COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00294-CV

IN THE MATTER OF D.Y.

FROM THE 323RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 323-102941-16

MEMORANDUM OPINION[1]

Juvenile Appellant D.Y. and the State stipulated to the evidence supporting the State's allegation that she had violated penal code section 21.15(b)(2) by intentionally or knowingly "photograph[ing] or by videotape or other electronic means, namely a cell phone, record[ing], broadcast[ing] or transmit[ting], at a location that is a bathroom or private dressing room, a visual image of [another

[1]*See* Tex. R. App. P. 47.4.

female] without [that person's] consent and with the intent to invade [her] privacy." The trial court found the allegations true, adjudicated Appellant delinquent, and placed Appellant on probation for one year. In her sole issue, Appellant contends that the statute is "void for overbreadth" under the Free Speech Clause of the First Amendment. Because we uphold the statute's constitutionality, we affirm the trial court's judgment.

I. Standard of Review

We review the issue of a statute's facial constitutionality de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2014).

II. The Burden of Proof and Level of Scrutiny Depend on Whether the Statute Is Content-Based.

Generally, we presume that the statute is valid, and the challenger has the burden to prove that the statute is unconstitutional. *Id.* at 15. However, when a law criminalizes speech or expression based on its content, we presume that the law is unconstitutional, and the State then has the burden to prove that the statute is valid. *Id.*

We apply intermediate scrutiny to content-neutral statutes, but content-based statutes receive strict scrutiny. *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014).

The statute at issue provides that "[a] person commits an offense if, without the other person's consent and with intent to invade the privacy of the other person, the person . . . photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another in a bathroom

or changing room." Tex. Penal Code Ann. § 21.15(b)(2) (West Supp. 2016). While the parties agree that photographs and visual recordings, as well as the acts of creating them, are inherently expressive and protected by the First Amendment, *see Thompson*, 442 S.W.3d at 336–37, they disagree about which level of scrutiny we should apply to determine whether the statute is facially constitutional. Appellant argues that strict scrutiny applies because section 21.15(b)(2) is content-based; the State argues that intermediate scrutiny applies because the statute is content-neutral.

III. The Texas Court of Criminal Appeals Has Already Determined That the Statute Survives Strict Scrutiny.

We do not need to resolve the parties' disagreement about the appropriate level of scrutiny to apply because the Texas Court of Criminal Appeals has already concluded that the statute satisfies the strict scrutiny test. *See id.* at 348–49. When strict scrutiny applies, we may uphold a statute against a First Amendment challenge "only if it is narrowly drawn to serve a compelling government interest. In this context, a regulation is narrowly drawn if it uses the least restrictive means of achieving the government interest." *Id.* at 344 (citations and internal quotation marks omitted). In analyzing and ultimately striking down the former improper photography and visual recordings statute[2] because it failed the strict scrutiny test, the Texas Court of Criminal Appeals pointed to the statute

[2]Act of June 20, 2003, 78th Leg., R.S., ch. 500, § 1, Tex. Penal Code § 21.15(b)(1), 2003 Tex. Gen. Laws 1771, 1771 (amended 2015) (current version at Tex. Penal Code Ann. § 21.15(b)(1) (West Supp. 2016)).

at issue before us as an example of a statute that would satisfy that test. *Id.* The *Thompson* court stated,

- "Privacy constitutes a compelling government interest when the privacy interest is substantial and the invasion occurs in an intolerable manner",
- "[S]ubstantial privacy interests are invaded in an intolerable manner when a person is photographed without consent in a private place, such as the home," and
- Section 21.15(b)(2) is "narrowly drawn to protect substantial privacy interests."

Id. at 348–49 (citations omitted).

While we agree with Appellant that section 21.15(b)(2) was not the focus of *Thompson* and we are not compelled to follow it, we nevertheless find the Texas Court of Criminal Appeals's assessment of the statute persuasive and choose to follow it. Accordingly, we hold that the privacy interests protected by the statute are compelling, but the statute is narrowly drawn to protect those interests. Thus, section 21.15(b)(2) satisfies the strict scrutiny test and does not unlawfully restrict Appellant's rights to free expression. *See id.*; *see also Ex parte Houston*, No. 02-16-00359-CR, 2016 WL 6277408, at *2–3 (Tex. App.—Fort Worth Oct. 27, 2016, no pet.) (mem. op., not designated for publication) (affirming denial of habeas relief for conviction under section 21.15(b)(2) when application was based only on *Thompson's* holding former subsection (b)(1) unconstitutional).

IV. The Statute Is Not Overbroad.

As the Texas Court of Criminal Appeals has explained, the overbreadth doctrine allows a court to invalidate a statute on its face despite its legitimate reach and regardless of whether a party's constitutional rights were violated. *Ex parte Ellis*, 309 S.W.3d 71, 90–91 (Tex. Crim. App. 2010). "The overbreadth doctrine is strong medicine that should be employed sparingly and only as a last resort." *Id.* (citations and internal quotation marks omitted). In *State v. Johnson*, the Texas Court of Criminal Appeals set out the test:

> The overbreadth of a statute must be "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." The statute 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." The person challenging the statute must demonstrate from its text and from actual fact "that a substantial number of instances exist in which the Law cannot be applied constitutionally." The Supreme Court "generally do[es] not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." Moreover, the overbreadth doctrine is concerned with preventing the chilling of protected speech and that concern "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct." "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct that is necessarily associated with speech (such as picketing or demonstrating)."

475 S.W.3d 860, 865 (Tex. Crim. App. 2015) (citations omitted).

Section 21.15(b)(2) prohibits a person from taking a picture of another in a bathroom or changing room without that person's consent and with the intent to invade the person's privacy; the emphasis of the statute is on the prohibited

conduct. The sweep of the statute is limited by place (bathroom or changing room) and the actor's requisite intent (to invade the subject's privacy). Section 21.15(b)(2) does not implicate conduct in public places, unlike former section 21.15(b)(1), which was held to be overbroad. *See Thompson*, 442 S.W.3d at 350–51. Accordingly, we hold that section 21.15(b)(2) is not overbroad. We overrule Appellant's sole issue.

V. Conclusion

Having overruled Appellant's sole issue, we affirm the trial court's judgment.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: SUDDERTH, KERR, and PITTMAN, JJ.

DELIVERED: May 18, 2017