No. 08-1044

In the Supreme Court of Texas

———————♦———————

No. 01-07-00274-CV

In the

Court of Appeals

For the

First District of Texas

At Houston

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IN THE MATTER OF B.W.

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STATE'S RESPONSE TO PETITION FOR REVIEW

———————♦———————

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TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF FACTS

Petitioner was placed in the custody of Children's Protective Services (CPS) in November of 2004. However, she ran away from her group home facility in October of 2005. (CR 8). The CPS staff was not aware of petitioner's whereabouts until she was arrested for prostitution 14 months later. (RR – Exhibit P2).

On the morning of January 12, 2007, the thirteen-year-old petitioner stood on a sidewalk and waved to an undercover police officer who drove by. The officer stopped and, after some brief preliminary conversation, petitioner offered to give the officer a "blow job" for twenty dollars. Petitioner then entered the officer's vehicle and was arrested for the offense of prostitution. (CR 7). The State filed a petition alleging petitioner, a juvenile, engaged in delinquent conduct by committing the misdemeanor offense of prostitution. (CR 2).

During a psychological screening conducted several weeks after her arrest, petitioner reported that she lived with her 32-year-old boyfriend between the time she ran away from CPS custody and her arrest. (RR – Exhibit P2, p.2). However, the person conducting the examination warned that petitioner's reported facts should be viewed with caution because many of her statements were inconsistent with information found in her probation records. (RR – Exhibit P2, p.7).

Petitioner pled true to the allegations in the State's petition pursuant to an agreed recommendation. (RR 6; CR 32). The trial judge entered a written judgment

affirmatively finding petitioner engaged in the alleged delinquent conduct and was in need of rehabilitation and then placed her on probation for 18 months in the custody of the chief juvenile probation officer. (RR 7; CR 28-32). Four weeks later, petitioner filed a motion for new trial which the trial judge denied. (CR 34; CR SUPP II 2).

SUMMARY OF THE ARGUMENT

Ground one: Petitioner's claim that juveniles are not subject to adjudication for the offense of prostitution is meritless because the plain language of the applicable statutes provides for such an adjudication and the application of this plain language does not lead to any absurd results.

Ground two: The nature of the State's investigation of petitioner's case did not deprive her of due process because the constitution does not guarantee a defendant the right to have investigators conduct a criminal investigation in any particular manner. Furthermore, even if petitioner were owed some specific type of investigation, the record is silent regarding the extent of the investigation in this case. As such, it is impossible to declare the investigation deficient.

ARGUMENT

REPLY TO GROUND FOR REVIEW ONE

Petitioner contends her adjudication for the offense of prostitution is absurd because a juvenile is generally incapable of providing legal consent to engage in sex. She maintains the Texas Legislature could not have intended for the State to adjudicate juveniles delinquent under the prostitution statute since juveniles lack the ability to provide effective consent to sex acts in the context of the "statutory rape" statutes. *See* TEX. PEN. CODE ANN. §§ 21.11(a), 22.011(a)(2), 22.021(a)(1)(B) (Vernon 2003 & Vernon Supp. 2008) (statutory offenses involving sex crimes against minors do not

require lack of victim's consent). A review of the applicable statutes reveals petitioner's adjudication neither results in an absurd result nor runs afoul of legislative intent.

Legislative intent - The plain language of the applicable statutes permits adjudication

Petitioner was adjudicated of engaging in delinquent conduct by committing the offense of prostitution. (CR 28-32). The statute proscribing this conduct is found in the Texas Penal Code. TEX. PEN. CODE ANN. § 43.02 (a)(1) (Vernon 2003). The penal code offenses have been incorporated into the Texas Family Code which governs the adjudication of delinquent juveniles. TEX. FAM. CODE ANN. § 51.03(a)(1) (Vernon 2008). Specifically, the family code defines delinquent conduct for which a juvenile may be adjudicated as conduct that violates the penal code. *Id*. Therefore, it is undisputed that the plain language of the applicable statutes permits the prosecution of a juvenile for the offense of prostitution. (See petitioner's original direct appeal brief, p. 8: "Following the plain language of Family Code section 51.03, the State *technically can* proceed against a juvenile on any crime that it can bring against an adult." (italics in original)).

