

NO. 08-1044

IN THE SUPREME COURT OF TEXAS

IN THE MATTER OF B.W.

On Appeal from the Court of Appeals
For the First Appellate District of Texas, Houston, Texas
No. 01-07-00274-CV

REPLY IN SUPPORT OF PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Through a morass of illogical arguments and inapplicable statutes, the State's response to B.W.'s petition for review makes one thing clear: guidance from this Court is needed. The Court should grant B.W.'s petition to resolve several issues of first impression in Texas.

I. The Court should grant B.W.'s petition to determine whether the Legislature intended to permit the State to bring charges of prostitution against children who cannot legally consent to sex.

As in every case involving the construction of a statute, the Court's primary objective is to ascertain and give effect to the Legislature's intent. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004). In addition to considering the statute's plain language, the Court considers the objective the law seeks to obtain and the consequences of a particular construction. *Id.* (citing TEX. GOV'T CODE § 311.023(1), (5)). As the State acknowledges in its response, a statute's plain language will not be applied if it would lead to absurd consequences the Legislature could not possibly have intended. (*See* Resp. at 4 (citing *State v. Colyandro*, 233 S.W.3d 870, 877 (Tex. Crim. App. 2007)).)

The statute at issue here is the Juvenile Justice Code's blanket definition of "delinquent conduct" as "conduct . . . that violates a penal law of this state." TEX. FAM. CODE § 51.03(a). The State argues, and the court of appeals agreed, that the Legislature thus intended to permit the State to prosecute a child younger than fourteen for the offense of prostitution as defined in section 43.02 of the TEXAS PENAL CODE. A person commits an offense under that statute if he or she

knowingly agrees to engage in sexual conduct for a fee. TEX. PENAL CODE § 43.02(a). Actual physical contact is not required—the offense is complete if the person “agrees” to engage in sexual conduct for money. *Id.* However, the Legislature has otherwise spoken with unmistakable clarity that a child under fourteen cannot legally consent to sex. *See* TEX. PENAL CODE § 22.011(a)(2) (making it an offense to have sex with a child younger than fourteen irrespective of the child’s alleged consent); *May v. State*, 919 S.W.2d 422, 424 (Tex. Crim. App. 1996) (“[A] child under fourteen cannot legally consent to sex, because subsection (a)(2) [of section 22.011] is a strict liability offense not requiring proof that the victim did not consent.”). The Legislature could not possibly have intended, through its general adoption of penal offenses into the Juvenile Justice Code, to make children younger than fourteen culpable for (and, thus, legally capable of) consenting to sex.

The State argues that B.W.’s inability to give legally-effective consent for a sex act is not implicated here because “[t]he prohibited conduct in which she engaged consisted of the agreement [to engage in a sex act], not a sex act requiring any type of consent.” (Resp. at 5.) But the very same conduct that constitutes the offense of prostitution here—an agreement to engage in sex—is precisely the conduct the Legislature determined a child under fourteen is legally incapable of doing. The State’s confusion is further illustrated by its bizarre argument that the prostitution 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.” (Resp. at 6.) How can someone agree to engage in an act that the person does not (and cannot) consent to? The obvious answer is that they cannot, and it would be absurd to say that they could.

The State indulges in a series of hypotheticals designed to create the impression that B.W.’s proposed construction would lead to absurd results. The State argues that an adult male could agree to pay a thirteen-year-old girl for sex and then claim that no offense occurred because the girl was incapable of consenting. (Resp. at 6.) This argument makes no sense. By offering or agreeing to engage in sex with a child (or any other person) for a fee, the adult in the State’s hypothetical has committed an offense under section 43.02. Whether the *other* party consented (or even had the ability to consent) is irrelevant. Moreover, if the adult actually engages in a sexual act with the child, the State can additionally prosecute him or her for the commission of a sexual assault. *See* TEX. PENAL CODE § 22.021. The same would be true if both parties were under fourteen—while their legal inability to consent would preclude them from being prosecuted for prostitution based solely on an agreement to have sex, the State could still charge either or both with an offense for the actual act, i.e., sexual assault.

