TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00818-CR

Ex parte Clinton David Beck

FROM THE DISTRICT COURT OF COMAL COUNTY, 207TH JUDICIAL DISTRICT
NO. CR2011-197, HONORABLE R. BRUCE BOYER, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Clinton David Beck was charged with online solicitation of a minor and with engaging in an improper relationship between a teacher and a student. *See* Tex. Penal Code §§ 21.12(a) (prohibiting improper relationships between educators and students), 33.021 (setting out elements of offense of online solicitation of minor). The charges stemmed from text messages that Beck sent to one of his students, whom the district court gave the pseudonym Danielle Smith. During the relevant time, Smith was fourteen years old. Beck entered a plea of guilty to the improper-relationship charge, and the State dismissed the online-solicitation charge. After Beck entered his plea, the district court imposed a sentence of ten year's imprisonment but suspended imposition of the sentence and placed Beck on community supervision for ten years. *See id.* § 21.12(b) (specifying that offense is second-degree felony); *see also id.* § 12.33 (setting out permissible punishment range for second-degree felony).

A few years after the district court rendered its judgment, Beck filed an application for writ of habeas corpus. *See* Tex. Const. art. V, § 8 (empowering district courts "to issue writs

necessary to enforce their jurisdiction"); Tex. Code Crim. Proc. art. 11.072, § 1 (authorizing person convicted of felony to seek relief from "judgment of conviction ordering community supervision"). In his writ application, Beck argued that his conviction rested on an unconstitutional statute. Specifically, he contended that he was convicted under subsection 21.12(a)(3),[1] which prohibits, in relevant part, "[a]n employee of a public or private primary or secondary school" from "engag[ing] in conduct described by Section 33.021" with a student "enrolled in a public or private primary or secondary school at which the employee works." Tex. Penal Code § 21.12(a)(1)-(3). At the time relevant to this appeal, subsection 33.021(b) specified that a person over the age of seventeen commits an offense if "with intent to arouse or gratify the sexual desire of any person," he intentionally "communicates in a sexually explicit manner with a minor" or "distributes sexually explicit material to a minor" "over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service." *See* Act of May 25, 2005, 79th Leg., R.S., ch. 1273, § 1, sec. 33.021, 2005 Tex. Gen. Laws 4049, 4050, *amended by* Act of May 21, 2007, 80th Leg., R.S., ch. 610, § 2, sec. 33.021(b), (c), 2007 Tex. Gen. Laws 1167, 1167, *amended by* Act of May 27, 2007, 80th Leg., R.S., ch. 1291, § 7, sec. 33.021(f), 2007 Tex. Gen. Laws 4344, 4350 ("former § 33.021(b)") (current version at Tex. Penal Code § 33.021(b)).[2]

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[1] Although we are unable to correct the clerical error in this appeal, we note that the judgment of conviction in the underlying criminal proceeding appears to contain a mistake. Specifically, the judgment reflects that Beck was convicted under subsection 21.12(4)(a) of the Penal Code, but there is no section 21.12(4)(a) listed in the Penal Code. However, the allegations in the indictment fall squarely under section 21.12(a)(3) of the Penal Code. Accordingly, in this appeal, we have relied on section 21.12(a)(3) when addressing Beck's arguments.

[2] Section 33.021 also prohibits a person from soliciting "a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person." Tex. Penal Code § 33.021(c).

When requesting relief, Beck noted that the court of criminal appeals declared former subsection 33.021(b) of the Penal Code unconstitutional. *See Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013). In light of that ruling and in light of the fact that the statute under which he was convicted (section 21.12) refers to section 33.021, Beck urged the district court to "set aside the Judgment in the instant case and enter an acquittal" or "dismiss the indictment." Ultimately, the district court denied Beck's application for writ of habeas corpus and issued findings of fact and conclusions of law specifying, in relevant part, that Beck was Smith's teacher, that Beck sent sexually explicit text messages to Smith, that the law regarding section 21.12 has not changed, and that section 21.12 is constitutional.

