Opinion issued July 9, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00209-CR

STATE OF TEXAS, Appellant

V.

ZENA COLLINS STEPHENS, Appellee

On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Case No. 18DCR0152

---

and

NO. 01-19-00243-CR

EX PARTE ZENA COLLINS STEPHENS, Relator

Original Proceeding on Petition for Writ of Habeas Corpus

O P I N I O N

The Attorney General acting for the state of Texas indicted Zena Collins Stephens for tampering with a governmental record in violation of the Texas Penal Code and two counts of accepting a cash contribution over $100 in violation of the Texas Election Code. TEX. PENAL CODE § 37.10; TEX. ELEC. CODE § 253.033. Stephens filed a motion to quash the indictment alleging that the Attorney General did not have statutory authority to prosecute her for a violation of the Penal Code. She also filed a pretrial application for a writ of habeas corpus alleging that the statute delegating prosecutorial authority of election laws to the Attorney General was unconstitutional and that venue was improper in Chambers County. After a hearing, the trial court granted the motion to quash the indictment as to count I, which alleged a violation of the Penal Code, and denied the application for a writ of habeas corpus. The State appeals the trial court's pretrial order quashing count I of the indictment, and Stephens appeals the denial of her application for pretrial writ of habeas corpus.

We reverse the trial court's order quashing count I of the indictment and affirm the denial of Stephens's application for pretrial writ of habeas corpus.

Background

This case arises from an investigation into Stephens's campaign for Jefferson County Sheriff, a position to which she was elected in 2016. The Federal Bureau of Investigation discovered information regarding potential campaign-finance violations concerning Stephens and turned the information over to the Texas Rangers. The Texas Rangers presented the results of their investigation to the District Attorney of Jefferson County. The District Attorney advised the Texas Rangers to contact the Texas Attorney General instead. The Attorney General's Office chose to prosecute the case and presented evidence to a grand jury in Chambers County, which adjoins Jefferson County.

In April 2018, the Chambers County grand jury indicted Stephens on three counts: one count of tampering with a governmental record in violation of the Texas Penal Code, which is a state jail felony; and two counts of accepting a cash contribution exceeding $100 in violation of the Texas Election Code, which are misdemeanors. TEX. PENAL CODE § 37.10; TEX. ELEC. CODE § 253.033.

With respect to the first count, the indictment specifically alleged that Stephens

> With Intent to defraud or harm another, namely: the Jefferson County [Cl]erk or Jefferson County or the citizens of Jefferson County. . . did present or use a record or document, namely: a Candidate/Officeholder campaign Finance Report, by reporting a $5,000.00 individual cash contribution in the political contributions of $50 or less

> section of said Report, with knowledge of Its falsity and with Intent that it be taken as a genuine governmental record.

The remaining two counts alleged acceptance of $1,000 in cash and $5,000 in cash, respectively, from a single contributor in violation of Texas Election Code section 253.033(a).

Stephens moved to quash the indictment arguing that the Attorney General did not have authority to prosecute a violation of the Penal Code. In her motion to quash the indictment, Stephens argued that the Attorney General's ability to prosecute a criminal offense "prescribed by the election laws" of Texas did not give the Attorney General power to prosecute offenses outside the Texas Election Code, such as count I of the indictment. *See* TEX. ELEC. CODE § 273.021(c) ("The attorney general may prosecute a criminal offense prescribed by the election laws of this state.").

She filed an application for a pretrial writ of habeas corpus, challenging the constitutionality of the Election Code statute giving the Attorney General prosecutorial authority. In her habeas petition, Stephens alleged that section 273.021(c) was unconstitutional because the Texas Constitution mandates separation of powers, and the statute delegates a duty belonging to the judiciary to the executive branch. She also argued that venue was improper in Chambers County. Specifically, she claimed that the Election Code provides that an offense may be

prosecuted in the county in which the offense occurred or an adjoining county, but venue for the violation of the Penal Code is the county where the offense was committed. *See* TEX. ELEC. CODE § 273.024; TEX. CODE CRIM. PROC. art. 13.18. Since the felony charge of tampering with a governmental record is in the Texas Penal Code rather than the Election Code, she alleged that Chambers County was not the proper venue for prosecution because the indictment alleged that the offense occurred in Jefferson County.

Following a hearing, the trial court granted Stephens's motion to quash as to count I of the indictment but denied it as to counts II and III. The trial court also denied Stephens's petition for a pretrial writ of habeas corpus.