Following the court of appeals’ lead, the State argues that prohibiting criminal prosecution for juvenile prostitution would “render[] juveniles more vulnerable to exploitation” as “pimps would be encouraged to seek out juveniles.” (Resp. at 6.) As noted in B.W.’s petition, this argument is rooted in the comments of a single New York family court judge speculating on what he believes could

happen. (*Id.* at 7 (quoting *In re C.S.*, 591 N.Y.S.2d 691, 693 (N.Y. Fam. Ct. 1992)).) The State puts forth no proof whatsoever that such a result will occur. To the contrary, B.W.’s petition demonstrated that (1) the Family Code provides law enforcement with ample means to take a child into custody and protect him or her from potential exploitation apart from juvenile prosecution as a prostitute, and (2) the Legislature has otherwise created strong disincentives, including significantly greater penalties and an easier standard of culpability, to prevent pimps from seeking to exploit children. (*See* Pet. at 10.) The State’s attempt to justify its statutory construction should be rejected.

Finally, the State cites other statutes in an effort to show that “juveniles may engage in consensual sex under certain circumstances.” (Resp. at 9-10.) However, almost all of the statutes cited by the State have nothing at all to do with whether a child under fourteen may consent to sex. For example, the State notes that it is an affirmative defense to a charge of sexual assault that the actor was no more than three years older than the victim, *provided the victim was fourteen or older.* (*Id.* at 9 (citing TEX. PENAL CODE § 22.011(e).) This obviously has nothing to do with whether a thirteen-year-old can legally consent to sex. The State next argues that, under the statutory offense of indecency with a child, it is an affirmative defense that the actor was no more than three years older than the victim, regardless of the victim’s age. (*Id.* at 10 (citing TEX. PENAL CODE § 21.11(b)).) But consent (or lack thereof) is not relevant to the commission of this offense. Accordingly, the Legislature’s determination that certain sexual contact

between children is not punishable under this offense in no way reflects an intent to treat such contact as consensual. Finally, the State points to the fact that children under fourteen may engage in consensual sex if they are married. (*See id.* (citing TEX. PENAL CODE § 22.011(c)(1)).) As the State correctly notes, however, children under sixteen must request a court order for permission to marry, which shall be granted only if the court believes marriage to be in the child's best interest. *See* TEX. FAM. CODE § 2.103. Thus, this exception to sexual assault applies only in those rare cases where a court first reviews the child's situation and concludes that marriage is in his or her best interest.

None of the statutes cited by the State conflict with the Legislature's determination that a child under fourteen is legally incapable of consenting to sex. Thus, there is no support for the State's conclusion that a thirteen-year-old's legal inability to consent to sex is "a shifting concept." (Resp. at 10.) To the extent these statutes create any question about the Legislature's intent, the Court should grant B.W.'s petition to ascertain and give effect to that intent. *See City of Sunset Valley*, 146 S.W.3d at 642.

II. The Court should grant B.W.'s petition to determine the proper balance of policy interests in sex crimes involving children.

The Court should grant B.W.'s petition for the additional reason that the court of appeals' opinion marks a significant shift toward use of the juvenile justice system under the guise of "protecting" children. In its response, the State takes the position that B.W. is better served by adjudication and "lock-down

custody” in the juvenile system rather than placing her in the custody of the Texas Department of Family and Protective Services. (*See Resp.* at 7-9.) But this approach violates the United States Supreme Court’s directive in *In re Winship*, in which the Court cautioned against judicial intervention for the protection of a juvenile in the form of “subjecting the child to the stigma of a finding that he violated a criminal law.” 397 U.S. 358, 367 (1970). Moreover, while the State highlights the “path of destruction” B.W. engaged in while under the custody of TDFPS, there is no evidence in the record that she has been any better served by being placed in the juvenile system. To the extent the State asserts that the current system is flawed, the solution is to fix TDFPS, not to brand victims of the system as juvenile offenders. At a minimum, this Court should grant B.W.’s petition to determine whether this shift in focus is consistent with the Legislature’s intent.

