

Court of Criminal Appeals
April 1, 2015

Ex Parte Kenneth Lashon Green

No. WR-82,072-01

Case Summary written by Alicia McCullar, Staff Member.

PER CURIAM.

The court considered an application filed for a writ of habeas corpus following the applicant's conviction of two counts of sexual assault and stacked prison sentence. The Eleventh Court of Appeals affirmed the conviction. In the instant case, the Court considered the applicant's contention that his *pro se* petition for discretionary review was dismissed as untimely filed.

Upon receipt of an affidavit from the Program Supervisor of the Mail System Coordinators Panel of TDCJ-ID, it was confirmed that the applicant placed his petition in the prison mail system four days in advance of the due date. Although, the court did not receive the petition until after passage of the due date, it determined that the court erred in dismissing the petition as untimely filed because it was placed in the prison mail system prior to the due date.

For the foregoing reasons, the court allowed the applicant to file an out-of-time petition for discretionary review of the judgment of the Eleventh Court of Appeals. The applicant was allowed thirty days from the date of issuance of the court's mandate to file the petition. The applicant's remaining claims were dismissed.

JUDGE YEARY, dissenting.

The applicant's post-conviction application for writ of habeas corpus included four grounds for relief, and the dissent concluded that two of those points required attention. First, the applicant contended that his appellate counsel was ineffective because his sentences were improperly stacked. Secondly, as was ultimately considered by the majority opinion, the applicant said that the Court erred by dismissing, as untimely, his petition for discretionary review. The dissenting opinion gave the most attention to the first point of contention.

The dissent argued that relief on the claim of ineffective assistance of counsel on appeal for failing to address the error of stacking sentences

should be granted. The dissent set out the following as grounds for an assertion of ineffective counsel: (1) counsel's decision not to raise an issue on appeal was objectively unreasonable; and (2) that if the complaint had been raised on appeal, a reasonable probability existed that the applicant would prevail. Considering § 3.03 of the Texas Penal Code—addressing when sentences handed down from “the same criminal episode must be served concurrently and when they may be served consecutively”—and its applicability to § 22.011 of the Penal Code, the dissent determined that because the victim was, at the time of the offense, twenty-one years old, the applicant's sentences were erroneously stacked. TEX. PENAL CODE § 3.03(b)(2)(A). Section 22.011 allows for sentences to be stacked only when the victim of the offense is seventeen years of age or younger. Absent other justification in the language of § 3.03, lack of agreement to stack sentences as part of a plea bargain, or any other reason, the dissent argued that the sentences should not be consecutively served.

Moreover, the applicant's appellate counsel admitted to not noticing the error of the stacked sentences and the dissent argued that counsel might not have considered ever raising a complaint challenging the stacking order. Relatedly, the state made a concession that the stacking order should be set aside. The dissent concluded that, on these facts, the applicant satisfied the burden of proving ineffective counsel.

Additionally, the dissent concluded that although he was entitled to relief on the ineffective assistance claim, the relief granted by the majority would not afford him an opportunity to address the ineffective counsel claim. In his discretionary review, the applicant will only have the opportunity to raise issues that were first raised in the court of appeals. An ineffective counsel claim was not brought on appeal and the court cannot consider such a claim on discretionary review. Therefore, the dissent argued that the majority's relief granted was not enough to properly address the errors of the convicting court. In the alternative, the dissent argued that the applicant should be granted a new appeal in order to properly raise his demonstrably meritorious claims for relief.