Opinion issued July 9, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00209-CR

THE STATE OF TEXAS, Appellant

V.

ZENA COLLINS STEPHENS, Appellee

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

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and

NO. 01-19-00243-CR

EX PARTE ZENA COLLINS STEPHENS

Original Proceeding on Petition for Writ of Habeas Corpus

DISSENTING OPINION

Zena Collins Stephens, Sheriff of Jefferson County, argues that section 273.021 of the Election Code, which authorizes the Attorney General to prosecute criminal violations of Texas election law, facially violates the Texas Constitution's separation-of-powers mandate. The majority rejects her argument and affirms the trial court's denial of her pretrial petition for a writ of habeas corpus. Because section 273.021 violates the separation-of-powers mandate, I respectfully dissent.

BACKGROUND

Stephens was elected in 2016. Afterward, the Texas Rangers investigated alleged campaign-finance violations. The Rangers presented the results of their investigation to the District Attorney of Jefferson County, who advised the Rangers to contact the Attorney General instead. The Attorney General chose to prosecute the case and moved it from Jefferson County to adjoining Chambers County, where a grand jury later indicted Stephens on three counts, one for the felony of tampering with a government record and two for the misdemeanor of accepting a cash donation exceeding $100. *See* TEX. PENAL CODE § 37.10; TEX. ELEC. CODE § 253.033.

DISCUSSION

Question Presented and the Majority's Answer

Our Constitution creates three distinct departments of government—legislative, executive, and judicial—and mandates that members of one shall not

exercise any power properly attached to the others, unless the Constitution expressly provides for its exercise. TEX. CONST. art. II, § 1. The Constitution grants the authority to represent the State in district and inferior courts to District Attorneys and County Attorneys, who are members of the judicial department. *Id.* art. V, § 21. It is well-settled that this constitutional grant of authority includes the exclusive responsibility and control of criminal prosecutions. *Meshell v. State*, 739 S.W.2d 246, 254 (Tex. Crim. App. 1987). The Legislature nonetheless has authorized the Attorney General, a member of the executive department, to represent the State in district and inferior courts to prosecute election-law violations. TEX. ELEC. CODE § 273.021. Can the Legislature delegate this authority to the Attorney General?

The majority says yes. The majority relies on the Constitution's grant of authority to the Attorney General, which states that he:

> 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. According to the majority, the final clause directing the Attorney General to "perform such other duties as may be required by law" allows

the Legislature to authorize him to prosecute election-law violations consistent with the constitutionally mandated separation of powers. I disagree.

Separation of Powers

The Texas Constitution, unlike the United States Constitution, expressly mandates the separation of powers. It provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. This express mandate "suggests that Texas would more aggressively enforce separation of powers between its governmental branches than would the federal government." *Ex parte Perry*, 483 S.W.3d 884, 894 (Tex. Crim. App. 2016) (plurality op.); *see also* Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1340 (1990) (separation-of-powers mandate "is phrased strongly").

Our Constitution's separation-of-powers mandate is violated in one of two ways. First, it is violated when one department of government assumes or is delegated a power more properly attached to another department. *Ex parte White*, 506 S.W.3d 39, 50 (Tex. Crim. App. 2016); *see also Rushing v. State*, 85 S.W.3d 283, 285 (Tex. Crim. App. 2002) (assumption or delegation "to whatever degree" of

power more appropriately attached to other department violates mandate). Second, the mandate is violated when one department unduly interferes with another department so that the latter cannot effectively exercise its constitutionally assigned powers. *Ex parte White*, 506 S.W.3d at 50.

Constitutional Interpretation

Like statutes, when we interpret constitutional provisions, our primary guide is their language because this is the best indicator of the intent of the framers who drafted them and the citizenry who adopted them. *Johnson v. Tenth Jud. Dist. Ct. of App. at Waco*, 280 S.W.3d 866, 872 (Tex. Crim. App. 2008). If, however, the language is less than plain and admits of ambiguity, we may consider extratextual factors. *Id.* One extratextual factor we may consider is the canon of construction known as ejusdem generis. *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000). This Latin phrase means of the same kind, class, or nature. *Thomas v. State*, 65 S.W.3d 38, 41 (Tex. Crim. App. 2001). Thus, when interpreting general words that follow a list of particular or specific things, the meaning of the general words should be limited to things of the same kind. *Id.* For example, our Constitution provides that the Legislature shall bar from public office persons "who have been convicted of bribery, perjury, forgery, or other high crimes." TEX. CONST. art. XVI, § 2. In interpreting the general words "other high crimes," the Court of Criminal Appeals applied the canon of ejusdem generis to limit them to crimes like the

specific ones enumerated in the provision—crimes involving "moral corruption and dishonesty inherent in the specified offenses." *Perez*, 11 S.W.3d at 221.