The State appeals the order quashing count I of the indictment, and Stephens appeals the denial of the pretrial habeas petition.

Validity of the Indictment

On appeal, the State argues that the trial court erred in quashing count I of the indictment because the Election Code authorizes the Attorney General to prosecute violations of elections laws. The State contends that the trial court erroneously concluded that the Attorney General's prosecutorial authority was limited to election laws found within the Election Code. We agree.

A. Standard of Review

Both a trial court's decision on a motion to quash an indictment and issues of statutory construction are questions of law that are reviewed de novo. *State v. Rousseau*, 396 S.W.3d 550, 555 n.6. (Tex. Crim. App. 2013) (motion to quash); *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019) (statutory construction).

This appeal presents an issue of statutory construction. When interpreting a statute, we seek to effectuate the "collective" intent or purpose of the legislators who enacted the legislation. *Hughitt v. State*, 583 S.W.3d 623, 626 (Tex. Crim. App. 2019); *Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014). We read the statute as a whole and give effect to the plain meaning of the statute's language, unless the statute is ambiguous, or the plain meaning leads to absurd results that the legislature could not possibly have intended. *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015); *see also Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991) ("[I]f the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning."). To determine plain meaning, we read words and phrases in context and construe them according to the rules of grammar and usage. *Wagner v. State*, 539 S.W.3d 298, 306 (Tex. Crim. App. 2018); *Yazdchi*, 428 S.W.3d at 837. We presume that every word in a statute has been used for a purpose and that each word, clause, and sentence

should be given effect if reasonably possible. *Wagner*, 539 S.W.3d at 306; *Liverman*, 470 S.W.3d at 836.

If a statute's language is ambiguous, or if application of the statute's plain meaning would lead to an absurd result that the Legislature could not possibly have intended, then a court may consider extratextual factors. *Boykin*, 818 S.W.2d at 785–86. A statute is ambiguous when it "may be understood by reasonably well-informed persons in two or more different senses." *Bryant v. State*, 391 S.W.3d 86, 92 (Tex. Crim. App. 2012); *see also Baird v. State*, 398 S.W.3d 220, 229 (Tex. Crim. App. 2013) (stating a statute is ambiguous when the language it employs is "reasonably susceptible to more than one understanding."). On the other hand, a statute is unambiguous when it reasonably permits no more than one understanding. *See State v. Neeley*, 239 S.W.3d 780, 783 (Tex. Crim. App. 2007).

B. Applicable Law

Texas election law requires candidates for public office to file a campaign-finance report at least twice a year, and the report must include a variety of information, including "the total amount or a specific listing of the political contributions of $50 or less accepted." TEX. ELEC. CODE § 254.031(a)(5) (requiring a listing of contributions $50 or less); *see id.* §§ 254.063 (requiring January and July reports), 254.064 (stating additional reports may be required), 254.066 (stating reports are filed with the authority with whom the candidate's campaign treasurer

appointment is required to be filed). A candidate "may not knowingly accept from a contributor in a reporting period political contributions in cash that in the aggregate exceed $100." *Id.* § 253.033(a).

Section 37.10(a)(2) of the Texas Penal Code makes it an offense to make, present, or use any "record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record." TEX. PENAL CODE § 37.10(a)(2). "Governmental record" is defined in the Penal Code to include "anything belonging to, received by, or kept by government for information, including a court record" and "an official ballot or other election record". *Id.* § 37.01(2)(A), (E).

Section 273.021 of the Election Code gives the Attorney General some prosecutorial authority, stating:

> (a) The attorney general may prosecute a criminal offense prescribed by the election laws of this state.
>
> (b) The attorney general may appear before a grand jury in connection with an offense the attorney general is authorized to prosecuted under Subsection (a).

TEX. ELEC. CODE § 273.021(a–b). Venue for prosecutions brought by the Attorney General under this provision of the Election Code is "the county in which the offense was committed or an adjoining county." *Id.* § 273.024.

C. Authority of the Attorney General

The parties dispute the Attorney General's authority to prosecute election laws, as stated in section 273.021 of the Election Code. The trial court held that the Attorney General did not have jurisdiction to prosecute count I of the indictment against Stephens, which alleged tampering with a government record under the Penal Code. On appeal, the State argues that section 273.021 unambiguously gives the Attorney General jurisdiction to prosecute violations of election laws, whether the law is inside or outside of the Election Code. We agree.

