In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-21-00129-CR
NO. 09-21-00130-CR
NO. 09-21-00131-CR
NO. 09-21-00132-CR
NO. 09-21-00133-CR
NO. 09-21-00134-CR
NO. 09-21-00135-CR
NO. 09-21-00136-CR
NO. 09-21-00137-CR
NO. 09-21-00138-CR

EX PARTE LEONARD WALTON FUSSELMAN II

On Appeal from the 228th District Court
Harris County, Texas
Trial Cause Nos. 1713215, 1713216, 1713217, 1713218,
1713219, 1713220, 1713221, 1713222, 1713223, 1713224

MEMORANDUM OPINION

In ten pretrial writs of habeas corpus, Leonard Walton Fusselman II sought to quash the indictments he complains of in this consolidated appeal. The indictments allege that Fusselman unlawfully, intentionally, and knowingly possessed

pornographic digital images of children younger than eighteen.[1] In the applications, Fusselman argued that the statute he was charged with violating, section 43.26 of the Texas Penal Code, is facially overbroad and therefore unconstitutional because the statute regulates sexual conduct that includes conduct of those who are not children, conduct that is not lewd, and images that are not pornographic.

After the trial court conducted a brief non-evidentiary hearing on Fusselman's pretrial habeas applications, the trial court denied the applications. There is precedent directly on point from an appeal to which Fusselman was a party, an appeal decided in the Fourteenth Court of Appeals. We will refer to the opinion of our sister court as *Fusselman* I.[2] In *Fusselman* I, the Fourteenth Court of Appeals specifically rejected the same arguments Fusselman presents here to challenge to the constitutionality of the statute he was charged with having violated. Although we addressed a facial challenge to an earlier version of the same statute Fusselman complains of in the appeals at issue, the Ninth Court of Appeals has also already rejected a facial challenge to the validity of the child pornography statute for many

[1]The appeals before us here were filed in the first instance in the Fourteenth Court of Appeals. Yet in May 2021, the Texas Supreme Court signed a docket-equalization order, and based on its authority to equalize appellate dockets, the Supreme Court transferred these appeals to the Ninth Court of Appeals. *See* Tex. Gov't Code Ann. § 73.001.

[2]*Ex parte Fusselman*, 621 S.W.3d 112, 117-23 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd).

of the same reasons relied on by our sister court in *Fusselman* I.[3] For the reasons explained below, we will affirm.

Background

In October 2017, in ten indictments, a Harris County Grand Jury charged Fusselman with possession of child pornography. The indictments allege facts charging Fusselman with violating section 43.26 of the Texas Penal Code. If convicted of violating section 43.26 under the indictments, each of Fusselman's convictions on the ten counts would be punishable as a third-degree felony.[4] In amended applications for writs of habeas corpus, which Fusselman filed in these ten cases when they were before the trial court, Fusselman alleged that section 43.26 is unconstitutional under the Texas and United States Constitutions.[5] Fusselman argued in the amended applications that section 43.26 is overly broad on its face because it

- Extends to seventeen-year-olds when, under Texas law, those who are seventeen or older have reached the age of consent for sex;

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[3]*See Savery v. State*, 782 S.W.2d 321, 323 (Tex. App.—Beaumont 1989), *aff'd, Savery v. State*, 819 S.W.2d 837, 838 (Tex. Crim. App. 1991).

[4]Tex. Penal Code Ann. § 43.26(d).

[5]The Amended Applications for writ of habeas corpus were Fusselman's live pleadings when the trial court conducted the hearing and denied the writs in each of the cases, Trial Court Cause Numbers 1713215, 1713216, 1713217, 1713218, 1713219, 1713220, 1713221, 1713222, 1713223, and 1713224.

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- defines *sexual conduct* too broadly, as the statute defines *sexual conduct* to include the lewd exhibition of any portion of the female breast below the top of the areola; and

- the statute forbids possessing images of simulated sexual conduct when "there [was] no non-speech crime involved in the making of [the] images[,]" which Fusselman concludes allows the simulated conduct depicted in the images without anything linking the simulated conduct to "any valid crime."

