TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00652-CR

Ex parte Randy Scott McDonald

FROM COUNTY COURT AT LAW NO. 1 OF WILLIAMSON COUNTY
NO. 18-06371-1, THE HONORABLE BRANDY HALLFORD, JUDGE PRESIDING

O P I N I O N

Randy Scott McDonald was charged with the offense of harassment for sending repeated electronic communications to Jeffrey Comstock. *See* Tex. Penal Code § 42.07(a)(7). After being charged, McDonald filed a pretrial application for writ of habeas corpus arguing that subsection 42.07(a)(7) of the Penal Code is facially unconstitutional. *See* Tex. Code Crim. Proc. art. 11.09; Tex. Penal Code § 42.07(c). The trial court denied McDonald's pretrial habeas application. McDonald appeals the trial court's ruling. We will affirm the trial court's order denying McDonald's application for writ of habeas corpus.

STANDARD OF REVIEW AND GOVERNING LAW

"[P]retrial habeas, followed by an interlocutory appeal, is an 'extraordinary remedy,' and 'appellate courts have been careful to ensure that a pretrial writ is not misused to secure pretrial appellate review of matters that in actual fact should not be put before appellate courts at the pretrial stage.'" *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010) (quoting *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010)). "Pretrial habeas can be used to

bring a facial challenge to the constitutionality of the statute that defines the offense." *Id.* A determination regarding whether a statute is facially unconstitutional is a question of law subject to de novo review. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). A facial challenge is essentially "a claim that 'the statute, by its terms, always operates unconstitutionally.'" *Lebo v. State*, 474 S.W.3d 402, 405 (Tex. App.—San Antonio 2015, pet. ref'd) (quoting *Gillenwaters v. State*, 205 S.W.3d 534, 536 n.2 (Tex. Crim. App. 2006)). When assessing a statute's constitutionality, reviewing courts "presume that the statute is valid and that the legislature has not acted unreasonably or arbitrarily" when enacting the statute. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). Moreover, the party presenting the statutory challenge has the burden of establishing that the statute is unconstitutional. *Id.*

"The First Amendment overbreadth doctrine holds that a statute is facially invalid if, as written, it sweeps within its coverage a 'substantial' amount of First Amendment-protected expression as compared to any activity it proscribes constitutionally." *Ex parte Perry*, 471 S.W.3d 63, 88 (Tex. App.—Austin 2015) (quoting *Ex parte Lo*, 424 S.W.3d at 18), *rev'd in part on other grounds*, 483 S.W.3d 884 (Tex. Crim. App. 2016). "[T]he overbreadth doctrine allows a statute to be invalidated on its face even if it has legitimate application, and even if the parties before the court have suffered no constitutional violation." *Ex parte Ellis*, 309 S.W.3d at 91. "The overbreadth doctrine is 'strong medicine' that should be employed 'sparingly' and 'only as a last resort.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). "[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* (quoting *Broadrick*, 413 U.S. at 615).

The concepts of overbreadth and vagueness can be intertwined. *See Long v. State*, 931 S.W.2d 285, 288 (Tex. Crim. App. 1996). "A statute may be challenged as unduly vague

. . . if it does not: (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) establish definite guidelines for law enforcement." *Scott v. State*, 322 S.W.3d 662, 665 n.2 (Tex. Crim. App. 2010), *abrogated on other grounds by Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014). Generally, arguments alleging that a statute is unduly vague requires a showing that it is overly vague "as applied" to the defendant. *Bynum v. State*, 767 S.W.2d 769, 774 (Tex. Crim. App. 1989); *see Scott*, 322 S.W.3d at 670-71 (explaining that because statute did "not implicate the free-speech guarantee of the First Amendment, Scott, in making his vagueness challenge to that statutory subsection, was required to show that it was unduly vague as applied to his own conduct"). "If, however, the challenged statute implicates the free-speech guarantee of the First Amendment—that is, if the statute is susceptible of application to speech guaranteed by the First Amendment—the defendant may argue that the statute is overbroad on its face because its vagueness makes it unclear whether it regulates a substantial amount of protected speech." *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142, at *1 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication); *see United States v. Williams*, 553 U.S. 285, 304 (2008); *Scott*, 322 S.W.3d at 665 n.3.

