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COUNTY CRIMINAL COURT OF APPEALS NO. 1

KRISTIN WADE, JUDGE

	MC-23-R0001-D	
THE STATE OF TEXAS	*	**IN THE DALLAS MUNICIPAL**
Appellant	*	**COURT OF RECORD**
DALLAS COUNTY, TEXAS	*	**DALLAS COUNTY,TEXAS**
	*	
VS.	*	
	*	
IQBAL JIVANI	*	**IN THE COUNTY CRIMINAL**
Appellee	*	**COURT OF APPEALS DALLAS**
	*	**COUNTY,TEXAS**

JUDGMENT

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED.**

Judgment entered July 27, 2023.

Judge Kristin Wade

On August 24, 2022, the State of Texas charged Appellee, Iqbal Jivani, with the above Class C misdemeanor for manifesting the purpose of engaging in prostitution. The State then filed a superseding complaint on October 18, 2022. The complaint states, in pertinent part, that the defendant "on or about the 23rd day of August, 2022… did… knowingly loiter in a public place in a manner and under circumstances manifesting the purpose of inducing another to commit an act of prostitution at the 11100 block of Shady Trl, a location within the territorial limits of the City of Dallas, Texas to wit: said actor was in a known prostitution area and stopped to engage passers-by in conversation.

On November 10, 2022, during pre-trial proceedings, Appellee filed a Motion to Quash the complaint. The motion presented three grounds: (1) that the complaint violated the Fourth Amendment; (2) that the ordinance is unconstitutionally vague on its face; and (3) that the ordinance is unconstitutionally overbroad on its face. The State filed a response to Defendant's Motion to Quash the Complaint on November 28, 2022. Appellant then filed a Response to State's Reply to Defendant's Motion to Quash the Complaint on November 30, 2022.

On December 2, 2022, the trial court signed an Order of Dismissal and an Order on Defendant's Motion to Quash Complaint. The trial court then signed an Amended Order of Dismissal and an Amended order on Defendant's Motion to Quash Complaint on December 6, 2022. Both orders held that the complaint did not violate the Fourth Amendment but that the Dallas City Code ordinance 31-26 was unconstitutionally vague and overbroad. On January 17, 2022, Appellant filed its notice of appeal, giving the trial court notice of its intent to appeal its December order for finding Dallas city Code section 31-27 unconstitutional.

ANALYSIS

Appellant's first point of error contends that the trial court did not abuse its discretion in overruling Jivani's Fourth Amendment ground in the motion to quash. Appellant (The State of Texas), and the trial court agree the complaint was not facially defective, and a pretrial motion to quash may not be used to complain of matters involving the factual merits of the case. Thus, this issue will not be addressed.

Appellant's second and third points of error can be summarized and addressed together. Appellant argues the trial court erred in granting Appellee's Motion to Quash Complaint on the grounds of vagueness and overbreadth. When considering a constitutional challenge to a statute or ordinance, an appellate court begins with the presumption that the enactment is constitutional. *Sullivan v. State*, 986 S.W.2d 708, 711 (Tex. App.-Dallas 1999, no pet.); *Meisner v.. State*, 907 S.W.2d 664, 667 (Tex.App.-Waco 1995, no pet.) ; *Flores v. State*, 33 S.W.3d 907, 920 (Tex. App.—Houston [14th Dist.] 200, pet. Ref'd). The challenger has the burden to prove a provision's unconstitutionality. Mere doubts as to an enactment's constitutionality are not enough to compel a court to render it void. *Ex Parte Granviel*, 561 S.W. 2d 503, 515 (Tex. Crim. App 1978).

When analyzing the constitutionality of a statue under vagueness and overbreadth, the issue of overbreadth should be addressed first. *See* Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 494 (1982). A statue my be challenged as

overbroad, in violation of the Free Speech Clause of the First Amendment, if, in addition to proscribing activity that may be constitutionally forbidden, it sweeps within its coverage a substantial amount of expressive activity that is protected by the First Amendment. The ordinance at issue appears to prohibit various activities, such as a "known prostitute" loitering on a street corner, or an individual repeatedly engaging passers-by in conversation, or any person repeatedly attempting to stop vehicles by waving their arms. The First Amendment overbreadth doctrine provides that a regulation of conduct can sweep too broadly and prohibit protected as well as non-protected conduct. 10 P.L.E. CONSTITUTIONAL LAW § 47 (2023). An ordinance is overbroad when it punishes constitutionally protected conduct as well as illegal activity. Id. This is a concept known as the chilling effect: free speech and association rights are deterred through laws that appear to target protected forms of expression.

