

NINTH COURT OF APPEALS OF TEXAS AT BEAUMONT

Ex parte David Lee Victorick and David Lee Victorick v. State of Texas

Victorick · No. 09-14-00112-CR; 09-14-00190-CR · Decided January 14, 2015

SUMMARY

This document is David Lee Victorick’s motion in the Texas Court of Criminal Appeals requesting a 31-day extension, until February 9, 2015, to file a petition for discretionary review. The motion explains counsel’s competing professional obligations and identifies related appeals involving Victorick’s conviction for online solicitation of a minor and a pretrial double-jeopardy habeas challenge. It includes the Ninth Court of Appeals’ opinion affirming the denial of habeas relief and Victorick’s conviction.

CASE DETAILS

COURT	Ninth Court of Appeals of Texas at Beaumont
WRITING FOR THE COURT	Leanne Johnson; McKeithen, C.J.; Kreger; Johnson
JURISDICTION	Texas
DECIDED	January 14, 2015
DOCKET	09-14-00112-CR; 09-14-00190-CR
DISPOSITION	affirmed
PROCEDURAL POSTURE	Victorick appealed the denial of a pretrial application for writ of habeas corpus asserting double jeopardy and separately appealed his conviction for online solicitation of a minor. The Ninth Court of Appeals consolidated and decided the related appeals.
STANDARD OF REVIEW	For legal sufficiency, the court viewed all evidence in the light most favorable to the verdict and determined whether any rational factfinder could have found the essential elements beyond a reasonable doubt. The court deferred to the jury’s determinations concerning witness credibility, evidentiary weight, conflicting inferences, and reasonable inferences. Constitutional challenges were reviewed under a presumption that the challenged rule was valid, with the burden on the challenger to establish unconstitutionality as applied.
PRECEDENTIAL VALUE	published

PARTIES

David Lee Victorick v. The State of Texas

TOPICS

writ of certiorari

mootness

double jeopardy

criminal procedure

due process

PRACTICE AREAS

criminal procedure

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QUESTIONS PRESENTED

1. Whether the conditions of Victorick's pretrial bond constituted punishment for purposes of the Fifth Amendment Double Jeopardy Clause.
2. Whether Victorick's pretrial habeas appeal became moot after his conviction.
3. Whether the evidence was legally sufficient to prove that Victorick knowingly solicited a minor to meet him with the intent that she engage in sexual contact.
4. Whether the trial court's use of the term "victim" in a pretrial bond order demonstrated that it had prejudged Victorick's guilt and denied him an impartial tribunal.
5. Whether Texas Rule of Civil Procedure 18a(a)(3) and 18a(j)(1)(A), governing recusal proceedings, were unconstitutional as applied to Victorick because they did not provide an interlocutory appeal.

HOLDINGS

1. Conditions of pretrial bond authorized to secure the defendant's appearance and protect the victim and community, and imposed without a finding of guilt, do not constitute punishment for purposes of the Double Jeopardy Clause.
2. The conviction did not necessarily moot the pretrial habeas appeal because the double-jeopardy claim, if meritorious, could entitle Victorick to relief from the sentence imposed by the appealed conviction.
3. The evidence was legally sufficient for a rational jury to find beyond a reasonable doubt that Victorick knowingly solicited K.E., a minor, to meet him with the intent that she engage in sexual contact.
4. The record did not establish that the trial court prejudged Victorick's guilt or deprived him of an impartial tribunal.
5. Victorick failed to establish that Rule 18a(a)(3) or 18a(j)(1)(A) was unconstitutional as applied to him or to a hypothetical third party.

