



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00218-CV

EX PARTE J.A.G.

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CI21969
Honorable Angelica Jimenez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: June 26, 2019

REVERSED AND RENDERED

The sole issue presented in this appeal is whether the trial court erred in denying a petition for expunction where: (1) the petitioner pled no contest to committing the offense of online solicitation of a minor and was ordered to serve deferred adjudication community supervision; (2) the trial court's order was set aside in a habeas proceeding because the online solicitation of a minor statute was held unconstitutional; and (3) the district attorney's motion to dismiss the charges was also granted because the statute was declared unconstitutional. We join our sister courts in holding the petitioner was entitled to an expunction. *See Tex. Educ. Agency v. S.E.H.*, 571 S.W.3d 372 (Tex. App.—Houston [1st Dist.] 2018, pet. filed); *Ex parte E.H.*, No. 02-17-00419-CV, 2018 WL 4050556 (Tex. App.—Fort Worth Aug. 16, 2018, pet. filed); *Ex parte C.D.*,

No. 12-17-00309-CV, 2018 WL 3569838 (Tex. App.—Tyler July 25, 2018, pet. filed). The trial court’s order is reversed, and judgment is rendered granting the petition for expunction.

BACKGROUND

On June 18, 2013, J.A.G. pled no contest to a charge of online solicitation of a minor. Pursuant to a plea bargain agreement, the trial court entered an order deferring the adjudication of J.A.G.’s guilt and placing J.A.G. on eight years’ community supervision.

On October 30, 2013, the Texas Court of Criminal Appeals held the online solicitation of a minor statute unconstitutional. *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013). It is undisputed that J.A.G. subsequently filed an application for writ of habeas corpus relief which was granted by the trial court. Although the trial court’s order granting habeas relief is not contained in the appellate record, the order presumably set aside the trial court’s order deferring J.A.G.’s adjudication and remanded J.A.G. to custody “to answer the charges as set out in the indictment so that the indictment may be disposed of in accordance with . . . *Ex parte Lo*.” *Ex parte Chance*, 439 S.W.3d 918, 918 (Tex. Crim. App. 2013) (granting such relief in a post-conviction writ of habeas corpus).

On October 14, 2016, the district attorney filed a motion to dismiss the charges against J.A.G. because the statute under which he was charged had been declared unconstitutional. The trial court signed an order granting the motion and dismissing the cause.

On November 17, 2017, J.A.G. filed a petition for expunction asserting he was entitled to an expunction under article 55.01(a)(2) of the Texas Code of Criminal Procedure (the “Code”). The petition stated “there was court-ordered community supervision under Article 42.12 of the [Code], *however that was negated* by the said Writ of Habeas Corpus and Order [*on Writ of Habeas Corpus*].” (emphasis in original). The Texas Department of Public Safety (“DPS”) filed an answer

asserting J.A.G was not entitled to expunction because he served court-ordered community supervision. After a hearing, the trial court denied the petition.¹ J.A.G. appeals.

STANDARD OF REVIEW

“We review a trial court’s ruling on a petition for expunction for an abuse of discretion.” *Ex Parte Green*, 373 S.W.3d 111, 113 (Tex. App.—San Antonio 2012, no pet.). “To the extent a ruling on expunction turns on a question of law, we review the ruling de novo because ‘[a] trial court has no ‘discretion’ in determining what the law is or applying the law to the facts.’” *Id.* (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)). “Thus, a trial court abuses its discretion if it misapplies or misinterprets the law.” *Id.*

DISCUSSION

One of the requirements that must be shown to be entitled to an expunction under article 55.01(a)(2) of the Code is that “there was no court-ordered community supervision under Chapter 42A for the offense.” TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2). In its appellee’s brief, DPS refers to the plain language of the statute and asserts, “Regardless of how the community supervision terminated or what happened after it terminated, there still was community supervision for the offense. Consequently, the expunction of [J.A.G.’s] arrest was properly denied by the trial court.” Although DPS acknowledges the Fort Worth court’s holding to the contrary, it notes a petition for review is pending in that appeal.

As previously noted, the Texas Court of Criminal Appeals held the online solicitation of a minor statute facially unconstitutional. *Ex parte Lo*, 424 S.W.3d at 14. “An unconstitutional statute is void from its inception.” *Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988).

¹ We note the trial court’s order was signed before the previously cited opinions from our sister courts had issued. At the time the trial court’s order was signed, the Houston court had reversed a trial court’s order granting a petition for expunction under similar circumstances; however, the Houston court subsequently granted en banc reconsideration and held the trial court did not err in granting the petition. *See Tex. Educ. Agency*, 571 S.W.3d at 377.

When a statute is declared facially unconstitutional, there is no valid law upon which to base a prosecution or to justify the imposition of community supervision. *Smith v. State*, 463 S.W.3d 890, 896 (Tex. Crim. App. 2015) (noting void statute provides no valid law upon which to predicate a prosecution); *Reyes*, 753 S.W.2d at 383 (noting void statute justifies no act performed under it). Stated differently, “void legal consequences from void statutes are treated as void from their very inception.” *Tex. Educ. Agency*, 571 S.W.3d at 376. As such, any “community supervision imposed pursuant to a void statute must be treated just as it would be treated in other legal circumstances: as a legal nullity.” *Id.*; see also *Ex parte C.D.*, 2018 WL 3569838, at *3 (noting when statute under which a person was arrested has been declared unconstitutional “it is as if [the person’s] arrest never occurred”). Accordingly, because the law treats community supervision ordered as a consequence of a void statute as a nullity, we hold “there was no court-ordered community supervision” for the offense for which J.A.G. sought to have his records expunged. Therefore, the trial court erred in denying J.A.G.’s petition.

CONCLUSION

The trial court’s order is reversed, and judgment is rendered granting J.A.G.’s petition for expunction.

Irene Rios, Justice