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TERRY L. JONES, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

838 N.W.2d 51

Filed August 27, 2013. No. A-12-717.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
3. **Jurisdiction: Affidavits: Appeal and Error.** Although jurisdiction is vested in an appellate court upon timely filing of a notice of appeal and an affidavit of poverty, the trial court retains jurisdiction to determine the validity of in forma pauperis proceedings.
4. **Habeas Corpus: Judgments: Collateral Attack.** Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction.
5. **Judgments: Collateral Attack.** Only a void judgment may be collaterally attacked.
6. **Judgments: Jurisdiction: Collateral Attack.** Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
7. **Habeas Corpus: Jurisdiction: Sentences.** A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose.
8. **Habeas Corpus.** A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose.
9. **Habeas Corpus: Sentences.** The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding.
10. **Jurisdiction: Judgments: Appeal and Error.** Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void.
11. **Speedy Trial: Waiver.** A defendant waives any objection on the basis of a violation of the right to a speedy trial when he or she does not file a motion to discharge before the trial begins.

Appeal from the District Court for Lancaster County: ANDREW R. JACOBSEN, Judge. Affirmed.

Terry L. Jones, pro se.

Jon Bruning, Attorney General, and George R. Love for appellees.

PIRTLE and RIEDMANN, Judges, and MULLEN, District Judge, Retired.

PIRTLE, Judge.

INTRODUCTION

Terry L. Jones appeals the order of the district court for Lancaster County denying habeas relief and granting summary judgment against him.

BACKGROUND

In February 1995, an amended complaint was filed against Jones in the county court for Lancaster County alleging that Jones committed two criminal acts: first degree sexual assault and first degree false imprisonment. Jones was convicted in November on both counts. He was sentenced to a term of 30 to 40 years' imprisonment for the sexual assault conviction and to a consecutive term of 4 to 5 years' imprisonment for the false imprisonment conviction.

In November 2011, Jones filed a petition for writ of habeas corpus against the Nebraska Department of Correctional Services, the director of the department, and the warden of the Tecumseh State Correctional Institution (collectively the State). The petition alleged that his convictions and sentences were void or voidable because his right to a speedy trial was violated and because the district court lacked subject matter jurisdiction due to the failure to bring Jones to trial within the constitutional and statutory time period.

Prior to Jones' petition for writ of habeas corpus, Jones filed a motion to proceed in forma pauperis with his action in the trial court. The in forma pauperis request was denied, and the court found the petition proposed to be filed appeared on its face to be frivolous. The court gave Jones 30 days in which to pay a filing fee and service costs.

Although there is no evidence in the record that Jones paid the filing fee and service costs, he apparently did so. His petition for writ of habeas corpus was filed November 30, 2011.

The State filed a motion for summary judgment, stating that Jones' petition on its face did not raise an issue which is cognizable under Nebraska's habeas law and alleging that the State was entitled to summary judgment as a matter of law. The trial court held a telephonic hearing on the State's motion on July 11, 2012, and the motion was granted July 12. The court found that the issue raised by Jones could not be raised in a habeas proceeding, and the petition was dismissed. Jones timely appealed this order on August 8.

Jones filed a "Motion for Leave to Temponary [sic] Proceed in Forma Pauperis" on August 8, 2012. The motion indicated Jones' belief that he must pay the docket fee, though he did not have the funds to do so at that time. The district court's order on August 9 sustained the motion "to the extent that [Jones] is given 21 days from the date of this order to submit the filing fee for this appeal or the appeal will be dismissed."

ASSIGNMENT OF ERROR

Jones asserts on appeal that the district court erred and abused its discretion in denying the writ of habeas corpus on speedy trial grounds.

STANDARD OF REVIEW

[1] On appeal of a habeas petition, we review the trial court's factual findings for clear error and its conclusions of law de novo. *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008).

ANALYSIS

In Forma Pauperis Motion.

[2] An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Gerken v. Hy-Vee, Inc.*, 11 Neb. App. 778, 660 N.W.2d 893 (2003).

Before reaching the merits of this case, we note there were some irregularities in the trial court proceedings regarding Jones' motions for leave to proceed in forma pauperis.

The trial court's order on August 9, 2012, stated that Jones' motion to proceed in forma pauperis was sustained "to the extent that [Jones] is given 21 days from the date of this

order to submit the filing fee for this appeal or the appeal will be dismissed."

