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TIBA's Case of the Week

Case Name: Ex parte James Richard "Rick" Perry

- OFFENSE: Abuse of Official Capacity & Coercion of a Public Servant
- COUNTY: Travis
- COURT OF APPEALS: Austin 2015
- C/A CITATION: 471 S.W.3d 63
- C/A RESULT: Affirmed & Reversed in Part
- CCA. CASE No. PD-1067-15 DATE OF OPINION: February 24, 2016
- DISPOSITION: Indictment Ordered Dismissed
- OPINION: Keller, PJ. VOTE: 2-4-2
- TRIAL COURT: 390th D/C; Hon. Bert Richardson
- LAWYERS: David Botsford, Thomas Phillips & Anthony Buzbee (Defense); Lisa McMinn (SPA)

(Background Facts) A Travis County grand jury returned a two-count indictment against (then) Governor Rick Perry. Count I alleged the offense of "abuse of official capacity" -- that he abused his official capacity by misusing funds appropriated to the Public Integrity Unit of the Travis County District Attorney's Office. Count II alleged the offense of "coercion of a public servant" -- that he coerced a public servant, District Attorney Rosemary Lemberg, by threatening to veto the funds for that unit if she did not resigned from office.

Ed Note: (Procedural History) Governor Perry filed a motion to quash and dismissthe indictment and a pretrial application for a writ of habeas corpus. He claimed that the statutes underlying both counts were unconstitutional as applied to the charges against him. Included in his claims were allegations that the abuse-of-official-capacity statute was unconstitutional as applied because it infringed upon a governor's absolute right under the Texas Constitution to veto items of appropriation and because it violated the Texas Constitution's Separation of Powers clause. He also attacked Count II on the basis that the relevant portion of the coercion statute was facially unconstitutional because it was overbroad in violation of the First Amendment. The motion to quash also claimed that

Count II failed to negate the exception found in § 36.03(c). Despite expressing several reservations about the indictment, the trial court denied the motion to quash and denied relief in the habeas action. As to the various as-applied claims, the trial court held that state law does not permit them to be raised pretrial. Regarding the facial challenge to Count II, the trial court held that neither of the statutes under which Governor Perry is being prosecuted is facially unconstitutional.

114 Pre-Trial Habeas Corpus / Cognizibility of Issues: Governor Perry filed an appeal in the Court of Appeals, claiming that the trial court erred in denying relief on the habeas application. The Court of Appeals recognized that at least some as applied challenges can be addressed pretrial. Nevertheless, that court held that none of Governor Perry's as-applied claims were cognizable in a pretrial habeas action. In arriving at that holding, the Court of Appeals relied upon our statements in prior cases that pretrial habeas may not be used to advance an as-applied challenge. The Court of Appeals considered Ex parte Boetscher, 812 S.W.2d 600 (Tex.Cr.App. 1991), as an "unstated qualification" of that principle, but then held that Governor Perry's challenges were not like those in Boetscher. The Court of Appeals further concluded that Governor Perry's remaining proposed rationales for the fact that some as-applied challenges are allowed on pretrial habeas were not rooted "in any existing controlling precedent of the Court of Criminal Appeals" but in "broader 'factors' he identifies in what he terms the high court's 'evolving jurisprudence regarding cognizabilityin pretrial habeas.'" The Court of Appeals rejected these rationales, saying that, as an intermediate court, it was not empowered "to 'evolve' or otherwise alter the binding effect of the Court of Criminal Appeals's controlling precedents," even if it might perceive sound justifications for doing so (see , Vol. 23, No. 31; 08/03/2015).

