



# **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**

**KELLER, P.J., filed a dissenting opinion.**

Applicant pled guilty to improper photography and received a two-year sentence. A document attached to the State's answer indicates that he used his cell phone to video record a twenty-eight year old man having sex with a fifteen-year-old girl. In exchange for his plea, the State agreed not to file aggravated sexual assault or child pornography charges arising out of the transaction. Applicant did not appeal his conviction. The parties and the trial court agree that applicant's sentence has discharged. Applicant nevertheless claims that he is suffering collateral consequences of his conviction because he is currently in the custody of the Harris County Jail on a Motion to Adjudicate Guilt for a charge of unlawful possession of a firearm by a felon.

## **A. Firearm Offense – Not a Collateral Consequence**

## SHAY DISSENT- 2

To be entitled to post-conviction relief under Article 11.07,<sup>1</sup> an applicant must be in “confinement” as a result of his conviction.<sup>2</sup> Under the statute, confinement includes actual confinement on the conviction or any collateral consequence resulting from the conviction.<sup>3</sup>

Applicant has failed to establish that the proceedings in his felon-in-possession case are a collateral consequence of this conviction. The charge of possession of a firearm by a felon does not depend on the continuing validity of the prior conviction that made the defendant a felon. Under the felon-in-possession-of-a-firearm statute, all that matters is that the defendant was classified as a felon at the time he possessed the firearm; any later decision setting aside that prior felony does not retroactively affect the defendant’s status for that purpose.<sup>4</sup> Even though the Court overturns this conviction, applicant’s criminal liability under the felon-in-possession statute will not be affected.

It is true that we have suggested that a statute that is declared unconstitutional on its face is “void from its inception” and “stillborn,”<sup>5</sup> but there are exceptions to that principle.<sup>6</sup> Even though a person’s felony status may be caused by what turns out to be a facially unconstitutional statute, the law still prohibits him from possessing a firearm. His recourse is to challenge the statute

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<sup>1</sup> TEX. CODE CRIM. PROC. art. 11.07.

<sup>2</sup> *Ex parte Cooke*, 471 S.W.3d 827, 830 (Tex. Crim. App. 2015); *Ex parte Renier*, 734 S.W.2d 349, 351 (Tex. Crim. App. 1987).

<sup>3</sup> TEX. CODE CRIM. PROC. art. 11.07, § 3(c); *Cooke, supra*; *Ex parte Harrington*, 310 S.W.3d 452, 457 (Tex. Crim. App. 2010).

<sup>4</sup> *Ex parte Jimenez*, 361 S.W.3d 679, 683-84 (Tex. Crim. App. 2012).

<sup>5</sup> *Smith v. State*, 463 S.W.3d 890, 895 (Tex. Crim. App. 2015).

<sup>6</sup> *Karenev v. State*, 281 S.W.3d 428, 431 (Tex. Crim. App. 2009) (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940)) (internal quotation marks omitted).

successfully *before* possessing a firearm.<sup>7</sup> The United States Supreme Court has followed this rule with respect to a similar federal felon-in-possession-of-a-firearm statute even when the prior felony conviction was invalid because the defendant was not afforded an attorney (in violation of *Gideon v. Wainwright*<sup>8</sup>)<sup>9</sup>—one of the few errors that we have held renders a conviction “void.”<sup>10</sup>

The Court contends that it does not matter that granting relief will not affect applicant’s status as a felon for purposes of the felon-in-possession-of-a-firearm statute because Article 11.07 jurisdiction does not turn on “the potential result of granting relief.” But it does. In *Ex parte Lockett*, we explained that “the relief sought must request a change of either the fact or the length of confinement.”<sup>11</sup> And in *Ex parte Renier*, when we discussed the “confinement” requirement, we explained that Article 11.07 requires this Court to “enter its judgment remanding the petitioner to custody or ordering his release.”<sup>12</sup> Although the legislature partially superseded *Renier*’s holding by enlarging the definition of “confinement” to include “any collateral consequence resulting from the conviction,” *Lockett* and *Renier* both require that this Court be able to *release* applicant from that confinement as more broadly defined. And the habeas statute still requires that this Court enter a

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<sup>7</sup> See *Lewis v. United States*, 445 U.S. 55, 64-65 (1980).

<sup>8</sup> 372 U.S. 335 (1963).

<sup>9</sup> See *Lewis*, 445 U.S. at 56, 65.

<sup>10</sup> See *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001) (listing, as one of four errors in a nearly exclusive list of situations in which a criminal judgment is void, when “an indigent defendant is required to face criminal trial proceedings without appointed counsel, when such has not been waived, in violation of *Gideon v. Wainwright*”).