After the district court issued its order denying Beck's requested relief, he appealed the district court's ruling. We will affirm the district court's order denying his writ application.

STANDARD OF REVIEW

Appellate courts review a trial court's denial of habeas-corpus relief under an abuse-of-discretion standard. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). "A trial court abuses its discretion when its ruling is arbitrary or unreasonable." *Gaytan v. State*, 331 S.W.3d 218, 223 (Tex. App.—Austin 2011, pet. ref'd). But a trial court does not abuse its discretion if its ruling lies within "the zone of reasonable disagreement." *Bigon v. State*, 252 S.W.3d 360, 367 (Tex. Crim. App. 2008); *see Lopez v. State*, 86 S.W.3d 228, 230 (Tex. Crim. App. 2002). Under that standard, we "review the record evidence in the light most favorable to the trial court's ruling." *Kniatt*, 206 S.W.3d at 664.

However, there was no allegation in the indictment that Beck engaged in that type of behavior.

In general, a post-conviction writ of habeas corpus may not be used to decide matters that could have been raised at trial and on direct appeal. Tex. Code Crim. Proc. art. 11.072, § 3. To succeed under a post-conviction writ of habeas corpus, "the applicant bears the burden of proving, by a preponderance of the evidence, the facts that would entitle him to relief." *Ex parte Ali*, 368 S.W.3d 827, 830 (Tex. App.—Austin 2012, pet. ref'd). In habeas corpus proceedings, "[v]irtually every fact finding involves a credibility determination," and "the fact finder is the exclusive judge of the credibility of the witnesses." *Ex parte Mowbray*, 943 S.W.2d 461, 465 (Tex. Crim. App. 1996). For habeas proceedings under article 11.072, "the trial court is the sole finder of fact," and appellate courts afford "almost total deference to a trial court's factual findings when supported by the record, especially when those findings are based upon credibility and demeanor." *Ex parte Ali*, 368 S.W.3d at 830. Moreover, reviewing courts must also defer "not only to all implicit factual findings that the record will support in favor of a trial court's ruling, 'but also to the drawing of reasonable inferences from the facts.'" *Amador v. State*, 221 S.W.3d 666, 674-75 (Tex. Crim. App. 2007) (quoting *Kelly v. State*, 163 S.W.3d 722, 726 (Tex. Crim. App. 2005)). "[W]hen the facts are uncontested and the trial court's ruling does not turn on the credibility or demeanor of witnesses, a de novo review by the appellate court is appropriate." *Ex parte Ali*, 368 S.W.3d at 831.

DISCUSSION

In two issues on appeal, Beck contends that the district court erred by denying his application because there was no evidence establishing an element necessary "to sustain a conviction in this case" and "because the statute upon which this conviction rests is unconstitutional and was a nullity *ab initio*."

Evidence Regarding Intent

In his first issue on appeal, Beck argues that there is no evidence establishing an element that was necessary for his conviction. Specifically, he contends that "[t]here is no evidence that [he] had any intent to arouse anyone's sexual desires." When presenting this issue, Beck acknowledges that he pleaded guilty to the crime of having an improper relationship with a student at the school where he worked and entered a judicial confession admitting to all of the allegations in the indictment. *See* Tex. Penal Code § 21.12(a)(3) (prohibiting conduct between teacher and student that is described by section 33.021 of Penal Code); former § 33.021(b) (criminalizing, among other conduct, communicating with minor in sexually explicit manner by text message). However, he asserts that his judicial confession does not constitute evidence needed to support his plea because it referred to the allegations "in the indictment" and because the State improperly struck the intent language from the indictment during the plea hearing. With the alteration performed by the State shown in strikeout font, the relevant portion of the indictment alleged that Beck "did then and there while the Defendant was an employee of a public school, to-wit: Oak Run Middle School, ~~with the intent to arouse or gratify the sexual desire of Danielle Smith (pseudonym),~~ intentionally communicate through text messages in a sexually explicit manner . . . to Danielle Smith (pseudonym), a person who was enrolled in the said Oak Run Middle School and who was not the Defendant's spouse."

