COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00465-CR

EX PARTE DENNIS GLENN JANSSEN

FROM THE 213TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. C-213-010865-1060283-AP

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Dennis Glenn Janssen appeals the trial court's denial of his application for writ of habeas corpus in which he argued that the statute under which he was placed on deferred-adjudication community supervision was facially unconstitutional. *See* Tex. Code Crim. Proc. Ann. art. 11.072 (West

[1]*See* Tex. R. App. P. 47.4.

2015). Because the trial court did not abuse its discretion by finding that Janssen had forfeited the constitutional challenges raised in his application for writ of habeas corpus, we will affirm.

II. PROCEDURAL BACKGROUND

In 2008, Janssen entered an open plea of guilt to the offense of online solicitation of a minor under age fourteen. The trial court deferred a finding of guilt, placed Janssen on ten years' deferred-adjudication community supervision, and assessed a $3,000 fine. Janssen did not appeal from the judgment placing him on deferred-adjudication community supervision.

In 2016, Janssen filed an application for writ of habeas corpus in which he argued that his deferred-adjudication community supervision is illegal because the statute under which he was charged—Texas Penal Code section 33.021(c)—is unconstitutionally overbroad such that it violates the First Amendment and is also unconstitutionally vague such that it violates the Fourteenth Amendment. *See* Tex. Penal Code Ann. § 33.021(c) (West Supp. 2016). In response, the State filed a memorandum, arguing that Janssen had forfeited his constitutional challenges and that section 33.021(c) is not facially unconstitutionally overbroad or facially unconstitutionally vague, and included proposed findings of fact and conclusions of law. The trial court adopted the State's memorandum and proposed findings of fact and conclusions of law as its own and denied Janssen's application. Janssen now appeals from the denial of his application for writ of habeas corpus.

III. STANDARD OF REVIEW

We generally review a trial court's decision to deny an article 11.072 habeas application for an abuse of discretion. *Ex parte Houston*, No. 02-16-00359-CR, 2016 WL 6277408, at *1 (Tex. App.—Fort Worth Oct. 27, 2016, no pet.) (mem. op., not designated for publication); *Ex parte Jessep*, 281 S.W.3d 675, 678 (Tex. App.—Amarillo 2009, pet. ref'd). We will uphold the habeas court's order as long as it is correct on any theory of law applicable to the case. *Ex parte Obi*, 446 S.W.3d 590, 596 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (op. on reh'g).

IV. JANSSEN FORFEITED HIS CONSTITUTIONAL CHALLENGES

In his application for writ of habeas corpus,[2] Janssen argued that Texas Penal Code section 33.021(c) is facially unconstitutionally overbroad in violation of the First Amendment and is also facially unconstitutionally vague in violation of the Fourteenth Amendment.

A defendant forfeits his right to assert facial or as-applied challenges to a statute's constitutionality if he does not raise such challenges in the trial court; such challenges cannot be asserted for the first time on appeal. *Karenev v.*

[2]After reviewing Janssen's application for writ of habeas corpus and the State's response, we determined that briefing was not necessary to the disposition of this appeal and submitted this case without briefing. *See* Tex. R. App. P. 31.1 (stating that in an appeal from a trial court's denial of an application for writ of habeas corpus, an appellate court may, but is not required to, request briefing from the parties).

State, 281 S.W.3d 428, 434 (Tex. Crim. App. 2009).[3] A defendant who did not raise a claim based on a forfeitable right in the trial court in the underlying prosecution or on direct appeal cannot do so for the first time on habeas corpus. *See Ex parte Pena*, 71 S.W.3d 336, 338 (Tex. Crim. App. 2002); *Ex parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974) (stating that an applicant's failure "to object at the trial, and to pursue vindication of a constitutional right of which he was put on notice on appeal, constitutes a waiver of the position he now asserts" on habeas corpus). Moreover, a reviewing court should not address the merits of an issue that has not been preserved for appeal. *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009).

[3]An exception exists if a statute has been held unconstitutional; when that is the case, a defendant may raise the issue on direct appeal because the statute is "void ab initio." *See Smith v. State*, 463 S.W.3d 890, 896–97 (Tex. Crim. App. 2015); *Ex parte Chance*, 439 S.W.3d 918, 922 (Tex. Crim. App. 2014) (Cochran, J., concurring) (distinguishing constitutional challenges to a valid statute, which cannot be raised for the first time on appeal, from requests for relief from a statute that has already been declared void, which can be raised for the first time on appeal). Because section 33.021(c) has not been held unconstitutional, the exception is not triggered here. *See State v. Paquette*, 487 S.W.3d 286, 290 (Tex. App.—Beaumont 2016, no pet.); *Ex parte Fisher*, 481 S.W.3d 414, 420 (Tex. App.—Amarillo 2015, pet. ref'd); *Ex parte Wheeler*, 478 S.W.3d 89, 95 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd); *Ex parte Zavala*, 421 S.W.3d 227, 232 (Tex. App.—San Antonio 2013, pet. ref'd) (all holding that section 33.021(c) is not unconstitutionally overbroad or unconstitutionally vague on its face). The Texas Court of Criminal Appeals has held that subsection (b) is unconstitutional, *see Ex parte Lo*, 424 S.W.3d 10, 24 (Tex. Crim. App. 2013), but that holding does not invalidate subsection (c)—the provision under which Janssen was convicted—and is not relied on by Janssen to support the arguments in his application.

Here, it is undisputed that Janssen did not raise his facial constitutional challenges in the trial court. Nothing in the record establishes that the bases of Janssen's constitutional challenges to section 33.021(c) were not reasonably available at the time of trial. Janssen, however, failed to raise his constitutional challenges to section 33.021(c) in the trial court and thus cannot do so now for the first time by application for writ of habeas corpus. *See Pena*, 71 S.W.3d at 338; *Bagley*, 509 S.W.2d at 333–34; *Ex parte Jennings*, No. 14-09-00817-CR, 2010 WL 2968043, at *5 (Tex. App.—Houston [14th Dist.] July 29, 2010, pet. ref'd) (mem. op., not designated for publication) (holding applicant forfeited constitutional challenges to section 33.021). Because Janssen forfeited his constitutional challenges by not raising them prior to his guilty plea, the trial court did not abuse its discretion by denying Janssen's application for writ of habeas corpus.

V. CONCLUSION

We affirm the trial court's order denying Janssen's application for writ of habeas corpus.

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, GABRIEL, and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: January 19, 2017