TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00885-CR

Ex parte Alberto Vazquez

FROM THE 368TH DISTRICT COURT OF WILLIAMSON COUNTY
NO. 18-0179-K368, THE HONORABLE RICK J. KENNON, JUDGE PRESIDING

O P I N I O N

The State charged Alberto Vazquez with the offense of online solicitation of a minor. *See* Tex. Penal Code § 33.021. Vazquez filed a pretrial application for writ of habeas corpus, asserting that the statute defining the offense is void for vagueness and thus facially unconstitutional. The district court denied relief. In a single issue on appeal, Vazquez asserts that the district court erred in concluding that the statute was constitutional. We will affirm the district court's order.

BACKGROUND

The State alleges that on or about January 24, 2018, Vazquez solicited online an undercover police officer, who Vazquez believed to be younger than fourteen years of age, to engage in sexual activity with him. The alleged conduct violates Section 33.021(c) of the Texas Penal Code, which provides that "[a] person commits an offense if the person, over the Internet . . . knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual

intercourse with the actor or another person." *Id*. § 33.021(c). The statute defines a minor as "an individual who is younger than 17 years of age" or "an individual whom the actor *believes* to be younger than 17 years of age." *Id*. § 33.021(a) (emphasis added). Vazquez argued in his pretrial application for writ of habeas corpus that the term "believes" is impermissibly vague, thus rendering the statute "void for vagueness" and facially unconstitutional. The district court denied relief. This interlocutory appeal followed.

STANDARD AND SCOPE OF REVIEW

"Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy." *Ex parte Ingram*, 533 S.W.3d 887, 891 (Tex. Crim. App. 2017). "This remedy is reserved 'for situations in which the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review.'" *Id*. (quoting *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001)). "Generally, pretrial habeas is not available to test the sufficiency of the charging instrument or to construe the meaning and application of the statute defining the offense charged." *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). Pretrial habeas is also not available "when the resolution of a claim may be aided by the development of a record at trial," *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010), and, except in limited circumstances not present here, pretrial habeas "cannot be used to advance an as-applied constitutional challenge to a statute," *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2016).[1]

[1] In his brief, Vazquez refers to what he contends are the specific facts of his case, which may be relevant to an as-applied challenge to the statute. To the extent that Vazquez's brief could be construed as raising an as-applied challenge to the statute, such a challenge is not cognizable at this time. *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011) ("An 'as applied' challenge is brought during or after a trial on the merits, for it is only

Pretrial habeas is available "when the applicant alleges that the statute under which he or she is prosecuted is unconstitutional on its face; consequently, there is no valid statute and the charging instrument is void." *Weise*, 55 S.W.3d at 620. "A party raising a facial challenge to the constitutionality of a statute must demonstrate that the statute operates unconstitutionally in all of its applications." *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 908 (Tex. Crim. App. 2011). "In a facial challenge to a statute's constitutionality, courts consider the statute only as it is written, rather than how it operates in practice." *Id*. Thus, evidence showing how the statute operates in a particular case "is irrelevant to a facial challenge, which asserts that there are no factual circumstances under which the statute would be constitutional." *Id*. at 908-09. Such a challenge is "extremely difficult to prove." *Id*. at 909.

Whether a statute is facially constitutional is a question of law that we review de novo. *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013). Unless the First Amendment is implicated (and Vazquez does not contend that it is here), we begin with the presumption that the statute is valid and that the Legislature has not acted unreasonably or arbitrarily in enacting it, and the burden rests upon the person challenging the statute to overcome that presumption. *See id*. at 15; *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013); *see also* Tex. Gov't Code § 311.021(1) ("In enacting a statute, it is presumed that compliance with the constitutions of this state and the United States is intended."). "A reviewing court must make every reasonable presumption in favor of the statute's constitutionality, unless the contrary is clearly

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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."); *see also Ex parte Carter*, 514 S.W.3d 776, 782-83 (Tex. App.—Austin 2017, pet. ref'd); *Ex parte Paxton*, 493 S.W.3d 292, 302-03 (Tex. App.—Dallas 2016, pet. ref'd).

shown." *Peraza v. State*, 467 S.W.3d 508, 514 (Tex. Crim. App. 2015) (citing *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978)).

ANALYSIS

As noted earlier, the offense of online solicitation defines a minor as "an individual who is younger than 17 years of age" or "an individual whom the actor believes to be younger than 17 years of age." Tex. Penal Code § 33.021(a). The statute does not define the term "believes." In Vazquez's view, this renders the statute unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See* U.S. Const. amend. XIV.

