In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00216-CR

EX PARTE TONYA COUCH

On Appeal from Criminal District Court No. 2
Tarrant County, Texas
Trial Court No. CDC2-C009633-00

Before Birdwell, Bassel, and Womack, JJ.
Opinion on Remand by Justice Birdwell

OPINION ON REMAND

The Court of Criminal Appeals remanded this appeal to us to determine whether appellant Tonya Couch's pretrial habeas claim for relief is cognizable. Because we determine that it is not, we affirm the trial court's order denying pretrial habeas relief.

Background

In four separate indictments and cause numbers, the State charged Couch with violating Penal Code Section 34.02(a)(4) in four different ways. Tex. Penal Code Ann. § 34.02(a)(4). In number 1457264, the State charged her with

> [k]nowingly financ[ing] or invest[ing] or intend[ing] to finance or invest funds of $30,000 or more but less than $150,000, that Tonya Couch believed were intended to further the commission of criminal activity: namely hindering apprehension of Ethan Couch, an individual having engaged in delinquent conduct that violated a penal law of a grade of felony.

In numbers 1596597 and 1597467, the State charged her with "[k]nowingly financ[ing] or invest[ing] or intend[ing] to finance or invest funds of $30,000 or more but less than $150,000, that [Tonya Couch] believed were intended to further the commission of criminal activity, to-wit: hindering apprehension." And finally, in number 1598847, the State charged her with

> [k]nowingly financ[ing] or intend[ing] to finance funds of $30,000 or more but less than $150,000 that [Tonya Couch] believed were intended to further the commission of criminal activity, to-wit: hindering apprehension of Ethan Couch, by withdrawing funds in cash in the amount of $30,000 from JPMorgan Chase Bank to finance the travel of [Tonya Couch] and Ethan Couch to Mexico.

Couch filed a pretrial habeas corpus application, in which she sought dismissal of the indictment in number 1597467. She contended that Penal Code Section 34.02(a)(4) is unconstitutional because "by forbidding the mere intent to finance or invest funds intended to further the commission of criminal activity," it "creates a thought crime" in violation of the First, Eighth, and Fourteenth Amendments of the United States Constitution. U.S. Const. amends. I, VIII, XIV; Tex. Penal Code Ann. § 34.02(a)(4). She later filed an amended application on the same grounds—that the entirety of Section 34.02(a)(4) is void because part of it creates a thought crime—seeking dismissal of all four indictments. After a nonevidentiary hearing, the trial court denied the application.

On appeal, we determined that Section 34.02(a)(4) does not implicate the First Amendment and therefore is not unconstitutional; we affirmed the trial court's order. *Ex parte Couch*, 629 S.W.3d 509, 515–17 (Tex. App.—Fort Worth), *rev'd*, 629 S.W.3d 217, 218 (Tex. Crim. App. 2021). On reviewing Couch's petition for discretionary review, the Court of Criminal Appeals "noticed that there may be a question about the cognizability of appellant's challenge to the statute." 629 S.W.3d at 217. Because we had not expressly addressed cognizability in our opinion, the Court of Criminal Appeals vacated our judgment and remanded the case to us "to address the cognizability of the issue raised in appellant's pretrial writ application." *Id.* at 218.

Cognizability of Couch's Complaint

"The great and central office of the writ of habeas corpus is to test the legality of a prisoner's current detention." 39 Am. Jur. 2d Habeas Corpus § 1; *see Ex parte Lowe*, 251 S.W. 506, 507 (Tex. Crim. App. 1923) ("A party's right to [the habeas corpus] does not depend upon the legality or illegality of his original caption, but upon the legality or illegality of his present detention." (quoting *Ex parte Coupland*, 26 Tex. 386, 391 (1862) (alteration in original))); *see also Coupland*, 26 Tex. at 390 ("[T]he only object of the writ is to relieve the party detained from the illegal restraint . . . ."); *Green v. State*, 999 S.W.2d 474, 477 (Tex. App.—Fort Worth 1999, pet. ref'd) ("The purpose of a pretrial habeas corpus application is not to facilitate trial, but to stop trial and secure immediate release from confinement."). Therefore, pretrial habeas relief is an extraordinary remedy. *Ex parte Ingram*, 533 S.W.3d 887, 891 (Tex. Crim. App. 2017). It "lies only if the petitioner is entitled to immediate release from confinement, so that the writ is generally available only when the release of the prisoner from the detention he or she attacks will follow as a result of a decision in the prisoner's favor." 39 Am. Jur. 2d Habeas Corpus § 11 (citations omitted). A pretrial habeas application is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not result in her immediate discharge. *Ex parte Hammons*, 631 S.W.3d 715, 716 (Tex. Crim. App. 2021); *Ex parte Ruby*, 403 S.W.2d 129, 130 (Tex. Crim. App. 1966).