Despite the plain language of these statutes authorizing a juvenile's adjudication for penal code offenses, petitioner maintains the legislature could not have intended to subject juveniles to adjudication for the offense of prostitution since juveniles generally cannot provide legally-effective consent to engage in sex. When attempting to discern legislative intent, courts focus on the literal text of the applicable statute and attempt to discern the fair, objective meaning of that text. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). When the statute is clear and unambiguous, the legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract

from the statute. *Id*. Courts are bound to administer the law as it is written regardless of how harsh the law may seem; courts do not make law. *Lomax v. State*, 233 S.W.3d 302, 308 (Tex. Crim. App. 2007) (quoting *Rodriguez v. State*, 953 S.W.2d 342, 353 (Tex. App.--Austin 1997, pet. ref'd) (Onion, J.)). The legislature is constitutionally entitled to expect that the judiciary will faithfully follow the specific text it adopted. *Id*. Therefore, the judiciary should ordinarily give effect to the plain meaning of a statute. *Id*.

As mentioned, section 51.03(a)(1) clearly and unambiguously subjects juveniles to adjudication for all the penal code offenses, which include the offense of prostitution. The judiciary, therefore, should give effect to the legislature's expressed intent.

<u>Application of these statutes does not produce an absurd result</u>

Petitioner insists the plain language of the section 51.03(a)(1) of the family code and section 43.02(a)(1) of the penal code should be disregarded because application of these statutes to her case leads to an absurd result. *See State v. Colyandro*, 233 S.W.3d 870, 877 (Tex. Crim. App. 2007) (courts may avoid application of the plain language if the statute's plain language would lead to absurd consequences that the legislature could not possibly have intended). Petitioner maintains the legislature could not have intended to apply the offense of prostitution to a child under the age of 14 because, for purposes of defining sex crimes against children elsewhere in the penal code, it explicitly determined that such a child cannot give legally-effective consent. *See* TEX. PEN. CODE ANN. §§ 21.11(a), 22.011(a)(2), 22.021(a)(1)(B) (Vernon 2003 & Vernon Supp. 2008) (statutory offenses involving sex crimes against minors do not require lack of victim's consent). Petitioner claims that any attempt to apply the offense of prostitution to a child younger

than 14 "leads to the inherently inconsistent result that a child is at the same time both legally capable and legally incapable of consenting to sex." (petitioner's petition, p. 6).

Petitioner's argument is meritless because her inability to give legally-effective consent for a sex act is not implicated in her commission of the offense of prostitution as that offense was charged in this case. Petitioner was not charged with engaging in a sex act; rather, she was charged with *agreeing* to engage in a sex act. (CR 2). *See* TEX. PEN. CODE ANN. § 43.02(a)(1) (Vernon 2003). The prohibited conduct in which she engaged consisted of the agreement, not a sex act requiring any type of consent. *Kass v. State*, 642 S.W.2d 463, 470 (Tex. Crim. App. 1981) (McCormick, J., dissenting) (in prostitution case in which the defendant was not charged with consummated act of prostitution, the act serving as the gravamen of the offense was the solicitation). Obviously, a person may agree to engage in conduct without intending to actually engage in the conduct. Thus, when a person only agrees to engage in conduct, her legal capacity to actually engage in the conduct is not necessarily implicated. Accordingly, even assuming petitioner could not effectively consent to have sex, it did not prevent her from committing the offense of prostitution by simply agreeing to have sex. Therefore, it is not absurd for a juvenile to be unable to effectively consent to sex in the context of sex crimes against children, while allowing for the adjudication of juvenile prostitutes.

