Opinion issued December 29, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-22-00196-CR

CHRISTOPHER CRENSHAW, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1172270

MEMORANDUM OPINION

A jury convicted appellant Christopher Crenshaw of capital murder, *see* TEX. PENAL CODE § 19.03(a)(2), and the trial court assessed his punishment at life imprisonment. On appeal, Crenshaw challenges the constitutionality of Texas Penal Code section 12.31(a)(1)—the statute governing the sentencing of juvenile offenders

convicted of capital murder—as applied to him. *See* TEX. PENAL CODE § 12.31(a)(1). We conclude that Crenshaw's challenge was not preserved and affirm the trial court's judgment.

Background

In November 2007, Carltrell Odom and two of his friends, Raul Duran and Vinny Lemus, were talking in the parking lot of Odom's apartment complex when a group of four young men approached and surrounded them. One yelled, "This is a [expletive] robbery," and they pulled out guns, ordering Odom and his friends to the ground. One of the men took Duran's cell phone. As Odom moved to the ground, one of the attackers, Allan Nickerson, struck Odom on the head with a handgun. Odom pushed the handgun away from his face and began running away. Nickerson chased, shooting at Odom. The first shot missed, but the second shot hit Odom in the back. With Odom on the ground, Nickerson approached and fired a third time into the back of Odom's head, killing him. A black sedan approached, and the four attackers entered the car and drove away.

Crenshaw, a juvenile, was arrested for his role in the incident and charged with capital murder. *See* TEX. PENAL CODE § 19.03(a)(2). Crenshaw's case was transferred from juvenile court to adult court. At trial, a jury convicted him, and the trial court sentenced him to life imprisonment without the possibility of parole.

Crenshaw challenged his sentence as a violation of *Miller v. Alabama*, 567 U.S. 460, 470 (2012), a case holding that statutory sentencing schemes that automatically impose a life-without-parole sentence on juvenile defendants violate the prohibition of cruel and unusual punishment in the Eighth Amendment to the United States Constitution. The Texas Court of Criminal Appeals vacated Crenshaw's sentence. *Ex parte Crenshaw*, No. WR-90,518-01, 2019 WL 5783912 (Tex. Crim. App. Nov. 6, 2019) (per curiam) (orig. proceeding, not designated for publication). Crenshaw was remanded to the custody of the Harris County Sheriff for further sentencing proceedings to assess his sentence at (1) life with the possibility of parole or (2) life without parole after consideration of his individual conduct, circumstances, and character.

On remand, Crenshaw moved to be sentenced within the range of a first-degree felony. The trial court denied Crenshaw's motion and sentenced Crenshaw to life imprisonment with the possibility of parole.

Crenshaw appeals the trial court's denial of his motion to determine sentencing range.

Constitutionality of Sentencing Range

In his sole issue, Crenshaw challenges the constitutionality of Texas Penal Code section 12.31(a)(1) as applied to him. Specifically, that section 12.31(a)(1) does not allow for individualized or discretionary sentencing of juvenile offenders

convicted of capital felonies. The State contends that Crenshaw did not preserve the issue for appeal and, even if he did, his sentence is not unconstitutional.

A. Standard of Review

"Whether a statute is facially constitutional is a question of law that we review de novo." *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). We do not determine the constitutionality of a statute "unless such a determination is absolutely necessary to decide the case in which the issue is raised." *Salinas v. State*, 464 S.W.3d 363, 366 (Tex. Crim. App. 2015) (quoting *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 909 (Tex. Crim. App. 2011)).

B. Analysis

Crenshaw moved for the trial court to determine his sentencing range. Crenshaw argued that the application of section 12.31(a)(1) would be an ex post facto violation and that a life sentence with the possibility of parole after 40 years violates *Miller* and the Eighth Amendment. Crenshaw's motion did not describe his remaining challenge as a facial or an as-applied challenge. Crenshaw does not argue on appeal that there is an ex post facto violation. But he does make an as-applied challenge to the constitutionality of Texas Penal Code section 12.31(a)(1). We address the only issue Crenshaw has raised on appeal.

An "as-applied" challenge to a statute asserts that a statute, although generally constitutional, operates unconstitutionally as to the claimant because of their

circumstances. *Gillenwaters v. State*, 205 S.W.3d 534, 536 n.3 (Tex. Crim. App. 2006). In contrast, a "facial" challenge to a statute asserts that the statute always operates unconstitutionally. *Id*. at n.2. Both facial and as-applied challenges must be preserved for appellate review. TEX. R. APP. PROC. 33.1(a); *Karenev v. State*, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009) (holding that defendant may not raise for first time on appeal facial challenge to constitutionality of statute); *Curry v. State*, 910 SW.2d 490, 496 (Tex. Crim. App. 1995) (holding that defendant waived as-applied challenge to constitutionality of statute by failing to make specific objection at trial). Constitutional challenges to a statute can be forfeited by the failure to object at trial. *Curry*, 910 S.W.2d at 496 & n.2; *see Mendez v. State*, 138 S.W.3d 334, 342 (Tex. Crim. App. 2004).

While Crenshaw did not identify his challenge as either a facial or an as-applied challenge in the trial court, his motion did not discuss circumstances unique to him that would make the application of section 12.31(a)(1) unconstitutional as applied to him. But on appeal, his argument focuses on his age and the fact that he was not the shooter. These are two different types of challenges.

Crenshaw's challenge at the trial court was that a life sentence with the possibility of parole after 40 years violated the Eighth Amendment's prohibition against cruel and unusual punishment and the requirements of *Miller*. This argument is best characterized as a facial challenge. *See Gillenwaters*, 205 S.W.3d at 536 n.2.

Crenshaw's argument on appeal is an as-applied challenge because he raises his specific age and role in the incident as issues that must be considered in the statute's application. *See Bynum v. State*, 767 S.W.2d 769, 774 (Tex. Crim. App. 1989) (requiring showing that statute is unconstitutional as applied to defendant in their situation). But in his motion below, Crenshaw made no argument about his age or role in the incident. Consequently, the trial court did not have the opportunity to consider these arguments.

Crenshaw cannot raise his as-applied challenge for the first time on appeal. *Flores v. State*, 245 S.W.3d 432, 437 n.14 (Tex. Crim. App. 2008) (noting "well-established requirement that appellant must preserve an 'as applied' constitutional challenge by raising it at trial"). We therefore hold Crenshaw's as-applied challenge was not preserved for our review and is waived. TEX. R. APP. PROC. 33.1(a); *Curry*, 910 SW.2d at 496 & n.2. We overrule Crenshaw's sole issue.

Conclusion

We affirm the trial court's denial of Crenshaw's motion to determine sentencing.

Sarah Beth Landau
Justice

Panel consists of Chief Justice Radack and Justices Landau and Hightower.

Do not publish. TEX. R. APP. P. 47.2(b).