When presenting his challenge, Beck concedes in his reply brief that he cannot attack any alleged defect in the indictment because he failed to make any objection to the indictment or to the alteration made by the State, *see* Tex. Code Crim. Proc. art. 1.14(b) (providing that if "the defendant does not object," he "waives and forfeits the right to object to the defect, error, or

irregularity [in the indictment] and he may not raise the objection on appeal or in any other postconviction proceeding"); *Ex parte Gibson*, 800 S.W.2d 548, 551 (Tex. Crim. App. 1990) (explaining that complaint regarding defect in substance of indictment must be raised by pretrial objection or is waived); *Jones v State*, 810 S.W.2d 824, 826 (Tex. App.—Houston [14th Dist.] 1991, no pet.) (rejecting complaint that indictment failed to allege required mens rea where defendant failed to file motion to quash indictment prior to trial), but he highlights the alteration when arguing that there is no evidence of his intent. In addition to arguing that his judicial confession does not constitute evidence of his unlawful intent, Beck also argues that the remainder of the evidence before the district court similarly did not provide any evidence of an unlawful intent on his part. For all of these reasons, Beck insists that he is entitled to habeas relief.

In general, "a challenge to the sufficiency of the evidence used to sustain a felony conviction is not cognizable on an application for a post-conviction writ of habeas." *Ex parte Grigsby*, 137 S.W.3d 673 (Tex. Crim. App. 2004). However, the court of criminal appeals has clarified this general rule by stating that "a claim of no evidence is cognizable because '[w]here there has been no evidence upon which to base a conviction, a violation of due process has occurred and the conviction may be attacked collaterally in a habeas corpus proceeding'" and that "[i]f the record is devoid of evidentiary support for a conviction, an evidentiary challenge is cognizable on a writ of habeas corpus." *Ex parte Perales*, 215 S.W.3d 418, 419-20 (Tex. Crim. App. 2007) (quoting *Ex parte Coleman*, 599 S.W.2d 305, 307 (Tex. Crim. App. 1978)). Similarly, the court has more recently explained that "[a] claim of insufficient evidence is not cognizable on a postconviction writ of habeas corpus, but a claim of no evidence is cognizable." *Ex parte Knight*, 401 S.W3d 60, 64

(Tex. Crim. App. 2013); *see also Ex parte Graves*, 436 S.W.3d 395, 396 (Tex. App.—Texarkana 2014, pet. ref'd) (noting that "[d]ue process is violated if there is no evidence upon which to base a conviction" and providing that "a claim that the record is devoid of evidentiary support for a conviction is cognizable on a post-conviction habeas corpus application"). *But see Ex parte Jessep*, 281 S.W.3d 675, 680 (Tex. App.—Amarillo 2009, pet. ref'd) (determining that applicant's legal-sufficiency challenge was not cognizable and that general rule not allowing review applied because appellant did not demonstrate that record was devoid of evidentiary support for conviction). In light of Beck's contention that there is no evidence establishing the required intent, we believe that he has asserted a cognizable claim.

When he filed his application for writ of habeas corpus, Beck did not present any argument regarding the evidence supporting his conviction and instead limited his argument to his assertion that his conviction was improper because it was based on an unconstitutional statute. After the district court made its ruling and issued its order, its findings of fact, and its conclusions of law, Beck did file a motion objecting to the denial of his writ of habeas corpus, challenging the district court's findings and conclusions, and arguing that the amendment to the indictment demonstrated that there was a complete lack of evidence establishing that "Beck acted with any improper intent." (Emphasis removed).

