Opinion issued July 27, 2021

In The

Court of Appeals

For The

First District of Texas

NOS. 01-17-00661-CR and 01-17-00662-CR

EX PARTE CARLOS MORA

AND

THE STATE OF TEXAS, Appellant

V.

CARLOS MORA, Appellee

On Appeal from the County Criminal Court at Law No. 16
Harris County, Texas
Trial Court Case Nos. 2125133 and 2150264

O P I N I O N

The State charged Carlos Mora by information with committing the offense of unlawfully disclosing or promoting intimate visual material. *See* TEX. PENAL CODE § 21.16(b). On Mora's motion to quash and application for habeas relief, the

trial court quashed the information and granted the habeas application on the ground that this criminal statute violates the free-speech guarantee of the First Amendment to the United States Constitution and therefore is void. The State appeals.

The Court of Criminal Appeals has since rejected Mora's position, holding that the original version of Section 21.16(b) of the Penal Code, which is the same version of the statute at issue in this suit, is constitutional. *See Ex parte Jones*, No. PD-0552-18, 2021 WL 2126172, at *3–17 (Tex. Crim. App. May 26, 2021) (per curiam) (rejecting challenge that Section 21.16(b) facially violated First Amendment). While one judge filed a concurring opinion and another concurred without opinion, the Court was unanimous in rejecting the position Mora advocates in this appeal. *See id.* at *17; *see also Ex parte Jones*, No. PD-0552-18, 2021 WL 2132157, at *1–6 (Tex. Crim. App. May 26, 2021) (Yeary, J., concurring).

But the decision of the Court of Criminal Appeals in *Ex parte Jones* is unpublished, and the Court's unpublished opinions "have no precedential value and must not be cited as authority by counsel or by a court." TEX. R. APP. P. 77.3; *see Turner v. State*, 443 S.W.3d 328, 333 n.2 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (citing unpublished Court of Criminal Appeals decision relied on by appellant in challenging trial court's evidentiary rulings but refusing to consider decision based on Rule 77.3). This leaves us in a quandary. The rules of procedure prohibit us from relying on the Court's unpublished opinion in deciding this appeal. Thus,

our dilemma: what is a court of appeals to do when the Court of Criminal Appeals has spoken on an issue but effectively forbids us from repeating what it said?

The State answers this question by suggesting that an exception to the rule against citing and relying on the Court's unpublished opinions applies here. Citing *Alford v. State*, the State contends that we may cite the Court's unpublished opinions for the limited purpose of showing how the Court has interpreted constitutional law. 358 S.W.3d 647, 657 n.21 (Tex. Crim. App. 2012). Despite the language of Rule 77.3, the Court of Criminal Appeals cited and discussed one of its own unpublished decisions in *Alford*, explaining in a footnote that it could do so for the purpose of demonstrating how it has "interpreted and applied constitutional law," even though the unpublished decision was not binding authority. *Id.* at 656–57 & n.21; *see also Mays v. State*, 318 S.W.3d 368, 379 n.24 (Tex. Crim. App. 2010) (relying on three of the Court's prior unpublished decisions regarding constitutional issue).

Moreover, even outside the context of constitutional issues, it is not clear that Rule 77.3's directive against the citation of the Court's unpublished opinions is applied as uniformly as the rule's unqualified language suggests it ought to be. The Court itself has arguably relied on one of its own unpublished opinions with respect to an issue that was not constitutional in nature. *See Buntion v. State*, 482 S.W.3d 58, 75–77 (Tex. Crim. App. 2016) (relying on unpublished opinion discussing disqualification, albeit in case in which issue of disqualification was raised in context

of due process claim). Our sister court likewise has relied on one of the Court's unpublished opinions with respect to a non-constitutional issue simply because it found the Court's reasoning to be "illustrative and persuasive." *Jackson v. State*, 474 S.W.3d 755, 757 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd).

Here, we need not delineate the outer bounds of Rule 77.3's scope. In *Ex parte Jones*, the Court of Criminal Appeals decided the constitutional issue before us in a thorough opinion that reflects its judgment that Section 21.16(b) does not run afoul of the First Amendment. None of the Court's judges dissented from that judgment. While *Ex parte Jones* is not precedent, as a practical matter its reasoning calls for the same result in this materially indistinguishable appeal. *See Meine v. State*, 356 S.W.3d 605, 610 n.1 (Tex. App.—Corpus Christi 2011, pet. ref'd) (noting that court's own decision was consistent with unpublished opinion issued by Court of Criminal Appeals even though unpublished opinion was not binding precedent that could be considered). We therefore adopt the Court's reasoning as our own.

We hold that the trial court erred in quashing the information charging Mora and in granting his habeas application, and we therefore reverse the trial court's orders granting Mora's motion and application and remand for further proceedings.

PER CURIAM

Panel consists of Justices Kelly, Goodman, and Rivas-Molloy.

Publish. TEX. R. APP. P. 47.2(b).