Furthermore, still assuming a juvenile cannot engage in consensual sex under any situation, such a circumstance does not preclude application of the prostitution statute to a juvenile because the statute does not limit its application to instances of prostitution involving *consensual* sexual conduct. As charged in this case, a person commits the

offense of prostitution "if [s]he knowingly…agrees to engage…in sexual conduct for a fee." TEX. PEN. CODE ANN. § 43.02(a)(1) (Vernon 2003). This statute does not differentiate between consensual and nonconsensual sexual conduct. It simply forbids a person from agreeing to engage in a sex act, consensual or otherwise, for a fee. Petitioner clearly and undisputedly agreed to engage in sexual conduct for a fee. The consensual nature of the sexual conduct is not an element of the crime. Therefore, it is not absurd to adjudicate a juvenile for the offense of prostitution in accord with the plain terms of section 51.03 of the family code and section 43.02 of the penal code.

To the contrary, it would be absurd to rule juvenile girls and boys may engage in prostitution immune from any criminal liability. If such were the case, a 13-year-old girl could engage in sex for a fee with her similarly aged male classmates and both the boys and the girl could claim that no offense occurred because none of the parties possessed the ability to engage in consensual sex due to their age. Or an older adult male who agreed to pay a 13-year-old girl for sex could claim he did not commit the offense of prostitution because the sex would not have been consensual due to the girl's inability to supply legally-effective consent. Absolving these parties of criminal liability would be absurd.

Furthermore, any ruling suggesting there is no criminal law prohibiting juvenile prostitution would result in the absurd result of rendering juveniles more vulnerable to exploitation. If juveniles are immune from prosecution for prostitution, pimps would be encouraged to seek out juveniles to act as their prostitutes since there would be no criminal liability for the prostitute herself. And as long as the pimp remains undetected

in the background, there would be no grounds for prosecution even when the juvenile prostitute is engaged in her trade in plain sight for all to see. The influence on pimps' business practices aside, such a ruling also could arguably encourage enterprising, but amoral, juveniles to engage in prostitution, and financially thrive, knowing there would be no criminal consequences. Society simply cannot stand for such an absurd result.

The problem with the approach suggested by petitioner was discussed in *Matter of C.S.*, 591 N.Y.S.2d 691 (1992), wherein the court observed that if a juvenile cannot be found delinquent for having engaged in prostitution, the practical effect is that she can commit the offense innumerable times and never be adjudicated. *Id.* at 693. The Court continued:

> The ramifications of this situation [i.e., an inability to prosecute the 13-year-old prostitute due to a technicality in New York's law] are wholly unacceptable. It empowers cynical pimps to exploit children knowing that they will not be long removed from the streets because the Family Court lacks jurisdiction [to obtain a conviction]. In an age of deadly sexually transmitted diseases, this places young persons who are highly vulnerable, and most needful of protection, outside the authority of the juvenile justice system to aid them.

Id. The Court then concluded that this problem can be rectified by adjudicating the juvenile delinquent and confining her since such restraint would serve her best interests. *Id.* Such confinement serves "our obligation, as a society purporting to care for the well-being of its children, to discourage to any extent possible the victimization of vulnerable young people, and to augment our ability to help them." *Id.* at 694.

Nevertheless, petitioner suggests her adjudication in the juvenile justice system is not necessary to protect her from such exploitation on the streets because the Department

of Family and Protective Services has authority to take possession of her if it is shown she is engaged in prostitution. (petitioner's petition, pp. 9-10). However, petitioner was placed in the custody of CPS about two years before she committed the instant offense and this arrangement did not serve her well.[1] (CR 8). She ran away from her CPS facility and CPS staff was not aware of her whereabouts until she was arrested 14 months later. (CR 8; RR – Exhibit P2). During this time, she engaged in the commission of criminal offenses (prostitution, assault, and drug possession), lived with and had sex with her 32-year-old boyfriend, failed to attend school, used a variety of illegal drugs, acquired several sexually transmitted diseases, and had two abortions. (RR – Exhibit P2).