In its appellee's brief, the State asserts that Beck did not preserve his challenge because he did not present those grounds in his writ application. *See Ex parte Tutton*, No. 10-14-00360-CR, 2015 WL 4384496, at *3 n.2 (Tex. App.—Waco July 9, 2015, pet. ref'd) (mem. op., not designated for publication) (determining that arguments made in applicant's "'Supplemental

Response and Unopposed Request for Rehearing' were not before the trial court at the time the trial court denied [his] habeas-corpus application"); *see also Willover v. State*, 70 S.W.3d 841, 845 (Tex. Crim. App. 2002) (explaining that "an appellate court must review the trial court's ruling in light of what was before the trial court at the time the ruling was made"). In response, Beck argues that the record provided to his habeas attorney did not contain the alteration to the indictment, that his attorney did not learn about the alteration until after the district court denied habeas relief, and that his argument regarding the indictment alteration and the absence of evidence were timely because they were made while the district court retained plenary power over the case. Assuming without deciding that the challenge was properly presented to the district court, we believe that there was sufficient evidence to support his plea.

Article 1.15 of the Code of Criminal Procedure imposes a procedural safeguard before a trial court may render a conviction based on a guilty plea. Tex. Code Crim. Proc. art. 1.15; *see Menefee v. State*, 287 S.W.3d 9, 13 (Tex. Crim. App. 2009). Specifically, even when a defendant enters a plea of guilty, a court may not "render a conviction in a felony case" unless evidence was presented supporting the defendant's guilt. *Menefee*, 287 S.W.3d at 13. "The evidence does not have to establish the defendant's guilt beyond a reasonable doubt but must embrace every element of the offense charged." *Jones v. State*, 373 S.W.3d 790, 793 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *see also Menefee*, 287 S.W.3d at 13-14 (discussing types of evidence that may be considered). "A deficiency in one form of proof may be compensated for by other competent evidence in the record." *Jones*, 373 S.W.3d at 793. A judicial confession can satisfy the requirements of article 1.15 if it embraces all of the elements of the charged offense. *See Menefee*, 287 S.W.3d at 13.

Furthermore, reviewing courts "measure the sufficiency of the evidence by the so-called hypothetically correct jury charge, one which accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." *See DeLay v. State*, 465 S.W.3d 232, 244 n.48 (Tex. Crim. App. 2014). Moreover, intent "can be inferred from acts, words, and conduct of the accused" as well as the circumstances in which the defendant's actions occurred. *DeLeon v. State*, 77 S.W.3d 300, 312 (Tex. App.—Austin 2001, pet. ref'd).

As mentioned above, Beck was charged with having an improper relationship with one of his students. Subsection 21.12(a)(3) of the Penal Code prohibits, among other conduct, a teacher from "engag[ing] in conduct described by Section 33.021" with a student enrolled at the school where the teacher works. Tex. Penal Code § 21.12(a)(1)-(3). At the time relevant to this appeal, former subsection 33.021(b) specified that a person over the age of seventeen commits an offense if "with the intent to arouse or gratify the sexual desire of any person," the person intentionally "communicates in a sexually explicit manner with a minor" "over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service." *See* former § 33.021(b).

During the plea hearing, Beck agreed to plead guilty to the offense of engaging in an improper relationship with one of his students. Moreover, as part of the plea bargain in which the State agreed to dismiss one of the charges, Beck signed a judicial confession in which he "admit[ted] and judicially confess[ed] that I knowingly and intentionally and unlawfully committed the offense(s) alleged in the indictment . . . at the time and place and in the manner alleged and that such

allegations are true and correct, and that I am in fact GUILTY of the offense alleged," waived his "right to be confronted with and to cross-examine" witnesses, and also stipulated "to the introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment." *See Chindaphone v. State*, 241 S.W.3d 217, 220 (Tex. App.—Fort Worth 2007, pet ref'd) (determining that judicial confession was sufficient to support plea where it read as follows: "I have read the indictment or information filed in this case and I committed each and every act alleged therein"); *see also* Tex. Code Crim. Proc. art. 1.15 (explaining that "evidence may be stipulated if the defendant in such case consents in writing, in open court, to waive the appearance, confrontation, and cross-examination of witnesses" and further consents to oral stipulation of evidence or "introduction of testimony by affidavits, written statements of witnesses, and any other documentary evidence in support of the judgment").