Holding: Although we have said that as-applied challenges are not cognizable before trial, we allow certain types of claims to be raised by pretrial habeas because the rights underlying those claims would be effectively undermined if not vindicated before trial. Within this category of rights that would be effectively undermined if not vindicated pretrial, we have, so far, recognized the constitutional protections involving double jeopardy and bail. *** When we say that as-applied challenges are not cognizable pretrial, what we mean is that, unlike with facial challenges, the unconstitutionality of a statute as applied is not, in the abstract, a basis for invoking the pretrial writ. But . . . certain types of as-applied claims may be raised by pretrial habeas because the particular constitutional right at issue in the as-applied challenge is the type that would be effectively undermined if not vindicated prior to trial. *** In accordance with the rationale of United States v. Myers, 635 F.2d 932 (2d Cir. 1980), and federal cases, as well as Abney v. United States, 431 U.S. 651 (1977), and Helstoski v. Meanor, 442 U.S. 500 (1979), and in light of our more aggressive enforcement of separation of powers in Texas, we hold that the type of separation of powers claim in this case may be resolved prior to trial. If a statute violates separation of powers by unconstitutionally infringing on a public official's own power, then the mere prosecution of the public official is an undue infringement on his power. Consequently, Governor Perry may obtain pretrial resolution of his separation of powers claim that alleges the infringement of his veto power as governor of the State of Texas.

Concurring / Dissenting Opinions: Judge Alcala delivered a concurring opinion. She wrote separately to express her opinion that the lower courts should follow the approach taken by the lead opinion as to the "cognizability question in Count I." She argued that, " it is the underlying principles that should guide the analysis about whether pretrial habeas relief is appropriate, rather than the category of the claim or a consideration of exclusive factors that . . . may not be relevant to the analysis in any way." Judge Newell also

concurred, writing to express his opinion that "everyone is making this case more complicated than it is because of who it involves." He was joined by Judge Keasler and Judge Hervey, and concluded by stating that, while Presiding Judge Keller's opinion "does an effective job streamlining our cognizability jurisprudence . . . applying Boetscher to address Appellant's claims regarding the first count in the indictment does a better job of hitting the intended target." Judge Meyers dissented, disagreeing with the majority's decision on cognizability, arguing that the "majority is simply making a special exception for public officials in order to reach its desired outcome in this case," and that "the separation of powers claim needs to be addressed at this time." Judge Johnson also dissented, arguing that the "opinion of the Court t stretches constitution, case law, and statute beyond where I am willing to follow."

(David A. Schulman) First, I agree with the Court of Appeals determination that "Governor Perry's challenges were not like those in Boetscher." As lead counsel for the Applicant in that case, I know that we prosecuted a writ of habeas corpus claiming that the (then) criminal non-support statute was unconstitutional because it elevated a misdemeanor into a felony if the defendant was a resident of a sister state, which I believed and still believe was a "facial" challenge, not an "as applied" challenge. Nevertheless, I believe the Governor's claims are cognizable for the reasons stated in the majority opinion. Second, I personally believe that this holding means that whenever an elected Texas official is charged with an offense which involves the manner in which he/she performed the duties of office, they may challenge the prosecution in a pre-trial habeas corpus. What this opinion does not do is to create a broad exception to the general rule that "as applied" challenge cannot be the focus of a pre-trial habeas corpus application. Thus, to the extent that General Paxton's lawyers think it means their as applied challenge can be raised pretrial, they're wrong, because the allegations do not involve allegations pertaining to his official duties.

62 Challenges to Prosecution / Constitutionality / Separation of Powers: In his motion to quash and at the court below, Governor Perry claimed the abuse-of-official-capacity statute was unconstitutional as applied because it infringed upon a governor's absolute right under the Texas Constitution to veto items of appropriation and because it violated the Texas Constitution's Separation of Powers clause.