Analysis

Scope of Article IV, Section 22

The Constitutional provision setting forth the authority of the Attorney General is less than plain and reasonably could be assigned more than one meaning with respect to its reference to "such other duties as may be required by law." Because these words are general in nature and preceded by a number of particular grants of authority, resort to ejusdem generis to interpret them is proper. *See id.*

The Constitution specifically grants the Attorney General authority to:

- represent the State in the Supreme Court of Texas;
- inquire into charters of private corporations and seek judicial forfeiture of these charters when warranted unless otherwise expressly directed by law;
- represent the State in court to keep corporations from exercising any unlawful power or seeking unlawful taxes, tolls, freight, or wharfage; and
- give written legal advice to the Governor and other executive officers when it is requested by them.

TEX. CONST. art. IV, § 22.

None of these specific constitutional grants of authority to the Attorney General concern criminal proceedings or elections. The Legislature's delegation of authority to the Attorney General to prosecute violations of Texas election law therefore is not grounded in any of the specific powers given to the Attorney General

by the Constitution. To interpret "such other duties as may be required by law" as authorizing such a legislative delegation, one must interpret this general phrase without reference to and in isolation from the specific grants that precede it. This mode of interpretation disregards both the canon of ejusdem generis and the well-established rule that constitutional provisions should not be interpreted in isolation from their surroundings. *See Johnson*, 280 S.W.3d at 872 n.36.

The history of the office of the Texas Attorney General underscores his lack of authority to prosecute election-law violations. The absence of criminal prosecutorial authority in particular from the Attorney General's constitutional portfolio was the result of a conscious choice, not an oversight. Since Reconstruction, the Attorney General has been a member of the executive department. *Saldano v. State*, 70 S.W.3d 873, 879 (Tex. Crim. App. 2002). The Constitution of 1876, which establishes the structure of our government and the powers of its constitutive parts, stripped the Supreme Court of Texas of its criminal jurisdiction and thereby eliminated the sole specific constitutional authority the Attorney General had once possessed to appear in criminal cases. *See id.* at 879–81. The diffusion of criminal prosecutorial authority among a multitude of District Attorneys and County Attorneys who are outside of the executive department is in keeping with the unique structure of Texas government, which was deliberately

fractured in response to the despotic control wielded by the Reconstruction governor. *See id.* at 877–78.

In sum, neither the language nor the history of article IV, section 22 of the Texas Constitution supports the majority's holding that the Legislature may authorize the Attorney General to prosecute election-law violations. The lone interpretation of "such other duties as may be required by law" that confines the Attorney General to his constitutionally prescribed role as a member of the executive department places such authority outside his office. Interpreting this phrase to allow the Legislature to assign the Attorney General the authority to prosecute criminal violations of the election laws violates the constitutionally mandated separation of powers because it delegates to him a power more properly assigned to the judicial department. *See* TEX. CONST. art. V, § 21; *Meshell*, 739 S.W.2d at 254.

The Majority's Flawed Reasoning

The majority makes two perfunctory arguments in support of its holding. First, it cites *Saldano* for the proposition that the Legislature may delegate prosecutorial authority to the Attorney General. *See Saldano*, 70 S.W.3d at 880. Second, leaning on *Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref'd), the majority suggests that because the Constitution already assigns both executive and judicial duties to the Attorney General, the legislative assignment of additional

judicial duties to him does not amount to the delegation of a power more properly attached to another department. *See id.* at 879–80. Neither argument is persuasive.

In *Saldano*, the Court of Criminal Appeals remarked in passing that the Legislature's ability to assign other duties to the Attorney General, "presumably, could include criminal prosecution." 70 S.W.3d at 880. But this remark was unnecessary to the Court's decision and unaccompanied by any analysis. The remark therefore is obiter dictum, which is not binding. *See Garrett v. State*, 377 S.W.3d 697, 704 n.27 (Tex. Crim. App. 2012). Dictum is instructive solely to the extent that its analysis is persuasive. *See id.* Dictum bereft of analysis is not persuasive.

The majority's second point is less an argument than a non-sequitur. Though the Constitution expressly gives the Attorney General duties that are both executive and judicial in function despite his status as an officer of the executive department, it does not follow that the Legislature may give him any additional judicial duty it desires. Our Constitution forbids doing so by specifying that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." TEX. CONST. art. II, § 1. Consequently, any judicial duty the Attorney General wields must stem from an express grant of authority in the Constitution. *See Meshell*, 739 S.W.2d at 252 ("Although one department has occasionally exercised a power that would otherwise seem to fit within the power of another department,

our courts have only approved those actions when authorized by an express provision of the Constitution."). None of the Attorney General's duties set forth in article IV, section 22 of the Constitution concern criminal or electoral matters.