In contrast to the path of destruction petitioner traveled while under the purported custody of CPS, her adjudication allowed the trial judge to place her in the custody of the chief juvenile probation officer where she will be afforded numerous programs, including individual counseling and the use of an educational specialist, designed to benefit her in all matters of her life. (CR 28-32). These benefits conferred on petitioner as a result of her adjudication are consistent with the established purpose of the juvenile system, which is to rehabilitate children rather than punish them for criminal actions. *Anthony v. State*, 954 S.W.2d 132, 135 (Tex. App.--San Antonio 1997, no pet.), *overruled on other grounds, Gonzales v. State*, 67 S.W.3d 910 (Tex. Crim. App. 2002).

Accordingly, adjudicating petitioner for the offense of prostitution under the plain language of the penal code and the family code does not result in an absurd result. To the

[1] CPS is a division of the Department of Family and Protective Services. *In re E.A.K.*, 192 S.W.3d 133, 137 n.1 (Tex. App.--Houston [14th Dist.] 2006, pet. denied).

contrary, it would be absurd for a court to defy the legislature's plain language and to suggest juveniles should be immune from criminal consequences for committing the offense of prostitution. Furthermore, it would be absurd to return petitioner to CPS custody from which she has a propensity to run away[2], as opposed to placing her in the lock-down custody of the juvenile system where she will be confined and, thereby, assured of participating in the rehabilitative programs she requires.

<u>Juveniles may effectively consent to engage in sex acts in some instances</u>

Petitioner's argument is premised on her claim that the legislature determined a juvenile may not provide effective consent to engage in sexual conduct. She divines this legislative determination from the statutory rape statutes which indicate that a juvenile victim generally may not provide legally effective consent for purposes of those particular offenses (sexual assault and aggravated sexual assault). TEX. PEN. CODE ANN. §§ 21.11(a), 22.011(a)(2), 22.021(a)(1)(B) (Vernon 2003 & Vernon Supp. 2008).

There is no indication, however, that the legislature intended for this inability-to-consent concept to be applied in a blanket fashion throughout the penal code. To the contrary, the legislature acknowledged that juveniles may engage in consensual sex under certain circumstances. For example, a juvenile (aged 14 through 17) may engage in consensual sex as long as she and her partner are within three years of age of each other. TEX. PEN. CODE ANN. § 22.011(e) (Vernon Supp. 2008). And a juvenile under the age of 14 may engage in consensual "sexual contact" as long as the actors are with three years

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[2] As noted by petitioner, she fell through the proverbial cracks while in CPS custody. (petitioner's original direct appeal brief, p. 29).

of age of each other. TEX. PEN. CODE ANN. § 21.11(b) (Vernon 2003). Furthermore, a 13-year-old girl such as petitioner may engage in consensual sexual intercourse if she is married. TEX. PEN. CODE ANN. §22.011(c)(1) (Vernon 2003) (defining "child," for statutory rape purposes, as person younger than 17 *who is not defendant's spouse*); *Johnson v. State*, 103 S.W.3d 463, 463 (Tex. App.--San Antonio 2003, no pet.) (suggesting juveniles in petitioner's age group may enter common-law marriage); *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014, at *2 n.7 (Tex. App.--Austin May 22, 2008, orig. proceeding) (not designated for publication) (Texas law allows juveniles as young as 16 to marry with parental consent and those younger than 16 to marry pursuant to a court order); *Tibbets v. State*, No. 03-01-00672-CR, 2002 WL 31386096, at *6 (Tex. App.--Austin Oct. 24, 2002, no pet.) (not designated for publication) (juvenile under 14 may marry with a court order); *Compare* TEX. FAM. CODE ANN. § 2.102 (Vernon Supp. 2008) (juvenile aged 16 or 17 may marry with parental consent), *with* TEX. FAM. CODE ANN. § 2.103 (Vernon Supp. 2008) (juvenile – with no mention of age restriction - may marry with court order).

Therefore, there are circumstances in which a 13-year-old juvenile may effectively consent to engage in sex. *Id.* As such, a juvenile's inability to consent is not absolute; it is a shifting concept. *See May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996) (recognizing that the meaning of the term "consent" in regards to sexual relations may vary depending on context). In this sense, while the legislature has created the incapacity-to-consent concept to protect juvenile *victims* of sexual misconduct, there is no indication that it intended to use this concept to protect juvenile *offenders* involved in the

commission of sexually-related offenses. In particular, the prostitution statute does not provide any suggestion of a defense for juveniles who commit that offense. TEX. PEN. CODE ANN. § 43.02 (Vernon 2003).