The doctrine of overbreadth is generally applied sparingly and as a last resort. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Under the overbreadth doctrine, a law may be declared unconstitutional on its face, even if it has some legitimate application and even if the parties before the court were not engaged in activity protected by the First Amendment. United States v. Stevens, 559 U.S. 460, 473 (2010).

In a facial challenge to the overbreadth and vagueness of a law, a court must first consider whether the ordinance "reaches a substantial amount of constitutionally protected conduct." Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 494 (1982). To determine whether a statute reaches a substantial amount of constitutionally protected conduct, the State references Etheridge. 2014 Tex. App. LEXIS 10880, at *5 (Tex. App. Oct. 1, 2014). Ethridge can easily be distinguished from the case

at bar, as the appellant was charged with the misdemeanor offense of evading arrest or detention. However, Dallas Code Section 31-27, which details a *manifestation* crime, is quite dissimilar to the statute and facts of Etheridge. Dallas City Code Section 31-27, criminalizes a person who *seems* to be manifesting prostitution—the question becomes not "is she engaging in unlawful acts?" but "does she/he **appear** to be engaging in unlawful acts?" This code section balances itself precariously on the phrase "circumstances manifesting the purpose…to commit an act of prostitution. This gives law enforcement and prosecutors more leeway than the evasion statue in Etheridge. The vagueness in section 31-27 opens the door for differences in interpretation: what one person would view as a manifestation of prostitution; another person would view as a regular activity. These differences in interpretation must be considered when we contemplate a possible chilling effect.

Code section 31-27 additionally states, "no one shall be convicted of violating this subsection if it appears at trial that the explanation [of his/her conduct] given was true and disclosed a lawful purpose." Dallas, Tex., Code Section 31-27. If, at trial, a person's explanation of his/ her conduct does not pass muster, he/she can be convicted under this ordinance. *This will certainly create a chilling effect on lawful behaviors.* Under this statute, people will find their behaviors, and their explanations for their behaviors, pitted against what law enforcement believes they are doing. Citizens can either engage in commonplace behaviors (like gesturing to vehicles and talking to passerby) and risk being charged under the statute if explanations for their behaviors are disbelieved, or cease engaging in these lawful, commonplace behaviors and avoid charges under the Ordinance. This also raises the issue of bias among the arresting officer as well as

targeting low income/high crime areas of the City. Could certain behaviors in North Dallas be ignored such as flagging down cars, or talking to passer-byes, while the very same behavior in South Dallas would be automatically considered suspicious.

Finally, in Johnson v. Carson, a Florida petitioner was arrested for violating a statute extremely similar to Section Dallas Code section 31-27. 569 F. Supp. 974, 979 (M.D. Fla. 1983). The court held that "even if a person explains his or her conduct and the trial court ultimately believes the explanation and a lawful purpose is disclosed, the person's first amendment rights have, nonetheless, been chilled by the arrest." Id. This is because "the possibility of arrest deters the free exercise of first amendment rights." Id. Likewise, the mere possibility of arrest under Section 31-27 deters the free exercise of First Amendment rights. Although Johnson is a Florida case, it can be looked to as a guiding precedent because it contains a First Amendment analysis similar to the one that must be conducted here.

A statue may be challenged as unduly vague if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and establish definite guidelines for law enforcement. *See* Scott, 322 S.W 3d at 655, citing Bynum V. State, 767 S.W.2d 769, 773 (Tex. Crim. App. 1989). Vague laws allow arbitrary and discriminatory enforcement, do not provide fair warning to those the laws may be enforced against, and inhibit the exercise of First Amendment freedoms. Mays v. State, 765 S.W.2d 438, 439 (Tex. Crim. App. 1989). Any law imposing criminal liability must be sufficiently clear (1) to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and (2) to establish determinate guidelines for law enforcement. State v. Doyal, 589 S.W.3d 136, 141 (Tex. Crim. App. 2019). It is extremely

important that criminal laws are both specific and clear so that law enforcement has "minimal guidelines" to prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Kolender v. Lawson, 461 U.S. 352, 358 (1983).

To analyze vagueness, we should determine firstly whether an individual of ordinary intelligence would receive sufficient information from the ordinance that his conduct is prohibited by law, and secondly whether the ordinance provides sufficient notice to law enforcement of the ordinance. Meisner v. State, 907 S.W.2d 664, 667 (Tex. App—Waco 1994, no pet.); Scott v. State, 322 S.W.3d at 668-69 (citing *Bynum*, 767 S.W.2d at 773). A vague law "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on a…subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104 (1972).

