IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-84,007-01

EX PARTE PATRICK TAYLOR SHAY, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM CAUSE NO. 1195055-A IN THE 337TH DISTRICT COURT HARRIS COUNTY

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

For the reasons expressed in my dissenting opinion in *Ex parte Chang*, 485 S.W.3d 918 (Tex. Crim. App. 2016) (Yeary, J., dissenting), I dissent to the Court granting post-conviction habeas corpus relief on the grounds that Applicant was convicted under a statute that was later declared to be unconstitutionally overbroad without deciding whether the statute was unconstitutional as applied to Applicant. This case illustrates the absurdity of granting retroactive relief regardless of whether the statute functioned unconstitutionally with respect to a particular applicant's conduct.

Applicant was indicted for the offense of Improper Photography or Visual Recording

under Section 21.15(b)(1) of the Penal Code. TEX. PENAL CODE § 21.15(b)(1).[1] He pled guilty to that state jail felony offense, and his punishment was assessed at two years' confinement in a state jail. Judgment was entered on August 19, 2009. Applicant did not appeal his conviction. Since that time, this Court has declared the statutory provision under which Applicant was convicted, Section 21.15(b)(1), to be unconstitutional on its face. *Ex parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014). Applicant now seeks relief from his conviction, arguing that we should either declare him to be actually innocent of the offense or else vacate his conviction and dismiss the indictment against him as based upon a facially unconstitutional statute. Based upon *Ex parte Fournier*, 473 S.W.3d 789 (Tex. Crim. App. 2015), today the Court denies Applicant the former relief while granting him the latter. I dissented in *Fournier* and again in *Chang*, and I dissent again today.

In my dissent in *Fournier*, I argued that we ought to consider not automatically giving retroactive application to a judicial decision declaring a penal statute to be unconstitutionally overbroad under the First Amendment. Instead, I suggested that we should consider only granting post-conviction habeas corpus relief "to those applicants who can establish that their conduct did not fall within the plainly legitimate sweep of the overbroad statute." 473 S.W.3d at 805 (Yeary, J., dissenting). I will not rehash the substance of my dissent here. I write

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[1] Prior to its amendment by Acts 2015, 84 th Leg., ch. 955, §§ 1, 2, eff. June 18, 2015, this provision read: "A person commits an offense if the person . . . by videotape or other electronic means records . . . a visual image of another at a location that is not a bathroom or private dressing room . . . without the other person's consent . . . and . . . with intent to arouse or gratify the sexual desire of any person[.]"

further today only because this case illustrates the sensibleness of my suggestion.

In the plea papers, Applicant judicially confessed to the offense as alleged in the indictment, which simply charged an offense in the terms of the statute, the only elaboration being the name of the complainant. For its part, the State has attached a document to its answer which it designates as "Justice Information Management System probable cause, cause no. 1195055" (a number that corresponds to Applicant's cause number). This document identifies a complainant with the same name as the complainant alleged in the indictment and describes (presumably to establish probable cause for an arrest warrant) the offense he committed against her. It states:

> THE COMPLAINANT TOOK XANAX PILLS AND WHILE PASSED OUT JOSHUA GEHRER A 28 YEAR OLD MAN HAD SEX WITH THE COMPLAINANT, A 15 YEAR OLD GIRL. WHILE DEF. GEHRER WAS HAVING SEX WITH THE JUVENILE COMPLAINANT, THIS DEFENDANT TOOK VIDEOS OF THE ACT ON HIS PHONE.

This hardly seems to establish that the statute operated unconstitutionally as applied to Applicant's particular conduct.

In *Thompson*, the Court recognized that the Improper Photography or Visual Recording statute may well cover some conduct that may legitimately be proscribed. The Court explained:

> The State asserts an interest in protecting the privacy of those [persons] photographed or recorded. Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner. We agree with the State that substantial privacy interests are invaded in an intolerable manner when a person is photographed without

> consent in a private place, such as a home, or with respect to an area of the person that is not exposed to the general public, such as up a skirt.
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> * * *
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> Subsection (b)(1) could . . . be narrowed by adding an element that requires that a person's privacy interest be invaded as a result of the place of the person recorded or the manner in which a visual recording is made.
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> * * *
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> As we explained above, § 21.15(b)(1) does apply to the situation in which a non-consensual photograph is taken of a person in a private place, such as the home, and the situation in which a photograph is taken of an area of a person's body that is not exposed to the public, such as when a photograph is taken up a woman's skirt. Assuming these to be legitimate applications of the statute, we address the overbreadth question.

442 S.W.3d at 348-49 (footnotes omitted).

Likewise, if we assume that the statute has at least as much plainly legitimate sweep as we claimed in *Thompson*, I believe it to be undeniable that Applicant's conduct, if accurately reflected in the "Justice Information Management System" document quoted above, clearly falls within it. In any event, Applicant has not alleged that the offense as he committed it does *not* fall within those possible applications of Section 21.15(b)(1) that are not unconstitutional.

For the reasons given in my dissenting opinions in *Fournier* and *Chang*, I would not grant Applicant relief retroactively, on authority of *Ex parte Thompson*, when he is challenging the constitutionality of the statute for the first time in post-conviction habeas corpus proceedings and his conduct was in no conceivable way justifiable as protected First

Amendment expression. Neither the statute nor the State has violated Applicant's constitutional right to free speech, and society's interest in preventing any chilling effect that might have been caused by Section 21.15(b)(1) has been adequately served. Automatically granting relief to Applicant under these circumstances is pointless.

I respectfully dissent.

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