In his habeas application, McDonald urged that subsection 42.07(a)(7) of the Penal Code is facially unconstitutional because it is overbroad and vague. That provision provides, in relevant part, as follows:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, the person . . .
>
> > (7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.

Tex. Penal Code § 42.07(a)(7); *see also id.* § 42.07(b)(1) (defining "[e]lectronic communication"). Both McDonald's overbreadth and vagueness challenges asserted that the statute criminalizes communication that is within the scope of protected speech, and McDonald did not assert that the statute was overly vague "as applied" to him.

Previously, the Court of Criminal Appeals addressed the constitutionality of subsection 42.07(a)(4), which contains a prohibition on harassing phone calls that is similar to the prohibition on certain electronic communications in subsection 42.07(a)(7). *See Scott*, 322 S.W.3d at 667-71. Specifically, the Court was asked to address whether subsection 42.07(a)(4) implicated the First Amendment free-speech guarantee when confronted with vagueness and overbreadth challenges to the statute. *Id.* at 667-69. The Court concluded that the provision does not implicate the First Amendment's free-speech guarantee because the statute "is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another's privacy and do so in a manner reasonably likely to inflict emotional distress," meaning that "the conduct to which the statutory subsection is susceptible of application will be, in the usual case, essentially noncommunicative, even if the conduct includes spoken words." *Id.* at 669-70. In other words, the Court explained that, "in the usual case, persons whose conduct violates § 42.07(a)(4) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake." *Id.* at 670. Consequently, the Court reasoned that "[t]o the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not covered by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Id.*

Following that ruling by the Court of Criminal Appeals, this Court was presented with similar arguments regarding subsection 42.07(a)(7), which is the provision at issue in this case. *See Blanchard*, 2016 WL 3144142. In *Blanchard*, this Court explained that "[t]he free-speech analysis in *Scott* is equally applicable to subsection 42.07(a)(7)." *Id.* at *3. Although this Court noted that the language in subsections 42.07(a)(4) and 42.07(a)(7) differs slightly in that subsection 42.07(a)(4) "provides an alternative manner of committing the offense by making repeated phone calls 'anonymously,'" this Court reasoned that the slight "textual difference is inconsequential to the First Amendment analysis" and noted that the remaining statutory language in the two subsections "is identical." *Id.* (quoting Tex. Penal Code § 42.07(a)(4)).

Further, this Court observed that "[e]ach of the subsections in section 42.07 has the same subjective intent requirement that the actor engage in the particular form of communicative conduct with the specific intent to" harm the victims by inflicting one of the types of emotional distress listed in the statute. *Id.* For that reason, this Court reasoned that "an actor who violates subsection 42.07(a)(7) has no more an intent to engage in legitimate communication of ideas, opinions, or information than an actor whose telephone calls violate subsection 42.07(a)(4)" and that "[r]epeated electronic communications made with the specific intent to inflict one of the designated types of emotional distress 'for its own sake' invade the substantial privacy interests of the victim in 'an essentially intolerable manner.'" *Id.* (quoting *Scott*, 322 S.W.3d at 670); *see also Wagner v. State*, 539 S.W.3d 298, 311, 312 (Tex. Crim. App. 2018) (observing that Court of Criminal Appeals previously explained that "the First Amendment affords no protection to communicative conduct whereby one individual invades the substantial privacy interests of another in an essentially intolerable manner" and similarly rejecting constitutional challenge to subsection 25.07(a)(2)(A) of Penal Code, which prohibits

individual from communicating with person in threatening or harassing manner, because "the statute is capable of reaching only non-constitutionally protected speech"). Accordingly, this Court concluded that those types of communications "are not the type of legitimate communication that is protected by the First Amendment," that they "do not implicate speech protected by the First Amendment," and that the individual seeking habeas relief "failed to establish that, on its face, section 42.07(a)(7) violates the constitution by being overbroad or unduly vague." *Blanchard*, 2016 WL 3144142, at *3-4; *see also Garcia v. State*, 212 S.W.3d 877, 888 (Tex. App.—Austin 2006, no pet.) (explaining that "threats and harassment are not entitled to First Amendment protection"), *overruled in part on other grounds, Wagner v. State*, 539 S.W.3d 298, 315 n. 27 (Tex. Crim. App. 2018).