III. The Court should grant B.W.’s petition because she was denied due process.

The Court should also grant review to address the significant issue of whether the State has an obligation to conduct a child-abuse investigation when the State is the source of the evidence giving cause to believe a child is being abused. Contrary to the arguments put forth by the State, the issue is not whether the State conducted its investigation in some particular manner. (*See Resp.* at 12-14.) Rather, the State in this case conducted no investigation to determine whether

B.W. was being “compelled”¹ into prostitution, despite credible evidence of that possibility.

The record in this case affirmatively showed that B.W., a thirteen-year-old child, engaged in conduct constituting the offense of prostitution and that she was living with and having sex with a 32-year-old boyfriend whom she identified by name. (*See* Resp. at 8.) B.W. also had, by the time of her arrest, “acquired several sexually transmitted diseases and had two abortions.” (*Id.*) By definition, these facts constitute cause to believe that B.W. was a victim of abuse. *See* TEX. FAM. CODE § 261.001(1) (defining “abuse” to include sexual assault and compelling or encouraging prostitution). Anyone with knowledge of these facts would be obligated to report them to law enforcement for investigation. *See id.* § 261.101. Logically, by requiring such facts to be reported, the Legislature did not intend for the State to do nothing. Yet the State takes the position that it had no obligation to investigate in this case.

By specifically providing a means for the State to provide immunity in exchange for testimony against one who compels prostitution, the Legislature expressed a clear desire to pursue the compellers and protect the sexually exploited child. *See* TEX. PENAL CODE §§ 43.05, 43.06. The State’s response ignores the fact that the State alone has the power to provide immunity to victims of sexual exploitation from prosecution in return for testimony against one who is

¹ A person commits the offense of “compelling prostitution” if he or she “causes by an means a person younger than 17 years to commit prostitution.” TEX. PENAL CODE § 43.05(a).

promoting or compelling a child to commit prostitution. B.W. has no opportunity to assert immunity—its application rests entirely in the hands of the State. In light of the complete discretion the Legislature has given the State, minimal due process protection requires that the State conduct *some* investigation to determine whether the child is a victim of sexual exploitation or abuse, rather than an offender.

The State also argues that its failure to investigate did not rise to the level of a due process violation because “petitioner herself was the best source of information regarding whether someone compelled her to commit prostitution.” (Resp. at 14 n.3.) This argument contradicts the well-settled principle that a child younger than seventeen who has been a victim of a sexual offense has no obligation to inform another person of the alleged offense. *See* TEX. CODE CRIM. PROC. Art. 38.07(b). The State’s improper attempt to shift the burden is consistent with its approach of taking the easy road by treating these children as offenders rather than as victims of sexual exploitation deserving of protection. The Court should grant B.W.’s petition to address this issue.

Finally, the State argues that the record is silent regarding the extent of the police investigation. (Resp. at 14-15.) However, within one month of B.W.’s arrest, the State presented, with respect to its obligation to produce exculpatory and mitigating evidence, a “response” that was blank. (CR 23.) In other words, the State represented that it had no potentially exculpatory evidence, despite the information it admittedly had regarding B.W.’s sexual history and despite the obligation under Texas law to retain records of any child-abuse investigation. *See*

TEXAS DEPARTMENT OF FAMILY & PROTECTIVE SERVICES, Policy Handbook § 2282, available at http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2281_3.jsp (detailing the documentation and retention requirements for child-abuse investigations); *see also* TEX. FAM. CODE § 261.3011 (providing that TDFPS shall develop guidelines and protocols for joint investigations with law enforcement). Under these circumstances, the Court should not presume that an investigation occurred.

PRAYER

Petitioner respectfully requests that the Court grant her petition for review, vacate the court of appeals' judgment, reverse the trial court's adjudication, and remand to the trial court for an appropriate disposition. Petitioner further requests any other relief to which she may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document has been served on the following by certified mail, return receipt requested, on the 30 day of April, 2009.

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