REVERSE and REMAND and Opinion Filed December 21, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01561-CR

THOMAS GEORGE GRISWOLD III, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 382nd Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 2-19-0884

OPINION ON REHEARING

Before Justices Molberg, Goldstein, and Smith
Opinion by Justice Goldstein

On the Court's own motion, we withdraw our October 26, 2021 opinion and judgment. This is now the opinion of the Court.

Thomas George Griswold III appeals his conviction for the third-degree felony offense of stalking. In three issues, Griswold asserts (1) the evidence is insufficient to support his conviction, (2) the trial court abused its discretion by denying his motion for new trial without conducting an evidentiary hearing, and (3) the trial court erred by denying his motion to quash the indictment because the stalking statute is unconstitutionally overbroad and vague on its face. Because we agree with Griswold that the stalking statute is unconstitutionally overbroad and

vague on its face, we reverse and remand to the trial court for further proceedings consistent with this opinion.

BACKGROUND

Griswold was indicted for stalking under section 42.072 of the penal code for conduct beginning on or about January 1, 2007 and ending on April 24, 2018. Specifically, the indictment alleged that Griswold:

> did then and there on more than one occasion and pursuant to the same scheme or course of conduct directed specifically toward [the complainant] that [Griswold] knowingly engaged in conduct that constituted an offence under section 42.07 and/or conduct that [Griswold] knew or reasonably should have known [the complainant] would regard as threatening bodily injury for [the complainant] and or bodily injury or death, and did cause [the complainant] to be placed in fear of bodily injury or death, to-wit: [listing five specific allegations of repeated communications, public declarations on Facebook, public statements, and public threats].

The indictment continued by alleging Griswold's conduct caused the complainant "to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended" and "would cause a reasonable person to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended."

At the time Griswold was indicted, section 42.072 of the penal code, entitled "Stalking," provided:

> (a) A person commits an offense if the person, on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:
>
> (1) constitutes an offense under Section 42.07 . . . :

> (2) causes the other person . . . to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and
> (3) would cause a reasonable person to:
> . . .
>
> > (D) feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

TEX. PENAL CODE ANN. § 42.072(a). Section 42.07, the "electronic-communications-harassment statute," provided:

> (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 ANN. § 42.07(a)(7). The definition of electronic communication encompasses current forms of communication and means:

> a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes:
>
> > (A) a communication initiated through the use of electronic mail, instant message, network call, a cellular or other type of telephone, a computer, a camera, text message, a social media platform or application, an Internet website, any other Internet-based communication tool, or facsimile machine; and
> > (B) a communication made to a pager.

TEX. PENAL CODE ANN. § 42.07(b)(1).

Prior to trial, Griswold filed a motion to quash the indictment alleging the stalking statute was unconstitutionally vague and overbroad, citing *Ex parte Barton*, 586 S.W.3d 573, 583–85 (Tex. App.—Fort Worth 2019, pet. granted) (op. on reh'g). After a hearing, the trial court denied the motion and proceeded to trial. Griswold was convicted of stalking as charged in the indictment and sentenced to ten years in prison. He filed a motion for new trial, which the trial court denied. This appeal followed.

DISCUSSION

In his third issue, Griswold challenges the constitutionality of the stalking statute. In particular, he contends the harassment statute, which is incorporated by direct reference into the stalking statute, is unconstitutionally vague because the words "harass, annoy, alarm, abuse, torment, or embarrass" "leaves the electronic-communications subsection open to various 'uncertainties of meaning.'"

There is a split of authority regarding this issue. *Compare State v. Chen*, 615 S.W.3d 376, 384–85 (Tex. App.—Houston [14th Dist.] 2020, pet. filed) (holding section 42.07(a)(7) unconstitutionally overbroad); *Ex parte Barton*, 586 S.W.3d at 583–85 (holding section 42.07(a)(7) facially unconstitutional as overbroad and vague); *with Ex parte Johnston*, No. 09-19-00445-CR, 2021 WL 1395564, at *3–5 (Tex. App.—Beaumont Apr. 14, 2021, no pet.) (mem. op., not designated for publication) (section 42.072 does not implicate First Amendment protection and therefore not unconstitutionally overbroad or vague); *Ex parte McDonald*, 606

S.W.3d 856, 863–64 (Tex. App.—Austin 2020, pet. filed) (same); *Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *4–5 (Tex. App.—Amarillo Apr. 8, 2019, pet. granted) (mem. op., not designated for publication) (same); *Ex parte Hinojos*, No. 08-17-00077-CR, 2018 WL 6629678, at *6 (Tex. App.—El Paso Dec. 19, 2018, pet. ref'd) (not designated for publication) (same); *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) (same); *Lebo v. State*, 474 S.W.3d 402, 408 (Tex. App.—San Antonio 2015, pet. ref'd) (same); *Duran v. State*, No. 13-11-00205-CR, 2012 WL 3612507, at *3–4 (Tex. App.—Corpus Christi–Edinburg Aug. 23, 2012, pet. ref'd) (mem. op., not designated for publication) (same).

We review de novo a constitutional challenge to a criminal statute. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex. Crim. App. 2007) (applying de novo standard when reviewing trial court's decision to deny motion to quash indictment). Whether a statute is facially constitutional is a question of law and the challenging party generally carries the burden to establish a statute's unconstitutionality. *Vandyke v. State*, 538 S.W.3d 561, 570 (Tex. Crim. App. 2017); *Ex parte Lo*, 424 S.W.3d 10, 14–15 (Tex. Crim. App. 2013).

