



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00225-CR

Christopher Ruben **ZAVALA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 226th Judicial District Court, Bexar County, Texas
Trial Court No. 2012CR6759
Honorable Dick Alcalá, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Marialyn Barnard, Justice
Patricia O. Alvarez, Justice
Irene Rios, Justice

Delivered and Filed: May 31, 2017

DISMISSED FOR LACK OF JURISDICTION

On January 26, 2016, a Bexar County jury found Appellant Christopher Zavala guilty of online solicitation of a minor; the trial court subsequently sentenced Zavala to ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice, suspended and probated for a term of ten years, and assessed a \$2,500.00 fine. In his sole issue on appeal, Zavala contends Texas Penal Code section 33.021(c) is facially unconstitutional and the trial court erred in denying his second petition for writ of habeas corpus. Act of May 27, 2007, 80th Leg., R.S., ch. 1291, § 7, 2007 Tex. Gen. Laws 4344, 4350, *amended by* Act of May 27, 2007, 80th

Leg., R.S., ch. 1291, § 7, 2007 Tex. Gen. Laws 4344, 4050 (amended again 2015) (current version at TEX. PENAL CODE § 33.021). Because Zavala failed to timely file a notice of appeal, we dismiss the appeal for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

On August 22, 2012, Zavala was indicted for online solicitation of a minor, in violation of Texas Penal Code 33.021, alleged to have occurred on April 19, 2012. *See id.* Two additional counts, alleging that Zavala engaged in a sexually explicit online conversation with a minor were subsequently waived and abandoned on August 5, 2014.

On the date of Zavala's alleged offense, Texas Penal Code section 33.021, entitled "Online Solicitation of a Minor," read in pertinent part as follows:

- (c) A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits 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.
- (d) It is not a defense to prosecution under Subsection (c) that
 - (1) the meeting did not occur;
 - (2) the actor did not intend for the meeting to occur; or
 - (3) the actor was engaged in a fantasy at the time of commission of the offense.

See id.

On February 6, 2013, Zavala filed both his "Motion to Quash Indictment & Exception to Form and Substance of Indictment," contending section 33.0321(c) was facially unconstitutional, and his application for writ of habeas corpus, contending that subsections (c) and (d) of section 33.021 were facially unconstitutionally vague due to conflicting provisions regarding the actor's intent. The trial court denied the motion to quash on January 25, 2014, and the application for writ of habeas corpus was denied on April 10, 2013.

Zavala subsequently appealed the writ's denial. This court issued an opinion on December 11, 2013, concluding that section 33.021(c) and (d) are not contradictory and affirming the trial court's order denying the writ of habeas corpus. *See Ex parte Zavala*, 421 S.W.3d 227 (Tex. App.—San Antonio 2013, pet. ref'd).

On January 6, 2016, Zavala filed a second petition for writ of habeas corpus, again asserting his contention that section 33.021(c) is facially unconstitutional and that the legislative amendments made to the statute in 2015 supported his claim. *See Act of May 5, 2015, 84th Leg., R.S., ch. 61, §§ 1, 2, 2015 Tex. Sess. Law Serv. 1035, 1035 (West) (codified at TEX. PENAL CODE § 33.021)*. On January 22, 2016, Magistrate Judge Andrew Carruthers denied Zavala's writ holding that the application was "frivolous" because its claims were substantively identical to his first writ. Zavala did not file a notice of appeal from the January 22, 2016 order.

The trial court heard pretrial motions on January 25, 2016, the day prior to the scheduled trial date on the indicted charge. Zavala reurged his application for writ of habeas corpus's facially unconstitutional challenge.

Defense: . . . in the second application regarding the facial challenge that we made, the writ was denied by the magistrate about a week ago, if I'm not mistaken, Judge. And I could be wrong, but it's my understanding that—it is my understanding of the law that when a magistrate rules we have the right to request consideration of that issue before the district judge. And so as previously identified regarding our facial constitutional claim, I would respectfully request consideration of that issue at [this] time by the Court. I don't know if you want to just sustain the magistrate [ruling] or if you want to—I'm just putting that out there—

Trial Court: So you have –

Defense: —making sure that it's reserved for appeal. I would respectfully request a district court ruling.

Trial Court: Okay. *Then I'm going to deny the application for—for writ of habeas corpus.* And sustain what the magistrate did. . . .

. . . .

Trial Court: Okay, I've signed the—the orders, I guess, the—on the record, *I have sustained what the magistrate has ruled on the application for habeas corpus.*

Defense: Thank you, Judge.

Trial Court: *Sustained his order denying.*

(emphasis added).

Voir dire began the next day and the jury subsequently returned a verdict of guilty to the online solicitation of a minor. Approximately six weeks later, on March 11, 2016, the trial court sentenced Zavala to ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice, suspended and probated for a term of ten years, and assessed a \$2,500.00 fine. This appeal ensued.

We first turn to this court's jurisdiction.

APPELLATE JURISDICTION

A. Arguments of the Parties

The State contends that because the trial court denied the issuance of the writ of habeas corpus requested by Zavala, and did not consider the merits of Zavala's second application for pretrial writ of habeas corpus, this court is without jurisdiction to hear this appeal.

Zavala argues the trial court reconsidered the application for writ of habeas corpus during the pretrial hearing, heard arguments of counsel, and decided the issue on the merits on January 25, 2016.

