Opinion issued July 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-01124-CR

NO. 01-18-01125-CR

EX PARTE WILLIAM VIRGIL HARTLEY, Applicant

On Appeal from the County Criminal Court at Law No. 6
Harris County, Texas
Trial Court Case Nos. 2195110, 2150372

MEMORANDUM OPINION

The State appeals the trial court's order that granted applicant's pre-trial application for a writ of habeas corpus and motion to quash. In its sole point of error, the State argues that the trial court erred in concluding that Texas Penal Code section 42.07(a)(7) was unconstitutional.

We reverse.

Background

In May 2017, the State charged applicant by information with the offense of harassment. Applicant filed a combined pre-trial application for writ of habeas corpus[1] and a motion to quash in trial court cause number 2150372. The application for writ of habeas corpus was later assigned to trial court cause number 2195110. In his combined motion, applicant argued that Texas Penal Code section 42.07(a)(7) is unconstitutional under the United States Constitution because (1) it is unconstitutionally overbroad on its face under the First Amendment due to its content-based restriction that criminalizes a substantial amount of speech under the First Amendment and (2) it is unconstitutionally vague under the First and Fourteenth Amendments because persons of common intelligence must necessarily guess at its meaning and differ as to its application. Applicant thus argued that section 42.07(a)(7) violates the First Amendment and the Due Process Clause and is therefore void.

The trial court granted applicant's motion for habeas relief and motion to quash on November 30, 2018. Applicant filed proposed findings of fact and conclusions of law, which the trial court adopted on January 4, 2019.[2] In trial court

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1 *See* TEX. CODE CRIM. PROC. art. 11.09.

2 Although the trial court adopted findings of fact and conclusions of law on January 4, 2019, the State argues in its brief that we should not consider them because they were filed after the trial court had lost jurisdiction. *See* TEX. R. APP.

cause number 2195110, appellate cause number, 01-18-01124-CR, the State appeals from the trial court's order granting the application for writ of habeas corpus. In trial court cause number 2150372, appellate cause number, 01-18-01125-CR, the State appeals from the trial court's order granting the motion to quash the information.[3]

Constitutionality of 42.07(a)(7)

A. Standard of Review

"[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

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P. 25.2(g) ("Once the record has been filed in the appellate court, all further proceedings in the trial court—except as provided otherwise by law or by these rules—will be suspended until the trial court receives the appellate-court mandate."). We agree and disregard the trial court's findings and conclusions. *See Green v. State*, 906 S.W.2d 937, 939–40 (Tex. Crim. App. 1995) (holding findings of fact and conclusions of law, entered after filing of appellate record, were void); *Morris v. State*, No. 01-12-00893-CR, 2013 WL 1932186, at *3 (Tex. App.—Houston [1st Dist.] May 9, 2013, pet. ref'd) (mem. op., not designated for publication) (disregarding nunc pro tunc when signed after appellate record had been filed in court of appeal).

[3] Article 44.01 provides that the State may appeal an order that "dismisses an indictment, information, or complaint or any portion of an indictment, information, or complaint." *See* TEX. CODE CRIM. PROC. art. 44.01(a)(1).

to the constitutionality of the statute that defines the offense but may not be used to advance an 'as applied' challenge." *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." *Ellis*, 309 S.W.3d at 91. "[O]utside the limited First Amendment context, a criminal statute may not be attacked as overbroad." *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984).

A statute may be challenged as unduly vague, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, 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. *Bynum v. State*, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989). In addressing a vagueness challenge, we first consider whether the statute is vague as applied to a defendant's conduct before considering whether the statute may be vague as applied to the conduct of others. *Wagner v. State*, 539 S.W.3d 298, 314 (Tex. Crim. App. 2018).

B. Analysis

The version of section 42.07 in effect when the State charged applicant, provided,

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

(b) In this section:

(1) "Electronic communication" 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 by electronic mail, instant message, network call, or facsimile machine; and

(B) a communication made to a pager.[4]

Act of May 23, 2001, 77th Leg., R.S., ch. 1222, § 42.07, 2001 Tex. Gen. Laws 2795.

The Texas Court of Criminal Appeals has recently addressed the constitutionality of section 42.07(a)(7). *See Ex parte Barton*, PD-1123-19, 2022 WL 1021061 (Tex. Crim. App. Apr. 6, 2022); *Ex parte Sanders*, PD-0469-19, 2022 WL 1021055 (Tex. Crim. App. Apr. 6, 2022). The court held that "[t]he conduct regulated by § 42.07(a)(7) is non-speech conduct that does not implicate the First Amendment" and therefore the overbreadth of the statute is "inapplicable." *Barton*, 2022 WL 1021055, at *2, 6; *Sanders*, 2022 WL 1021055, at *14 Using the "familiar 'rational basis' test, the court of criminal appeals

[4] In 2017, the Legislature amended "electronic communication" to include "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." TEX. PENAL CODE § 42.07(b)(1)(A).

concluded that the statute was rationally related to a legitimate governmental interest and therefore not facially unconstitutional. *Barton*, 2022 WL 1021055, at *7–8.

In light of the holdings in *Barton* and *Sanders*, we therefore conclude that the trial court erred in finding that section 42.07(a)(7) is unconstitutional, granting habeas relief, and granting applicant's motion to quash. *See Purchase v. State*, 84 S.W.3d 696, 701 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (stating that intermediate courts of appeals are bound by decisions of state's highest criminal court).

Regarding his facial vagueness challenge, because the First Amendment does not apply to section 42.07(a)(7), applicant is required to show the statute as applied to him is impermissibly vague. *See Barton*, 2022 WL 1021061, at *3 (noting general rule that courts first consider whether statute is vague as applied to defendant's conduct); *Wagner*, 539 S.W.3d at 314. But, applicant may not bring an as-applied challenge to the statute's constitutionality in a pre-trial writ of habeas corpus. *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011) ("An 'as applied' challenge is brought during or after a trial on the merits, for it is only then that the trial judge and reviewing courts have the particular facts and circumstances of the case needed to determine whether the statute or law has been applied in an unconstitutional manner."). Accordingly, to the extent that the

trial court found that section 42.07(a)(7) was vague as applied to applicant's conduct, the trial court abused its discretion.

We sustain the State's sole point of error.

Conclusion

We reverse the trial court's order granting applicant's application for a writ of habeas corpus and its order granting applicant's motion to quash. We remand to the trial court for further proceedings.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Countiss and Rivas-Molloy.

Do not publish. *See* TEX. R. APP. P. 47.2(b).