KEY QUOTATIONS

"Unlike a habeas claim concerning pre-trial bail in which the applicant seeks relief from an unconstitutional pre-trial confinement, if he is correct regarding his double jeopardy argument, Victorick may be entitled to relief from the sentence imposed in the judgment of conviction that has also been appealed to this Court." (3)

"Therefore, we conclude that the trial court did not err in denying the application for writ of habeas corpus." (10)

“Viewing the totality of the evidence and inferences in a light most favorable to the verdict, the jury could have reasonably inferred that Victorick sent the messages to K.E.” (19)

“Victorick has not established that the trial court prejudged his guilt. Furthermore, Victorick has not shown that Rule 18a is unconstitutional as applied to him or as applied to some hypothetical third party.” (21)

FACTUAL BACKGROUND

Victorick, a high school teacher and coach, was accused of sending sexually explicit text messages to K.E., a fifteen-year-old member of his household, including messages that the jury could interpret as requests for oral sex and as solicitation to meet. His bond included conditions restricting firearms possession, contact with the alleged victim and her family, proximity to her residence, contact with children, and computer or internet use. A jury convicted him of online solicitation of a minor under Texas Penal Code section 33.021(c) and assessed five years' imprisonment.

PROCEDURAL HISTORY

Victorick was initially indicted under Texas Penal Code section 33.021(b)(1), and after that provision was held unconstitutional in *Ex parte Lo*, he was reindicted under section 33.021(c). The trial court denied his pretrial habeas application, declined to stay the trial, and later entered judgment after a jury convicted him and assessed five years' imprisonment. The court of appeals affirmed both the habeas denial and the judgment of conviction.

DISPOSITION

affirmed

CASES CITED

- *In re Victorick*, No. 09-13-00483-CR, 2013 WL 5969469, at *1 (Tex. App.—Beaumont Nov. 6, 2013, orig. proceeding) (mem. op., not designated for publication)
- *In re Victorick*, No. 09-13-00550-CR, 2013 WL 6885130, at *1 (Tex. App.—Beaumont Dec. 30, 2013, orig. proceeding, [leave denied]) (mem. op., not designated for publication)
- *Ex parte Victorick*, No. 09-13-00551-CR, 2014 WL 2152129, at *1 (Tex. App.—Beaumont May 21, 2014, pet. ref'd) (mem. op., not designated for publication)
- *Turner v. State*, 733 S.W.2d 218, 223 (Tex. Crim. App. 1987)
- *Ex parte Lo*, 424 S.W.3d 10, 27 (Tex. Crim. App. 2013)
- *Martinez v. State*, 826 S.W.2d 620, 620 (Tex. Crim. App. 1992)
- *United States v. Jorn*, 400 U.S. 470, 483-84, 487 (1971)
- *Ortiz v. State*, 933 S.W.2d 102, 105 (Tex. Crim. App. 1996)
- *Ervin v. State*, 991 S.W.2d 804, 807, 814 (Tex. Crim. App. 1999)
- *Missouri v. Hunter*, 459 U.S. 359, 366 (1983)
- *Blockburger v. United States*, 284 U.S. 299, 304 (1932)
- *State v. Torres*, 890 So. 2d 292, 296 (Fla. Dist. Ct. App. 2d Dist. 2004)

- Parent v. State, 900 So. 2d 598, 599-600 (Fla. Dist. Ct. App. 2d Dist. 2004)
- Halikopoulos v. Dillion, 139 F. Supp. 2d 312 (E.D.N.Y. 2001)
- Stack v. Boyle, 342 U.S. 1, 6 (1951)
- Ex parte Young, 257 S.W.3d 276, 278 (Tex. App.—Beaumont 2008, no pet.)
- Brooks v. State, 323 S.W.3d 893, 894-95, 899 n.13, 902 n.19 (Tex. Crim. App. 2010)
- Jackson v. Virginia, 443 U.S. 307, 319 (1979)
- Hooper v. State, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)
- Penagraph v. State, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981)
- Clayton v. State, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)
- King v. State, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000)
- Laster v. State, 275 S.W.3d 512, 521, 523 (Tex. Crim. App. 2009)
- Vernon v. State, 841 S.W.2d 407, 409 (Tex. Crim. App. 1992)
- Tumey v. Ohio, 273 U.S. 510, 523 (1927)
- In re Murchison, 349 U.S. 133, 136 (1955)
- Rodriguez v. State, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002)
- Ex parte Granviel, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978)
- Wood v. State, 18 S.W.3d 642, 650-51 (Tex. Crim. App. 2000)