

Court of Criminal Appeals
November 20, 2013

In re McCann

No. Nos. AP-76.998 & AP-76,999

Case Summary written by Jamie Vaughan, Staff Member.

Judge Hervey delivered the opinion of the Court, joined by Presiding Judge Keller and Judges Meyers, Johnson, Keasler, Cochran, and Alcalá.

Relator Patrick McCann is an attorney who represented a criminal defendant, Turner, who was convicted of capital murder and sentenced to death. Rytting, the appointed habeas counsel who subsequently represented Turner in his appeal, requested that McCann turn over Turner's trial file to assist in the appeal. McCann refused, believing Turner did not want the information turned over. A trial court ordered McCann to turn over Turner's file, and after McCann refused to comply with the order, the court found him in contempt. McCann sought mandamus relief from the Court of Criminal Appeals to overturn the trial court's orders.

Issue: Is McCann's request for mandamus relief appropriate, where he was ordered to relinquish his former client's file to subsequent counsel, against his former client's wishes?

The court first pointed out the requirements for mandamus relief: the act sought is purely ministerial and no adequate legal remedy exists. The issue the court focused on centered on who owns the client file. The court determined that attorneys are agents of their clients, and therefore, the client owns the files. Rytting argued that client files do not belong to clients because: (1) clients have only a limited possessory interest in the files because an attorney can withhold the files from the client in the form of an attorney lien to get the client to pay for the lawyer's services; (2) the ethical rules imply that a client does not own his files because they say an attorney must maintain a *copy* of the file; and (3) if a client is unwilling or incapable of deciding what is in his own best interest, the decision lies with the current attorney. The court rejected these arguments because: (1) the term "lien" suggests that the property does not belong to the attorney himself; (2) another ethical provision specifically states that an attorney needs the former client's consent to turn over the former client's file to a subsequent attorney; and (3) if an attorney suspects that a client is incompetent, he must seek to appoint a guardian. In conclusion, the court assumed (especially because the trial court so found) that Turner was competent, and he therefore had every right to undermine his own defense if he so chose by not allowing his current counsel to access his file. McCann therefore obeyed his fiduciary duty by not turning over the file, and the trial judge had no right to force him to violate his duty. Because McCann was clearly entitled to relief, vacating the orders of the trial court would be a purely ministerial act, and McCann had no

adequate remedy at law because his writ of habeas corpus would not resolve the underlying issue of the trial court's orders. Therefore, the court conditionally granted McCann mandamus relief.

Price, J., dissenting

Justice Price agreed with the majority that the client's file belongs to the client. However, Price disagreed that the determination was sufficient to grant mandamus relief. Price argues that, just because turning over the file was against the client's wishes, that did not mean that the court did not have the authority to override those wishes by ordering that the files be relinquished. Price further argues that this question should have been the focus of the court's discussion, and because this is not a well-settled area of the law, McCann's relief should not have been granted. Mandamus relief should be discretionary, and there was no clear error, so the trial judge's decision should stand.

Womack, J., dissented but filed no opinion.

Roberson v. State

No. PD-0917-12

Case Summary written by Leonardo De La Garza, Staff Member.

Johnson, J., delivered the opinion of the Court.

Appellant was charged by indictment, containing allegations of two previous felony convictions, with aggravated assault with a deadly weapon. At the beginning of punishment proceedings, appellant objected to the enhancement paragraph as stated in the indictment because the second enhancement paragraph's conviction date was before the conviction date on the first enhancement paragraph. After appellant's objection was overruled, appellant plead "true" to the enhancement allegations as read from the indictment. The jury found appellant guilty of aggravated assault and found the enhancement paragraphs true, assessing thirty years of imprisonment. The court of appeals affirmed, holding that the evidence was sufficient to support enhancement to habitual-offender status and that the trial court did not err. Appellant alleges that evidence was legally insufficient to support jury's findings that second enhancement paragraph was true because the enhancement paragraphs were incorrectly worded in reverse order.

Issues: Did the court of appeals erroneously rely on an unpublished memorandum opinion as controlling precedent rather than a published opinion that involved the same issue regarding enhanced sentences and finality of convictions in enhancement paragraphs? Did the trial court correctly apply the habitual-offender statutory enhancement?

The court held first that there was no error in the lower court's treatment—citing for comparative and illustrative purposes—of the unpublished memorandum opinion pursuant to Texas Rule of Appellate Procedure 47.7(a). Second, the evidence in the record provides sufficient evidence to support the jury's finding that the prior convictions did occur in the statutorily required sequence for habitual-offender enhancement.