A statute is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *see State v. Doyal*, 589 S.W.3d 136, 146 (Tex. Crim. App. 2019). "However, a statute is not unconstitutionally vague merely because the words or terms used are not specifically defined." *Engelking v. State*, 750 S.W.2d 213, 215 (Tex. Crim. App. 1988). Moreover, due process does not demand that a statute provide "perfect clarity and precise guidance." *Williams*, 553 U.S. at 304. Rather, due process requires "fair warning as to what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). For example, the Supreme Court has "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306 (citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870–871 & n.35 (1997); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)).

Vazquez contends that the term "believes" is similarly subjective. He posits a hypothetical scenario in which a defendant solicits a person for sex, is told that the person is a minor, does not believe what he has been told, and continues to solicit that person for sex, believing the person to be of legal age. Vazquez claims that under this and other scenarios, the statute provides no standard for determining whether the defendant "believes" the person with whom he is communicating is a minor.

The Supreme Court considered and rejected a similar argument in *United States v. Williams*, *supra*. In that case, the Supreme Court reviewed the constitutionality of a federal statute that prohibited, among other things, the online solicitation or distribution of "any material or purported material *in a manner that reflects the belief, or that is intended to cause another to believe*, that the material or purported material is, or contains" child pornography. 18 U.S.C. § 2252A(a)(3)(B) (emphases added). The Eleventh Circuit Court of Appeals had concluded that the phrases "in a manner that reflects the belief" and "in a manner that is intended to cause another to believe" were "so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed." *United States v. Williams*, 444 F.3d 1286, 1306 (11th Cir. 2006), *rev'd*, 553 U.S. 285 (2008). The appeals court worried that without "contextual parameters for the restriction on conduct that might illuminate its meaning," the statute could allow innocent people, such as grandparents emailing photographs of their grandchildren in bed, with the subject line, "Good pics of kids in bed," to be found guilty of soliciting or distributing child pornography. *Id*. at 1306-07.

In rejecting the lower court's analysis, the Supreme Court observed that "[c]lose cases can be imagined under virtually any statute" and that the problem posed by close cases, such as the hypothetical scenarios envisioned by the lower court, "is addressed, not by the

doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 306. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id*. The Court concluded that "[t]here is no such indeterminacy" regarding a person's belief, which involves "clear questions of fact." *Id*. The Court explained:

> Whether someone held a belief or had an intent is a true-or-false determination, not a subjective judgment such as whether conduct is "annoying" or "indecent." Similarly true or false is the determination whether a particular formulation reflects a belief that material or purported material is child pornography. To be sure, it may be difficult in some cases to determine whether these clear requirements have been met. "But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred."

Id. (quoting *American Commc'ns Assn. v. Douds*, 339 U.S. 382, 411 (1950)). The Court held that the statute was not vague and that the lower court erred in concluding otherwise. *Id*. at 306-07.

Nevertheless, Vazquez asserts that *Williams* holds a "larger lesson," specifically that "a defendant's belief should be reflected in his words and deeds and nobody else's, and that those words and deeds need to be measured against a definite yardstick to ascertain whether or not the defendant possessed the infringing belief." Vazquez bases this assertion on the fact that the statute at issue in *Williams* required "that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe." *Id*. at 306. Vazquez claims that the statute in this case, in order to survive constitutional scrutiny, must contain a similar requirement. We disagree.

Although the statute in *Williams* might have been more precise than the statute here, due process does not demand that a statute provide "perfect clarity and precise guidance" but only "fair notice of what is prohibited." *Id*. at 304.

Section 33.021 of the Penal Code prohibits a person from engaging in online solicitation of a minor, defined as "an individual who is younger than 17 years of age" or "an individual whom the actor believes to be younger than 17 years of age." Tex. Penal Code § 33.021(a). The term "believes" has a common and ordinary meaning of "to think or suppose; to entertain as likely or probably true." Webster's New International Dictionary (3d ed. 1981). The Fourteenth Court of Appeals, when construing that same term in a different statute, concluded that "'[b]elieves' is a term that readily can be understood by a person of common intelligence" and that "a person of common intelligence can determine with reasonable precision what conduct this statute prohibits." *Martinez v. State*, 852 S.W.2d 665, 667 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).

We reach the same conclusion regarding the statute in this case. A defendant's belief as to a person's age is a "clear question of fact" that requires a "true or false determination." *See Williams*, 553 U.S. at 306. Such a determination may be made by considering all the facts and circumstances in the case, including but not limited to the defendant's words and conduct. *See Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002); *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999). To the extent that there may be "close cases" in which it is difficult to determine the defendant's belief, such cases are addressed by the due-process requirement that the State prove its case beyond a reasonable doubt. *Williams*, 553 U.S. at 306. We conclude that Section 33.021 of the Penal Code is not

unconstitutionally vague for failing to define the term "believes." Accordingly, the district court did not err in denying Vazquez's pretrial application for writ of habeas corpus.

We overrule Vazquez's sole issue on appeal.

CONCLUSION

We affirm the district court's order.

Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

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