<sup>11</sup> 956 S.W.2d 41, 42 (Tex. Crim. App. 1997). See also *Harrington*, 310 S.W.3d at 456 (habeas applicant “must challenge either the fact or length of confinement”).

<sup>12</sup> 734 S.W.2d 349, 351 (Tex. Crim. App. 1987) (op. on applicant’s motion for reh’g) (emphasis in original).

judgment either “remanding the applicant to custody or ordering his release.”<sup>13</sup> We have broadly construed “release” to include any sort of remedy that removes the fact of confinement or mitigates the length of confinement,<sup>14</sup> but the habeas statute does not confer on this Court the authority to impose a remedy that does not in some sense “release” the offender from “confinement.” Granting relief on applicant’s unconstitutional-statute claim will not release him from the supposed collateral consequence of being a felon for purposes of the felon-in-possession-of-a-firearm statute.

**B. Estoppel – Cannot Show Use of Prior Felony as a Collateral Consequence**

But suppose that the continuing validity of the improper-photography conviction mattered because, for instance, it was being used simply to enhance punishment under Texas Penal Code § 12.42. The doctrine of estoppel would bar the applicant in this case from establishing collateral consequences because, absent the favorable plea agreement, it is very likely that he still would have had a felony conviction. The doctrine of estoppel can trump the ability to obtain relief even from the violation of an absolute requirement or prohibition.<sup>15</sup>

Applicant received a favorable plea deal, to say the least: two years in state jail for improper photography and an agreement that the State would not prosecute him for aggravated sexual assault or child pornography. Aggravated sexual assault is a first-degree felony with a maximum life sentence.<sup>16</sup> Possession of child pornography is a third-degree felony with a maximum sentence of

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<sup>13</sup> TEX. CODE CRIM. PROC. art. 11.07, § 5.

<sup>14</sup> See *Harrington*, 310 S.W.3d at 456; *Lockett*, 956 S.W.2d at 42.

<sup>15</sup> *Gutierrez v. State*, 380 S.W.3d 167, 177 (Tex. Crim. App. 2012).

<sup>16</sup> TEX. PENAL CODE § 22.021(e) (West 2008).

ten years.<sup>17</sup> And the State might have sought stacked sentences by prosecuting the sexual assault and child pornography counts separately.<sup>18</sup> An aggravated sexual assault conviction would also have subjected applicant to sex-offender registration requirements, which is not the case with a conviction for improper photography.<sup>19</sup>

Had applicant not obtained this extremely favorable deal, the State could have prosecuted him for aggravated sexual assault or child pornography, and if the evidence was in fact memorialized on video (as the conviction for improper photography suggests), then conviction would seem fairly certain, and in that event, applicant would still have had a felony conviction at the time he possessed the firearm. Our statement in *Rhodes* concerning the applicability of estoppel seems especially pertinent here: “Had he complained about the illegal leniency” at an earlier point in time, “the State could likely have obtained a legal judgment that would now be available for enhancement purposes. But instead, [the defendant] quietly enjoyed the benefits of the illegally lenient judgment, challenging it now only because, due to his own subsequent criminal conduct, the judgment can be used to enhance his punishment for a new offense.”<sup>20</sup>

None of this might matter if applicant were imprisoned or on parole for this offense. As the Court explains, the invalidation of a facially unconstitutional statute that defines the offense would appear to deprive a trial court of subject matter jurisdiction over the offense. But applicant’s goal of obtaining relief on habeas is complicated by the fact that his sentence has discharged. To even

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<sup>17</sup> *Id.* § 43.26(d).

<sup>18</sup> *See* TEX. CODE CRIM. PROC. art. 42.08 (West 2008)

<sup>19</sup> *Id.* art. 62.001.

<sup>20</sup> *Rhodes*, 240 S.W.3d at 891. *See also* *Cooke*, 471 S.W.3d at 832 n.27 (quoting *Rhodes*).

**SHAY DISSENT- 6**

mount his challenge to the conviction, he must first establish collateral consequences. We cannot even get to applicant's subject-matter-jurisdiction claim until collateral consequences have been established. And the equities that the Court speaks about, with regard to an offense that should not exist because the statute is facially unconstitutional, are those that weigh in favor of a defendant currently being imprisoned or on parole. The equities seem to have much less force for a defendant whose sentence has already discharged and who would likely have been subject to a far greater sentence absent the plea bargain.

In summary, applicant is suffering no collateral consequences because he was in fact a felon at the time he possessed the firearm, and his status as a felon at that point in time is not affected by the subsequent invalidation of the improper-photography statute. And applicant is estopped from claiming the use of the prior conviction as a collateral consequence in this case because, absent the very favorable plea agreement he obtained, the State would in all likelihood have obtained a felony conviction that would now be available for use in his felon-in-possession-of-a-firearm prosecution.

I would dismiss the application.

Filed: December 14, 2016

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