

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-15-00424-CR

EX PARTE SHERIF S. MAHMOUD, Appellant

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 14-01-00392-CR

MEMORANDUM OPINION

The State charged Sherif S. Mahmoud with online solicitation of a minor under section 33.021(c) of the Texas Penal Code. Mahmoud filed an application and an amended application for writ of habeas corpus on the grounds that section 33.021 is unconstitutional. The trial court denied Mahmoud's application. In three appellate issues, Mahmoud contends that the trial court erred by finding the statute constitutional. Specifically, he argues that section 33.021 is unconstitutionally overbroad in violation of the First Amendment, is unconstitutionally vague in

violation of the Fourteenth Amendment, and violates the Dormant Commerce Clause. We affirm the trial court's order.

Texas Penal Code section 33.021(c) provides that a person commits an offense under this section:

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.

Tex. Penal Code Ann. § 33.021(c) (West Supp. 2015). At the time of Mahmoud's offense, the statute defined a "minor" as "an individual who represents himself or herself to be younger than 17 years of age" or "an individual whom the actor believes to be younger than 17 years of age." Act of May 25, 2005, 79th Leg., R.S., ch. 1273, § 1, 2005 Tex. Gen. Laws 4049, 4050 (amended 2015) (current version at Tex. Penal Code Ann. § 33.021(a)) (italics omitted). The former statute also provided that it was not a defense 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." *Id.* (italics omitted). Mahmoud contends that section 33.021 essentially punishes a substantial amount of protected speech—i.e., "speech that is neither solicitant nor directed at someone the speaker believes to be a minor." He also contends that section 33.021 is contradictory

regarding the intent element and should be found void for vagueness. Last, he argues that section 33.021 unduly burdens interstate commerce in violation of the Dormant Commerce Clause because it attempts to place regulations on Internet users everywhere.

Whether a statute is facially unconstitutional is a question of law that we review *de novo*. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). When a party challenges the constitutionality of a statute, we usually begin with the presumption that the statute is valid and that the legislature has not acted unreasonably or arbitrarily in enacting it. *Id.* at 14–15. The party challenging the statute normally carries the burden to establish the statute’s unconstitutionality. *Id.* at 15. A different standard of review applies if the challenged statute seeks to restrict and punish speech based on its content. *Id.* “Content-based regulations . . . are presumptively invalid, and the government bears the burden to rebut that presumption.” *Id.* (footnotes omitted). We apply strict scrutiny to content-based regulations. *Id.*

We recently addressed the same constitutional issues set forth in Mahmoud’s brief in *State v. Paquette*, No. 09-15-00361-CR, 2016 WL 747243, at *3 (Tex. App.—Beaumont Feb. 24, 2016, no pet.). In *Paquette*, we relied on this Court’s analysis in *Ex parte Victorick*, No. 09-13-00551-CR, 2014 WL 2152129, at *2–7

(Tex. App.—Beaumont May 21, 2014, pet. ref'd) (mem. op., not designated for publication), *cert. denied*, *Victorick v. Texas*, 135 S. Ct. 1557 (2015). *Paquette*, 2016 WL 747243, at *2–3. In *Victorick*, we concluded that section 33.021(c) “punishes **conduct** rather than the content of speech alone.” 2014 WL 2152129, at *3. We thus rejected the argument that the statute involved a content-based restriction on speech and began our analysis with the presumption that the statute was constitutionally valid. *Id.* at *4.

Relying on our analysis in *Victorick*, we held in *Paquette* that section 33.021(c) is not unconstitutionally overbroad or vague. *Paquette*, 2016 WL 747243, at *3; *see Victorick*, 2014 WL 2152129, at *2-7. Mahmoud urges us to revisit our decision in *Victorick*; we decline to do so. Thus, based on our former precedent identified above, we reject Mahmoud’s argument that section 33.021 is overbroad in violation of the First Amendment and unconstitutionally vague in violation of the Fourteenth Amendment. *See Paquette*, 2016 WL 747243, at *3; *Victorick*, 2014 WL 2152129, at *6.

Mahmoud also contends that the trial court erred in denying him relief because section 33.021 violates the Dormant Commerce Clause. We also rejected this contention in *Paquette*. 2016 WL 747243, at *4. We affirm our prior holding

that section 33.021(c) has only an incidental effect on interstate commerce and does not violate the Dormant Commerce Clause. *See id.*

Having overruled Mahmoud's arguments on appeal, we affirm the trial court's order.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on March 10, 2016
Opinion Delivered March 30, 2016
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Before Kreger, Horton, and Johnson, JJ.