Ordinarily, "[a] challenge to a statute under the overbreadth[1] doctrine is a facial challenge that can be brought in a pretrial habeas application, and the denial of relief may be immediately appealed." *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016); *see Ex parte Nuncio*, No. PD-0478-19, 2022 WL 1021276, at *1 (Tex. Crim. App. Apr. 6, 2022); *cf. Ex parte Barton*, No. PD-1123-19, 2022 WL 1021061, at *3 (Tex. Crim. App. Apr. 6, 2022) ("A law implicating First Amendment freedoms may be found facially vague without 'a showing that there are no possible instances of conduct clearly falling within the statute's prohibitions.'" (quoting *State v. Doyal*, 589 S.W.3d 136, 145 (Tex. Crim. App. 2019))). But if the remedy for a successful challenge would be severance of the unconstitutional provision from the rest of the statute—resulting in charges remaining pending under the surviving part of the severed statute—then the overbreadth challenge is not cognizable in a pretrial habeas application. *See Ingram*, 533 S.W.3d at 892–94; *see also* Tex. Gov't Code Ann. § 311.032(c) (providing that when a statute does not expressly mention severability or nonseverability, and any part of "the statute or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable"); *Salinas v.*

[1]An overbreadth challenge is a First-Amendment-based facial challenge contending that a statute substantially prohibits or chills protected activity in relation to its "plainly legitimate sweep." *Ex parte Dehnert*, 605 S.W.3d 885, 888 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd) (quoting *U.S. v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587 (2010)).

State, 523 S.W.3d 103, 110 (Tex. Crim. App. 2017) ("[I]t is possible for only a portion of a statute to be facially unconstitutional, and if that is the case, the court should invalidate only that portion, leaving the remainder of the statute intact, so long as doing so would be feasible."); *cf. Ex parte Dikes*, No. 14-19-00461-CV, 2020 WL 3240898, at *4 (Tex. App.—Houston [14th Dist.] June 16, 2020, pet. ref'd) (mem. op., not designated for publication) (holding First Amendment overbreadth claim not cognizable in pretrial habeas application because even if court declared unconstitutional parts of harassment statute grafted into stalking statute, appellant could still be convicted of stalking under the indictment "without the State's reliance on the portions of the statute that appellant challenges"); *Ex parte Rivello*, No. 05-19-00676-CR, 2020 WL 728423, at *4 (Tex. App.—Dallas Feb. 13, 2020, pet. ref'd) (mem. op., not designated for publication) (holding pretrial habeas claim not cognizable because even if court held hate-crime enhancement statutes unconstitutional, Rivello "would still be charged with aggravated assault and would still have to stand trial"); *Ex parte Mandola*, No. 03-16-00223-CR, 2018 WL 845013, at *5 (Tex. App.—Austin Feb. 14, 2018, pet. ref'd) (mem. op., not designated for publication) (determining pretrial habeas claim not cognizable because "Mandola [was] claiming that the retaliation enhancement provision in the aggravated-assault statute violates equal protection, but he [did] not otherwise challeng[e] the legality of the aggravated-assault statute under which he [stood] charged"); *Joyner v. State*, 367 S.W.3d 737, 738 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (dismissing appeal

from denial of pretrial habeas application challenging restraint on sex-offender-registration-violation charge when appellant was convicted for theft while appeal was pending); *Tex. Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345, 350 (Tex. App.—Fort Worth 2007, pet. dism'd) (acknowledging that determination of jurisdiction—based upon whether arbitration agreement was subject to the Federal Arbitration Act—required some preliminary consideration of the merits).