Even assuming as Beck suggests that his judicial confession was no evidence of his intent because the confession did not pertain to that element, we note that the State introduced into evidence as an exhibit during the plea hearing the offense report prepared by Officer David Schroeder in which he discussed his recorded interviews with various witnesses and the text messages at issue. *See Ramirez v. State*, No. 12-11-00322-CR, 2012 Tex. App. LEXIS 5230, at *9 (Tex. App.—Tyler June 29, 2012, no pet.) (per curiam) (mem. op., not designated for publication) (relying, in part, on police reports when determining if there is sufficient evidence to support plea). In the report, Officer Schroeder explained that he got a call from Smith's step-father who stated that he was concerned about text messages that Smith had been receiving from her teacher Beck. Next, the report chronicled the various text messages that were sexual in nature, including discussions

regarding what "the normal age for a girl to have sex" is, how some girls have sex "much earlier" than sixteen or seventeen, how well Smith knew her "own body," what Smith enjoys sexually, how "experts say that" someone should know his or her own body before getting involved with someone sexually "because it makes you more confident and relaxed," what Smith's thoughts were on masturbation, how "pretty much everyone does it," whether people shave before having sex, whether Smith shaves all or some of her pubic hair, how Beck found it hard to believe that Smith "never 'explored'" given how "comfy" she was about things, how Beck believed that Smith having a boyfriend should increase her "natural urges and desires," how Smith controlled her sexual urges, what was the riskiest or wildest thing that Smith had ever done, whether a guy had ever seen Smith naked, and whether Smith had ever flashed anyone. Moreover, the report showed that Beck repeatedly asked Smith if she had any additional questions that were sexual in nature. In addition, Officer Schroeder wrote in the report how the documents that Smith's mother gave to the police showed that Smith and Beck had been communicating by text message for several months and that the two had exchanged over 2,000 text messages.

Regarding the interviews that he conducted, Officer Schroeder discussed in the report that he interviewed, among other people, Smith, Smith's older sister, and Smith's neighbor Laura Tyler. Regarding his interview with Smith, Officer Schroeder related that Smith called the texting inappropriate and mentioned how Beck sat on her and bit her hand one day when they were at school. When discussing his interview with Smith's older sister, Officer Schroeder discussed how Smith's sister stated that she had observed the texting between Beck and Smith, that she had observed Smith in Beck's classroom once, and that Beck paid "close attention" to Smith. After

discussing his interview with Smith's sister, Officer Schroder discussed the interview that he had with Tyler. According to Officer Schroeder, during the interview, Tyler explained that Smith spent a lot of time at her house because Smith was friends with Tyler's son, that Tyler observed Smith and Beck texting one another often, and that Smith related one day that Beck told Smith that Smith had nice legs after touching her legs and telling Smith to try out for track.

Finally, Officer Schroder discussed in his report the notes that he received from Beck's principal that the principal made while interviewing Beck about the text messages with Smith, and Officer Schroeder revealed that the notes showed that Beck admitted that he crossed the line and that he had had an inappropriate conversation with Smith.

In light of the evidence from the police report and in light of the reasonable inferences that can be made from that evidence, we must conclude that the evidence embraces every element of the charged offense of having an improper relationship with a student by indicating that Beck was Smith's teacher, that he communicated in a sexually explicit manner with Smith by text messaging, and that he communicated with Smith with the intent to "arouse or gratify the sexual desire of any person." *See* Tex. Penal Code §§ 21.12(a)(3); former § 33.021(b)(1).