It is unlikely that the Dallas City Ordinance 31-27 Ordinance provides an individual of ordinary intelligence sufficient information that her conduct is prohibited by law. Even if an individual is a known prostitute, she may not think that her engaging passerby in conversation or hailing vehicles rises to manifestation of prostitution—everything about this ordinance is highly dependent on the mindset of an arresting officer. The Ordinance may make it illegal for an individual to solicit someone to engage in prostitution, but realistically, the ordinance also makes it illegal for a woman in a high crime area to summon a cab if a police officer is watching.

As for the level of notice and direction provided to law enforcement to prevent arbitrary and erratic enforcement, the ordinance requires that "no arrest shall be made for

a violation of this subsection unless the arresting officer first affords such person an opportunity to explain such conduct, and no one shall be convicted of violating this subsection if it appears at trial that the explanation given was true and disclosed a lawful purpose." Dallas, Tex., Code Section 31-27. Though the State feels that this guideline prevents officers from arbitrary and erratic enforcement of the ordinance, as stated in the overbreadth analysis, any charging ability of the Ordinance depends on whether an arresting officer believes a detained individual, and whether the detained individual's explanation is "good enough" that he/ she can avoid charges.

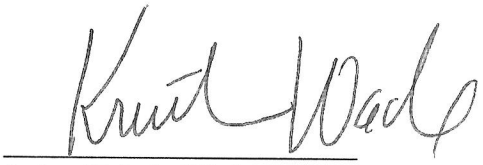
In the context of the First Amendment, when examining the vagueness of a statute, "it must be sufficiently definite to avoid chilling protected expression." State v. Doyal 589 S.W.3d 136, 146 (Tex. Crim App. 2019.) To avoid a chilling effect, the use of a scienter requirement or level of intent in the law may "sometimes alleviate vagueness concerns, but does not always do so." Id. It is possible that the ordinance contains a scienter requirement. The ordinance prohibits loitering in a public place when such behavior is done in a "manner and under circumstances manifesting the purpose of inducing, enticing, or procuring another to commit an act of prostitution." Dallas, Tex., Code Section 31-27. The same language was used in a Seattle City Code, where the court decided that the word "purpose" was defined as an "intention," showing that intent was required under the Seattle ordinance. City of Seattle v. Jones, 488 P.2d 750 (Wash. 1971). However, Jones was not analyzed under a First Amendment framework. See id. Additionally, a law that implicates First Amendment freedoms requires great specificity because "uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas are clearly marked." Doyal 589 S.W.3d

at 146. Even if there is a scienter requirement in Section 31-27, the Ordinance also reads to necessitate police officers to look for "circumstances manifesting" prostitution; there are a great number of activities which could be seen as "circumstances manifesting" prostitution, many of which are not performed with the intent to engage in prostitution.

This court agrees with the Trial Judge that there is a statue that penalizes actual solicitation for prostitution. See TEX.PENAL CODE section 43.02 (Prostitution). Dallas City Code Ordinance section 31-27 is seeking a shortcut that trespasses on the constitutional rights of Dallas citizens. Thus, the ruling of the trial court is affirmed, as Dallas Code section 31-27 is unconstitutional on its face because it is overbroad and vague in violation of the First Amendment to the United States Constitution.

JUDGMENT AFFIRMED.

Entered this the 27th day of July 2023.



Judge Kristin Wade

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COUNTY CRIMINAL COURT OF APPEALS NO. 1

KRISTIN WADE, JUDGE

No. MC-23-R0001-D
STATE OF TEXAS, Appellant

V.
IQBAL JIVANI, Appellee

On Appeal from the Municipal Court of Record of the City of Dallas, Dallas County, Texas
Cause # E00682828-01

STATEMENT OF FACTS

This is an appeal from the Dallas Municipal Court of Record in Dallas County, Texas. The Appellant was charged with violating Dallas City Code Section 31-27, manifesting the purpose of engaging in prostitution. The ordinance provides as follows:

(a) A person commits an offense if he loiters in a public place in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution. Among the circumstances which may be considered in determining whether such purpose is manifested: that such person is a known prostitute or panderer, repeatedly beckons to, stops or attempts to stop, or engages passers-by in conversation, or repeatedly stops or attempts to stop motor vehicle operators by hailing, waiving of arms, or any other bodily gesture. No arrest shall be made for a violation of this subsection unless the arresting officer first affords such person an opportunity to explain such conduct, and no one shall be convicted of violating this subsection if it appears at trial that the explanation give was true and disclosed a lawful purpose.
(b) For the purpose of this section, a "known prostitute or panderer" is a person who, within one year previous to the date of arrest of violation of this section, has within the knowledge of the arresting officer been convicted of prostitution, promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution.
(c) The definition of prostitution in the Texas Penal Code shall apply to this section.