

Court of Criminal Appeals

June 24, 2015

Smith v. State

NOS. PD-1790-13, PD-1791, PD-1792-13, PD-1793-13

Case Summary written by Katy Almond, Staff Member.

JUDGE JOHNSON delivered the opinion of the Court, in which JUDGES MEYERS, ALCALA, RICHARDSON, and NEWELL joined.

The appellant was convicted of possession of child pornography, two counts of sexual assault of a child, and online solicitation of a minor. The appellant was sentenced to three years for each count of sexual assault and eight years for the possession and solicitation counts. The eight-year sentences were suspended and all of the sentences were to run concurrently.

The appellant appealed his conviction, contending that his trial counsel was ineffective and that the amounts assessed against him as court costs should be deleted because there was no bill of costs in the clerk's record. The court of appeals held that the appellant had not demonstrated ineffective assistance of counsel, but reformed the judgment with regards to court costs. The court of appeals reformed the judgment because there was no evidence of the specific dollar amount assessed.

The appellant and the state both filed petitions for discretionary review. On appeal, the appellant argued that his conviction under Texas Penal Code § 33.021(b) was void because the Court of Criminal Appeals held in *Ex parte Lo* that the statute was unconstitutionally vague. The state contended that the reformation of the court costs was error because there are statutes that provide for the assessment of costs.

The court first addressed appellant's claim that his conviction was void. The appellant reasoned that the decision in *Ex parte Lo*, where the court held that § 33.021(b) was facially unconstitutional, made his conviction under that statute void. The appellant further argued that he did not have to raise this ground prior to his appeal because reversal of a conviction that is based on a statute that has been declared void is a requirement. The

state argued that he could not raise this argument for the first time on appeal.

The Court of Criminal Appeals reversed the appellant's conviction under § 33.021(b) because "an unconstitutional statute is void from its inception." The court reasoned that, in *Marin*, it recognized three categories of rules and that the first category of these rules is "absolute requirements and prohibitions." The court reasoned that one absolute requirement is "the right to be free from the enforcement of a statute that has been declared unconstitutional and void." The court also reasoned that such absolute rights cannot be forfeited or waived because the right is so fundamental.

The court addressed the state's argument that, in *Karenev v. State*, the court held that a defendant could not raise a facial challenge to a statute's constitutionality for the first time on appeal. The court noted that this was a different situation because, in *Karenev*, the defendant was raising an argument that a statute was void for the first time on appeal against a statute that was not already declared void. The court then found that, because there was no valid law on which to base appellant's conviction of online solicitation, the judgment was reversed and appellant was acquitted of the charge.

The court then addressed the issue of court costs. The Court of Criminal Appeals noted that it had recently set out a roadmap of these issues in *Johnson v. State*, which the court of appeals did not have at the time of its opinion. Therefore, the court vacated the judgment of the court of appeals and remanded it for consideration of the *Johnson* case.

JUDGE KELLER, concurring and dissenting.

In Judge Keller's concurring and dissenting opinion, he agreed with the majority that there is a right not to be convicted under a law that has been declared facially unconstitutional and that right cannot be waived. However, Judge Keller also agreed with Judge Yeary's dissent that this argument should not have been addressed in a petition for discretionary review. He noted that there is a new statute that allows an indigent defendant to have a court appointed attorney file a writ of habeas corpus when

the defendant was convicted or sentenced under a statute that was found to be unconstitutional.

JUDGE YEARY, concurring and dissenting.

In Judge Yeary's concurring and dissenting opinion, he agreed with the disposition of all issues except the unconstitutionality of a statute being raised for the first time on appeal. Judge Yeary reasoned that the court has now created an exception to the contemporaneous objection rule—a "right not previously recognized as an exception" (here, the unconstitutionality of a statute that has now been rendered void). Judge Yeary also reasoned that a petition for discretionary review was not the correct avenue to address this claim because these petitions are only meant to address decisions of the court of appeals. He noted that the court could have remanded the case to the court of appeals, but that the correct avenue would have been to allow the appellant to raise his argument through a writ of habeus corpus.