For all of these reasons, we overrule Beck's first issue on appeal.

Constitutionality of Section 21.12

In his second issue on appeal, Beck contends that the district court erred by denying his application of writ of habeas corpus because the statute supporting his conviction is facially unconstitutional and was, therefore, a nullity from the time of its enactment. As set out above, Beck was charged with having an improper relationship with one of his students, and the portion of the

statute under which he was charged references section 33.021 of the Penal Code. *See* Tex. Penal Code § 21.12(a)(3). After Beck entered his guilty plea, the court of criminal appeals declared former subsection 33.021(b) unconstitutional "because it prohibits a wide array of constitutionally protected speech and is not narrowly drawn to achieve only the legitimate objective of protecting children from sexual abuse." *See Ex parte Lo*, 424 S.W.3d at 14.[3] As discussed earlier, former subsection 33.021(b) prohibited an individual from communicating "in a sexually explicit manner with a minor" through text messaging or other messaging services if the individual had "the intent to arouse or gratify the sexual desire of any person." Former § 33.021(b)(1).

Based on the ruling from *Lo*, Beck argues that the district court erred when it concluded that section 21.12 is constitutional because it refers to former section 33.021 and because the court of criminal appeals determined that former subsection 33.021(b) is unconstitutional. Stated differently, Beck asserts that "statutes that incorporate unconstitutional provisions are themselves unconstitutional." Furthermore, Beck contends that he "cannot be punished based on his conviction for violating a provision of a statute (Improper Relationship) that relies exclusively on a void statute (Online Solicitation subparagraph (b)) for liability." As support for his arguments, Beck points to various opinions expressing that a statute that has been declared unconstitutional "'is void from its

[3] After the court of criminal appeals declared subsection 33.021(b) unconstitutional, the legislature amended that provision. *See* Act of May 5, 2015, 84th Leg., R.S., ch. 61, § 2, sec. 33.021(b), 2015 Tex. Gen. Laws 1035, 1035-36. The statute currently provides that a person over the age of seventeen commits an offense if "with intent to commit" one or more enumerated sexual offenses, he intentionally "communicates in a sexually explicit manner with a minor" or "distributes sexually explicit material to a minor" "over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service." Tex. Penal Code § 33.021(b).

inception,'" "'is as inoperative as if it had never undergone the formalities of enactment,'" and "'is of no more force or validity than a piece of blank paper, and is utterly void,'" *see, e.g.*, *Ex parte Chance*, 439 S.W.3d 918, 918-19, 921 (Tex. Crim. App. 2014) (Cochran, J., concurring) (quoting 12B Tex. Jur. 3d Constitutional Law § 57, at 97 (2012); *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988)), and that, for those reasons, "a person may always obtain relief from an indictment or conviction based on a penal statute that has been previously declared unconstitutional," *id.* at 919.[4]

In response to Beck's application for writ of habeas corpus, the State argued in its answer and during the hearing that Beck's conviction should be upheld because the court of criminal appeals made no determination regarding the constitutionality of section 21.12 in *Ex parte Lo*. In addition, the State also argued that Beck could not raise a claim challenging the constitutionality of subsection 21.12(a)(3) through his post-conviction habeas application. When it issued its findings and conclusions, the district court made no express determination regarding whether Beck was permitted to challenge the constitutionality of the statute and instead ruled that section 21.12 is constitutional. However, the record before this Court and governing precedent compels a determination that Beck could not properly raise his constitutional claim in his writ application. *See Alford v. State*, 400 S.W.3d 924, 929 (Tex. Crim. App. 2013) (explaining that reviewing court should uphold ruling by trial court if ruling was correct under any applicable theory of law).

