IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0095-20

BRYAN WAYNE WHILLHITE, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRD COURT OF APPEALS TOM GREEN COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

Appellant was convicted of two offenses: sexual assault of a child and online solicitation of a child. TEX. PENAL CODE §§ 29.03 & 33.021(b). After he pled guilty to both offenses, the trial court placed him on deferred adjudication for ten years. When the State later moved to revoke his deferred adjudication community supervision, Appellant pled true to the allegations, and the trial court assessed his punishment in each case at seventy-five years' confinement in the penitentiary, the two sentences to run concurrently.

On appeal from the revocation proceeding, Appellant's attorney filed an *Anders* brief, along with a motion to withdraw. *Anders v. California*, 386 U.S. 738 (1967). Appellant was given the opportunity to file a *pro se* brief, and he apparently did so. *See Kelly v. State*, 436 S.W.3d 313, 319–21 (Tex. Crim. App. 2014). Agreeing with counsel that the record presented no arguable grounds for appellate relief, the court of appeals granted appellate counsel's motion to withdraw and affirmed the judgment adjudicating Appellant's guilt. *Whillhite v. State*, No. 03-18-00766-CR, 2020 WL 54025 (Tex. App.—Austin Jan. 3, 2020) (mem. op., not designated for publication).

Today this Court remands the cause to the court of appeals for further proceedings with newly appointed counsel. The Court does so in order to permit Appellant to pursue an argument that at least his conviction for online solicitation should be reversed because it was predicated upon a penal statute that had been declared by this Court to be facially unconstitutional in *Ex parte Lo*, 424 S.W.3d 10, 27 (Tex. Crim. App. 2013), and later, *void ab initio* in *Ex parte Smith*, 463 S.W.3d 890 (Tex. Crim. App. 2015). The court of appeals declined to reach the issue, holding that it could not be raised for the first time in an appeal from a revocation proceeding. *Whillhite*, at *1 n.1.

Relying upon *Ex parte Shay*, 507 S.W.3d 731, 735 (Tex. Crim. App. 2016), the Court now holds that a conviction obtained under a penal provision that had previously been declared facially unconstitutional may be challenged for the first time, even in an appeal from a revocation proceeding. Majority Opinion at 4; *see also Nix v. State*, 65 S.W.3d 664, 667–68 (Tex. Crim. App. 2001) (recognizing two exceptions to the rule

announced in *Manuel v. State*, 994 S.W.2d 658 (Tex.Crim.App.1999), that "a defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding . . . only in appeals taken when deferred adjudication community supervision is first imposed," one of which is the "void judgment" exception). The Court holds that because this argument presents a colorable ground for appellate relief, the court of appeals should have remanded the case to the trial court, consistent with *Anders*, for appointment of new appellate counsel to pursue that ground—"and any other ground that might support the appeal." Majority Opinion at 4.

In *Ex parte Smith*, I dissented to the Court addressing an argument based on *Lo* when it was raised for the first time, not on direct appeal, but on discretionary review. 463 S.W.3d at 898 (Yeary, J., concurring and dissenting). I argued then that, in our capacity as a discretionary review court—because we address only issues "decided" by the courts of appeals—we should not address such an issue, even though it involved a conviction obtained under a statute that had been previously declared unconstitutional. *Id*. at 900. I persist in that view.

I also remain dubious of the Court's holding in *Lo* and, indeed, of the overbreadth doctrine in general, for reasons I have expressed in other separate opinions in the past. *See, e.g.*, *Ex parte Fournier*, 473 S.W.3d 789, 803 (Tex. Crim. App. 2015) (Yeary, J., dissenting) ("The windfall that inevitably flows from judicially declaring an overbroad penal provision to be facially unconstitutional need not extend so far as to apply retroactively to grant habeas corpus relief to applicants who have suffered no First

Amendment infraction themselves."); *State v. Johnson*, 475 S.W.3d 860, 885–93 (Tex. Crim. App. 2015) (Yeary, J., dissenting) (advocating that the Court should limit application of the overbreadth doctrine to assess the claims of litigants who can show that their own First Amendment rights have been violated; otherwise, the litigants lack standing to challenge the statute under state law). *See also United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1588 (2020) (Thomas, J., concurring) ("[The overbreadth doctrine] seemingly lacks any basis in the text or history of the First Amendment, relaxes the traditional standard for facial challenges, and violates Article III principles regarding judicial power and standing. In an appropriate case, we should consider revisiting this doctrine.").

But this case is in a different posture than *Smith*. In the face of a motion from appellate counsel to withdraw because of the absence of any issue that could plausibly be argued on appeal, it was the court of appeals' duty under *Anders* to determine whether any such issue exists. Because of that, I agree with the Court that there is at least an argument to be made that Appellant might be able to obtain relief under *Lo*, even on an appeal from the revocation proceeding. (On the other hand, for the same reason, the case presents a basis for the State to argue that *Lo* was wrongly decided.) And, in any event, there is certainly an argument to be made on direct appeal that Appellant's trial counsel performed in a constitutionally ineffective manner when he let his client plead guilty under a penal provision that this Court (rightly or not) had already declared unconstitutional.

I observe also that the Court's remand today does not purport to affect the court of appeals' judgment affirming Appellant's conviction for sexual assault of a child. With these observations, I concur in the Court's judgment.

FILED: June 10, 2020
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