TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00652-CR

Ex parte Randy Scott McDonald

FROM COUNTY COURT AT LAW NO. 1 OF WILLIAMSON COUNTY
NO. 18-06371-1, THE HONORABLE BRANDY HALLFORD, JUDGE PRESIDING

CONCURRING OPINION

I concur only in the Court's judgment because I have concerns about the Court's analysis and our decision holding Penal Code section 42.07(a)(7) constitutional in *Blanchard v. State*, No. 03-16-00014-CR, 2016 WL 3144142 (Tex. App.—Austin June 2, 2016, pet. ref'd) (mem. op., not designated for publication).

In unpublished *Blanchard*, this Court held "that the electronic communications proscribed by subsection 42.07(a)(7) do not implicate speech protected by the First Amendment" because the "communicative conduct" reached by the statute—conduct intended to "harass, annoy, alarm, abuse, torment, embarrass, or offend"—lacks "an intent to engage in legitimate communication of ideas, opinions, or information" and thus "invades the substantial privacy interests of the victim in 'an essentially intolerable manner.'" 2016 WL 3144142, at *3 (quoting *Scott v. State*, 322 S.W.3d 662, 669–70 (Tex. Crim. App. 2010), *abrogated in part by Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014)).

What *Blanchard* did not address, and what the Second Court of Appeals' *Ex parte Barton* does, is that the Court of Criminal Appeals in *Wilson* has since acknowledged that a

potential offender could have more than one intent when delivering an electronic communication: "[T]he *Wilson* decision recognized that a person who communicates with the intent to harass, annoy, alarm, abuse, torment, or embarrass can also have an intent to engage in the legitimate communication of ideas, opinions, information, or grievances." 586 S.W.3d 573, 579 (Tex. App.—Fort Worth 2019, pet. granted).

Because of the possibility of multiple intents, the court in *Barton* held that Section 42.07(a)(7) "affects protected speech" and is unconstitutionally vague and overbroad. *Id.* at 580, 585. The court noted that "[t]he criminalization of 'annoying' behavior—without any objective measurement or standard—has been repeatedly held unconstitutionally vague." *Id*. at 581. It explained that the statute's disjunctive series of terms "'harass, annoy, alarm, abuse, torment, embarrass, or offend' leaves the electronic-communications subsection open to various 'uncertainties of meaning.'" *Id*. at 583 (quoting *Karenev v. State*, 258 S.W.3d 210, 215 (Tex. App.—Fort Worth 2008) (citing and quoting *Long v. State*, 931 S.W.2d 285, 289 (Tex. Crim. App. 1996)), *rev'd on other grounds*, 281 S.W.3d 428 (Tex. Crim. App. 2009)). And it reasoned: "The First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed. Many legitimate political protests, for example, contain both of these elements." *Id.* at 584 (quoting *Long*, 931 S.W.2d at 297 n.4).

The majority opinion here does not address *Wilson*'s recognition of the possibility of multiple intents. Its attempt to distinguish *Barton*'s analysis, by tying *Barton* to *Karenev* only, thus misses the mark. *Wilson*'s effect on *Scott* is central to *Barton*'s reasoning. Without analysis of that effect here, the majority opinion is incomplete.

The Court of Criminal Appeals has recognized a split among the courts of appeals and has granted petitions for discretionary review to decide Section 42.07(a)(7)'s facial constitutionality. *Compare Barton*, 586 S.W.3d at 585 (held unconstitutional), *with Ex parte Sanders*, No. 07-18-00335-CR, 2019 WL 1576076, at *5 (Tex. App.—Amarillo Apr. 8, 2019, pet. granted) (held constitutional); *see also Sanders*, 2019 WL 1576076, at *5 n.6 (Quinn, C.J., concurring) (asking the Court of Criminal Appeals to reconsider *Scott* because of *Wilson*). The majority opinion is a temporary solution because we will soon have the Court of Criminal Appeals' definitive resolution one way or the other.

Chari L. Kelly, Justice

Before Justices Goodwin, Baker, and Kelly

Kelly, J., concurring *dubitante* in the judgment

Filed: June 19, 2020

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