Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00805-CR

EX PARTE Fernando **RODRIGUEZ-GUTIERREZ**

From the 144th Judicial District Court, Bexar County, Texas
Trial Court No. 2016W0637
Honorable Lorina I. Rummel, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: June 28, 2017

AFFIRMED

Fernando Rodriguez-Gutierrez appeals the trial court's order denying his pretrial application for writ of habeas corpus challenging the pre-September 1, 2015 version of sections 33.021(c) and (d) of the Texas Penal Code. In his application and on appeal, Rodriguez-Gutierrez asserts the statute is facially unconstitutional in four ways: (1) it violates his due process rights; (2) it is unconstitutionally overbroad; (3) it is unconstitutionally vague; and (4) it unduly and impermissibly burdens interstate commerce in violation of the Dormant Commerce Clause.[1] In

[1] Rodriguez-Gutierrez also argues the amendments to section 33.021 adopted by the Texas Legislature in 2015 should be applied retroactively. Rodriguez-Gutierrez did not, however, present this as an issue on appeal. Furthermore, in adopting the amendments, the Texas Legislature provided that the amendments applied only to offenses committed after September 1, 2015, which was the effective date of the amendments. *See Sims v. Adoption Alliance*, 922 S.W.2d 213, 215-16 (Tex. App.—San Antonio 1996, writ denied) (holding court is not free to ignore plain meaning of statute with regard to effective date); TEX. GOV'T CODE ANN. § 311.022 (West 2013) ("A statute is presumed to be prospective in its operation unless expressly made retrospective.").

his brief, Rodriguez-Gutierrez concedes this court has previously rejected each of these constitutional challenges; however, he notes the Texas Court of Criminal Appeals has granted the petition seeking discretionary review of our prior opinion. *See Ex parte Ingram*, No. 04-15-00459-CR, 2016 WL 1690493 (Tex. App.—San Antonio Apr. 27, 2016, pet. granted) (mem. op., not designated for publication). For the reasons stated in *Ex parte Ingram*, we overrule Rodriguez-Gutierrez's issues and affirm the trial court's order.

BACKGROUND

Rodriguez-Gutierrez was indicted for online solicitation of a minor alleged to have occurred on or about June 9, 2015. In an application for a pretrial writ of habeas corpus, Rodriguez-Gutierrez challenged the facial constitutionality of sections 33.021(c) and (d) of the Texas Penal Code, which define the offense of online solicitation of a minor.[2] The pre-September 1, 2015 version of the statute, applicable in this case, provided, in pertinent part:

> (c) A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.
>
> (d) It is not a defense to prosecution under Subsection (c) that
>
> (1) the meeting did not occur;
>
> (2) the actor did not intend for the meeting to occur; or
>
> (3) the actor was engaged in a fantasy at the time of commission of the offense.

After considering the merits of the application, the trial court signed an order denying it. Rodriguez-Gutierrez timely appealed.

[2] "A facial challenge to the constitutionality of a statute that defines the offense charged may be raised by means of a pre-trial application for a writ of habeas corpus." *Ex parte Thompson*, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014).

STANDARD OF REVIEW

The constitutionality of a criminal statute is reviewed de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013); *Ex parte Ingram*, 2016 WL 1690493, at *3. A statute that does not restrict speech based on its content is presumed valid, and the party challenging the statute has the burden to establish it is unconstitutional. *Ex parte Ingram*, 2016 WL 1690493, at *3. A statute that restricts speech based on its content is presumed invalid, and it is the government's burden to rebut that presumption. *Id.*

"A claim that a statute is unconstitutional 'on its face' is a claim that the statute, by its terms, always operates unconstitutionally." *Gillenwaters v. State*, 205 S.W.3d 534, 536 n.2 (Tex. Crim. App. 2006). A statute is only facially unconstitutional if it always operates unconstitutionally in all possible circumstances. *Ex parte Ingram*, 2016 WL 1690493, at *4.

DUE PROCESS, DUE COURSE OF LAW, AND RIGHT TO PRESENT A DEFENSE

In his first issue, Rodriguez-Gutierrez contends section 33.021 violates his right to due process and due course of law and his right to present a defense. Specifically, Rodriguez-Gutierrez argues section 33.021(c) criminalizes the solicitation of a minor to meet with another to engage in sex, but section 33.021(d)(2) negates the mens rea requirement that the actor intend for the meeting with the minor to actually occur. Similarly, Rodriguez-Gutierrez argues section 33.021(d)(3) precludes a defendant from raising the defense that he did not intend to meet with a minor but was merely engaged in a fantasy exchange. Therefore, Rodriguez-Gutierrez argues sections 33.021(d)(2) and (d)(3) unconstitutionally negate the mens rea requirement and unconstitutionally deprive a defendant of his right to present a defense against the key element of intent.

