Affirmed and Opinion Filed May 11, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01357-CR

EX PARTE MICHAEL CHARLES MCDERMOTT

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-80437-2015

MEMORANDUM OPINION ON REHEARING

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Lang

Before the Court is Michael Charles McDermott's motion for rehearing. We deny the motion. On our own motion, we withdraw our opinion of April 20, 2017 and vacate the judgment of that same date. This is now the opinion of the Court.

This is an accelerated appeal from two trial court orders summarily denying Michael Charles McDermott's pretrial applications for writ of habeas corpus. In two issues, McDermott, who stands charged with fraud under The Securities Act ("Act"), asserts the trial court erred in denying habeas relief because the Act is unconstitutional. We conclude McDermott's claims are not cognizable by pretrial habeas. Accordingly, we affirm the orders.

I. BACKGROUND

McDermott was indicted in February 2015. The indictment alleged in relevant part that "[o]n or about" May 28, 2009 through March 29, 2010, McDermott

> did then and there, directly and through agents, sell and offer for sale interests in the Resale Life Insurance Policy Program (hereinafter referred to as the "RSLIP Program"), being a security, to wit: an evidence of indebtedness, promissory note, and an investment contract . . . [and] committed fraud in connection with the sales and offers for sale of said securities[.]

See Act of May 20, 2003, 78th Leg., R.S., ch. 108, 2003 Tex. Gen. Laws 147 (amended 2011) (current version at Tex. Rev. Civ. Stat. Ann. art. 581-29 (West Supp. 2016)); *see also* Tex. Rev. Civ. Stat. Ann. art. 581-4(A) (West 2010).

McDermott challenged the constitutionality of the Act and sought dismissal of the indictment by filing an "application for writ of habeas corpus to prohibit prosecution on vagueness grounds" and an "application for writ of habeas corpus to prohibit retroactive application of a judicial decision." Both applications asserted the instruments he allegedly sold and offered for sale were not "an evidence of indebtedness, promissory note, and investment contract" as alleged in the indictment, but rather were "life settlements," which "refer to insurance policies." In both applications, McDermott characterized his position as facial challenges to the constitutionality of the Act. Finally, both applications relied on *Griffitts v. Life Partners, Inc.*, No. 10-01-00271-CV, 2004 WL 1178418 (Tex. App.—Waco May 26, 2004, no pet.) (mem. op., not designated for publication), and *Life Partners, Inc. v. Arnold*, 464 S.W.3d 660 (Tex. 2015). *Griffitts*, a 2004 Waco Court of Appeals decision, affirmed a summary judgment that determined the life settlements at issue there were not securities. *Griffitts*, 2004 WL 1178418 *2-3. *Arnold*, a 2015 Texas Supreme Court decision, held the life settlements before it were securities. *Arnold*, 464 S.W.3d at 662.

Specifically, the application raising vagueness asserted McDermott was denied fair notice that his alleged conduct constituted a criminal offense because the Act's definition of "security" did not include "life settlement" and specifically excluded "any insurance policy, endowment policy, annuity contract, optional annuity contract, or any contract or agreement in relation to

and in consequence of any such policy or contract."[1] Additionally, that application asserted the apparent opposite results in *Griffitts* and *Arnold* created a "state of uncertainty" as to whether life settlements were securities and allowed for "arbitrary enforcement" as reflected by his being prosecuted in spite of *Griffitts*. The application "to prohibit retroactive application of a judicial decision" contended *Arnold* expanded the Act's definition of "security" to include life settlements, and applying that decision retroactively deprived McDermott of fair notice because at the time he engaged in the alleged conduct, his "actions were approved publicly in law" by *Griffitts*,

The State responded to both applications asserting, among other arguments, that McDermott's contentions were not cognizable in a pretrial habeas action. On appeal, the parties' arguments generally mirror their arguments to the trial court.

II. PRETRIAL HABEAS

A. Applicable Law

1. Cognizability

A pretrial writ of habeas corpus is an extraordinary writ appropriate generally when resolution of the question presented would result in the applicant's immediate release and would not be aided by the development of a record. *See Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010). On appeal, a reviewing court should entertain an application for pretrial writ

[1] The Act's definition of "security" provides that the term

> shall include any limited partner interest in a limited partnership, share stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust certificate, preorganization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title, or any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as a security, whether similar to those here referred to or not. The term applies regardless of whether the 'security' or 'securities' are evidence by a written instrument. Provided, however, that this definition shall not apply to any insurance policy, endowment policy, annuity contract, optional annuity contract, or any contract or agreement in relation to and in consequence of any such policy or contract, issued by an insurance company subject to the supervision or control of the Texas Department of Insurance when the form of such policy or contract has been duly filed with the Department as now or hereafter required by law.