After a thorough review of the cases, we find persuasive and agree with the analyses and reasoning in both *Barton* and *Chen*, which held that the electronic-communications-harassment statute (section 42.07(a)(7) "sends repeated electronic

communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another") is unconstitutional. *Barton*, 586 S.W.3d at 575 (vague and overbroad); *Chen*, 615 S.W.3d at 385 (overbroad).

In *Barton*, the Fort Worth Court of Appeals first addressed whether the statute implicated the free-speech guarantee of the First Amendment. *Barton*, 586 S.W.3d at 576. Although the Texas Court of Criminal Appeals previously held the telephone-harassment statute, section 42.07(a)(4), was not "susceptible of application to communicative conduct that is protected by the First Amendment" in *Scott v. State*, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010), the Fort Worth court noted that portion of *Scott* had been abrogated by *Wilson v. State*, 448 S.W.3d 418, 424–25 (Tex. Crim. App. 2014). Reading *Wilson* to concede that conduct punishable by the statute could have a dual intent—one protected by the First Amendment and one not—the court "departed from *Scott*'s 'sole intent' limiting construction and held the electronic-communications-harassment statute implicated speech protected by the First Amendment." *Chen*, 615 S.W.3d at 381 (discussing *Barton*, 586 S.W.3d at 579). The *Barton* court then held section 42.07(a)(7) unconstitutional, noting that it "suffers from a fatal flaw of vagueness because the disjunctive series of the terms 'harass, annoy, alarm, abuse, torment, embarrass, or offend' leaves the electronic-communications subsection open to various 'uncertainties of meaning,'" and "the term 'reasonably likely' does not create a 'reasonable person' standard sufficient to cure the failure of the subsection to specify whose sensitivities were offended."

Barton, 586 S.W.3d at 583 (citing *Long v. State*, 931 S.W.2d 285, 288–90 (Tex. Crim. App. 1996)).

In *Chen*, the Fourteenth Court agreed with the logic of *Barton*, elaborating further on the First Amendment implications. While *Scott* addressed "the uniquely invasive nature of telephone calls," the court noted that "'electronic communications' encompasses a far broader array of activities . . . Crucially, many of the activities do not fall within the 'captive-audience' context, but instead require affirmative actions by the user to access the content at issue." *Chen*, 615 S.W.3d at 382 (citation omitted). The Fourteenth Court agreed with *Barton*'s conclusion that *Scott* was no longer controlling, noting the breadth of the electronic-communications-harassment statute is "breathtaking" and has "the potential to sweep up large swaths of protected speech." *Id*. at 384. It concluded that "by its plain text[,] the scope of the statute prohibits or chills a substantial amount of protected speech, rendering it unconstitutionally overbroad." *Id*. at 385.

Like *Barton* and *Chen*, we conclude the electronic-communications-harassment statute goes "beyond a lawful proscription of intolerably invasive conduct and instead reaches a substantial amount of speech protected by the First Amendment" and that the scope of section 42.07(a)(7), as incorporated and included in section 42.072(a), prohibits or chills a substantial amount of protected speech in relation to the legitimate sweep of the statute, rendering it unconstitutionally overbroad. *See Barton*, 586 S.W.3d at 584; *Chen*, 615 S.W.3d at 385 (citing *Ashcroft*

v. Free Speech Coalition, 535 U.S. 234, 255 (2002)). We likewise agree with the *Barton* and *Chen* courts that, because of the court of criminal appeals' subsequent holdings (notably the *Wilson* case) and after considering the differences between regular telephonic communications and other electronic communications, the court of criminal appeals' holding in *Scott* is no longer controlling. For those reasons, we decline to adopt the reasoning of our sister courts which have concluded otherwise.

We conclude inclusion of the terms "harass, annoy, alarm, abuse, torment, embarrass, or offend" leaves the electronic-communications subsection open to various "uncertainties of meaning" and renders the harassment provisions incorporated into the stalking statute facially unconstitutional as vague and overbroad. *Barton*, 586 S.W.3d at 583, 585; *Chen*, 615 S.W.3d at 385. By following *Barton* and *Chen,* we acknowledge without reiteration the decades of judicial and legislative grappling with First Amendment guarantees juxtaposed against the activities proscribed by stalking and harassment statutes set against the backdrop of the breadth and scope of electronic communications in the cyber age. *See Barton*, 586 S.W.3d at 577–85.

Finally, we reject the State's contention that this constitutional issue "may not be ripe" for this Court to address until the Texas Court of Criminal Appeals issues a decision in *Barton*. The State conflates ripeness with judicial efficiency. Ripeness concerns justiciability. *Noell v. Air Park Homeowners Ass'n, Inc.*, 246 S.W.3d 827, 832 (Tex. App.—Dallas 2008, pet. denied) (citing *Perry v. Del Rio,* 66 S.W.3d 239,

249 (Tex. 2001)). The doctrinal purpose of ripeness is to prevent premature adjudication. *Noell*, 246 S.W.3d at 832. Because Griswold has been convicted as charged in the indictment, this issue is ripe, and nothing prevents this Court from exercising its jurisdiction over this appeal. The only contingency is what guidance, if any, may be afforded by a future opinion from a higher court.

We conclude that section 42.072(a) of the penal code is unconstitutionally overbroad and vague on its face to the extent it incorporates section 42.07(a)(7) and includes the terms "harass, annoy, alarm, abuse, torment, embarrass, or offend." Accordingly, we sustain Griswold's third issue. Having sustained Griswold's third issue, we need not address his remaining two issues. *See* TEX. R. APP. P. 47.1.

We reverse the trial court's judgment and remand to the trial court to grant the motion to quash and dismiss the indictment. *See Adley v. State*, 718 S.W.2d 682, 685 (Tex. Crim. App. 1985).

/Bonnie Lee Goldstein/
BONNIE LEE GOLDSTEIN
JUSTICE

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