[3] Although jurisdiction is vested in an appellate court upon timely filing of a notice of appeal and an affidavit of poverty, the trial court retains jurisdiction to determine the validity of in forma pauperis proceedings. *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996). The trial court apparently determined that the in forma pauperis proceedings on appeal were valid because it granted Jones a form of "temporary" in forma pauperis status. The trial court sustained Jones' motion, but gave him 21 days from the date of the order to submit the filing fee or the appeal would be dismissed by the trial court. We note that in forma pauperis requests on appeal are either granted or denied by the trial court. There is no authority in the Nebraska Revised Statutes or the Nebraska court rules of appellate practice to support "temporary" in forma pauperis status.

In addition, although the trial court retains jurisdiction to determine the validity of in forma pauperis proceedings, after notice of appeal and poverty affidavits have been filed, the appeal is perfected and dismissal is at the discretion of the appellate court.

Further, the court's order for Jones to pay docket fees does not comply with the Nebraska court rules of appellate practice. The rules provide that docket fees shall be paid in advance as required by Neb. Rev. Stat. § 33-103 (Reissue 2008) except in specific categories of cases, including habeas corpus proceedings. See Neb. Ct. R. App. P. § 2-101(G)(1)(c) (rev. 2010). In habeas corpus proceedings, the fees are collected at the conclusion of the proceeding.

Because Jones appeals the denial of habeas corpus relief and the court rules do not require payment in advance in habeas corpus proceedings, we find this court does have jurisdiction to reach the merits on this appeal.

Habeas Corpus.

[4-7] Under Nebraska law, an action for habeas corpus is a collateral attack on a judgment of conviction. *Peterson v. Houston*, 284 Neb. 861, 864 N.W.2d 26 (2012). Only a

void judgment may be collaterally attacked. *Id*. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *Id*. Thus, a writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose. *Id*.

[8,9] A writ of habeas corpus is not a writ for correction of errors, and its use will not be permitted for that purpose. *Id*. The regularity of the proceedings leading up to the sentence in a criminal case cannot be inquired into on an application for writ of habeas corpus, for that matter is available only in a direct proceeding. *Id*.

[10,11] Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void. *Id*. The Nebraska Supreme Court has held that a defendant waives any objection on the basis of a violation of the right to a speedy trial when he or she does not file a motion to discharge before the trial begins. *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011). See Neb. Rev. Stat. § 29-1209 (Reissue 2008).

In February 1995, an amended information was filed against Jones, and on September 6, Jones filed a waiver of his speedy trial rights. He went to trial in November without asserting his speedy trial rights in a motion to discharge; he therefore waived his claim. Jones could have raised this issue in a direct proceeding, but he cannot inquire into the regularity of proceedings leading to his sentences on an application for habeas corpus. See *Peterson v. Houston, supra*.

We find the court had jurisdiction of the parties and the subject matter. Because Jones has not shown his convictions and sentences are void, Jones' appeal is meritless and the district court did not err in finding Jones did not raise an issue which could be addressed in a writ of habeas corpus proceeding.

CONCLUSION

We find that the trial court erred in sustaining Jones' motion for leave to proceed in forma pauperis on a temporary basis, but that this amounts to harmless error. Upon our review of the record, we do not find that the trial court erred when it denied Jones' writ of habeas corpus.

AFFIRMED.

ANNA MARIE RONESS, APPELLEE, V.
WAL-MART STORES, INC., APPELLANT.
837 N.W.2d 118

Filed August 27, 2013. No. A-12-963.

1. **Workers' Compensation: Judgments: Evidence: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2010), a judgment of the Workers' Compensation Court may be modified, reversed, or set aside based on the ground that there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award.
2. **Evidence: Words and Phrases.** Competent evidence means evidence that tends to establish the fact in issue.
3. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, an appellate court will not disturb the findings of fact of the trial judge unless clearly wrong.
4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence is considered in the light most favorable to the successful party, every controverted fact is resolved in favor of the successful party, and the successful party has the benefit of every inference that is reasonably deducible from the evidence.
5. **Workers' Compensation: Proof: Expert Witnesses.** To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.
6. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
7. **Workers' Compensation: Expert Witnesses: Words and Phrases.** Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient