Affirmed and Memorandum Opinion filed June 16, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00461-CR

EX PARTE GARRETT LEE DIKES, Appellant

On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Cause No. 17-CR-2664

MEMORANDUM OPINION

Appellant Garrett Lee Dikes was charged with stalking. *See* Tex. Penal Code Ann. § 42.072. Appellant filed a pretrial application for writ of habeas corpus challenging the constitutionality of the stalking statute. After a non-evidentiary hearing the trial court issued an order denying the application. Appellant appeals the trial court's denial, raising five issues. The State responds by raising the threshold issue of whether appellant's challenge is cognizable by a pretrial writ. We conclude that appellant's challenge is not cognizable by pretrial writ because even if we granted all the relief appellant seeks, he would not be entitled to immediate release. Accordingly, we affirm the trial court's denial of appellant's pretrial application for

writ of habeas corpus.

BACKGROUND

Appellant was indicted for stalking under section 42.072 of the Texas Penal Code. The indictment alleges that appellant:

> did then and there, on more than one occasion and pursuant to the same scheme and course of conduct directed specifically at Abigail Ables, knowingly engage in conduct that:
>
> Paragraph A:
>
> constituted an offense under Section 42.07 of the Texas Penal Code, namely:
>
> made repeated telephone communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend Abigail Ables, or
>
> sent repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend, Abigail Ables;
>
> or
>
> Paragraph B:
>
> the defendant knew or reasonably should know that Abigail Ables would regard as threatening bodily injury on Abigail Ables, or threatening that an offense will be committed against Abigail Ables property, namely:
>
> - on or about August 12, 2017, entering Abigail Ables property without her consent, or
> - on or about August 12, 2017, using Abigail Ables computer without her consent, or
> - on or about August 17, 2017, hiding in an area near Abigail Ables residence, or
> - on or about September 7, 2017, going to Abigail Ables residence without her consent, or
> - on or about September 7, 2017, accessing or deleting Abigail Ables phone without her consent,

- on or about September 7, 2017, taking a parking pass or articles of clothing from Abigail Ables without her consent, or
- on or about September 8, 2017, entering Abigail Ables residence without her consent, or
- on or about September 8, 2017, entering Abigail Ables bedroom without her consent, or
- on or about September 8, 2017, parking near Abigail Ables residence, or
- on or about September 8, 2017, walking towards Abigail Ables person;

and the defendant's the [sic] conduct caused Abigail Ables to be placed in fear of bodily injury or death or in fear that an offense would be committed against Abigail Ables property, or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended;

and the defendant's the [sic] conduct would cause a reasonable person to fear bodily injury or death for himself or herself, fear bodily injury or death for a member of the person's family or house or for an individual with whom the person has a dating relationship, or fear that an offense will be committed against the person's property, or feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended[.]

Appellant filed a pretrial application for writ of habeas corpus in which he argued that (1) the term "repeated" found in sections 42.07(a)(4) and 42.07(a)(7) of the Texas Penal Code (proscribing harassment) is facially void for vagueness or overbreadth; (2) the term "electronic communications" found in section 42.07(a)(7) of the statue is facially void for vagueness or overbreadth; and (3) the terms "harass," "annoy," "alarm," "abuse," "torment," "embarrass," or "offend" found in sections 42.07 and 42.072 (proscribing stalking) of the Texas Penal Code are facially void for vagueness or overbreadth. The trial court denied appellant's application and this appeal followed.

ANALYSIS

I. Standard of review and applicable law

In general, we review a trial court's ruling on an application for writ of habeas corpus using an abuse-of-discretion standard, and we view any evidence in the light most favorable to that ruling and defer to implied factual findings supported by the record. *Phuong Anh Thi Le v. State*, 300 S.W.3d 324, 327 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Pretrial habeas corpus proceedings are separate criminal actions, and the applicant has the right to an immediate appeal before trial begins. *Greenwell v. Court of Appeals for the Thirteenth Judicial Dist.*, 159 S.W.3d 645, 649–50 (Tex. Crim. App. 2005). A defendant may only seek pretrial habeas relief in limited circumstances. *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005). Those limited circumstances are to (1) challenge the State's power to restrain the defendant; (2) challenge the manner of pretrial restraint, i.e., the denial of bail or conditions of bail; and (3) raise certain issues that would bar prosecution or conviction. *Id*.

A threshold issue is whether a claim is cognizable on pretrial habeas. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy, and we must be careful to ensure that a pretrial writ is not misused to secure pretrial appellate review of matters that should not be put before the appellate courts at the pretrial stage. *Id*. Whether a claim is cognizable on pretrial habeas is a threshold issue that we must address before the merits of the claim may be resolved. *See id*. (holding that if a non-cognizable claim is resolved on the merits in a pretrial habeas appeal, then the pretrial writ has been misused, and the State can appropriately petition the Court of Criminal Appeals to correct such misuse). "Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant's favor,

would not result in immediate release." *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016); *see also Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001).

A claim that a statute is unconstitutional on its face may be raised by pretrial writ of habeas corpus because the invalidity of the statute would render the charging instrument void. *Ex parte Flores*, 483 S.W.3d 632, 638 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). To invalidate a statute as facially unconstitutional, the defendant must show that the statute is unconstitutional in all its applications. *Ellis*, 309 S.W.3d at 80; *Ex parte Gonzalez*, 525 S.W.3d 342, 346–47 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

A constitutional attack may not be based on an apprehension of future injury. *Ex parte Spring*, 586 S.W.2d 482, 485 (Tex. Crim. App. 1978). Such an attack is not ripe unless the record shows that the challenged section will be applied to the defendant. *Gonzalez*, 525 S.W.3d at 347.

II. Appellant's challenge to the constitutionality of the stalking statute is not ripe because it is based on an apprehension of future injury.

Appellant was indicted under section 42.072 of the Texas Penal Code, which provides that a person commits the offense of stalking if the person,

> on more than one occasion and pursuant to the same scheme or course of conduct that is directed specifically at another person, knowingly engages in conduct that:
>
> (1) constitutes an offense under Section 42.07, or that the actor knows or reasonably should know the other person will regard as threatening:
>
> (A) bodily injury or death for the other person;
>
> (B) bodily injury or death for a member of the other person's family or household or for an individual with whom the other person has a dating relationship; or
>
> (C) that an offense will be committed against the other person's

property;

(2) causes the other person, a member of the other person's family or household, or an individual with whom the other person has a dating relationship to be placed in fear of bodily injury or death or in fear that an offense will be committed against the other person's property, or to feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended; and

(3) would cause a reasonable person to:

(A) fear bodily injury or death for himself or herself;

(B) fear bodily injury or death for a member of the person's family or household or for an individual with whom the person has a dating relationship;

(C) fear that an offense will be committed against the person's property; or

(D) feel harassed, annoyed, alarmed, abused, tormented, embarrassed, or offended.

Tex. Penal Code Ann. § 42.072.

Appellant argues that the portions of the stalking statute (section 42.072) that rely on certain definitions in the harassment statute (section 42.07) are facially unconstitutional as vague and overbroad. Specifically, appellant argues that the words "repeated," and "electronic communications" are unconstitutionally vague and overbroad in violation of the First Amendment to the United States Constitution.[1] Appellant further argues that the terms "harass," "annoy," "alarm,"

[1] In *Ex parte Barton*, our sister court recently declared the electronic-communication element of the harassment statute facially unconstitutional. 586 S.W.3d 573, 585 (Tex. App.—Fort Worth 2019, pet. granted); *see also* Tex. Penal Code Ann. § 42.07(a)(7). The Fort Worth court noted that its decision was in conflict with several other courts of appeals, which held that the electronic-communication portion of the harassment statute was not unconstitutionally vague or overbroad. *See Tarkington v. State*, No. 12-19-00078-CR, 2020 WL 1283899, at *4 (Tex. App.—Tyler Mar. 18, 2020, no pet. h.) (not designated for publication); *Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *4 (Tex. App.—Amarillo Apr. 8, 2019, pet. granted) (not designated for publication); *Ex parte Hinojos*, No. 08-17-00077-CR, 2018 WL 6629678, at *5-6 (Tex. App.—El Paso Dec. 19, 2018, pet. ref'd) (not designated for publication); *Ex parte Ogle*, No. 03-18-00207-CR, 2018 WL 3637385, at *7 (Tex. App.—Austin Aug. 1, 2018) (not designated

"abuse," "torment," "embarrass," or "offend" as used in the stalking statute are unconstitutionally vague and overbroad.

Appellant's application for writ of habeas corpus is limited to challenging the constitutionality of the harassment statute, and the terms harass, annoy, alarm, abuse, torment, embarrass, or offend in the stalking statute. As indicted, however, appellant could be convicted of the charged offense (stalking) without proof of any of the offending terms in either statute. Removing the challenged sections from the indictment, appellant stands charged as follows:

> [The defendant] did then and there, on more than one occasion and pursuant to the same scheme and course of conduct directed specifically at Abigail Ables, knowingly engage in conduct that:
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> *****
>
> the defendant knew or reasonably should know that Abigail Ables would regard as threatening bodily injury on Abigail Ables, or threatening that an offense will be committed against Abigail Ables property, namely:
>
> [list of individual actions allegedly committed]
>
> and the defendant's the [sic] conduct caused Abigail Ables to be placed in fear of bodily injury or death;
>
> *****
>
> and the defendant's conduct would cause a reasonable person to fear bodily injury or death for himself or herself, fear bodily injury or death for a member of the person's family or house or for an individual with whom the person has a dating relationship[.]

Appellant is charged with stalking under the statute without resort to the portions of

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for publication), pet. ref'd *Ogle v. State*, 563 S.W.3d 912 (Tex. Crim. App. 2018); cert. denied *Ogle v. Texas*, 140 S. Ct. 118, 205 L. Ed. 2d 25 (2019); *Ex parte Reece*, No. 11-16-00196-CR, 2016 WL 6998930, at *3 (Tex. App.—Eastland Nov. 30, 2016, pet ref'd) (not designated for publication); *Lebo v. State*, 474 S.W.3d 402, 407 (Tex. App.—San Antonio 2015, pet. ref'd). Because any opinion on the issue in this case would be advisory, we do not decide whether this court would join the majority of courts who have declined to find the statute unconstitutional.

the statute to which appellant challenges as unconstitutional.

The Penal Code defines the elements of stalking, in relevant part, as when a person (1) on more than one occasion and pursuant to the same scheme or course of conduct directed specifically at another person, (2) knowingly, (3) engages in conduct that (a) he knows or reasonably believes the other person will regard as threatening, (b) caused the other person or a member of the person's family or household to fear bodily injury, death, or an offense against the person's property, and (c) would cause a reasonable person to fear bodily injury, death, or that an offense will be committed against the person's property. *See Avilez v. State*, 333 S.W.3d 661, 670–71 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). Proof of those elements does not require the State, under the indictment in this case, to prove that appellant repeatedly used electronic communications to harass, annoy, alarm, abuse, torment, embarrass, or offend the complainant.

Even if this court agreed with appellant and declared the challenged portions of the statutes unconstitutional, appellant would not be entitled to immediate release. Under the indictment appellant can be convicted of stalking without the State's reliance on the portions of the statute that appellant challenges. The indictment does not require the State to establish any of the challenged elements of section 42.07(a)(7) or the challenged elements of section 42.072.

Appellant's argument that the stalking statute is unconstitutionally vague and overbroad in violation of the First Amendment to the United States Constitution is based on an apprehension of future injury and is not ripe for our review. *See Spring*, 586 S.W.2d at 485. As such, appellant's claim is not cognizable on pretrial writ of habeas corpus and we may not address the merits of appellant's application. *See Ellis*, 309 S.W.3d at 79. We overrule appellant's five issues.

CONCLUSION

We hold that appellant's constitutional complaint is not cognizable on pretrial writ of habeas corpus because even if appellant were successful, he would not be entitled to immediate release. We therefore affirm the order of the trial court denying appellant's application for writ of habeas corpus.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.
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