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[4] In his briefs, Beck also refers to various cases in which the court of criminal appeals and other courts of appeals have granted habeas or appellate relief for convictions under a statute that has been declared unconstitutional. *See, e.g.*, *Ex parte Chance*, 439 S.W.3d 918, 918 (Tex. Crim. App. 2014); *Schuster v. State*, 435 S.W.3d 362, 367 (Tex. App.—Houston [1st Dist.] 2014, no pet.). However, the cases that Beck refers to granted relief for convictions under former section 33.021(b), which the court of criminal appeals has declared unconstitutional, and do not address convictions under section 21.12.

In *Karenev v. State*, the court of criminal appeals concluded "that a defendant may not raise for the first time on appeal a facial challenge to the constitutionality of a statute." 281 S.W.3d 428, 434 (Tex. Crim. App. 2009); *see also Curry v. State*, 910 S.W.2d 490, 496 (Tex. Crim. App. 1995) (explaining that as-applied challenge was not preserved where there was "no evidence in the record that appellant specifically objected at trial to the fact that the statute was vague and therefore violated the Fourteenth Amendment"). When making this ruling, the court explained that there are the following three categories of rights: "(1) absolute requirements or prohibitions, (2) rights that are waivable-only, and (3) rights that can be forfeited." *Karenev*, 281 S.W.3d at 434. Further, the court determined that challenges to the constitutionality of a statute fall within the third category and may be waived and that statutes are "presumed to be constitutional until it is determined otherwise." *Id.*

In a subsequent opinion, the court clarified and reaffirmed that ruling. *See Smith v. State*, 463 S.W.3d 890 (Tex. Crim. App. 2015). In *Smith*, the court determined that a defendant could challenge his conviction under former subsection 33.021(b) for the first time on appeal. *See id.* at 896-97. When explaining why Smith was allowed to raise the issue for the first time on appeal, the court stated that the difference between the relief sought by Smith and Karenev is that Smith was "seeking relief for a conviction of a non-crime under a statute that has already been held to be invalid" and that Karenev "was attacking a valid statute that had not yet been declared void." *See id.* at 896. Further, the court explained that "one consequence of declaring a penal statute unconstitutional and void" is to place a conviction under that statute into the first category of absolute rights that "cannot be forfeited or waived." *Id.*

Although the court of criminal appeals has declared former subsection 33.021(b) unconstitutional, *see Ex parte Lo*, 424 S.W.3d at 14, it has made no determination regarding the constitutionality of section 21.12 in *Lo* or in any other case. Similarly, this Court has not been called on to determine the constitutionality of 21.12.[5] Accordingly, we must conclude that Beck's constitutional challenge falls under the third category of rights and may be waived. Furthermore, the record from the underlying criminal proceeding shows that Beck did not challenge the constitutionality of section 21.12.

In his briefs, Beck seems to suggest that he is excused from the obligation of challenging the constitutionality of the statute supporting his conviction during his trial or on appeal because the ruling from *Lo* somehow automatically invalidated subsection 21.12(a)(3) in addition to subsection 33.021(b). Whether or not the court of criminal appeals or this Court might ultimately determine that section 21.12(a)(3) is unconstitutional for the reasons identified in *Lo*, there has been no binding judicial declaration on that matter at this point. Moreover, although we need not further address the matter, we note that the statute at issue in this case (section 21.12) has additional elements that were not required for conviction under former section 33.021(b) and that those

[5] After this appeal was filed, one of our sister courts of appeals issued an opinion addressing the constitutionality of section 21.12 in light of the ruling from *Lo*. *See Collins v. State*, 479 S.W.3d 533, 540 (Tex. App.—Eastland 2015, no pet.) (concluding "that Section 21.12(a)(3) is unconstitutionally broad insofar as it incorporates the unconstitutionally broad Section 33.021(b)"). However, the court in *Collins* was not confronted with a post-conviction writ application in which the applicant failed to challenge the constitutionality of section 21.12 at trial; instead, the court in *Collins* was reviewing a ruling on a pre-trial habeas application in which the defendant challenged her indictments. *See id.* at 536. In any event, as explained above there has been no ruling on the constitutionality of the statute by the court of criminal appeals, and the analysis and determination from *Collins* are not binding on this Court.