In *Ex parte Ingram*, this court rejected this same argument. 2016 WL 1690493, at *4. We first noted our prior holding that section 33.021(c) contains a mens rea requirement. *Id.* (citing *Ex parte Zavala*, 421 S.W.3d 227, 232 (Tex. App.—San Antonio 2013, pet. ref'd)). "[T]he mens rea

in subsection (c) is the solicitation of a minor, not the actual meeting of the minor." *Ex parte Ingram*, 2016 WL 1690493, at *6; *see also Ex parte Zavala*, 421 S.W.3d at 231-32 (holding "the gravamen of the offense defined by subsection (c) is the knowing ***solicitation*** of a minor to meet a person, with the intent that the minor will engage in some form of sexual contact with that person") (emphasis in original). We also disagreed that section 33.021(d) negated the mens rea requirement, reasoning, "While 33.021(d) may not be a defense in and of itself, subsection (d) may be a [] factor or element toward a valid defense — such as no intent." *Ex parte Ingram*, 2016 WL 1690493, at *4; *see also State v. Paquette*, 487 S.W.3d 286, 290-91 (Tex. App.—Beaumont 2016, no pet.) (holding section 33.021(d)(3) does not unconstitutionally foreclose a defendant's ability to assert a fantasy defense); *Ex parte Wheeler*, 478 S.W.3d 89, 95-96 (Tex. App.—Houston [1st Dist.] 2015, pet. ref'd) (holding section 32.021(d)(2) precludes "only a defense on the basis that the [defendant] lost the specific intent to meet or changed his mind about meeting after the solicitation occurred" but "does not relieve the State of its burden to prove that the defendant had the specific intent to meet at the time of the solicitation"). Therefore, for the reasons previously stated in *Ex parte Ingram*, Rodriguez-Gutierrez's first issue is overruled.

OVERBREADTH CHALLENGE

In his second issue, Rodriguez-Gutierrez contends section 33.021 is unconstitutionally overbroad on its face because it is a content-based restriction that severely criminalizes a substantial amount of speech protected by the First Amendment.

In rejecting this same argument in *Ex parte Ingram*, we first noted "[t]he First Amendment's protections are only implicated where the government seeks to regulate protected speech." 2016 WL 1690493, at *5. We then noted the Texas Court of Criminal Appeals held section 33.021(c) is directed at conduct, specifically "'the conduct of requesting a minor to engage in illegal sexual acts,'" and "'offers to engage in illegal transactions [such as sexual assault of a

minor] are categorically excluded from First Amendment protection.'" *Id*. (quoting *Ex parte Lo*, 424 S.W.3d at 16-17). We then concluded section 33.021 is not unconstitutionally overbroad "because the statute does not implicate First Amendment speech protections and does not include within its sweep a substantial amount of protected speech." *Id.* For the same reasons stated in *Ex parte Ingram*, Rodriguez-Gutierrez's second issue is overruled. *See id*.; *see also Ex parte Moy*, No. 14-16-00420-CR, 2017 WL 1901214, at *4-6 (Tex. App.—Houston [14th Dist.] May 9, 2017, no pet. h.) (rejecting same argument); *Ex parte Wheeler*, 478 S.W.3d at 94-96 (same).

VAGUENESS

In his third issue, Rodriguez-Gutierrez contends section 33.021 is unconstitutionally vague because it forbids solicitation that is not intended to result in a meeting. As a result, Rodriguez-Gutierrez argues "[m]en of common intelligence must guess at its meaning and differ as to its application."

The same argument raised by Rodriguez-Gutierrez in his third issue was rejected by this court in *Ex parte Ingram*, 2016 WL 1690493, at *6-7. As we previously explained, "the *mens rea* in subsection (c) is the solicitation of a minor, not the actual meeting of the minor." *Id*. at *6. As we further explained in *Ex parte Zavala*:

> The crime of soliciting a minor under section 33.021(c) is committed, and is completed, at the time of the request, i.e., the solicitation. The requisite intent arises within the conduct of soliciting the minor, and must exist at the time of the prohibited conduct of solicitation. Indeed, it is the requirement that the defendant must solicit "with the intent that the minor will engage in sexual contact" that operates to make otherwise innocent conduct, i.e., soliciting a minor to meet, into criminal conduct. It follows then, that for purposes of a subsection (c) solicitation offense, it does not matter what happens after the solicitation occurs because the offense has been completed; it does not matter whether the solicited meeting actually occurs, or that the defendant did not intend for the meeting to actually occur, or that the defendant was engaged in a fantasy at the time of the solicitation.

421 S.W.3d at 232 (internal citations omitted). Thus, men of common intelligence are not required to guess at the statute's meaning.

Because the statute is not unconstitutionally vague, we overrule Rodriguez-Gutierrez's third issue. *See id*.; *see also Ex parte Moy*, 2017 WL 1901214, at *6-7 (rejecting same argument); *Ex parte Wheeler*, 478 S.W.3d at 96 (same).

IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE

In his final issue, Rodriguez-Gutierrez argues section 33.021 "places the undue and impermissible burdens on interstate commerce by attempting to place regulations on the entirety of the Internet." We fully examined this argument in *Ex parte Ingram*, concluding "any effect of section 33.021(c) on interstate commerce is only incidental in relation to the local benefit." 2016 WL 1690493, at *7. Accordingly, we hold section 33.021 does not violate the Dormant Commerce Clause and overrule Rodriguez-Gutierrez's final issue. *See id*.; *see also Ex parte Moy*, 2017 WL 1901214, at *7 (rejecting same argument); *Ex parte Wheeler*, 478 S.W.3d at 96-97 (same).

CONCLUSION

The trial court's order is affirmed.

Rebeca C. Martinez, Justice

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