Section 273.021(a) of the Election Code clearly and unambiguously gives the Attorney General power to prosecute criminal laws prescribed by election laws generally, whether those laws are inside or outside of the Code. When a statute is unambiguous, the court should not add to or subtract from it. *Ex parte Vela*, 460 S.W.3d 610, 612 (Tex. Crim. App. 2015). The phrase "election laws" is not synonymous with "Election Code," and if the Legislature intended to limit the Attorney General's prosecutorial authority to laws found only in the Election Code, it could have done so.

This interpretation is confirmed by other provisions of the Election Code. When interpreting a statute, courts look "not only at the single, discrete provision at issue but at other provisions within the whole statutory scheme." *State v. Schunior*, 506 S.W.3d 29, 37 (Tex. Crim. App. 2016). Other sections of the Election Code

acknowledge the existence of election laws both outside and inside the Code. For example, section 31.003 directs the Secretary of State to maintain uniformity "of this code and of the election laws outside this code." TEX. ELEC. CODE § 31.003. Similarly, section 31.004 directs the Secretary of State to assist election authorities "with regard to the application, operation, and interpretation of this code and of the election laws outside this code." *Id.* § 31.004. The Legislature specifically referenced election laws outside of the Code, supporting that if the Legislature wished to limit section 273.021 to only those laws within the Election Code, it could have done so. We hold that section 273.021 authorizes the Attorney General to prosecute election laws found outside of the Election Code.

D. Campaign Finance Reports are Election Records

We next determine whether the Penal Code provision under which Stephens was indicted qualifies as an "election law" under section 273.021(a). *See* TEX. ELEC. CODE § 273.021(a) (giving the Attorney General power to prosecute a criminal offense prescribed by "the election laws of this state"). The State argues that because the Legislature explicitly included "election record" within the definition of "governmental record" in the Penal Code, section 37.10 of the Penal Code is an election law when used with respect to election records, such as a campaign-finance report. *See* TEX. CODE CRIM. PROC. art. § 37.01(2)(E) (defining "governmental record"); *id.* § 37.10(a)(2) (stating it is a crime to present a document with intent that

it be taken as a genuine governmental record). Stephens relies on *Lightbourn v. County of El Paso*, 118 F.3d 421 (5th Cir. 1997), and argues that election laws only encompass laws that specifically govern elections.

In *Lightbourn*, the Fifth Circuit concluded that the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134, was not an election law. *Lightbourn*, 118 F.3d at 430. The court reasoned that the ADA is a generally applicable law with no specific provisions related to elections or voting. *Id.* Therefore, the Secretary of State had no duty to take steps to ensure local election officials complied with the ADA. *Id.*

Unlike the statute in *Lightbourn*, the Penal Code explicitly refers to election matters. In 2003, the Legislature specifically amended the definition of "governmental record" in section 37.01(a) of the Penal Code to include "an official ballot or other election record." Act of May 31, 2003, 78th Leg., R.S., ch. 393, § 21, 2003 Tex. Gen. Laws 1633, 1639–40.

"Government record" is defined in the Penal Code to include "anything belonging to, received by, or kept by government for information, including a court record" and "an official ballot or other election record." TEX. PENAL CODE § 37.01(2)(A), (C). The indictment alleges that Stephens presented a false campaign finance report to Jefferson County. Stephens was required to submit the report pursuant to section 254.063 of the Election Code. TEX. ELEC. CODE § 254.063.

"Government," as defined in the Penal Code, includes Jefferson County. TEX. PENAL CODE § 1.07(24) ("Government" means the state, a county, municipality, or political subdivision of the state, or any branch or agency of the same). Section 37.10 does not define when a document becomes a governmental record, but courts have held that documents received by the government are "government records." *See State v. Vasilas*, 187 S.W.3d 486, 491 (Tex. Crim. App. 2006) (finding that a petition for expunction was not a governmental record when the defendant prepared it, but that for purposes of section 37.10 it became one once the court received it and the defendant used it in seeking to obtain the expunction); *Pokladnik v. State*, 876 S.W.2d 525, 527 (Tex. App.—Dallas 1994, no pet.) (holding false statement on affidavit for foreclosure submitted on State Department of Highways and Public Transportation form was not a governmental record until filed with the Department of Public Safety); *Constructors Unlimited, Inc., v. State*, 717 S.W.2d 169, 174 (Tex. App.—Houston [1st Dist.] 1986, no pet.) (holding forms submitted to a governmental entity were not governmental records at the time false entries were made because the forms did not belong to the government, had not been received by the government, and were not kept by the government for information). A campaign-finance report that has been presented to the county, as mandated by election law, is a "governmental record" for purposes of prosecution under section 37.10 of the

Penal Code, and we hold that the Attorney General has authority to indict and prosecute an allegation of presentment of a false report.