Accordingly, since the penal code and case law recognize that juveniles are not absolutely incapable of effectively consenting to engage in sex acts, the legal fiction of a juvenile's general inability to effectively consent does not render the adjudication of a juvenile for prostitution an absurd result. The plain language of the applicable statutes provides for petitioner's adjudication and this plain language should be followed.

Petitioner's first ground for review is meritless and should be dismissed.

REPLY TO GROUND FOR REVIEW TWO

Petitioner contends her adjudication for prostitution violates her due process rights because the State purportedly failed to investigate whether someone compelled her to engage in the act of prostitution. In order to understand petitioner's argument, several of the statutes relating to the various prostitution offenses must be examined.

As pled in the charging instrument in this case (CR 2), a person commits the offense of "prostitution" by knowingly agreeing to engage in sexual conduct for a fee. TEX. PEN. CODE ANN. § 43.02(a)(1) (Vernon 2003). A person commits the offense of "compelling prostitution" if he knowingly causes by any means a person younger than 17 years to commit prostitution. TEX. PEN. CODE ANN. § 43.05(a)(2) (Vernon 2003). A party to the offense of compelling prostitution may be required to testify or furnish evidence about the offense. TEX. PEN. CODE ANN. § 43.06(a) (Vernon 2003). The party

may not be prosecuted for any offense about which she is required to testify or furnish evidence. TEX. PEN. CODE ANN. § 43.06(b) (Vernon 2003).

In view of the potential immunity from prosecution provided in section 43.06(b), petitioner claims it is possible that someone may have compelled her to commit prostitution and it is further possible that if there were a compeller, she might have been able to gain immunity by testifying against her compeller. Considering these possibilities, petitioner argues the State should have investigated whether someone actually did compel her to commit prostitution.

<u>There is no due process violation</u>

The State's failure to investigate petitioner's case to her satisfaction does not violate her due process rights. Due process ensures a defendant receives a fair trial. *Wiseman v. State*, 223 S.W.3d 45, 49 (Tex. App.--Houston [1st Dist.] 2006, pet. ref'd). It is doubtful, however, that due process requires the State to actually generate potentially exculpatory evidence. *Gabriel v. State*, 900 S.W.2d 721, 727 (Tex. Crim. App. 1995) (Clinton, J., concurring) (citing *San Miguel v. State*, 864 S.W.2d 493 (Tex. Crim. App. 1993)). The police have no affirmative obligation to investigate a crime in any particular way. *Gini v. Las Vegas Metro. Police Dep't*, 40 F.3d 1041, 1045 (9th Cir. 1994). Due process does not require that the police take every conceivable step to investigate claims of innocence or the existence of some defense. *Baker v. McCollan*, 99 S.Ct. 2689, 2695 (1979). The police have no constitutional duty to perform any particular investigative test or employ any particular investigative tool. *Arizona v. Youngblood*, 109 S.Ct. 333, 338 (1988).

The principle of due process is general and requires fundamental fairness by the State in all its dealings with a criminal defendant. *Cook v. State*, 940 S.W.2d 623, 630 (Tex. Crim. App. 1996) (Baird, J., concurring and dissenting). So the State does have a duty to seek the truth in its investigation of crimes. *Id*. However, the State is unaware of any authority dictating that the police must investigate in any particular manner or, more specifically, that officers must investigate the possibility that an arrestee may have some type of available immunity from prosecution. Due process violations resulting from flawed investigations generally involve affirmative misconduct by the police, rather than investigative inaction. *See Id*. (citing *Foster v. California*, 89 S.Ct. 1127 (1969)) (eyewitness was effectively told defendant committed the crime): *Dispensa v. Lynaugh*, 847 F.2d 211, 218 (5th Cir. 1988) (defendant identified in suggestive identification procedure); *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Crim. App. 1989) (egregious police misconduct in capital murder investigation); *Mooney v. Holohan*, 55 S.Ct. 340, 342 (1935) (State used perjured testimony); *Napue v. Illinois*, 79 S.Ct. 1173, 1177 (1959) (State failed to correct unsolicited perjury); *Rogers v. Richmond*, 81 S.Ct. 735 (1961) (conviction based in part on introduction of coerced confession); *Hernandez v. Estelle*, 674 F.2d 313 (5th Cir. 1981) (State concealed identity of material witness whose testimony would benefit defendant)). Therefore, any failure by the police in this case to investigate whether someone compelled petitioner to commit prostitution did not deprive her of due process.