The Attorney General's Additional Arguments

In the State's briefing, the Attorney General suggests several additional bases for his authority to prosecute election-law violations. He first relies on longstanding practice. The Attorney General advises that the Legislature has authorized his office to prosecute violations of Texas election law since 1951. An uninterrupted tradition or longstanding practice, however, "cannot provide authority that the law does not." *Saldano,* 70 S.W.3d at 883. Our Constitution is the fundamental law of Texas. *Oakley v. State*, 830 S.W.2d 107, 109 (Tex. Crim. App. 1992). An unconstitutional statute or practice does not become a constitutional one by age or persistence.

The Attorney General further argues that the Legislature gave his office the authority to prosecute election-law violations because local officials had proved unable to address problems arising out of elections. The Attorney General observes that some cases are too politically sensitive for local prosecutors to handle. *See Medrano,* 421 S.W.3d at 880 (endorsing this rationale). But the question before us is whether the Legislature's grant of prosecutorial authority to the Attorney General in section 273.021 of the Election Code is constitutional, not whether it is wise. *See Montgomery v. State*, 170 S.W.2d 750, 753 (Tex. Crim. App. 1943) (wisdom of

legislation rests exclusively with Legislature, which may pass any law it deems proper so long as law doesn't violate Texas or United States Constitutions).

Finally, the Attorney General makes two consequentialist objections. He first contends that acceptance of Stephens's position as to the separation of powers would effectively invalidate all other statutes authorizing him to bring criminal prosecutions. He then contends that acceptance of Stephens's position likewise would invalidate statutes authorizing him to represent the State in civil suits.

As to other statutes authorizing the Attorney General to prosecute criminal offenses, it is not a foregone conclusion that their constitutional validity turns on section 273.021's. Section 273.021 differs from some of these other statutes. It authorizes the Attorney General to unilaterally initiate a prosecution for a violation of Texas election law. TEX. ELEC. CODE § 273.021(a). The same legislation also grants the Attorney General the authority to direct District Attorneys and County Attorneys to prosecute election-law violations or press these local prosecutors into service to assist in the prosecution of election-law violations. *Id.* § 273.022. In contrast, some other legislative delegations of prosecutorial authority merely allow the Attorney General to prosecute an offense if the District Attorney or County Attorney consents. *See, e.g.*, TEX. PENAL CODE § 1.09 (granting Attorney General authority to prosecute offenses occurring on or involving State property if he has consent of local District or County Attorney). Whether such conditional grants of

authority also run afoul of the separation-of-powers mandate is debatable. That's a question for another day. Section 273.021 is the only statute before us.

At any rate, statutes granting the Attorney General a prosecutorial role are relatively few in number. *See Ex parte Lo*, 424 S.W.3d 10, 30 n.2 (Tex. Crim. App. 2013) (per curiam) (op. on reh'g) (with few exceptions, Attorney General not authorized to represent State in Texas trial courts). Thus, the stakes are less than the Attorney General suggests, even if he is correct that a ruling in Stephens's favor would jeopardize other grants of prosecutorial authority. But to the extent that such a ruling could jeopardize other statutes, this is a function of the Texas Constitution's text and underlying history. The Attorney General's general lack of prosecutorial authority, while unusual in comparison to other attorneys general, reflects Texas's constitutional arrangement. *See Saldano*, 70 S.W.3d at 880–81. Alteration of this arrangement is the sole prerogative of the people. *See Oakley*, 830 S.W.2d at 109. This court is constrained to enforce the Constitution as it is written. *Id.*

As to other statutes authorizing the Attorney General to represent the State in civil suits, it is doubtful that a ruling in Stephens's favor would jeopardize them. The merit of Stephens's position turns in significant part on the Constitution's commitment of criminal matters to the judicial department. *See Meshell*, 739 S.W.2d at 254. Moreover, article VI, section 22 repeatedly authorizes the Attorney General to appear in court in civil matters on behalf of the State in certain contexts. The

Attorney General's authority to represent the State in civil matters therefore is not nearly as susceptible to attack on the basis of the separation-of-powers mandate.

CONCLUSION

Stephens is entitled to a writ of habeas corpus because the Attorney General's prosecution of her violates the Constitution's separation-of-powers mandate. I respectfully dissent from the majority's refusal to grant her petition for the writ.

Gordon Goodman
Justice

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

Justice Goodman, dissenting.

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