Several of our sister courts of appeals have reached the same conclusion regarding the constitutionality of subsection 42.07(a)(7) following the decision in *Scott*. *See Ex parte Reece*, No. 11-16-00196-CR, 2016 WL 6998930, at *3 (Tex. App.—Eastland Nov. 30, 2016, pet. ref'd) (mem. op., not designated for publication) (determining that vagueness challenge and overbreadth claim failed because "the electronic communications proscribed by subsection (a)(7) do not implicate protected speech under the First Amendment"); *Lebo*, 474 S.W.3d at 408 (same); *Duran v. State*, Nos. 13-11-00205-CR, -00218-CR, 2012 WL 3612507, at *3-4 (Tex. App.—Corpus Christi Aug. 23, 2012, pet. ref'd) (mem. op., not designated for publication) (same).

Following *Blanchard*, this Court was again asked to determine whether subsection 42.07(a)(7) was facially overbroad in an appeal of a pretrial application for writ of habeas corpus. *See Ex parte Ogle*, Nos. 03-18-00207—00208-CR, 2018 WL 3637385 (Tex. App.—Austin Aug. 1, 2018, pet. ref'd) (mem. op., not designated for publication). When arguing that subsection 42.07(a)(7) is facially unconstitutional, Ogle argued that various Supreme Court

opinions are inconsistent with the Court of Criminal Appeals' analysis in *Scott*, which formed the basis for various intermediate appellate courts concluding that subsection 42.07(a)(7) is constitutional. *Id.* at *4. Further, Ogle asserted that the Supreme Court cases compel a conclusion that the statute is overbroad because it prohibits "noncommercial speech based on its content," defines the regulated speech by its function, and restricts speech that does not fall within one of the historically recognized unprotected categories of speech. *Id.* at *3, *4

When addressing those arguments, this Court explained that the Supreme Court cases on which Ogle relied did not address intentionally harassing conduct, that subsection 42.07(a) does not draw distinctions "based on the subject matter or content of a message" and instead draws distinctions "based on the manner in which a message is conveyed to the recipient," and that Ogle did not refer "to any cases standing for the proposition that narrow restrictions on repeated and intentionally harassing conduct constitute a facial distinction defining speech by its purpose or function." *Id.* at *4-5 (discussing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015), *United States v. Alvarez*, 567 U.S. 709 (2012) (plurality op.), and *United States v. Stevens*, 559 U.S. 460 (2010)). In addition, this Court reaffirmed its prior conclusion that the analysis from *Scott* regarding subsection 42.07(a)(4) applied "with equal force to subsection 42.07(a)(7)." *Id.* at *5. In other words, subsection 42.07(a)(7), like subsection 42.07(a)(4), "did not implicate the free-speech guarantee afforded by the First Amendment because the statute only applies to individuals who have 'the specific intent to inflict emotional distress' by repeatedly making" electronic communications "'to invade another's privacy . . . in a manner reasonably likely to inflict emotional distress' and, accordingly, because the statute applies to conduct that is 'essentially noncommunicative, even if the conduct includes spoken words.'" *See id.* at *5 (quoting *Scott*, 322 S.W.3d at 668-70).

Moreover, this Court noted that Ogle urged that subsection 42.07(a)(7) is broader than subsection 42.07(a)(4) and that, as support for his argument, Ogle referred to a dissenting opinion to a decision by the Court of Criminal Appeals refusing discretionary review of a decision by one of our sister courts of appeals that concluded that subsection 42.07(a)(7) is constitutional. *Id.* at *6 (discussing *Ex parte Reece*, 517 S.W.3d 108, 109 (Tex. Crim. App. 2017) (Keller, J., dissenting)). However, this Court also noted that the dissent's reasoning "was not adopted by the majority of the" Court of Criminal Appeals and that there has been no binding decision declaring subsection 42.07(a)(7) unconstitutional. *Id.*

DISCUSSION

In one issue on appeal, McDonald contends that subsection 42.07(a)(7) is unconstitutionally overbroad and vague under the First Amendment.

