IN THE SUPREME COURT OF TEXAS

NO. 06-0952

IN RE EDUARDO "WALO" GRACIA BAZAN

ON PETITION FOR WRIT OF MANDAMUS

Argued September 26, 2007

JUSTICE MEDINA delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE BRISTER, JUSTICE GREEN, and JUSTICE JOHNSON joined.

JUSTICE WILLETT filed a concurring opinion.

In this original mandamus proceeding, we must decide whether Chapter 87 of the Local Government Code forbids a district court from removing a county officer, who has been convicted of a felony, when the conviction is based on acts that occurred before the officer's election. The question arises because one section in Chapter 87 provides for the officer's immediate removal upon conviction, while another seemingly prohibits removal for acts that predate an election.

We construed this statute in *Talamantez v. Strauss*, 774 S.W.2d 661 (Tex. 1989) (per curiam), concluding that a county officer could not be removed from office for acts predating the officer's election. Although not mentioned in our per curiam opinion, the conviction in *Talamantez* involved a third degree felony similar to the conviction in this case and thus supports the relator's

present claim. Because we conclude that *Talamantez* was wrongly decided, however, we overrule that decision and deny the present petition for writ of mandamus.

I

In this case, Hidalgo County Constable Eduardo "Walo" Gracia Bazan was convicted of a third degree felony for theft of property by a public servant, sentenced to seven years probation, and fined $3,000.00. *See* TEX. PENAL CODE § 31.03(f). In such situations, the Local Government Code provides for the immediate removal of the county officer upon conviction. TEX. LOCAL GOV'T CODE § 87.031.[1] If the officer appeals the conviction, which Bazan has done, the removal order is superseded, unless the trial court determines that the public interest requires the officer's suspension during the appeal. *Id*. § 87.032.[2] In this instance, the trial court ordered Bazan's suspension during his appeal.

Bazan sought mandamus relief in the court of appeals, complaining that the trial court's order was contrary to *Talamantez*. As in *Talamantez*, Bazan's felony conviction is based on acts that predate his election. Bazan contends that he cannot be removed for these acts because Local Government Code section 87.001 prohibits the removal of a county officer "for an act the officer committed before election to office." *Id*. § 87.001. The court of appeals nevertheless denied relief, and Bazan filed the present petition, repeating his arguments under *Talamantez*.

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[1] Section 87.031, "IMMEDIATE REMOVAL," provides: "(a) The conviction of a county officer by a petit jury for any felony or for a misdemeanor involving official misconduct operates as an immediate removal from office of that officer. (b) The court rendering judgment in such a case shall include an order removing the officer in the judgment."

[2] Section 87.032, "APPEAL; SUSPENSION," provides: "If the officer appeals the judgment, the appeal supersedes the order of removal unless the court that renders the judgment finds that it is in the public interest to suspend the officer pending the appeal. If the court finds that the public interest requires suspension, the court shall suspend the officer as provided by this subchapter."

II

We had an opportunity to reconsider *Talamantez* shortly after our decision when another court of appeals refused to reinstate a county officer under similar circumstances. *Minton v. Perez*, 783 S.W.2d 803 (Tex. App.–San Antonio 1990, orig. proceeding). The *Minton* court was unsure from *Talamantez*'s cursory analysis how section 87.001 was to be reconciled with the constitutional provision disqualifying persons convicted of high crimes from holding public office. *See id.* at 805 ("to the extent that section 87.001 conflicts with article XVI, section 2, the constitution must prevail"). The court speculated that perhaps some undisclosed fact distinguished *Talamantez* from its case. *Id.* We heard oral argument in a subsequent mandamus proceeding involving the same parties, but dismissed the petition as moot after Minton's successful criminal appeal resulted in his reinstatement. *Minton v. Perez*, 841 S.W.2d 854, 855 (Tex. 1992). As in *Minton*, the Hidalgo County Criminal District Attorney, who is the real-party-in-interest to this proceeding, asks that we reexamine *Talamantez* in light of article XVI, section 2.

This constitutional provision states that: "Laws shall be made to exclude from office . . . [persons] who have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes." TEX. CONST. art. XVI, § 2. An individual convicted of a felony is thus ineligible to hold public office whether the conviction comes before or after the individual's election to office. *See id.*; TEX. ELEC. CODE § 141.001(4) (individual convicted of a felony ineligible to hold public office); TEX. LOCAL GOV'T CODE § 87.031 (felony conviction operates as an immediate removal from office); Op. Tex. Att'y Gen. No. H-20 (1973) ("The term 'other high crimes' includes any offense of the same degree or grade as those specifically enumerated, namely felonies."). Section

87.001 of the Local Government Code, on the other hand, broadly states that an officer may not be removed from office for acts committed before the officer's election.

