Affirmed and Memorandum Opinion filed June 16, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00248-CR

EX PARTE CHARLES JONES, Appellant

On Appeal from the County Criminal Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 2245081

MEMORANDUM OPINION

In this appeal from the denial of a pretrial writ of habeas corpus, we consider appellant Charlie Jones's facial challenge to the constitutionality of section 42.07(a)(4) of the Texas Penal Code. We conclude that we are bound by the high court's decision in *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010), in which the court held that the challenged statute is not unconstitutional on its face. We therefore affirm the trial court's judgment denying habeas relief.

BACKGROUND

Appellant was charged with harassment by information alleging appellant:

> unlawfully, with intent to harass, annoy, abuse another, namely J. Greenhaw employed by Houston Police Department, Auto theft Division, cause the telephone of J. Greenhaw to ring repeatedly and make repeated telephone communications in a manner reasonably likely to harass, annoy/and abuse another.

Appellant applied for a pretrial writ of habeas corpus seeking to set aside his indictment because section 42.07(a)(4) under which he was charged is unconstitutionally vague and overbroad. Section 42.07(a)(4) provides that a person commits an offense if the person

> with intent to harass, annoy, alarm, abuse, torment, or embarrass another:
>
> *****
>
> (4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another[.]

Tex. Pen. Code Ann. § 42.07.

Appellant asserted three reasons in the trial court for the requested relief. First, he argued the statute is overbroad on its face because it restricts protected speech in violation of the First Amendment. Second, he argued the statute is void for vagueness. Third, he argued the statute is unconstitutional as applied to him.

After a hearing at which the trial court admitted evidence of the police report, over the State's objection, the trial court denied relief. The police report contains detailed recitations of the reports made by appellant that are the subject of the harassment allegation. In reviewing appellant's facial challenge to the statute, we need not review the underlying facts leading to appellant's charge and arrest. *See generally Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010) (pretrial habeas is unavailable "when the resolution of a claim may be aided by the development of a record at trial."). Therefore, in addressing appellant's claim for

habeas relief we need not consider evidence of the police report.

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 (1) to challenge the State's power to restrain the defendant; (2) to challenge the manner of pretrial restraint, i.e., the denial of bail or conditions of bail; and (3) to raise certain issues that would bar prosecution or conviction. *Id*.

II. Under controlling authority of the Court of Criminal Appeals appellant's facial challenge to the constitutionality of the statute fails.

In appellant's first issue he argues that section 42.07(a)(4) is facially overbroad under the First Amendment to the United States Constitution. In appellant's second issue he argues the statute, if not overbroad, is unconstitutionally vague. Appellant argues the statute impermissibly restricts speech based on its content and should be reviewed under a strict scrutiny standard because it regulates protected speech.

In most cases, a facial challenge to the constitutionality of a statute can

succeed only when the statute is shown to be unconstitutional in all of its applications. *See State v. Rosseau*, 396 S.W.3d 550, 557–58 (Tex. Crim. App. 2013). Under the First Amendment's overbreadth doctrine, a statute may be declared unconstitutional on its face, even if the statute has a legitimate application, and even if the defendant was not engaged in activity protected by the First Amendment. *State v. Johnson*, 475 S.W.3d 860, 864–65 (Tex. Crim. App. 2015).

A statute is overbroad if the statute sweeps within its coverage of proscribed activities a substantial amount of speech or other conduct protected by the First Amendment. *See Bynum v. State*, 767 S.W.2d 769, 772 (Tex. Crim. App. 1989). To invalidate a statute under the overbreadth doctrine, the person challenging the statute must demonstrate that there are a substantial number of instances in which the statute cannot be applied constitutionally. *See Johnson*, 475 S.W.3d at 865. The danger that the statute will be applied unconstitutionally must be "realistic" and not based on "fanciful hypotheticals." *Id*.