To determine cognizability of Couch's First Amendment claim in this pretrial habeas application, we must therefore look ahead to what our remedy should be if we were to determine that subsection (a)(4) is unconstitutionally overbroad. If any unconstitutional part of the subsection could be severed in a way that Couch would still be subject to confinement, she would not be entitled to immediate release and, therefore, would not be entitled to raise her claim in a pretrial habeas application. *See Ingram*, 533 S.W.3d at 894; *Perry*, 483 S.W.3d at 903 (holding that a Texas court has a duty to employ a reasonable narrowing construction of a statute if possible but that "[e]ven if a narrowing construction is not feasible, a state court may cure an overbreadth problem by severing a portion of the statute"). Whether severance is feasible "depends upon the extent to which we can reconcile the full protection of First Amendment liberties with the discernable intent of the Legislature"; therefore, severance is feasible if the valid and invalid statutory provisions at issue are not so "inextricably intertwined . . . that a severance would render the statute incomplete or contrary to legislative intent." *Perry*, 483 S.W.3d at 903.

Here, even if we were to hold that two of the manner and means in Section 34.02(a)(4)—knowingly intending to finance, or knowingly intending to invest, funds the person believes are intended to further the commission of criminal activity—are unconstitutional, we would nevertheless be able to sever the unconstitutional part to allow prosecution under the two other unchallenged manner and means, which no one disputes require an actus reus: (1) knowingly financing funds the person believes are intended to further the commission of criminal activity; and (2) knowingly investing funds the person believes are intended to further the commission of criminal activity. *See* Tex. Penal Code Ann. § 34.02(a)(4); *Deschenes v. State*, 253 S.W.3d 374, 380 (Tex. App.—Amarillo 2008, pet. ref'd) (describing essential elements of money laundering under Penal Code Section 34.02(a)(1)); *cf. Jordan v. State*, 816 S.W.2d 89, 92 (Tex. Crim. App. 1991) (defining finance—for purposes of illegal-investment statute, Texas Health & Safety Code Section 481.126(a)—as "to raise or provide funds or capital for" or "to furnish with necessary funds" and invest as "to commit [money] in order to earn a financial return").

Couch fails to cite *Ingram* in her brief on remand. She instead contends that *Ruby*, a 1966 Texas Court of Criminal Appeals opinion, is the "sole source for the proposition that 'The writ of habeas corpus is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not result in his immediate discharge.'" But although *Ruby* did not cite authority for this proposition, it did not have to; it is not an outlier. *See, e.g.*, *Lowe*, 251 S.W. at 507

("The additional capiases in the hands of the sheriff of Hill [C]ounty, as shown by his uncontroverted return, upon indictments for felonies, preclude this court in habeas corpus proceeding from releasing him from custody."); *see also* 39 Am. Jur. 2d Habeas Corpus § 1.

Couch also distinguishes inapposite Court of Criminal Appeals authority to assert that "regardless of 'immediate release,' a facial-unconstitutionality challenge is cognizable on habeas." In *Ex parte Crisp*, 661 S.W.2d 944 (Tex. Crim. App. 1983), and *Ex parte Meyer*, 357 S.W.2d 754 (Tex. Crim. App. 1962), each appellant was charged in a single indictment with a single charge. Later, in *Ex parte Weise*, the Court of Criminal Appeals distinguished both cases in the cognizability context, noting that it had recognized exceptions to the general rule that "habeas corpus is generally not available before trial to test the sufficiency of the complaint, information, or indictment." 55 S.W.3d 617, 620 & n.17 (Tex. Crim. App. 2001). *Crisp* and *Meyer* fell into the exception for a facial unconstitutionality challenge when "there is no valid statute and the charging instrument is void." *Id.*[2] Here, though, the ultimate availability of severance as a remedy would result in Couch's remaining restrained on pending charges under unchallenged, and otherwise valid, parts of the statutory subsection.

[2]Arguably, the constitutionality analyses in those cases could be considered dicta based on the court's ultimate conclusion in each that the prior, unamended version of the challenged statutes applied so that the appellants remained charged under indictments alleging a valid offense; thus, they were not entitled to immediate release. *Crisp*, 661 S.W.2d at 948; *Meyer*, 357 S.W.2d at 756.

Couch also contends that *Ex parte Watkins* supports cognizability of her claim, but the cognizability determination in *Watkins* was limited to pretrial double-jeopardy claims. 73 S.W.3d 264, 273 (Tex. Crim. App. 2002). Relying upon United States Supreme Court authority, and in response to the dissent, the *Watkins* majority concluded that "a claim of collateral estoppel which is based upon constitutional double jeopardy principles *is* cognizable on a pretrial writ of habeas corpus, as is any double jeopardy claim." *Id.* (citing and quoting *Abney v. United States*, 431 U.S. 651, 660–61, 97 S. Ct. 2034, 2040–41 (1977), for the principle that a pretrial writ of habeas corpus is the "preferred procedural vehicle" for review of a double-jeopardy claim). The *Watkins* majority explained why pretrial habeas review of a specific double-jeopardy claim could be important even if it would not result in a petitioner's immediate release. *Id.* at 274. None of *Watkins*'s reasoning applies here, and the Court of Criminal Appeals has recognized that *Watkins* is a claim-specific exception. *See Perry*, 483 S.W.3d at 895 ("Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant's favor, would not result in immediate release."). We decline to extend *Watkins*'s admitted exception to the general rule to these factually and legally distinguishable circumstances.

