail, but later acknowledged that the trial court “entered a valid order” and complained that the “agreed to and [duly] executed” order was “not being obeyed.” Further, on appeal, appellant references the “valid” court order and explicitly states in his brief that he does not challenge his commitment to the maximum security mental health facility.

Nor did appellant challenge the statutory provisions under which he was taken into custody and is being confined and restrained, or the application of those provisions to him. He did not dispute that he has been found incompetent to stand trial, *see id.* art. 46B.054, or that he is charged with “violent offenses,” *see id.* art. 17.032(a)(4), (7), and therefore must be committed to a maximum security unit of a mental health facility, *see id.* art. 46B.073(b), (c). Nor did he dispute that, pursuant to article 46B.075, he was required to be placed in the custody of the sheriff for transport to the mental health facility. *See id.* art. 46B.075. Furthermore, at no time did appellant assert that the provisions of article 46B.073, mandating his commitment to a maximum security unit of a mental health facility because he has been found incompetent and is charged with “violent offenses,” are unconstitutional. Nor did he claim that article 46B.075, which required the sheriff to take him into custody for transportation to the maximum security unit of a mental health facility, is unconstitutional.

“To be entitled to habeas corpus relief, an applicant must establish that he was either ‘confined’ or ‘restrained’ unlawfully at the time that the application was filed.” *State v. Collazo*, 264 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2007, pet. ref’d); *see Ex parte Weise*,

55 S.W.3d at 619. Here, appellant did not dispute that the trial court properly followed the applicable statutory procedures outlined in the Code of Criminal Procedure regarding competency restoration, and he did not contend that any of those statutory provisions are unconstitutional. Thus, while appellant expressed his belief that he is being unlawfully confined or restrained in jail, the record demonstrates that he is confined and restrained pursuant to a valid court order issued in accordance with unchallenged—and therefore presumed valid and constitutional—statutory provisions governing the procedures for competency restoration. *See Hopper v. State*, 520 S.W.3d 915, 927 n.77 (Tex. Crim. App. 2017) (“[A]bsent a challenge to the constitutionality of a statute, we presume the statute is constitutional.”); *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (“Statutes are presumed to be constitutional until it is determined otherwise.”); *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002) (“In the absence of contrary evidence, we will presume that the legislature acted in a constitutionally sound fashion.”). Appellant did not establish—or even assert—the contrary.

CONCLUSION

The function of a writ of habeas corpus is to secure release from unlawful confinement or restraint. Appellant does not seek release but rather the enforcement of the trial court’s commitment order. Moreover, appellant has not demonstrated that his confinement and restraint—pursuant to a valid unchallenged court order entered in accordance with unchallenged and therefore valid and constitutional statutes—are unlawful. Consequently, we cannot conclude that

the trial court abused its discretion in denying appellant's petition for writ of habeas corpus. We affirm the trial court's denial of habeas relief.⁷

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Affirmed

Filed: September 28, 2017

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⁷ All pending motions are dismissed as moot.