



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-76,082-03

EX PARTE CARLTON MCEWEN, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. D-1-DC-08-904053-C IN THE 403RD DISTRICT COURT
FROM TRAVIS COUNTY**

Per curiam. NEWELL, J. filed a concurring opinion, joined by WALKER, J. YEARY, J. filed a dissenting opinion, joined by SLAUGHTER, J.

OPINION

Applicant was convicted of four counts of indecency with a child by contact and one count of indecency with a child by exposure. He was sentenced to life imprisonment for counts one through four and twenty years' imprisonment for count five. The Third Court of Appeals affirmed his convictions. *McEwen v. State*, No. 03-08-00522-CR (Tex. App.—Austin Aug. 26, 2009)(not designated for publication). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

Applicant contends that his trial counsel rendered ineffective assistance by failing to

challenge the enhancement because it was a community supervision sentence which was not revoked. While such a conviction would be final for enhancement purposes for counts one through four, it was not available to enhance count five. *See* TEX. PENAL CODE §12.42(g)(1). Based on the record, the trial court has determined that trial counsel's performance was deficient and that Applicant was prejudiced regarding the sentence of count five only.

Relief is granted. *Strickland v. Washington*, 466 U.S. 668 (1984). The sentence in count five of cause number D-1-DC-08-904053 in the 403rd District Court of Travis County is set aside, and Applicant is remanded to the custody of the Sheriff of Travis County for a new sentencing hearing on count five. All other relief regarding count five is denied. All relief requested in counts one through four is denied. The trial court shall issue any necessary bench warrant within ten days from the date of this Court's mandate.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice—Correctional Institutions Division and the Board of Pardons and Paroles.

Delivered: June 24, 2020
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