

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-16-00493-CR**

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**David Lane Scott, Appellant**

**v.**

**The State of Texas, Appellee**

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**FROM THE COUNTY COURT AT LAW NO. 1 OF WILLIAMSON COUNTY  
NO. 15-05876-1, HONORABLE SUZANNE BROOKS, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

David Lane Scott has been charged with the offense of sale, distribution, or display of harmful material to a minor.<sup>1</sup> *See* Tex. Penal Code § 43.24. Scott filed a pretrial application for writ of habeas corpus challenging the constitutionality of section 43.24 of the Texas Penal Code. The trial court denied relief. On appeal, Scott contends that the trial court erred by denying his habeas application, asserting that section 43.24 of the Penal Code is unconstitutional as applied to

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<sup>1</sup> Scott was originally indicted with the felony offense of improper relationship between an educator and student with the manner and means alleged as online solicitation of a minor under section 33.021(b) of the Texas Penal Code. That charge was dismissed after the Texas Court of Criminal Appeals ruled that section was unconstitutional because of its overbreadth. *See Ex parte Lo*, 424 S.W.3d 10, 24 (Tex. Crim. App. 2013); *see also Ex parte Fournier*, 473 S.W.3d 789, 790 (Tex. Crim. App. 2015) (noting that constitutional infirmity with section 33.021(b) was Legislature's drafting of overly broad statute).

him and that he is being prosecuted based on a communication that has been held to be protected speech. We will affirm the trial court's order denying habeas relief.

## DISCUSSION

The Texas Court of Criminal Appeals has held that pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy. *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016). Before *Ex parte Perry*, pretrial habeas was not generally available for as-applied challenges to statutes. *Id.* But *Perry* created a narrow path by which pretrial habeas may be available for as-applied challenges to the constitutionality of a statute if: (a) the constitutional right at issue is the type that would be effectively undermined if not vindicated before trial, and (b) conservation of judicial resources is better served by interlocutory review of the claim. *Id.* at 895-96, 898 n.79 (noting that “[j]udicial economy may sometimes favor pretrial review, but the nature of the right at stake can compel it” (emphases in original)). Pretrial resolution of an as-applied challenge is not available when the constitutional right at issue does not include a right to avoid trial. *Id.* at 899 (noting that habeas applications raising separation-of-powers or double-jeopardy claims involve constitutional rights that include right to avoid trial); see also *Ex parte Carter*, No. 03-14-00669-CR, 2017 Tex. App. LEXIS 82, at \*14 (Tex. App.—Austin Jan. 6, 2017, pet. filed) (op. on remand) (citing *Perry*). Whether a claim is cognizable on pretrial habeas is a threshold issue that should be addressed before the merits of the claim may be resolved. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. 2010); *Ex parte Paxton*, 493 S.W.3d 292, 297 (Tex. App.—Dallas 2016, pet. ref’d). Resolving the merits of a non-cognizable claim on pretrial habeas is a misuse of the writ. *Ellis*, 309 S.W.3d at 79; *Paxton*, 493 S.W.3d at 298.

Here, Scott’s claim is not cognizable on pretrial habeas. Although Scott contends that the trial court erred by denying his habeas application because section 43.24 of the Penal Code is unconstitutional as applied to him, he made no showing that the constitutional right he asserts—i.e., his right to freedom of speech—is the type that would be effectively undermined if not vindicated before trial, nor has he shown that conservation of judicial resources is better served by interlocutory review of his claim. *See Perry*, 483 S.W.3d at 895-96. Further, Scott made no showing that his right to freedom of speech includes the right to avoid trial. *Id.* at 899; *see also Carter*, 2017 Tex. App. LEXIS 82, at \*14 (affirming denial of pretrial habeas relief after concluding that constitutional right to free speech does not include right to avoid trial). The substance of Scott’s as-applied challenge is that section 43.24 of the Texas Penal Code “does not fit this case.” However, that contention is not an as-applied challenge. That contention merely questions the applicability of the statute to his conduct, not the constitutionality of the statute as applied to his conduct. *See Carter*, 2017 Tex. App. LEXIS 82, at \*11.

Scott also contends that his habeas claim is cognizable because he has a right not to be charged with conduct that does not constitute a crime. According to Scott, the Court of Criminal Appeals has “explicitly held” that sexual communication with a minor is protected speech under *Ex parte Lo*. *See* 424 S.W.3d 10 (Tex. Crim. App. 2013). However, the Court of Criminal Appeals has stated that *Lo* “did not necessarily hold that *Lo*’s conduct was constitutionally protected” and rather, that the constitutional infirmity with Penal Code section 33.021(b) was the Legislature’s overly broad drafting. *Ex parte Fournier*, 473 S.W.3d 789, 790 (Tex. Crim. App. 2015). Scott’s reliance on *Lo* to justify his alleged conduct as constitutionally protected is misplaced.

We conclude that Scott has not shown that his as-applied challenge to the constitutionality of section 43.24 is cognizable in a pretrial writ of habeas corpus.<sup>2</sup> *See Perry*, 483 S.W.3d at 895. Accordingly, we cannot conclude that the trial court erred by denying habeas relief.

### CONCLUSION

We affirm the trial court's order.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Field and Bourland

Affirmed

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<sup>2</sup> In the absence of this showing, we need not resolve the merits of Scott's claim. *See Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010); *Ex parte Paxton*, 493 S.W.3d 292, 297 (Tex. App.—Dallas 2016, pet. ref'd).