

**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.

***Peyronel v. State***

No. PD-1274-14

Case Summary written by Ben Agee, Staff Member.

JUDGE HERVEY delivered the opinion of the Court in which PRESIDING JUDGE KELLER, JUDGES MEYERS, KEASLER, RICHARDSON, YEARY, and NEWELL joined. JUDGE ALCALA concurred.

Facts: Appellant Bobby Joe Peyronel was convicted of aggravated sexual assault of a minor under the age of fourteen. During a break in the punishment phase of the proceedings, a woman who was deemed to be part of the defense approached one of the jurors and asked, “How does it feel to convict an innocent man?”

As a result of this, the court excused all witnesses from the courtroom. The state further asked that the court ask “female members of the defendant’s family” to leave the courtroom during the punishment phase. The defendant’s counsel asserted that such a suggestion by the state was too broad, and would “create the

impression in the jury's mind that [the defendant] has absolutely no support whatsoever." The state responded by saying that the defendant's "support" had intimidated a juror, and therefore the female members of the defendant's family should be released.

Ultimately, the court decided to exclude all members of the gallery from the remainder of the punishment proceedings.

Mr. Peyronel appealed, saying he preserved a complaint that his public-trial right was violated, to which the state argued that a right to a public trial is subject to forfeiture. After the appellate court agreed with the appellant, the state appealed to the Court of Criminal Appeals of Texas.

Issue: Whether a person's right to a public trial can be forfeited in certain circumstances.

Analysis: The Court began by stating that all rights other than the "most fundamental" can be forfeited "if not insisted upon by the party to whom they belong." The court went on to discuss its research and subsequent finding that no jurisdictions in the country would require a public trial in spite of the wishes of the parties involved. In addition to the forfeitable nature of a public trial, the court discussed how, though the appellant had expressed his displeasure with the trial court's actions, he had never expressly asserted that his constitutional right to a public trial was violated.

Holding: Because the court could not find any reasons a right to public trial could not be forfeited, and because the appellant had never concretely expressed his thoughts that his right to a public trial had been violated, the Court of Criminal Appeals of Texas reversed the appellate court, and otherwise affirmed the trial court.

#### JUDGE JOHNSON, dissenting.

In dissent, Judge Johnson said that the record clearly pointed to the fact that, by preserving a complaint, the appellant had effectively, if not expressly, stated that his right to a public trial had been violated. When the appellant's counsel stated that excluding all female members of appellant's family was "too broad," the counsel effectively objected to any exclusion over the

bare minimum of removing the one disruptive female who had initially accosted a juror.

Because the appellant had sufficiently objected to the exclusion of the entire gallery, the dissent argued that the judgment of the court of appeals should have been affirmed.