The vagueness doctrine, on the other hand, is an outgrowth not of the First Amendment, but of the Due Process Clause. *United States v. Williams*, 553 U.S. 285, 304 (2008). A statute may be challenged as unduly vague, in violation of the Due Process Clause, if it does not: (1) give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) establish definite guidelines for law enforcement. *See Martinez v. State*, 323 S.W.3d 493, 507 (Tex. Crim. App. 2010). Ordinarily, a criminal defendant who challenges a statute as unduly vague must show that it is vague as applied to the conduct for which he was charged. *Parker v. Levy*, 417 U.S. 733, 756 (1974); *Bynum*, 767 S.W.2d at 774. However, if the challenged statute implicates the free-speech guarantee of the First Amendment—i.e., if the statute, as authoritatively construed, is susceptible of application to speech guaranteed by the First Amendment—then the defendant is permitted to argue that

the statute is overbroad on its face because it is unclear whether it regulates a substantial amount of protected speech. *Williams*, 553 U.S. at 304.

At the hearing on appellant's application for writ of habeas corpus appellant's attorney admitted that his facial challenge to the statute was precluded by binding authority from the Court of Criminal Appeals. *See Scott*, 322 S.W.3d at 669–71, *abrogated on other grounds by Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014).

In *Scott*, the court was asked to address whether subsection 42.07(a)(4) implicated the free-speech guarantee of the First Amendment when confronted with a vagueness and an overbreadth challenge to the statute. *Id*. at 667–69. Although the court noted that the Free Speech Clause "generally protects the free communication and receipt of ideas, opinions, and information," it also explained that "[t]he State may lawfully proscribe communicative conduct that invades the substantial privacy interests of another in an essentially intolerable manner." *Id*. at 668–69. Further, the court observed that the plain language of the statute required an individual to have the specific intent "to inflict harm on the victim in the form of one of the listed types of emotional distress" and that the statute required the individual to repeatedly make phone calls to the alleged victim in a manner that was "reasonably likely to," consistent with the language of the statute, "harass, annoy, alarm, abuse, torment, embarrass, or offend an average person." *Id*. at 669.

The court concluded that section 42.07(a)(4) does not implicate the free-speech guarantee afforded by the First Amendment because the statute "is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another's privacy and do so in a manner reasonably likely to inflict emotional distress," meaning that "the conduct to which the statutory subsection is susceptible of application will be, in the usual case, essentially

noncommunicative, even if the conduct includes spoken words." *Id*. at 669–70. The court reasoned that "[t]o the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not covered by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Id*.

On appeal, appellant argues that the analysis in *Scott* does not control. Appellant first argues that the Court of Criminal Appeals has never addressed the statute's overbreadth. We disagree. The defendant in *Scott* challenged section 42.07(a)(4) on vagueness and overbreadth grounds. *Scott*, 322 S.W.3d at 665. In addressing Scott's challenges to the statute, the Court of Criminal Appeals noted that it understood Scott's argument to be that the statute is overbroad because its inherent vagueness makes it unclear whether it prohibits a substantial amount of speech. *Id.* This analysis is consistent with the Supreme Court's explanation of a facial vagueness challenge. *See Williams*, 553 U.S. at 304 (permitting defendant to assert facial vagueness challenge by arguing that the statute is overbroad on its face because it is unclear whether it regulates a substantial amount of protected speech).

Next, appellant argues that the *Scott* court's decision would have been different if it had the benefit of recent United States Supreme Court decisions. Appellant argues, "*United States v. Stevens*[1], decided just before *Scott*; and *United States v. Alvarez*[2], decided two years later, make it clear that all speech outside of recognized categories of historically unprotected speech is protected." Appellant urges, "In light of these recent developments in Supreme Court free-speech caselaw,

[1] 559 U.S. 460 (2010).

[2] 567 U.S. 709 (2012).

Scott's "does not implicate" analysis is incorrect.

As an initial matter, we note that none of the statutes at issue in the cases cited by appellant involved the type of intentionally harassing conduct prohibited by subsection 42.07(a)(4). *See* Tex. Penal Code § 42.07(a)(4); see also *Alvarez*, 567 U.S. at 715–16, 722, 730 (evaluating Stolen Valor Act criminalizing lying about being awarded Medal of Honor, noting that government had "not demonstrated that false statements generally should constitute a new category of unprotected speech," and concluding that statute "infringes upon speech protected by the First Amendment"); *Stevens*, 559 U.S. at 464, 472, 482 (addressing statute criminalizing "the commercial creation, sale, or possession of certain depictions of animal cruelty," concluding that "'depictions of animal cruelty'" is not category of speech "outside the scope of the First Amendment," and deciding that statute was "substantially overbroad").

