



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**

Per curiam. Yeary, J., filed a concurring opinion.

OPINION

Appellant was charged with the offenses of sexual assault of a child and online solicitation of a minor. TEX. PENAL CODE §§ 29.03; 33.021(b). Several months later, the Court decided *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013), holding that Penal Code section 33.021(b), *Online Solicitation of a Minor*, was unconstitutionally overbroad. Appellant pled guilty to both offenses and was placed on deferred adjudication community supervision. The State later moved to revoke appellant's community supervision. The trial court held a hearing, adjudicated appellant guilty as to each offense,

and sentenced him to 75 years imprisonment for each offense, to run concurrently.

On appeal from the revocation proceedings, appellant's court-appointed counsel filed a motion to withdraw and an *Anders* brief. *See Anders v. California*, 386 U.S. 738 (1967). The court of appeals conducted an independent review of the record, found no reversible error, agreed with counsel that there were no meritorious grounds for appeal, and granted the motion to withdraw. *Whillhite v. State*, No. 03-18-00766-CR slip op. at 2-3 (Tex. App.–Austin Jan. 3, 2020)(not designated for publication). In a footnote, the court pointed out that Penal Code § 33.021(b) had been found unconstitutional in *Lo*, but said that a challenge to appellant's conviction under that provision was not reviewable in an appeal of the revocation proceeding. *Id.* at 1 n.1. The court stated that the proper vehicle for such a challenge would be a habeas proceeding under article 11.07. TEX. CODE CRIM. PROC. Art. 11.07.

Appellant has filed a petition for discretionary review citing this Court's opinion in *Smith v. State*, 463 S.W.3d 890 (Tex. Crim. App. 2015), and suggesting that the court of appeals should have addressed the effect of *Lo* on his conviction under section 33.021(b).

In *Smith*, we examined the effect of our holding in *Lo* on the defendant's conviction under section 33.021(b), and explained that a statute that has been declared unconstitutional is considered "void from its inception" or void *ab initio*. *Smith*, 463 S.W.3d at 895.

Further, because "one consequence of declaring a penal statute unconstitutional and void is to put a conviction pursuant to that statute into the *Marin* 'category one'--an absolute right or legal requirement that is so fundamental that it cannot be forfeited or waived by those

complaining thereafter,” the defendant in *Smith* could raise the issue for the first time on discretionary review. *Id.* at 896.

Appellant’s case is in a different procedural posture than *Smith*’s, and the court of appeals viewed that difference as fatal to its review. It’s true that “the general rule is that an attack on the original conviction in an appeal from revocation proceedings is a collateral attack and is not allowed.” *Wright v. State*, 506 S.W.3d 478, 481 (Tex. Crim. App. 2016). However, there are exceptions to this rule, including the “void judgment exception.” *Nix v. State*, 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001)(holding void judgment exception applies in context of appeal from deferred adjudication revocation proceedings in same way it applies in appeal from regular community supervision). Under the void judgment exception, the claimed defect is one that rendered the original judgment of conviction void or a nullity. The Court has identified at least four situations in which a judgment might be void, one of which is that the trial court lacks subject matter jurisdiction over the offense charged. *Id.* at 668. And, in *Ex parte Shay*, we held that the effect of a conviction under a statute later held unconstitutional is akin to a loss of subject matter jurisdiction. 507 S.W.3d 731, 735 (Tex. Crim. App. 2016)(“Because *Smith* tells us that Shay’s statute under which he was convicted ‘is as if it never existed’ then . . . the statute’s ‘non-existence’ undermines the trial court’s subject-matter jurisdiction as well. Indeed, *Smith*’s logic lends support to Shay’s argument: If there is no law supporting Shay’s conviction, then there is no law over which the district court had subject-matter jurisdiction”).

Our opinions in *Smith*, *Nix*, and *Shay*, at the very least, present an arguable ground

for relief that could be raised even on appeal from the revocation proceedings: if the trial court had no subject matter jurisdiction over appellant's prosecution under section 33.021(b) because the statute had been declared unconstitutional, then appellant's conviction was void and he could raise the issue on appeal from the revocation proceedings. As such, the court of appeals was required to abate and remand to the trial court with orders to appoint counsel to present this and any other ground that might support the appeal. *See Stafford v. State*, 813 S.W.2d 503, 511 (Tex. Crim. App. 1991); *see also In re Schulman*, 252 S.W.3d 403 (Tex. Crim. App. 2008).

We grant grounds (1) and (2) of appellant's petition for discretionary review,¹ vacate the judgment of the court of appeals, and remand this case to that court for further actions consistent with this opinion.

Delivered June 10, 2020
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¹ Ground (3) is refused with prejudice.