This section expresses what is sometimes called "the forgiveness doctrine," the idea being that pre-election conduct does not disqualify one from holding office the same way post-election conduct does. The doctrine's rationale is that the public has the authority "to forgive the misconduct of an elected official" following a campaign in which all the facts would presumably become known. *In re Brown*, 512 S.W.2d 317, 321 (Tex. 1974). The public's power to forgive, however, is not without limits. It does not extend, for example, to felony convictions because a convicted felon is not qualified to hold public office, with or without the public's consent. TEX. ELEC. CODE § 141.001; *Hayes v. Harris County Democratic Executive Committee*, 563 S.W.2d 884, 885 (Tex. Civ. App.–Houston [1st Dist.] 1978, no writ). Thus, when the acts in question are themselves disqualifying under the constitution, they cannot be forgiven by the electorate. *In re Bates*, 555 S.W.2d 420, 428 (Tex. 1977); *In re Laughlin*, 265 S.W.2d 805, 808 (Tex. 1954); *see also McInnis v. State*, 603 S.W.2d 179, 180 n.2 (Tex. 1980).

Talamantez is not grounded on the forgiveness doctrine, but rather on the notion that section 87.001 is a general limitation on a court's authority to remove an officer under Chapter 87 of the Local Government Code. In expressing that limitation, however, *Talamantez* failed to consider the nature of the officer's prior acts or the nature of the proceeding resulting in the officer's removal. These considerations are important because a county officer may be removed for different types of misconduct that normally dictate the method of removal. Chapter 87 recognizes this by

distinguishing between civil and criminal removal proceedings. The key to understanding the limitation expressed in section 87.001 lies in this distinction.

Chapter 87 explains civil prosecutions in subchapter B.[3] TEX. LOCAL GOV'T CODE §§ 87.011-87.019. Under this subchapter, a county officer may be removed for a number of reasons that are not necessarily criminal, such as incompetency, official misconduct, intoxication, or the failure to execute a bond. *Id*. §§ 87.013-.014. Subchapter B details who may initiate the proceeding, the requisites of the petition and citation, the conduct of the trial, appeal, and other matters. *Id*. §§ 87.011-87.019. Unlike a criminal trial, the burden is proof by a preponderance of the evidence. *See Huntress v. State*, 88 S.W.2d 636, 643-44 (Tex. Civ. App.–San Antonio 1935, no writ) (civil removal proceeding not dependent on proof of criminal charges); *cf*. *In re Brown*, 512 S.W.2d at 319-20 (concerning removal of a district judge).

Subchapter C, on the other hand, connects its removal proceeding directly to the criminal prosecution. TEX. LOCAL GOV'T CODE §§ 87.031-.032. It does not incorporate subchapter B's procedural detail but rather simply directs the criminal court to include an order removing the county officer from office in the event of conviction. *Id*. § 87.031. Removal in this instance depends on proof beyond a reasonable doubt. *See* TEX. PENAL CODE § 2.01 ("no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt").

Section 87.001 is the only provision in subchapter A, the subchapter reserved for provisions of general applicability. Again, it provides that "[a]n officer may not be removed under this chapter

[3] Chapter 87 is divided into four subchapters: (A) General Provisions, (B) Removal by Petition and Trial, (C) Removal by Criminal Conviction, and (D) Filling of Vacancies.

for an act the officer committed before election to office." *Id.* § 87.001. *Talamantez* applied section 87.001 to a criminal removal proceeding, probably because of the provision's purported general application, but that was a mistake. The history of this section reveals that the Legislature intended it only as a limitation on a civil removal proceeding under subchapter B; it is not a limitation on the removal of a county officer incident to a criminal prosecution. To confirm this intent, we trace the statute back to its origin.

III

The removal provisions at issue were first enacted in 1879, only three years after the adoption of the current constitution. In that year, the Sixteenth Legislature adopted title 66, chapter 2 of the Revised Code providing for the "Removal of County and Certain District Officers."[4] The removal provisions in the Local Government Code are substantively the same as this original legislation, but their organization has been changed. While the current statute begins with section 87.001's limitation for pre-election acts, the 1879 statute began with the two provisions relevant to criminal prosecution. TEX. REV. CIV. STAT. arts. 3388-3389 (1879). These provisions continue today as subchapter C, sections 87.031 and 87.032 of the Local Government Code, but have been moved from the statute's beginning.

After the two criminal provisions, the 1879 statute shifted to the civil proceeding, listing the grounds for such removal as incompetency, official misconduct, and drunkenness. *Id.* art. 3390 . Two pages of definitions and procedures followed, most of which are carried forward in Chapter 87,

[4] The Texas State Law Library has archived the 1879 Revised Statutes of Texas on its web site at http://www.sll.state.tx.us/codes/1879/1879.html.

subchapter B.[5] *Id*. arts. 3391-3417. As in subchapter B, the 1879 statute provided that a civil removal action could be commenced on the sworn petition of any citizen who had lived in the county for six months and was not himself under indictment. *Id*. arts. 3401-3402. The 1879 statute then explained the procedure for conducting the civil removal proceeding, adding near its end that no officer should be removed for prior acts: "No officer shall be prosecuted or removed from office for any act he may have committed prior to his election to office." *Id*. art. 3415.