B. Jurisdiction Over Zavala's Second Petition for Writ of Habeas Corpus

1. Requirements for Appeal

“An order denying relief on the merits is a final judgment in the habeas corpus proceeding,’ and is, therefore, immediately appealable.” *Abdygapparova v. State*, No. 04-14-00393-CR, 2015 WL 3505101, at *1 (Tex. App.—San Antonio June 4, 2015, pet. ref'd) (mem.

op., not designated for publication) (citing *Greenwell v. Court of Appeals for Thirteenth Judicial Dist.*, 159 S.W.3d 645, 649 (Tex. Crim. App. 2005)). As with any other appeal, the general rule is that a defendant appealing the denial of an application for writ of habeas corpus “has thirty days from the date of an appealable order to file a notice of appeal.” *Ex parte Matthews*, 452 S.W.3d 8, 10 (Tex. App.—San Antonio 2014, no pet.) (citing TEX. R. APP. P. 26.2(a)(1)); *Olivo v. State*, 918 S.W.2d 519, 522 (Tex. Crim. App. 1996)). “If a notice of appeal is not timely filed, the court of appeals has no option but to dismiss the appeal for lack of jurisdiction.” *Id.* (quoting *Castillo v. State*, 369 S.W.3d 196, 198 (Tex. Crim. App. 2012)); *see also Olivo*, 918 S.W.2d at 522.

“There is no right of appeal from a refusal to issue a writ of habeas corpus when the trial court did not consider and resolve the merits of the petition.” *Purchase v. State*, 176 S.W.3d 406, 407 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *see also Ex parte Bowers*, 36 S.W.3d 926, 927 (Tex. App.—Dallas 2001, pet. ref’d) (“Neither the order—nor anything else in the record before us—reflects that the trial court considered the merits of appellant’s petition.”). “The crucial question to be answered is not whether the trial court issued the writ, but whether the court considered and resolved the merits of the petition.” *Purchase*, 176 S.W.3d at 407. A trial court’s denial of a habeas as frivolous does not constitute a ruling on the merits of the claim. *See Ex parte Martell*, 901 S.W.2d 754, 755, 757 (Tex. App.—San Antonio 1995, no pet.).

In the present case, the magistrate signed the order denying Zavala’s second application for writ of habeas corpus on January 22, 2016. Three days later, on January 25, 2016, Zavala requested that the trial court reconsider the magistrate’s decision. Both the State and defense counsel presented arguments regarding the constitutionality of the statute. The trial court orally denied the second application for writ of habeas corpus, on the merits of the writ, on January 25, 2016. The record does not contain a written order denying the writ.

2. *Zavala's Notice of Appeal*

The only notice of appeal in this matter was filed on April 8, 2016.

3. *Appellate Deadlines*

“Habeas corpus proceedings are separate and distinct proceedings independent of the cause instituted by the presentation of an indictment or other forms of the State’s pleadings.” *Ex parte Shumake*, 953 S.W.2d 842, 846 n.8 (Tex. App.—Austin 1997, no pet.); *accord Greenwell*, 159 S.W.3d at 650. Although habeas corpus proceedings should be docketed separately from the substantive cause, with a separate cause number, failure to do so does not change the appellate court’s jurisdiction. *See Ex Parte Brown*, No. 06-15-00219-CR, 2016 WL 529600, at *1 (Tex. App.—Texarkana Feb. 10, 2016, no pet.) (mem. op., not designated for publication).

A habeas corpus proceeding is appealable precisely because it is an independent original proceeding that is not part of the criminal case. *See Ex parte Shumake*, 953 S.W.2d at 846 n.8.

A habeas corpus action is, in theory, a different litigation than the criminal prosecution. . . . When habeas corpus is used as a vehicle for raising matters pretrial in a pending criminal prosecution, the difference between the pending prosecution and the habeas corpus proceeding is both more subtle and more significant. An order denying relief on the merits is a final judgment *in the habeas corpus proceeding*. Therefore, it is immediately appealable by the unsuccessful petitioner.

Greenwell, 159 S.W.3d at 649–50 (quoting DIX & DAWSON, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE, Vol. 43B, § 47.51, 219–20 (2nd ed. 2001) (alteration in original)).

More specifically, the Court of Criminal Appeals explained as follows:

The right of appeal occurs because the habeas proceeding is in fact considered a separate “criminal action,” and the denial of relief marks the end of the trial stage of that criminal action and the commencement of the timetable for appeal. The appealability of a habeas proceeding turns not upon the nature of the claim advanced but upon the use of the procedure itself and the trial court’s decision to consider the claim (i.e. “issue the writ”).

Id. (footnotes omitted).

4. *Application*

Even assuming, without deciding, that the appellate deadline ran from January 25, 2016, and not the signed order of January 22, 2016, the trial court's denial of Zavala's second application for writ of habeas corpus was immediately appealable and Zavala's notice of appeal on the trial court's denial was due on or before February 24, 2016. *See* TEX. R. APP. P. 26.2(a)(1); *Ex parte Matthews*, 452 S.W.3d at 10.

Because we conclude Zavala's notice of appeal with regard to his second application for writ of habeas corpus was not timely filed, we have no option but to dismiss the appeal for lack of jurisdiction. *See Ex parte Matthews*, 452 S.W.3d at 10. Accordingly, we dismiss Zavala's appeal for lack of jurisdiction.

Patricia O. Alvarez, Justice

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