In any event, even assuming a due process complaint may be based on an investigator's failure to undertake a particular course of investigative action, any

deficiency in the investigative process will amount to a due process violation only if bad faith is established and the defendant shows the missing evidence or information is material and favorable. *Pachecano v. State*, 881 S.W.2d 537, 542 (Tex. App.--Fort Worth 1994, no pet.); *Gilbert v. State*, 840 S.W.2d 138, 142 (Tex. App.--Houston [1st Dist.] 1992, no pet.); *California v. Trombetta*, 104 S.Ct. 2528, 2534 (1984). Merely showing the missing information "might have been" favorable does not establish materiality. *Pachecano*, 881 S.W.2d at 542.

There has been no showing of bad faith in the police investigation of this case. Nor has there been any showing that a more thorough investigation would have yielded anything favorable to petitioner. More specifically, there has been no showing that any type of further investigation would have revealed that anyone compelled petitioner to engage in prostitution. Petitioner merely suggests such information might have been uncovered, which is insufficient to establish materiality.[3] *Id.* Accordingly, there was no due process violation.

<u>The record does not affirmatively reflect the investigation was deficient</u>

Assuming that due process considerations owe petitioner a particular level of police investigation, her claim of a deficient investigation is meritless because the

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[3] Even if the police investigation did overlook material information (i.e., a compeller's identity), petitioner's due process rights were not violated since she had an alternative means of gaining information on the identity of her compeller, if any. *Trombetta*, 104 S.Ct. at 2534 (any error in the State's failure to preserve exculpatory evidence did not rise to constitutional dimensions since defendant had alternative means of demonstrating innocence). Namely, petitioner herself was the best source of information regarding whether someone compelled her to commit prostitution. The police should not be faulted for failing to uncover information already known to petitioner.

appellate record does not reveal the extent of the police investigation. Absent any evidence indicating the scope of the investigation and the particular investigative efforts, it is impossible to declare the investigation deficient. Based on a silent record, a reviewing court will not assume a deficient investigation occurred. *Brown v. State*, 129 S.W.3d 762, 767 (Tex. App.--Houston [1st Dist.] 2004, no pet.). Appellate courts do not reverse cases based on speculation about matters not shown in the record. *Green v. State*, 912 S.W.2d 189, 192 (Tex. Crim. App. 1995).

Similarly, the record also fails to show that a more thorough investigation would have uncovered any information beneficial to petitioner. Specifically, there is no evidence that anyone actually compelled petitioner to commit prostitution. Furthermore, even assuming someone did compel petitioner to commit the offense, this fact alone would not assure her immunity. Section 43.06 provides immunity to a compelled prostitute only if she is required to furnish evidence or testify against her compeller. TEX. PEN. CODE ANN. § 43.06(a),(b) (Vernon 2003). Therefore, if her compeller pled guilty or it was simply determined petitioner's testimony was not needed in her compeller's trial, petitioner would not receive immunity. As such, there is no evidence that further investigation would have benefitted petitioner and, therefore, it cannot be said that the level of investigation deprived her of a fair trial. Petitioner was not denied due process.

Petitioner's second ground for review is meritless and should be dismissed.

CONCLUSION

It is respectfully submitted that all things are regular and the judgment of the court of appeals should be upheld.

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CERTIFICATE OF SERVICE

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