Additionally, although appellant argues that the decision in *Scott* would have been different had it been decided after the release of the more recent opinions by the Supreme Court, we note that after the Supreme Court decided those cases, the Court of Criminal Appeals endorsed its analysis in *Scott*. *See Wagner v. State*, 539 S.W.3d 298, 311 (Tex. Crim. App. 2018). When addressing a Penal Code provision allowing prosecutions for intentionally or knowingly communicating in a "threatening or harassing manner" with another in violation of a protective order, the court determined that the statute did not implicate any constitutionally protected speech, summarized its analysis from *Scott*, and concluded that their "reasoning from that case leads us to conclude that appellant's overbreadth challenge should be rejected." *See Wagner*, 539 S.W.3d at 301, 311; *see* Tex. Penal Code § 25.07(a)(2)(A).

Finally, appellant argues the *Scott* decision should be re-examined. As an

intermediate court of appeals, we are bound to follow the precedent of the Texas Court of Criminal Appeals. *Gonzales v. State*, 190 S.W.3d 125, 130 n.1 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd); Tex. Const. art. V., § 5(a) (providing that Court of Criminal Appeals is final authority for interpreting criminal law in Texas). As such, this court does not have the authority to re-examine decisions by a higher court. *See Gonzales*, 190 S.W.3d at 130 n.1. Concluding that we are bound by the high court decision in *Scott*, we overrule appellant's first two issues.

III. Appellant's challenge to the statute as applied to him is not cognizable in an appeal from the denial of a pretrial writ of habeas corpus.

In his third issue appellant argues the statute is unconstitutional as applied to him. A pretrial writ of habeas corpus may not be used to address an as-applied constitutional challenge to a statute. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). An as-applied challenge is brought during or after a trial on the merits because it is only then that the trial judge and reviewing courts have the particular facts and circumstances of the case needed to determine whether the statute or law has been applied in an unconstitutional manner. *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011); *Ex parte Ragston*, 402 S.W.3d 472, 476 (Tex. App.—Houston [14th Dist.] 2013), *aff'd Ragston v. State*, 424 S.W.3d 49 (Tex. Crim. App. 2014).

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. *Ellis*, 309 S.W.3d at 79. 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).

Appellant argues, however, that his as-applied claim is cognizable on pretrial writ of habeas corpus under the authority of *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016). In *Perry*, former Texas governor Rick Perry contended that as applied to certain circumstances, the abuse of official capacity statute violated separation of powers principles. *Id*. at 888. The State contended that, because Perry challenged the statute as applied to him his argument was not cognizable in a pretrial habeas corpus application. *Id*. at 895. The Court of Criminal Appeals disagreed, holding that "pre-trial habeas is an available vehicle for a government official to advance an as-applied separation of powers claim that alleges the infringement of his own power as a government official." *Id*. at 898.

We find the facts here to be distinguishable from those in in *Perry*. *See Ex parte Walsh*, 530 S.W.3d 774, 781 (Tex. App.—Fort Worth 2017, no pet.) (declining to extend the holding in *Perry* to appellant's as-applied challenge because, inter alia, appellant was not a government official); *Ex parte Paxton*, 493 S.W.3d 292, 303 (Tex. App.—Dallas 2016, pet. ref'd) (declining to hold that pretrial habeas relief was available under *Perry* because the defendant's charges did "not arise out of his duties as an elected official but rather from his conduct as a private citizen"). *Perry* reaffirms that as-applied challenges are not cognizable on pretrial habeas except for certain carefully limited exceptions. *See Perry*, 483 S.W.3d at 895–98. The court concluded that cases involving criminal charges arising from an elected official's performance of his duties and implicating the separation of powers qualify as such an exception. *See id*. at 898. As a private citizen, appellant's charges do not arise out of any duty as an elected official. *See Paxton*, 493 S.W.3d at 303. Accordingly, we conclude that *Perry* does not support appellant's position that he may raise an as-

applied challenge on pretrial habeas. *See Perry*, 483 S.W.3d at 898. We overrule appellant's third issue.

CONCLUSION

In this interlocutory appeal from the denial of appellant's application for pretrial writ of habeas corpus we overrule appellant's issues and affirm the trial court's order denying habeas relief.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.
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