NUMBERS 13-18-00309-CR AND 13-18-00310-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

CARLOS ELIZONDO, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 107th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Perkes

Appellant Carlos Elizondo was indicted separately on one count of theft by a public servant, *see* TEX. PENAL CODE ANN. § 31.03, and one count of misappropriation of fiduciary property. *See id.* § 32.45. Elizondo filed a pretrial application for writ of habeas corpus in both cases, arguing the State violated his constitutional protections from

double jeopardy by subjecting him to multiple punishments for the same offense. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 14. Elizondo appeals the denial of those applications.[1] We affirm.

I. STANDARD OF REVIEW AND APPLICABLE LAW

We review a trial court's ruling on an application for writ of habeas corpus for abuse of discretion, viewing any evidence in the light most favorable to the ruling. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006) (citing *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex. Crim. App. 2003)). "An abuse of discretion does not occur unless the trial court acts 'arbitrarily or unreasonably' or 'without reference to any guiding 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)).

Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy reserved "for situations in which the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review." *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001). As a threshold issue, appellate courts must consider whether a pretrial claim for habeas relief is cognizable before considering the merits of the applicant's claim. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim App. 2010). "Neither a trial court nor an appellate court should entertain an application for writ of habeas corpus when there is an adequate remedy by appeal." *Weise*, 55 S.W.3d at 619 (citing *Ex parte Hopkins*, 610 S.W.2d 479, 480 (Tex. Crim. App. 1980)). Pretrial habeas is generally unavailable when the development of a trial record

[1] Because these interlocutory appeals are companion cases with identical issues that seek identical relief, we have consolidated them for purposes of this opinion to promote judicial efficiency.

may aid in the resolution of the applicant's claims. *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016) (citing *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010)).

II. DOUBLE JEOPARDY

A person may not be put in jeopardy twice for the same offense. U.S. CONST. amend. V; TEX. CONST. art. I, § 14. The Double Jeopardy Clause, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amends. V, XIV. The Texas Constitution similarly provides, "No person, for the same offense, shall be twice put in jeopardy of life or liberty; nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." TEX. CONST. art. I, § 14. The double jeopardy provisions of the Texas and United States constitutions "provide substantially identical protections." *Ex parte Mitchell*, 977 S.W.2d 575, 580 (Tex. Crim App. 1997) (citing *Phillips v. State*, 787 S.W.2d 391 (Tex. Crim. App. 1990)). The Fifth Amendment's Double Jeopardy Clause (1) prohibits a second prosecution for the same offense after the accused has already been convicted or acquitted and (2) forbids multiple punishment for the same offense in a single prosecution. *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

There are two relevant inquiries when considering whether the offenses at issue are the same: legal sameness and factual sameness. *Ex parte Castillo*, 469 S.W.3d 165, 168–69 (Tex. Crim. App. 2015). Legal sameness is a question of law that "depends on only the pleadings and statutory law—not the record—to ascertain whether two offenses are the same." *Id.* at 172. If the two offenses are legally the same, the next

step is to determine whether the offenses are factually the same. *Id.* at 169. "The factual-sameness inquiry requires a reviewing court to examine the entire record to determine if the same offenses have been alleged." *Id.* at 172.

While double jeopardy is a well-settled subject for pretrial habeas relief, *see Ex parte Ingram*, 533 S.W.3d 887, 892 (Tex. Crim App. 2017), including a claim based on successive prosecutions, *Ex parte Robinson*, 641 S.W.2d 552, 554 (Tex. Crim. App. [Panel Op.] 1982), the double-jeopardy guarantee against multiple punishments for the same offense in a single prosecution is not cognizable as a pretrial habeas claim because that right can be vindicated on direct appeal following trial. *Gonzalez v. State*, 8 S.W.3d 640, 643 n.9 (Tex. Crim. App. 2000); *see also Ex parte Collins*, No. 05-18-01051-CR, 2019 WL 2710753, at *2 (Tex. App.—Dallas June 28, 2019, no pet.) (mem. op., not designated for publication) (holding that unlike a successive prosecution claim, a multiple punishments claim is not cognizable as pretrial habeas relief); *Ex parte Chapa*, No. 03-18-00104-CR, 2018 WL 3999741, at *12 (Tex. App.—Austin Aug. 22, 2018, pet. ref'd) (mem. op., not designated for publication) (same).

The distinction between the availability of pretrial habeas relief for the two types of double-jeopardy claims reflects the different substantive rights each protection guarantees. The guarantee against successive prosecutions necessarily includes the right to be free from the rigors of a second trial for the same offense, a right that "would be significantly undermined if appellate review of [successive prosecution] claims were postponed until after conviction and sentence." *Abney v. United States*, 431 U.S. 651, 652 (1977).

On the other hand, the guarantee against multiple punishments for the same

offense "is limited to assuring that the court does not exceed its legislative authorization by imposing punishments for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Importantly, the State is entitled to seek a multiple-count indictment and obtain multiple guilty verdicts from the jury for offenses that are the same for double jeopardy purposes. *Ex parte Aubin*, 537 S.W.3d 39, 43 (Tex. Crim. App. 2017) (citing *Ball v. United States*, 470 U.S. 856, 865 (1985)). "Should the jury return verdicts for each count, however, the district judge should enter judgment on only one of the statutory offenses." *Ball*, 470 U.S. at 865. "It is only upon entry of a judgment for multiple offenses . . . that a multiple-punishments violation even occurs." *Aubin*, 537 S.W.3d at 43.

"A constitutional attack may not be based on an apprehension of future injury." *Ex parte Spring*, 586 S.W.2d 482, 485 (Tex. Crim. App. 1978) (citing *Bush v. Texas*, 372 U.S. 586 (1963)). "Such an attack is not ripe unless the record shows that the challenged section will be applied to the defendant." *Ex parte Gonzalez*, 525 S.W.3d 342, 347 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Ex parte Tamez*, 4 S.W.3d 366, 367 (Tex. App.—Houston [1st Dist.] 1999, no pet.)).

III. DISCUSSION

By his sole issue, Elizondo contends he is entitled to pretrial habeas relief because the State is subjecting him to multiple punishments for the same offense. Specifically, Elizondo argues theft by a public servant and misapplication of fiduciary property are the same offense for double jeopardy purposes. Elizondo's pretrial complaints, however, amount to nothing more than apprehension about a potential double-jeopardy violation. *See Spring*, 586 S.W.2d at 485. Even if we assume, without deciding, that theft by a public servant and misappropriation of fiduciary property are legally the same, the State

is permitted to indict, prosecute, and obtain guilty verdicts for both offenses without running afoul of Elizondo's constitutional rights; any potential violation would only occur if the trial court enters a judgment convicting Elizondo of both offenses. *See Aubin*, 537 S.W.3d at 43. Furthermore, there is no trial record in this case for us to review the factual sameness of the offenses, *see Castillo*, 469 S.W.3d at 170, which also precludes pretrial habeas relief. *See Perry*, 483 S.W.3d at 895.

Because Elizondo's multiple-punishments claim is not ripe, *see Spring*, 586 S.W.2d at 485, he failed to present a cognizable claim for pretrial habeas relief. *See Gonzalez*, 8 S.W.3d at 643 n.9. Accordingly, the trial court did not abuse its discretion in denying Elizondo's applications. *See Hill*, 499 S.W.3d at 865.

IV. CONCLUSION

We affirm the trial court's denial of Elizondo's pretrial applications for writ of habeas corpus.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
15th day of August, 2019.