IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0349-21

EX PARTE TONYA COUCH, Appellant

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FORT WORTH COURT OF APPEALS TARRANT COUNTY

Per curiam.

O P I N I O N

Appellant is charged in four separate cause numbers with money laundering under Penal Code § 34.02(a)(4), which provides that

> A person commits an offense if the person knowingly: finances or invests or *intends to finance or invest* funds that the person believes are intended to further the commission of criminal activity.

TEX. PENAL CODE § 34.02(a)(4) (emphasis added). The indictments each allege that appellant did "knowingly finance or invest or intend to finance or invest funds" of

specified amounts that she "believed were intended to further the commission of criminal activity."

Appellant filed a pretrial application for writ of habeas corpus seeking dismissal of the indictments on the ground that section 34.02(a)(4) is facially unconstitutional because "by forbidding the mere intent to finance or invest funds intended for further the commission of criminal activity," it creates a "thought crime" under the First, Eighth, and Fourteenth Amendments. The trial court denied relief.

Appellant appealed. The court of appeals upheld the trial court's ruling upon determining that section 34.02(a)(4) "is susceptible of a construction that provides an actus reus for the phrase 'intends to finance or invest'" and therefore is not facially unconstitutional. *Ex parte Couch*, No. 02-19-00216-CR slip op. at 15 (Tex. App.–Fort Worth Feb. 25, 2021). Appellant has now filed a petition for discretionary review challenging the court of appeals' construction of the statute.

In considering appellant's petition, we noticed that there may be a question about the cognizability of appellant's challenge to the statute. "[A] pretrial writ application is not appropriate when resolution of the question presented, even if resolved in favor of the applicant, would not result in immediate release." *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001)(citing *Headrick v. State*, 988 S.W.2d 266, 228-29 (Tex. Crim. App. 1999)). Here, appellant's indictments allege that she did knowingly (1) "finance or invest" or (2) "intend to finance or invest," but her writ application challenges only the portion of the statute pertaining to the second of these, "intend to finance or invest."

Thus, even if the challenged portion of the statute were struck as facially unconstitutional, it may be that only those corresponding portions of her indictments would need to be struck, and the prosecution could at least theoretically proceed on the other allegations.

The court of appeals should have addressed cognizability as a threshold issue before reaching the merits of the claim. *See Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010)(because pretrial habeas, followed by an interlocutory appeal, is an "extraordinary remedy" appellate courts must take care to ensure that a pretrial writ has not been misused; therefore, "whether a claim is even cognizable on pretrial habeas is a threshold issue that should be addressed before the merits of the claim may be resolved"). We therefore grant review of the decision of the court of appeals on our own motion, vacate the judgment of the court of appeals, and remand this case to that court to address the cognizability of the issue raised in appellant's pretrial writ application.[1]

DATE DELIVERED: September 15, 2021
PUBLISH

[1] We refuse appellant's petition for discretionary review without prejudice.