



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-94,154-01

EX PARTE BRYAN WAYNE WHILLHITE, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
CAUSE NO. D-13-0586-SA-W-1 IN THE 391ST DISTRICT COURT
FROM TOM GREEN COUNTY**

Per curiam. YEARY, J. filed a dissenting opinion joined by SLAUGHTER, J.

OPINION

Applicant pled guilty to one count of sexual assault of a child and one count of online solicitation of a minor, and the trial court placed him on deferred-adjudication community supervision for ten years. Subsequently, on the State's motion, the trial court revoked Applicant's deferred-adjudication community supervision, adjudicated his guilt, and assessed his punishment at seventy-five years' confinement for each offense, with the sentences to run concurrently. The Third Court of Appeals affirmed his conviction. *Whillhite v. State*, No. 03-18-00766-CR (Tex. App. — Austin, Jan. 3, 2020). After filing a pro se petition for discretionary review, this Court remanded to the Third Court of Appeals which then reversed his judgment of adjudication and rendered a judgment of acquittal as to his conviction for online solicitation of a minor and affirmed his

conviction for sexual assault of a child. *Whillhite v. State*, No. 03-18-00766-CR (Tex. App. — Austin, May 27, 2021). Applicant filed this application for a writ of habeas corpus in the county of conviction, and the district clerk forwarded it to this Court. *See* TEX. CODE CRIM. PROC. art. 11.07.

Applicant contends that counsel was ineffective for failing to challenge the online solicitation of a child charge. The trial court has found that the sentence issued at adjudication would likely have been different had the parties and judge realized that one of the charges had already been declared unconstitutional. The trial court therefore recommends a new punishment hearing.

We agree. Relief is granted. The sentence in cause number D-13-0586-SA-W-1 in the 391st District Court of Tom Green County is set aside, and Applicant is remanded to the custody of the Sheriff of Tom Green County for a new sentencing hearing. The trial court shall issue any necessary bench warrant within ten days from the date of this Court's mandate.

Copies of this opinion shall be sent to the Texas Department of Criminal Justice—Correctional Institutions Division and the Board of Pardons and Paroles.

Delivered: November 22, 2023

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