additional elements might ultimately impact the constitutionality of the prohibition. Specifically, the statute requires proof that the offender is a teacher and that the victim is a student. *See* Tex. Penal Code § 21.12(a)(3). Furthermore, although section 21.12(a)(3) references the conduct from section 33.021, section 21.12(a)(3) is not dependent on any determination being made under section 33.021 and instead establishes an offense that is separate from one under section 33.021. *Cf.* Tex. Gov't Code § 311.032 (explaining that "if any provision of the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application"). Although we acknowledge that cases have explained that unconstitutional statutes are void from their enactment and have no more effect than a blank piece of paper and although section 21.12 is obviously dependent on the wording from section 33.021, we cannot endorse Beck's expansion of the blank-sheet analogy as standing for the proposition that all statutory references to the now defunct provision are automatically voided and ineffective without the need for a judicial declaration because the wording of the unconstitutional provision can no longer be relied on or ascertained.

For all of these reasons, we must conclude that Beck waived his complaint regarding the constitutionality of section 21.12 and may not present that issue for the first time in a post-conviction application for writ of habeas corpus. *See Ex parte Jennings*, No. 14-09-00817-CR, 2010 WL 2968043, at *4 (Tex. App.—Houston [14th Dist.] July 29, 2010, pet. ref'd) (mem. op., not designated for publication) (explaining that challenge to constitutionality of statute is forfeited if not presented to trial court and that "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"). Accordingly, we overrule Beck's second issue on appeal.[6]

CONCLUSION

Having overruled all of Beck's issues on appeal, we affirm the district court's order denying his writ application.

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[6] As support for his argument that section 21.12(a)(3) is unconstitutional, Beck relies on *Nash v. State*, 811 S.W.2d 698 (Tex. App.—Houston [14th Dist.] 1991, pet. dism'd). In *Nash*, the appellate court was faced with determining the effect that a declaration that subarticle 21.16(c) of the Code of Criminal Procedure was unconstitutional had on subarticle 21.16(a). *Id.* at 699. Subarticle 21.16(c) provided, in relevant part, that a final judgment could not be entered earlier than "'eighteen months after the date the forfeiture was entered.'" *Id.* (quoting Tex. Code Crim. Proc. art. 21.16(c)(2)). Subarticle 21.16(a) provided the circumstances in which a trial court was required to "'remit to the surety the amount of the bond'" "'[a]fter forfeiture of bond and before the expiration of the time limits set by subsection (c) of this article.'" *Id.* (quoting Tex. Code Crim. Proc. art. 21.16(a)). Ultimately, the appellate court determined that subarticle 21.16(a) was also unconstitutional because it had no effect without the time limitations from subarticle 21.16(c). *Id.* at 700 (discussing analysis from *State v. Matyastik*, 811 S.W.2d 102, 104-05 (Tex. Crim. App.1991)).

We believe that Beck's reliance on *Nash* is misplaced. As a preliminary matter, we note that the court in *Nash* was not asked to consider for the first time in a post-conviction habeas proceeding what the effect of a prior ruling on the constitutionality of a statute had on the viability of a statute that refers to the unconstitutional statute but has not itself been declared unconstitutional. Although that procedural distinction renders any reliance on *Nash* inappropriate in this case, we also note that the statutory provisions at issue in *Nash* operated in conjunction with and depended on one another, but the statutes at issue in this case are distinct provisions and concern separate offenses. Finally, although subsection 21.12(a)(3) of the Penal Code references the prohibited conduct from former section 33.021, nothing in section 21.12 requires that any action or determination have been made under section 33.021 for section 21.12(a)(3) to become applicable.

David Puryear, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: May 4, 2016

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