Fusselman filed a brief that raises his facial challenge to section 43.26 in five appellate issues. In general, Fusselman argues that section 43.26 is facially overbroad because the statute is broader than what he claims should fall within the statute's legitimate sweep. Turning to his issues, Fusselman argues in issues one and two that section 43.26 is facially overbroad under the Texas and United States Constitutions because the statute defines *child pornography* to include "people who are not children[,]" meaning people who are seventeen who are old enough to consent to sex. In issue three, Fusselman argues that section 43.26 violates the First Amendment because it "punishes as *child pornography* images of body parts that the Supreme Court has not categorized as *child pornography*." In issue four, Fusselman argues that section 43.26 is facially unconstitutional under the First Amendment because it reaches the possession of child pornography that includes possessing images involving simulated rather than real sexual conduct. And last, Fusselman argues that section 43.26 is substantially overbroad when the combined

effect of the overbreadth problems he identified in his first four issues is considered as a whole.

Standard of Review

Under the First Amendment, defendants may file pretrial writs of habeas corpus to challenge a statute to raise a claim that the statute is unconstitutional because on its face it is too broad.[6] On appeal, "[w]hether a statute is facially constitutional is a question of law that we review *de novo*."[7] Under the First Amendment, a court may declare a law "unconstitutional on its face, even if it might have some legitimate applications."[8]

Even so, before a court will declare a statute is facially overbroad based on arguments over its breadth, the problems associated with the statute's reach must be "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[9] Stated another way, the statute the defendant assails as facially unconstitutional "must prohibit a substantial amount of protected expression, and the danger that the statute will be unconstitutionally applied must be realistic and not based on 'fanciful hypotheticals.'"[10] On appeal, the defendant "must demonstrate

[6]*Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016).
[7]*Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013).
[8]*Ex parte Perry*, 483 S.W.3d at 902.
[9]*Id*.
[10]*Id*.

from [the statute's] text and from actual fact 'that a substantial number of instances exist in which the Law cannot be applied constitutionally.'"[11]

In analyzing a statute for overbreadth, the first step required by the analysis is for the court to examine the statute to determine what the statute covers.[12] In construing statutes, we give effect to the plain meaning of the words used in the statute unless the language in it is ambiguous or that meaning would lead to an absurd result, a result the Legislature "could not have possibly intended."[13] When determining the meaning of a word, we look to the word's plain meaning unless the statute defined the term.[14] And we consider the words used in the context of the statute, presuming each word was used for a purpose so that we give each word, clause, and sentence reasonable effect, when possible.[15] If the meaning is unclear or the plain meaning of the words would lead to an absurd result, we may consider extratextual factors, including "(1) the object sought to be attained, (2) the circumstances under which the statute was enacted, (3) the legislative history, (4) common law or former statutory provisions, including laws on the same or similar subjects, (5) the consequences of a particular construction, (6) administrative construction of the statute, and (7) the title (caption), preamble, and emergency

[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*. at 902-03.

provision."[16] If we were to determine that a statute is too broad, we must narrow the statute's construction when possible to avoid construing the statute in a way that violates the First Amendment.[17] But a narrowing "construction should be employed only if the statute is readily susceptible" to a reasonable interpretation narrowing the statute's reach to prevent the statute from violating the First Amendment.[18] That said, the fact that a party "can conceive of some impermissible applications of a statute is not sufficient to render [the statute] susceptible to an overbreadth challenge."[19]

Section 43.26

As noted above, this case was transferred to us from the Fourteenth Court of Appeals. As the transferee court in these appeals, we must "decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court's decision otherwise would have been inconsistent with the precedent of the transferor court."[20]

In *Fusselman* I, the Fourteenth Court addressed the same arguments Fusselman presents to us here. According to Fusselman, section 43.26 of the Penal Code is facially unconstitutional based on the arguments he presented in his

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[16]*Id*. at 903.
[17]*Id*.
[18]*Id*.
[19]*United States v. Williams*, 553 U.S. 285, 303 (2008) (cleaned up).
[20]Tex. R. App. P. 41.3.

applications. Fusselman concludes that the indictments he sought to dismiss, all based on the possession of child pornography statute, should be dismissed because the statute violates one's freedom to engage in constitutionally protected speech.[21]

In the briefs Fusselman filed here, Fusselman simply argues the Fourteenth Court when deciding *Fusselman* I is wrong, but he then never explains how this Court's jurisprudence would have led to a result that is any different from the one our sister court reached in *Fusselman* I. In fact, had Fusselman chosen to examine the Ninth Court's jurisprudence on the validity of section 43.26, he would have discovered that over thirty years ago, we rejected a facial challenge to the constitutionality in a prior version of section 43.26, an opinion later affirmed by the Court of Criminal Appeals.[22] To be sure, in some ways, the predecessor statute differs from that of the current statute.[23] Even so, the reason the Ninth Court of

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[21]*Ex parte Fusselman*, 621 S.W.3d at 117-23 ("Having considered and rejected all reasons advanced by [Fusselman] for holding Penal Code section 43.26 unconstitutionally overbroad, we overrule [Fusselman's] issues and affirm the trial court's judgments[.]").