Finally, in *Ex parte Ellis*, the court declined to address—on cognizability grounds—the appellants' non-First-Amendment as-applied challenges to the money-laundering statute, leaving those indictments intact. 309 S.W.3d 71, 79–82 (Tex. Crim.

App. 2010) (affirming intermediate appellate court's judgment but holding that the intermediate court should not have addressed the as-applied challenges). But the court went on to address one appellant's First-Amendment facial challenge to the Election-Code-violation charges in other indictments, even though the money-laundering indictments remained pending. *Id.* at 82–92. The money-laundering indictments in *Ellis* were based on the allegation in the other indictments that the Election Code had been violated; therefore, the money-laundering indictments were contingent upon the Election-Code-violation offenses. *See id.* at 75. And the facial challenge to the Election Code provisions in *Ellis* implicated not just two manner and means of several, as alleged in this case, but the entire alleged Election-Code violation in that case. *Id.*; *Ex parte Ellis*, 279 S.W.3d 1, 5–6 (Tex. App.—Austin 2008); *see also* Tex. Elec. Code Ann. §§ 253.003(e), .094(a), (c); Tex. Penal Code Ann. § 34.02(a)(2). Thus, *Ellis* did not present the clear severability remedy available here.

Accordingly, we conclude that the authority cited by Couch is distinguishable. We instead choose to follow the more recently articulated and specific reasoning in *Ingram*, which is thoroughly consistent with the historical understanding of a pretrial habeas application and with longstanding Court of Criminal Appeals authority.[3] *See Weise*, 55 S.W.3d at 620 ("We have long held that when there is a valid statute or ordinance under which a prosecution may be brought, habeas corpus is generally not

[3]Because we conclude that our disposition is based on clear, binding authority, we decline to address Couch's public-policy arguments to the contrary. *See* Tex. R. App. P. 47.1.

available before trial to test the sufficiency of the complaint, information, or indictment.").

Although Couch sought dismissal of all four indictments in their entirety, she never raised a complaint about the other two manner and means charged and has never contended that those manner and means are not severable from the ones she did challenge. Even if we were to agree with her on the merits, our remedy would be to sever the invalid manner and means from subsection (a)(4), leaving her subject to prosecution under the rest of the subsection and therefore ineligible for immediate release. *See Ex parte Bishai*, Nos. 09-21-00158–63-CR, 2021 WL 5498211, at *4–5 (Tex. App.—Beaumont Nov. 24, 2021) (mem. op., not designated for publication), *pet. dism'd*, Nos. PD-0935–40-21, 2022 WL 698178, at *1 (Tex. Crim. App. Mar. 9, 2022);[4] *cf. Ex parte Edwards*, No. PD-1092-20, 2022 WL 1421507, at *2 (Tex. Crim. App. May 4, 2022) ("[A]n indictment is still an indictment even if it has a defect of substance."); *id.* at *4 (noting that reparable indictment defect can be remedied by amendment, motion to quash, or defense at trial); *Ex parte Matthews*, 873 S.W.2d 40, 42 (Tex. Crim. App. 1994) ("As a general rule, an indictment may not be challenged in a pre-trial application for writ of habeas corpus.").

[4]Bishai filed a motion to dismiss the appeals because he had pleaded guilty to a newly charged Class A misdemeanor and the appealed indictments had been dismissed. *See Bishai*, Nos. PD-0935–40-21, https://search.txcourts.gov/Case.aspx?cn=PD-0935-21&coa=coscca (3/9/22). Although the Court of Criminal Appeals dismissed the dismissal motion as moot, it nevertheless dismissed the appeals. *Id.*

Conclusion

Having determined that Couch's complaint is not cognizable via a pretrial habeas application, we affirm the trial court's order denying relief.

/s/ Wade Birdwell

Wade Birdwell
Justice

Publish

Delivered: May 26, 2022