See Tex. Rev. Civ. Stat. Ann. art. 581-4(A).

of habeas corpus when no adequate remedy by appeal exists and "the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review." *See Ex parte Weise*, 55 S.W.3d 617, 619, 620 (Tex. Crim. App. 2001). Whether a claim is cognizable on pretrial habeas is a threshold issue that must be addressed before the merits of the claim may be resolved. *See Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). A facial challenge to the constitutionality of the statute that defines the offense may be brought by pretrial habeas, but a complaint that the statute "as applied" is unconstitutional may not. *Id.* A facial challenge asserts the statute in question operates unconstitutionally in all possible circumstances, and requires courts to consider only how the statute is written, not how it operates in practice. *Salinas v. State*, 464 S.W.3d 363, 368 (Tex. Crim. App. 2015). An "as applied" challenge depends on the development of a record. *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011). It concedes the general constitutionality of the statute, but contends the statute is unconstitutional as applied to particular facts and circumstances. *Id.*

2. The Due Process Clause

The Due Process Clause of the Fifth Amendment is applicable to the states by the Fourteenth Amendment. *See Ex parte Bradshaw*, 501 S.W.3d 665, 677 (Tex. App.—Dallas 2016, pet. ref'd). Due process requires criminal statutes to provide fair notice of what conduct is forbidden before making the conduct criminal so that individuals have, at the time they engage in conduct, fair warning of whether their conduct will give rise to criminal penalties. *See id.* Deprivation of the right to fair notice may result from (1) vague statutory language that fails to specify a standard of conduct and a standard for determining when the statute is violated; or (2) "an unforeseeable and retroactive judicial expansion of statutory language" that alters the definition of an offense, the range of punishment, or any substantive defense. *See Coates v. City*

of Cincinnati, 402 U.S. 611, 614 (1971) (statute vague where "no standard of conduct is specified at all"); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) ("A deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."); *State v. Holcombe*, 187 S.W.3d 496, 499 (Tex. Crim. App. 2006) ("a statute is void for vagueness if its prohibitions are not clearly defined"); *Proctor v. State*, 967 S.W.2d 840, 845 (Tex. Crim. App. 1998) (judicial decision that alters definition of offense, punishment range, or substantive defenses available may not be applied retroactively).

3. Life Settlements

"Life settlements" refer to life insurance policies that are bought from insureds for a "cash settlement" and the interests of which are then sold to investors. *See Arnold*, 464 S.W.3d at 663; *see also* TEX. INS. CODE ANN. §1111A.002 (West Supp. 2016). In *Arnold*, the Texas Supreme Court concluded, based on undisputed summary judgment evidence, that particular transfers of interests in insurance policies to third party purchasers were sales of securities under the Act because they amounted to investment contracts. *Arnold*, 464 S.W.3d at 663, 667. There, Life Partners, Inc. and others engaged in the business of buying existing life insurance policies from insureds for a "cash settlement" that was less than the death benefit and was based on life expectancy, the benefit amount, and "other related factors." *Id.* at 663-64. Life Partners then sold interests in the policies' future benefits to others for investment purposes. *Id.* at 663. The return depended on how well Life Partners predicted the insureds' life expectancies. *Id.* at 664. In concluding the life settlement agreements at issue there were investment contracts and thus securities under the Act, the court "confirm[ed] and clarif[ied]" that

> an 'investment contract' for purposes of the [Act] means a contract, transaction, or scheme through which a person pays money to participate in a common venture or enterprise with the expectation of receiving profits, under circumstances in which the failure or success of the enterprise, and thus the

> person's realization of the expected profits, is at least predominantly due to the entrepreneurial or managerial, rather than merely ministerial or clerical, efforts of others.

Id. at 681. In so confirming, the court noted it was not creating new law, but was relying on "decades" of decisions "from throughout the country," including Texas. *See id.* at 680, 685.

B. Standard of Review

An appellate court reviews de novo a facial challenge to the constitutionality of a statute. *See Ex parte Paxton*, 493 S.W.3d 292, 297, 304 (Tex. App.—Dallas 2016, pet. ref'd).

C. Application of Law to Facts

We have reviewed the trial court's ruling de novo and agree with the State that McDermott's claims are not cognizable by pretrial habeas. Although he characterizes his claims as facial challenges, he does not assert the Act operates unconstitutionally in all possible circumstances. *See Salinas*, 464 S.W.3d at 368. In fact, he specifically states in his brief that the "question in this appeal is not whether the words 'investment contract,' 'note,' or 'evidence of indebtedness' (per the indictment) give fair notice under the Due Process Clause." The crux of McDermott's two issues is that he had no fair warning that selling or offering for sale life settlements constituted a criminal offense because the Act specifically excludes "any contract or agreement in relation to and in consequence of any [] policy or contract issued by an insurance company." However, to decide McDermott's issues, we must review the record to determine the exact nature of the instruments he allegedly sold or offered for sale. *See Arnold*, 464 S.W.3d at 682-84 (concluding the life settlements at issue there were securities "based on the undisputed material facts").

We conclude McDermott's claims are "as applied" challenges to particular facts and circumstances, requiring us to look beyond how the Act is written. *See Salinas*, 464 S.W.3d at

368. Accordingly, they are not cognizable by pretrial habeas. *See Ellis*, 309 S.W.3d at 79. We resolve McDermott's issues against him.

III. CONCLUSION

We affirm the trial court's orders.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE MICHAEL CHARLES MCDERMOTT

No. 05-16-01357-CR

On Appeal from the 380th Judicial District Court, Collin County, Texas
Trial Court Cause No. 380-80437-2015.
Opinion delivered by Justice Lang. Justices Fillmore and Schenck participating.

Based on the Court's opinion of this date, the trial court's orders denying relief on the applications for writ of habeas corpus are **AFFIRMED**.

Judgment entered this 11th day of May, 2017.