[22]*Savery v. State*, 782 S.W.2d 321, 323 (Tex. App.—Beaumont 1989), *aff'd*, *Savery v. State*, 819 S.W.2d 837, 838 (Tex. Crim. App. 1991).

[23]The predecessor child-pornography statute that Savery challenged in his appeal defined the offense as follows:

> Section 43.26. POSSESSION OF CHILD PORNOGRAPHY.
> (a) A person commits an offense if:
> (1) the person knowingly or intentionally possesses material containing a film image that visually depicts a child younger than 17 years of age at the time the film image of the child was made who is engaging in sexual conduct; and

Appeals and the Court of Criminal Appeals in *Savery* rejected Savery's challenge to the version of section 43.26 addressed in those opinions hinged on the rights that states have "to protect the victims of child pornography" with the hope that doing so will "destroy a market for the exploitative use of children."[24]

While we concede differences exist between the current version of section 43.26 and the version in existence when we decided *Savery*, we cannot see why (and Fusselman does not explain why) the differences between the versions of section 43.26 that apply to Fusselman and the version of that statute we addressed in *Savery* should lead to a different outcome than the one we reached in 1989 when concluding section 43.26 is not facially overbroad when we consider the statute's legitimate sweep.[25]

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(2) the person knows that the material depicts the child as described by Subdivision (1) of this subsection.

(b) In this section:

(1) "Film image" includes a photograph, slide, negative, film, or videotape, or a reproduction of any of these.

(2) "Sexual conduct" has the meaning assigned by Section 43.25 of this code.

(c) The affirmative defenses provided by Section 43.25(f) of this code also apply to a prosecution under this section.

(d) An offense under this section is a Class A misdemeanor.

Act of May 27, 1985, 69th Leg., R.S., ch. 530, § 2, sec. 43.26, 1985 Tex. Gen. Laws 2134 (current version at Tex. Pen. Code Ann. § 43.26 (West 2016)).

[24]*Savery,* 819 S.W.2d at 838 (quoting *Osborne v. Ohio*, 495 U.S. 103, 109 (1990)).

[25]*Id.*

For instance, consistent with what the Ninth Court said in *Savery*, the Court of Criminal Appeals explained the Legislature may pass legislation to protect victims of child pornography through legislation designed to destroy the market in child pornography, a market that creates a financial incentive leading to the exploitation of children.[26] Simply put, the Legislature could have reasonably decided that to damage the market that exists in child pornography, it needed to criminalize the possession of images of eighteen-year-olds engaged in the *sexual conduct*, as that term is defined by section 43.26.[27] So even though there are differences between the version of section 43.26 that we addressed in *Savery* and the version before us now, we are not persuaded the changes to the statute since *Savery* made section 43.26 facially unconstitutional in light of the statute's purpose to create a penalty that will help destroy the market incentives for exploiting children.[28] Bound by the Fourteenth Court's opinion in *Fusselman* I in these appeals, we overrule Fusselman's issues and affirm the trial court's orders denying Fusselman's pretrial writs.

Conclusion

For the reasons explained in *Fusselman* I, we overrule all five of the appellate issues that Fusselman raises in his briefs. As a result, we affirm the orders denying

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[26]*Id*.

[27]Tex. Penal Code Ann. § 43.25(a)(2); *id*. § 43.26(b)

[28]*Id*; *see generally Ex parte Fusselman*, 621 S.W.3d 112 (Tex. App.—Houston [14th Dist.] 2021, pet. ref'd); *and see Ex parte Perry*, 483 S.W.3d at 902.

Fusselman's applications for pretrial writs of habeas corpus in Trial Court Cause Numbers 1713215, 1713216, 1713217, 1713218, 1713219, 1713220, 1713221, 1713222, 1713223, and 1713224.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on November 15, 2021
Opinion Delivered May 4, 2022
Do Not Publish

Before Golemon, C.J., Horton and Johnson, JJ.