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Case Name: Ex parte Sam Eddie Nelson, Jr. v. The State of Texas

- OFFENSE: Post-Conviction Habeas Corpus
- COUNTY: Robertson
- CCA. CASE No. AP-74,818
- DATE OF OPINION: June 23, 2004
- DISPOSITION: Relief Denied VOTE: 7-1-1
- OPINION: Womack, J.
- TRIAL COURT: 82nd D/C; Hon. Robert Stem
- LAWYERS: Applicant Pro Se

562 Post-Conviction Habeas Corpus / Cognizibility of Issues: Applicant was convicted of felony theft in 1982. In 1994, police officers investigating a fight in a saloon found a handgun in Applicant's pocket. He was indicted for the felony offense of unlawfully carrying a handgun on premises licensed for the sale and service of alcoholic beverages. The indictment also alleged that he had been convicted in the 1982 felony theft. Because of the prior felony (as well as another that was not mentioned in the indictment), Applicant was not able to seek probation from a jury. Instead he waived trial by jury, pleaded guilty without a plea-bargain agreement, and asked the court to give him probation. This the court did on March 20, 1995, sentencing him to five years in prison suspended for a period of five years. The court entered in the judgment an affirmative finding that a deadly weapon was used in the commission of the offense. The term of community supervision was revoked in 1997, the court sentenced Applicant to five years in prison, and the judgment again contained an affirmative finding of use of a deadly weapon. In the instant application, he claimed that the deadly weapon finding was improperly entered.

Holding: We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal. Applicant could have appealed the judgment that suspended his sentence and put him on probation in 1995. He did not. He got a sentence of no more than five years, and it was suspended when, on the face of the judgment, suspension was not authorized. When his probation was revoked, he was accused of one offense that could have been punished by imprisonment for twenty years and other offenses that carried punishments of imprisonment for life -- offenses of which he said he was guilty. He was sentenced to five years. He could have appealed. But he did not. After getting to prison, he has invoked Ex parte Petty, 833 S.W.2d 145 (Tex.Cr.App. 1992), a decision of this Court that, for no recorded reason and contrary to our well-settled doctrines, permitted the writ of habeas corpus to be used as a substitute for appeal. Upon consideration of these doctrines, we hold that persons like Petty and Applicant, who could have complained of such errors in their judgments by appeal, may not raise such complaints for the first time on habeas corpus.

Concurring / Dissenting Opinions: Judge Meyers delivered a dissenting opinion, arguing as he did last week in Ex parte Townsend (see 68, Vol. 12, No. 24; June 21, 2004), that the Court's decision will "effectively do away with the writ process in Texas."

Comments: (David A. Schulman) This concept is not new, the Supreme Court having said the same thing nearly sixty years ago in Sunal v. Large, 332 U.S. 174 (1947). Thus, I ultimately do not have a problem with the Court taking this position. What I think is unfortunate is that there are numerous inmates still out there with "record" claims that were not raised on appeal, with that decision being made by counsel, who are now going to be stuck with their improperly entered deadly weapon findings, or, as we saw last week, with their improperly stacked sentences in Townsend. None of these people can say their lawyers were ineffective in not raising the issues on appeal because, at the time, they were entitled to rely on the Court's long standing policy of allowing certain record claims (such as deadly weapon findings and improperly stacked sentences) to be raised in a habeas corpus application - even when it hadn't been raised on appeal. By far the better solution would have been to declare that, from this date forward, every violation of any right sanctioned by any source must be raised on appeal or it is waived for habeas corpus purposes, but that, for those "caught" in the interim, whose lawyers may well have relied upon settled precedent from the Court in giving advice or in not raising matters thus making this "waiver" somewhat suspect, shall continue to get relief. It's interesting to note that two people are specifically mentioned in the opinion as being barred - this guy and Petty. But then Petty already got his relief.