We sustain the State's issue on appeal. Accordingly, we reverse the trial court's order quashing count I of the indictment.

Stephens's Application for Pretrial Writ of Habeas Corpus

Stephens appeals the denial of her application for a pretrial writ of habeas corpus. On appeal, she argues that her petition should have been granted because section 273.021 of the Election Code's delegation of authority to prosecute election laws to the Attorney General violates the Texas Constitution. Specifically, she argues that the section violates the separation of powers doctrine in the Texas Constitution. *See* TEX. CONST. art. II, § 1. She also argues that venue was improper in Jefferson County. Having decided that section 273.021 of the Election Code gives the Attorney General power to prosecute election law violations both inside and outside the Election Code, we now review whether the statute is an unconstitutional delegation of power.

A. Standard of Review

Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). It is 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).

The Court of Criminal Appeals has limited the use of pretrial habeas applications to issues that would result in the applicant's immediate release and has "held that an applicant may use pretrial writs to assert his or her constitutional protections with respect to double jeopardy and bail," to challenge the facial constitutionality of the statute under which she is prosecuted, or to allege that the offense charged is barred by the statute of limitations. *Ex parte Estrada*, 573 S.W.3d 884, 891–92 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (quoting *Ex parte Weise*, 55 S.W.3d at 619–20). Additionally, pretrial habeas is generally unavailable when the resolution of the claim may be aided by the development of a record at trial. *Ex parte Ingram*, 533 S.W.3d 887, 892 (Tex. Crim. App. 2017)

A trial court's ruling on a habeas petition is reviewed for an abuse of discretion. *Ex parte Montano*, 451 S.W.3d 874, 877 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). We view the evidence in the light most favorable to the trial court's ruling. *Sandifer v. State*, 233 S.W.3d 1, 2, (Tex. App.—Houston [1st Dist.] 2007, no pet.). We review legal questions raised by the petition de novo. *Id.*

B. Separation of Powers

On appeal, Stephens contends that the district court abused its discretion in denying her application for a writ of habeas corpus because the statute giving

authority to the Attorney General to prosecute violations of election laws violates the separation of powers doctrine of the Texas Constitution. *See* TEX. CONST. art. II, § 1. Stephens argues that the authority to prosecute crime belongs exclusively to district and county attorneys, who are members of the judicial branch. *See* TEX. CONST. art. V, § 21. She contends that the Legislature cannot grant the authority to prosecute to the Attorney General, who is part of the executive branch. *See id.* art. IV, § 22.

As an initial matter, Stephens cannot raise this argument regarding the Attorney General's constitutional authority to prosecute crime with respect to counts II and III because she did not raise that argument in the trial court. *See* TEX. R. APP. P. 33.1(a). In her pretrial habeas petition, she challenged only the authority of the Attorney General to "bring the criminal allegations set forth in . . . Count I." With respect to counts II and III, Stephens did not make a timely objection or motion to the trial court stating her grounds for relief. *See id.*

Facial constitutional challenges "are cognizable on pretrial habeas regardless of whether the particular constitutional right at issue would be effectively undermined if not vindicated prior to trial." *Ex parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016). The Texas Constitution expressly guarantees the separation of powers between the branches of government. TEX. CONST. art. II, § 1. To demonstrate a separation of powers violation, Stephens must show that either (1) one

branch of government has assumed or been delegated a power more properly attached to another branch, or (2) one branch of government is unduly interfering with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. *Jones v. State*, 803 S.W.2d 712, 715 (Tex. Crim. App. 1991).

Stephens argues that giving authority to the Attorney General to prosecute election laws unduly interferes with the functioning of the judicial branch. The offices of county and district attorneys are in the judicial branch of government. *See* TEX. CONST. art. V, § 21. While their powers are not enumerated, courts have recognized that, along with various civil duties, their primary function is "to prosecute the pleas of the state in criminal cases." *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987) (internal quotation and citation removed); *see also Saldano v. State*, 70 S.W.3d 873, 876 (Tex. Crim. App. 2002). The Attorney General's duties are prescribed by article IV, section 22 of the Texas Constitution which states:

> The Attorney General shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice

> in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law.