Overbreadth

When asserting that subsection 42.07(a)(7) is unconstitutionally overbroad on its face, McDonald contends that the provision restricts noncommercial speech based on its content. Moreover, McDonald asserts that the type of speech proscribed by subsection 42.07(a)(7) does not fall within one of the historical categories of content-based expression that the Supreme Court has explained may be restricted without violating the First Amendment. *See Alvarez*, 567 U.S. at 717-18. In addition, McDonald urges that the *Scott* analysis does not apply to subsection 42.07(a)(7) and did not have the benefit of later First Amendment opinions by the Supreme Court. *See Reed*, 576 U.S. 155; *Alvarez*, 567 U.S. 709; *Stevens*, 559 U.S. 460. Next, McDonald contends that subsection 42.07(a)(7) is much broader than the provision at issue in *Scott* and, as support for that argument, points to the dissenting opinion from the Court of

Criminal Appeals discussed above. *See Ex parte Reece*, 517 S.W.3d at 109. However, this Court addressed all of these arguments in *Ex parte Ogle* and, as set out above, ultimately concluded in that opinion that subsection 42.07(a)(7) was not unconstitutionally overbroad. *See* 2018 WL 3637385, at *4-7.

After acknowledging the analysis from our prior opinions in *Ex parte Ogle* and *Blanchard*, McDonald asks this Court to revisit and disavow those opinions in light of a recent opinion by one of our sister courts of appeals finding that the version of subsection 42.07(a)(7) in effect in 2013 implicated the free-speech protections guaranteed by the First Amendment. *See Ex parte Barton*, 586 S.W.3d 573 (Tex. App.—Fort Worth 2019, pet. granted). Although McDonald concedes that the *Barton* opinion addressed a prior version of section 42.07, *see* Act of May 26, 2001, 77th Leg., R.S., ch. 1222, § 1, sec. 42.07, 2001 Tex. Gen. Laws 2795, 2795 (amended 2013 and 2017), he contends that the analysis from *Barton* should apply to the current version of section 42.07, particularly since the current version of the statute expanded the types of electronic communications that are prohibited under section 42.07, *see* Tex. Penal Code § 42.07(b) (including additional types of communication within definition of "[e]lectronic communication"). In its opinion, the Fort Worth Court of Appeals concluded that subsection 42.07(a)(7) "affects protected speech" and further concluded that the provision was overbroad. *See Ex parte Barton*, 586 S.W.3d at 580, 585.

However, the analysis from the Fort Worth Court of Appeals is not binding on this Court. *See Bass v. State*, No. 03-15-00628-CR, 2016 WL 3361178, at *2 n.2 (Tex. App.—Austin June 8, 2016, no pet.) (mem. op., not designated for publication). Moreover, having reviewed our sister court's opinion, which relies heavily on its own prior precedent, *see Ex parte Barton*, 586 S.W.3d at 583-85 (discussing and referencing *Karenev v. State*, 258 S.W.3d 210

(Tex. App.—Fort Worth 2008), *rev'd*, 281 S.W.3d 428 (Tex. Crim. App. 2009), which concluded that prior version of subsection 42.07(a)(7) was unconstitutionally vague), we are not persuaded that we should disregard our own prior cases addressing this issue, particularly when all of the other intermediate courts of appeals that have addressed the constitutionality of subsection 42.07(a)(7) have determined that the provision is not unconstitutionally overbroad.[1] *See Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *5 (Tex. App.—Amarillo Apr. 8, 2019, pet. granted) (mem. op., not designated for publication); *Ex parte Hinojos*, No. 08-17-00077-CR, 2018 WL 6629678, at *6 (Tex. App.—El Paso Dec. 19, 2018, pet. ref'd) (op., not designated for publication); *Ex parte Reece*, 2016 WL 6998930, at *3; *Lebo*, 474 S.W.3d at 408; *Duran*, 2012 WL 3612507, at *3-4.