Regarding the second issue, the court notes the general rule that a plea of true to an enhancement paragraph relieves the state of its burden to prove a prior conviction for enhancement purposes and forfeits the right to appeal the insufficiency of evidence to prove the prior conviction, but an exception remains when the record affirmatively reflects that the enhancement was improper. Case law narrows the exception to circumstances in which the record reflects that the prior conviction was not final, but the record evidence, rather than the enhancement-paragraph allegations, may be determinative. *Jordan v. State* and Texas Penal Code § 12.42(d) provide that in order for the habitual felony enhancement to apply, the state must show beyond a reasonable doubt that a defendant's second previous felony conviction was committed after the first previous felony conviction became final. Here, the record evidence reflects that the state met that burden, despite the incorrect wording of the enhancement allegations in the indictment, because the prosecutor read the allegations in proper order and appellant plead "true" to the allegations as read. Further, the incorrect wording in no way misled appellant. Thus, the evidence was sufficient to prove the enhancement allegations and to enhance appellant's punishment range to that of a habitual offender.

Ex Parte Charlie J. Gill

Ex Parte Tommy John Gill

Nos. PD-0596-13 & PD-0624-13

Case Summary written by Matt McKee, Staff Member.

Keasler, J., delivered the unanimous opinion of the Court, in which Meyers, Womack, Johnson, Hervey, Cochran, and Alcala, JJ., joined. Price J., joined parts I and II, and filed a concurring opinion. Keller, P.J., concurred.

On September 1, 2012, Appellants were arrested for an alleged murder. The trial court set Appellants' bail at \$1,000,000 each, subsequently reducing the respective amounts to \$100,000, and eventually to \$50,000 each. After Appellants spent ninety days in jail, the State announced it was not ready to proceed to trial. Accordingly, Appellants requested habeas corpus relief under Art. 17.151 of the Texas Code of Criminal Procedure, which provides that inmates are to be released on personal bond or reduction of bail if the state is not ready to proceed to trial after ninety days of incarceration.

At a hearing on their motion, Appellants testified that they were indigent and had no means of acquiring funds to pay their bail. Noting both Appellants' prior felony convictions, the trial court denied relief—impliedly basing its decisions on community safety concerns and Appellants' prior convictions. Finding the trial judge had a duty to consider the community's safety, the Beaumont Court of Appeals affirmed the trial court. The court additionally found that appellants did not meet their burden to prove their bail was excessive, or the burden to prove they did not pose a threat to the community. Noting an apparent split among Texas appeals courts regarding Art. 17.151's interpretation, the Texas Court of Criminal Appeals granted discretionary review to clarify whether a trial court is allowed to consider factors outside of Art. 17.151 when setting the terms for an inmate's bail.

Article 17.15 of the Texas Code of Criminal Procedure provides that judges are to consider the nature of an inmate's offense as well as the community's safety when determining the terms of an inmate's bond. Article 17.151, however, states that “[a] defendant who is detained in jail . . . must be released either on personal bond or by reducing the amount of bail required, if the state is not ready for trial of the criminal action for which he is being detained within . . . 90 days from the commencement of his detention if he is accused of a felony.”

Citing *Rowe v. State*, the Court found that where the State is not ready to proceed to trial after an inmate has been incarcerated for ninety days, a judge's only options are to release that inmate on personal bond, or to reduce the amount of the inmate's bail. 853 S.W.2d 581 (Tex. Crim. App. 1993). Considering Art. 17.15's general nature compared to Art. 17.151's narrow application, the Court found the legislature intended the two statutes to be compatible. Additionally, the court found that the words “must be released” demonstrate clear legislative intent. Because Appellants invoked Art. 17.151 in a proper manner, even under the abuse of discretion standard that gives substantial deference to the trial court, the trial judge's denial of appellant's writs could not be upheld. Moreover, because a witness' credibility is not a factor courts are allowed to consider under Art 17.151, the court's reliance on Appellants' pleading deficiencies were not adequate to support the trial court's ruling.

The Court also addressed the State's argument that Art. 17.151 is unconstitutional because it unduly infringes upon the judiciary's authority to set bail by “render[ing] the judiciary incapable of exercising its exclusive power to hear evidence, weigh evidence, exercise its discretion, and decide the issues presented.” The Court, however, found that because the trial judge “must decide . . . whether the State is ready for trial, determine the length a defendant has been in custody, as well as consider . . . whether to issue a personal bond or to set an amount of bail to effectuate the accused's release,” Finding Art. 17.151 “does not unduly interfere with the judge's exclusive role

of hearing and considering evidence,” the court reversed the Beaumont Court of Appeals’ holding, remanding the case to the habeas court.