Holding: Article IV, § 14 of the Texas Constitution gives the governor the authority to veto legislation. The provision places temporal limits on that authority, and it limits the governor's authority to veto only part of a bill. The provision also authorizes the Legislature to override a veto with the vote of two-thirds of the members present in each House. The Constitution does not purport to impose any restriction on the veto power based on the reason for the veto, and it does not purport to allow any other substantive limitations to be placed on the use of a veto. *** In the Pocket Veto Case, 279 U.S. 655 (1929), the United States Supreme Court emphasized the importance of the veto as a part of our system of government and explained that Congress could not, directly or indirectly, limit the President's power to veto bills . . .. *** We conclude that this applies equally to the governor's veto in Texas. The Legislature cannot directly or indirectly limit the governor's veto power. No law passed by the Legislature can constitutionally make the mere act of vetoing legislation a crime. And while the definition of misuse includes "to deal with property contrary to . . . an agreement under which the public servant holds the property," and the indictment alleges this definition as an alternative method of misuse, the governor cannot by agreement, on its own or through legislation, limit his veto power in any manner that is not provided in the Texas Constitution. *** The governor's power to exercise a veto may not be circumscribed by the Legislature, by the courts, or by district

attorneys (who are members of the judicial branch). When the only act that is being prosecuted is a veto, then the prosecution itself violates separation of powers.

Concurring / Dissenting Opinions: Judge Johnson dissented, arguing that the case does not involve separation of powers, and that "many of the examples set out are inapposite, and the language used as to Appellant differs from all other writ opinions." She agreed with Judge Newell that "this case has been greatly affected by who it involves."

62 Challenges to Prosecution / Constitutionality / Overbreadth: In his motion to quash and at the court below, Governor Perry attacked Count II on the basis that the relevant portion of the coercion statute was facially unconstitutional because it was overbroad in violation of the First Amendment. The motion to quash also claimed that Count II failed to negate the exception found in § 36.03(c), which provides that "It is an exception to the application of Subsection (a)(1) of this section that the person who influences or attempts to influence the public servant is a member of the governing body of a governmental entity, and that the action that influences or attempts to influence the public servant is an official action taken by the member of the governing body. For the purposes of this subsection, the term 'official action' includes deliberations by the governing body of a governmental entity." The trial court agreed with Governor Perry that the indictment failed to properly negate the exception found in § 36.03(c), concluding that the Governor and Rosemary Lehmberg were not members of the same governing body of a governmental entity," which the State included in order to negate the exception, neither expressly nor implicitly did so. Nevertheless, the trial court found it premature to quash Count II of the indictment and, instead, ordered the State to amend the indictment to cure the defect. The Court of Appeals, however, sustained Governor Perry's First Amendment overbreadth challenge to Count II. That Court found Penal Code § 36.03(a)(1), as it incorporates the definition of "coercion" found in Penal Code §1.07(a)(9)(F), to be unconstitutional.

Holding: In response to the State's argument that no chilling effect has been demonstrated because there has been no widespread prosecution of public servants performing ordinary duties, the Court of Appeals observed that the statute has rarely been utilized -- "at least until now." The Court of Appeals believed that the absence of prosecutions might also have been because of the Waco Court of Appeals case of State v. Hanson, 793 S.W.2d 270 (Tex.App. - Waco 1990), which held that a prior version of the statute was unconstitutionally vague in violation of the First Amendment. *** In 1994, with the overhaul of the Penal Code, the second half of the Legislature's two-pronged solution was rescinded, but the Hanson opinion had been issued by then, and public officials had reason to believe that it would prevent prosecutions like the one against Judge Hanson. The continued existence of the "governing body" exception could also have been reasonably seen as a roadblock to such prosecutions. The ruling sought by the State today would reintroduce the very chilling effect that Hanson and earlier legislative action eliminated. We conclude that the portion of Penal Code § 36.03(a)(1) at issue here, as it incorporates § 1.07(a)(9)(F), is unconstitutionally overbroad in violation of the First Amendment. We overrule the State's challenges to the Court of Appeals's disposition of Count II.

Concurring / Dissenting Opinions: Judge Meyers dissented, disagreeing that the coercion-of-a-public-servant statute is over broad and, therefore, facially unconstitutional."