Vagueness

On appeal, McDonald also asserts that subsection 42.07(a)(7) is unconstitutionally vague. More specifically, McDonald contends that the statute fails to define the criminal offense with sufficient clarity to allow an ordinary person to understand what conduct is prohibited. *See Martinez v. State*, 323 S.W.3d 493, 507 (Tex. Crim. App. 2010). Further, McDonald alleges that subsection 42.07 allows for arbitrary and discriminatory enforcement because a determination of whether speech is annoying, harassing, or offensive is a subjective inquiry that will vary from person to person. *See id.* More specifically, McDonald asserts that the statute delegates "the problem of whether a given communication is harassing or annoying or alarming . . . to the recipient of the communications" and then allows police officers and prosecutors to determine

[1] We note that the Court of Criminal Appeals has granted discretionary review of the Fort Worth court's decision, and one of the grounds for review is whether subsection 42.07(a)(7) is facially unconstitutional.

whether the communication "falls within the ambit of the statute." As support for his arguments, McDonald again refers to *Ex parte Barton* where our sister court concluded that subsection 42.07(a)(7) was unconstitutionally vague after deciding that it requires a highly subjective inquiry that will vary depending on the individuals involved. 586 S.W.3d at 585.

However, in *Blanchard*, this Court determined that the communications prohibited by subsection 42.07(a)(7) do not implicate speech protected by the First Amendment and that, therefore, subsection 42.07(a)(7) is not unconstitutionally vague. *See* 2016 WL 3144142, at *3. Similar conclusions were reached by several of our sister courts of appeals. *See Ex parte Hinojos*, 2018 WL 6629678, at *6; *Ex parte Reece*, 2016 WL 6998930, at *3; *Lebo*, 474 S.W.3d at 408; *Duran*, 2012 WL 3612507, at *3-4. "And without the First Amendment hitch, [McDonald] is required to show the statute as applied to him is impermissibly vague, something he has made no attempt to do." *See Ex parte Hinojos*, 2018 WL 6629678, at *6.

In light of our analysis in *Blanchard* and the persuasive reasoning summarized above, we are not persuaded that we should disavow our previous determination that subsection 42.07(a)(7) is not unconstitutionally vague.

In any event, we would be unable to agree with McDonald's contention that subsection 42.07(a)(7) does not set out with sufficient clarity what conduct constitutes an offense or allows for arbitrary enforcement by incorporating a subjective inquiry dependent on the beliefs of the victims and those officials involved in investigating and prosecuting potential offenses. For an individual's conduct to constitute an offense under subsection 42.07(a)(7), three requirements must be met. *See* Tex. Penal Code § 42.07(a)(7). "First, the actor must act with the specific intent to harass, annoy, alarm, abuse, torment, or embarrass another person." *Duran*, 2012 WL 3612507, at *4. Next, "the actor must send repeated" electronic communications,

meaning that the actor "must send electronic communications more than one time." *Id.*; *see also Wilson*, 448 S.W.3d at 424 (explaining that use in subsection 42.07(a)(4) of term "'repeated' means, at a minimum, 'recurrent' action or action occurring 'again'"). Finally, "the actor must send the electronic communications in a manner *reasonably* likely to harass, annoy, alarm, abuse, torment, embarrass, or offend *another* person." *Duran*, 2012 WL 3612507, at *4 (emphases added).

When the legislature enacted the statute, it did not require that the alleged misconduct cause *the victim* the type of emotional distress listed above, and instead specified that conduct was only an offense if it was "reasonably likely" to cause "another" person one of the listed types of emotional distress. Tex. Penal Code § 42.07(a)(7). "[T]he third requirement is not vague because in order to be convicted under section 42.07(a)(7), the manner of the electronic communications is restricted to that which is reasonably likely to be offensive in nature." *Duran*, 2012 WL 3612507, at *4. In other words, the statute requires that the actor make electronic communications "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend an average person." *See Scott*, 322 S.W.3d at 669 (discussing subsection 42.07(a)(4)). Accordingly, "we conclude that section 42.07(a)(7) gives a person of ordinary intelligence a reasonable opportunity to know the prohibited conduct and establishes definite guidelines for law enforcement to follow when determining whether a person has violated this statute" and that subsection 42.07(a)(7) is not unconstitutionally vague. *Id.*

For all of these reasons, we overrule McDonald's issue on appeal.

CONCLUSION

Having overruled McDonald's sole issue on appeal, we affirm the trial court's order denying his pretrial application for writ of habeas corpus.

Thomas J. Baker, Justice

Before Justices Goodwin, Baker, and Kelly
Concurring Opinion by Justice Kelly

Affirmed

Filed: June 19, 2020

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