State v. Cooper

Nos. PD-0001-13 & PD-0202-13

Case Summary written by Megan Kateff, Staff Member.

Womack, J., delivered the unanimous opinion of the Court.

In this case, the City of Plano adopted the 2003 International Property Maintenance Code (IPMC) and incorporated it into its local Property Maintenance Code. The appellee was charged with two violations of the IPMC for: (1) failure to maintain the exterior of a structure in good repair and in a structurally sound manner, and (2) failure to supply hot and cold running water to plumbing fixtures in a house. The appellee was convicted of both offenses in separate bench trials. On appeal, the appellee filed motions to dismiss for each offense, arguing that the State failed to allege that he was given notice of his initial violations before he could be convicted for subsequent violations, as required by the code. Both motions were granted.

Issue: Was the appellee entitled to notice of his violations of the IPMC before he could be convicted for subsequent violations?

On appeal, the two cases were consolidated, and the State argued that the notice requirement was not carried over from the pre-amendment version of the code to the current version under which the appellee was charged. In interpreting statutes, the court of criminal appeals stated that it would evaluate the literal text of the statute, giving effect to its plain meaning unless the plain text would lead to absurd consequences not intended by the legislature. In evaluating the section of the municipal code at issue, the court held not only that the State referenced the wrong provision of the municipal code in its argument, but also that the actual provision of the current code under which the appellee was charged carried with it the notice requirement from the original, pre-amendment text. If the city’s intent was to eliminate the notice requirement in the amended version of the code, it could have done so, but rather explicitly included it in the amended version. Therefore, the court affirmed the decision of the court of appeals, holding that because the State failed to allege that the appellee was given notice in the charging instrument, it was insufficient to state a chargeable offense and was properly dismissed. As a final matter, the court addressed a policy concern raised by the State and noted that its decision does not limit a home-rule city—a city given broad legislative discretion so long as its legislation does not conflict with the Texas Constitution—from creating and enforcing municipal ordinances, nor does it limit a home-rule city’s methods of prosecution.

Ex Parte Buck

No. WR-57,004-03

Case Summary written by Mayra Varela, Staff Member.

Per Curiam.

Applicant was convicted of capital murder and sentenced to death. On direct appeal, the Court of Criminal Appeals of Texas affirmed the conviction and sentence. In 2003, Applicant filed two post-conviction applications for writ of habeas corpus. The Court denied relief for the first application and dismissed the second application. In March 2013, Applicant filed a third application for writ of habeas corpus.

Issue: Whether the third application for habeas corpus relief satisfies the dictates of the Code of Criminal Procedure Article 11.071, § 5?

The Court determined the application was an abuse of the writ and declined to consider the merits of the claims on the grounds that the application failed to meet the requirements of Article 11.071, § 5(a), the capital habeas corpus statute. As such, the Court dismissed the application for habeas corpus relief.

Justice Alcalá filed a dissenting opinion, joined by Justices Price and Johnson.

Justice Alcalá dissents from the Court's refusal to review the applicant's 2013 claim on its merits. In 2003, appointed habeas counsel filed a writ of habeas corpus on behalf of the applicant but only raised frivolous claims and failed to investigate the applicant's grounds for relief. Consequently, counsel's failure to perform his statutory duties under Article 11.071 led to the forfeiture of any subsequent writs, including applicant's 2013 writ containing a legitimate claim for relief. Alcalá argues that while an 11.071 applicant may not be constitutionally entitled to effective assistance of counsel, the applicant is at least entitled to counsel who demonstrates the minimum level of competence to assist the applicant with the preparation of his habeas corpus application. To do otherwise is contradictory to the capital habeas statute's plain meaning and the underlying purpose of the statute.

Because the initial application for relief was improperly filed by ineffective habeas counsel, the 2013 writ for habeas corpus relief was improperly barred when it raised a legitimate claim. The applicant's 2013

writ raised the claim of ineffective trial counsel because trial counsel failed to present mitigating evidence that would probably have led to a different outcome from the jury. Alcala argues that the applicant has been deprived of his “one full and fair opportunity to present his constitutional jurisdictional claims in accordance with the procedures of the state” due to the improper filing by ineffective habeas counsel. For this reason, the Court should not bar the applicant’s ineffective-assistance claim and instead adjudicate it on its merits.