The 1879 statute eventually became part of Title 100 of the Revised Civil Statutes of 1925. Title 100 faithfully tracked the 1879 statute, beginning with the two criminal provisions, then detailing the civil proceeding. *See* TEX. REV. CIV. STAT. arts. 5968-5987 (1925).[6] Again, as part of the discussion on civil removal, the 1925 statute added that no officer should be removed "for any act committed prior to his election to office." *See* TEX. REV. CIV. STAT. art. 5986 (1925). The statute's reorganization did not occur until 1987, when these removal provisions were recodified in Chapter 87 of the Local Government Code as part of the Legislature's statutory revision program. Act of 1987, 70th Leg., R.S., ch. 149, § 1.001, 1987 Tex. Gen. Laws 714.

It was then that the provision prohibiting removal for pre-election acts was moved to the front of the statute and its language modified to read: "An officer may not be removed under this chapter

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[5] The 1879 statute included an archaic distinction between "habitual drunkenness" and "drunkenness," providing that a habitual drunk might be removed from office regardless of whether the condition affected the officer's performance whereas incapacity and three convictions were necessary to remove a more infrequent drunk from office. TEX. REV. CIV. STAT. arts. 3395-3399 (1879). That distinction has not survived.

[6] The Texas State Law Library has archived the 1925 Revised Statutes of Texas on its web site at http://www.sll.state.tx.us/codes/1925/1925.html.

for an act the officer committed before election to office." TEX. LOCAL GOV'T CODE § 87.001.[7] The provision was also labeled as one of general application at that time.

The 1987 recodification was part of the Legislature's continuing effort to make the laws of this state more accessible and understandable by reorganizing provisions and updating language. Act of 1987, 70th Leg., R.S., ch. 149, § 1.001, 1987 Tex. Gen. Laws 714. The Legislature, however, expressly disclaimed the intent that its revisions should affect any substantive changes. *Id*. *Talamantez* followed shortly after these revisions, applying section 87.001's limitation broadly to prevent the removal of any county officer for pre-election acts, even those resulting in a felony conviction. Because our application was a substantive departure from prior law, it was contrary to the Legislature's declared intent. *Id*.; *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 654-55 (Tex. 1989). Properly construed, section 87.001's limitation for pre-election acts must apply only to the civil removal proceedings detailed in the chapter, not to removals that are incident to independent criminal prosecutions. This construction is consistent with prior law and the underlying constitutional provisions.

Annotations to the 1879 civil removal provisions, now found in Chapter 87's subchapter B, reference two constitutional provisions: article V, section 24 and article XV, section 7. *See* TEX. REV. CIV. STAT. arts. 3390-3391 (1879).[8] The first provides that county officers "may be removed

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[7] In 1879, this provision read: "No officer shall be prosecuted or removed from office for any act he may have committed prior to his election to office." TEX. REV. CIV. STAT. art. 3415 (1879) [art. 5986 (1925)]. This provision was amended in 1939 to remove the prohibition against prosecution. Act approved June 1, 1939, 46th Leg., R.S., ch.1, § 1, vol. I, 1939 Tex. Gen Laws 499. In 1987,the phrase "under this chapter" was added along with other minor linguistic changes. Acts of Sept. 1, 1987, 70th Leg., R.S., ch. 149, § 1, 1987 Tex. Gen. Laws 805.

[8] *See* note 4, *supra*.

by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury." TEX. CONST. art. V, § 24. The other directs the Legislature to "provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution." *Id.* art. XV, § 7. Subchapter B is the Legislature's response to these constitutional directives.

The criminal provisions in the 1879 statute, now Chapter 87's subchapter C, are not annotated similarly because they have a different constitutional source. That source is article XVI, section 2, which directs that laws be made to exclude from office those convicted of high crimes. *Id.* art. XVI, § 2. Because the constitution makes no allowance for high crimes that predate an officer's election, section 87.00l's limitation for prior acts can only refer to official misfeasance that is, itself, not disqualifying and thus is prosecuted in a civil removal proceeding.[9] Accordingly, the trial court did not abuse its discretion in suspending Bazan from office pending the appeal of his felony conviction.

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The petition for writ of mandamus is denied.

David M. Medina
Justice

Opinion delivered: March 28, 2008

[9] *See Reeves v. State ex rel. Mason*, 267 S.W. 666, 669 (Tex. 1924) (affirming court of appeals' holding that art. 6055 [now Tex. Local Gov't Code § 87.001] was intended to prevent civil removal for official misconduct in a prior term); *Williams v. State*, 150 S.W.2d 803, 805 (Tex. Crim. App. 1941) (acts barring prosecution or removal means "offense[s] committed relating to misfeasance of office," not all criminal acts); *see also* Tex. Atty Gen. Op. GM-749 (1939) (art. 5986 [now § 87.001] applies only to civil actions for the removal of officer and has no application to the prosecution of officers for violations of the penal statutes).