TEX. CONST. art. IV, § 22. The "other duties" clause of this section provides legislative authority to empower the Attorney General with other duties. *See Medrano v. State*, 421 S.W.3d 869, 878–79 (Tex. App.—Dallas 2014, pet. ref'd). Stephens argues that these provisions mean that the authority to represent the State in trial courts belongs exclusively in the judicial branch and allowing the Attorney General to prosecute election law violations unduly interferes with the functioning of that branch. We disagree.

Under the doctrine of *ejusdem generis*, "'when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation.'" *State v. Fidelity & Deposit Co. of Md.*, 223 S.W.3d 309, 312 (Tex. 2007) (quoting *Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003). The Texas Constitution gives the Attorney General the power to represent the State, to provide legal advice when asked by the Governor or other executive officers, and to take action against corporations and their charters. In general, these duties relate to State created entities. The last clause of the Constitution describing the authority of the Attorney General, gives him power "to perform other duties as may be required by law." TEX. CONST. art. IV, § 22. Using

the doctrine of *ejusdem generis*, this clause provides the exception required to allow the Attorney General to represent the State in criminal prosecutions of election laws, as proscribed by the Legislature. *See Saldano*, 70 S.W.3d at 880 ("[The Texas Constitution] authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution."); *Medrano*, 421 S.W.3d at 879. This is in keeping with the constitutional delegation of power, which allows the Attorney General to represent the State, to advise the State, and to act on behalf of the State against corporations. Corporations, like elections and elected offices, are wholly creatures of state action. It follows that the Attorney General has authority to prosecute election law violations.

Stephens has not demonstrated that section 273 of the Election Code delegates to the executive branch a power more properly given to the judicial branch nor has she demonstrated that doing so unduly interferes with the functioning of county and district attorneys. Courts have recognized that some duties of county and district attorneys are more accurately characterized as executive and some duties imposed upon the Attorney General are both executive and judicial. *See id.* at 879 (citing *Meshell*, 739 S.W.2d at 253 n.9 and *Brady v. Brooks*, 89 S.W. 1052, 1056 (Tex. 1905)). Section 273 gives the Attorney General concurrent jurisdiction with county and district attorneys. It does not take away their ability to prosecute election law violations. It is not the case that the Legislature has delegated away the county and

district attorneys' responsibilities. "Absent the consent of a local prosecutor or the request of a district or county attorney for assistance, the attorney general has very limited authority to represent the state in criminal cases in trial courts." *Ex parte Lo*, 424 S.W.3d 10, 30 n.2 (Tex. Crim. App. 2013) (op. on reh'g). Giving the Attorney General concurrent authority to prosecute a limited class of criminal cases does not delegate a power to the Attorney General more properly attached to another branch nor does it unduly interfere with the duties of the district and county attorneys such that they "cannot *effectively* exercise [their] constitutionally assigned powers." *Jones*, 803 S.W.2d at 715 (quoting *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990) (emphasis in original).

The trial court did not abuse its discretion in denying Stephens's pretrial habeas because the statutory delegation to the Attorney General does not violate the Texas Constitution.

C. Venue

On appeal, Stephens also argues that the district court abused its discretion in denying her pretrial application for writ of habeas corpus because venue is improper in Chambers County.

Venue is distinct from jurisdiction. *Ex parte Watson*, 601 S.W.2d 350, 351 (Tex. Crim. App. 1980). Jurisdiction concerns the power of the court to hear and determine the case. *Id.* Venue concerns the geographic location where a case may be

tried. *See Soliz v. State*, 97 S.W.3d 137, 141 (Tex. Crim. App. 2003). Regarding the criminal jurisdiction of district courts, article V, section 8 of the Texas Constitution provides only that "those courts shall have original jurisdiction in criminal cases of the grade of felony," and of all misdemeanors involving official misconduct." TEX. CONST. art. V, § 8. Improper venue, therefore, does not deprive the court of jurisdiction and may not be raised in habeas proceedings. *Ex parte Watson*, 601 S.W.2d at 352. Likewise, venue is the sort of claim that may be aided by the development of a record at trial. *Ex parte Ingram*, 533 S.W.3d at 892.

On this record, we cannot conclude that the district court abused its discretion in denying Stephens's pretrial application for writ of habeas corpus.

Conclusion

We reverse the trial court's order quashing count I of the indictment. We affirm the trial court's order denying Stephens's pretrial application for writ of habeas corpus. We remand this case to the trial court.

Peter Kelly
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.

Justice Goodman, dissenting.

Publish. TEX. R. APP. P. 47.2(b).