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⚖ Vol. 19, No. 47, November 28, 2011

Case Name: John Christopher Lo v. The State of Texas

- OFFENSE: Pre-Trial Habeas Corpus
- COUNTY: Harris
- C/A CASE No. 01-11-0020-CR
- DATE OF OPINION: November 10, 2011
- DISPOSITION: Trial Court Affirmed OPINION: [Jennings, J.](#)
- TRIAL COURT: 248th D/C; Hon. Joan Campbell
- LAWYERS: [Mark Bennett](#) (Defense); [Jessica Akins](#) (State)

Ed Note: (Background Facts) Penal Code Section 33.021(b) prohibits communicating with a minor in “a sexually explicit manner” with “an individual who represents himself or herself to be younger than 17 years of age” or “an individual whom the actor believes to be younger than 17 years of age.” Appellant was charged under the statute with the online solicitation of a minor. In response, he filed a pretrial application for writ of habeas corpus and motion to quash the indictment, asserting that the Penal Code’s prohibition of such communications is “unconstitutional on its face under the First Amendment as it is a content based restriction that severely criminalizes a substantial amount of harmless speech between adults that is protected under the First Amendment” and it is “not narrowly tailored to promote a compelling state interest as it prohibits a substantial amount of protected speech that is unnecessary to the protection of children.” Appellant also argued that the language used in the Penal Code’s prohibition is “unconstitutionally vague under the First Amendment because it works to encompass a vast array of communications and will chill the exercise of free speech.” Finally, appellant argued that the Penal Code’s prohibition violates the Dormant Commerce Clause “because it unduly burdens interstate commerce by attempting to place regulations on the entirety of the Internet.” The trial court denied appellant the relief that he requested in his application and refused to dismiss the criminal charge against him. Appellant then brought this appeal.

⚖ **62 Challenges to Prosecutions / Overbreadth:** Appellant argues that section 33.021(b) is unconstitutionally overbroad in violation of the First Amendment because “simple profanity or vulgarity—not rising to the level of obscenity—is constitutionally protected speech,” the government may not lawfully prohibit the “sexually explicit communications that are criminalized” by the statute, the statute “prohibits non-obscene communications by adults,” and the statute is not “narrowly tailored.” Appellant asserts that the “scope of the speech encompassed by the statute is staggering” and that the breadth of the statute creates the potential for abuse. Appellant also asserts that the statute could be applied in a multitude of situations because the term “sexually explicit” is broadly defined, the statute is “not limited to personal conversations,” and the statutory “intent to arouse” could simply be inferred “in many cases.”

Holding: Section 33.021(b) includes a scienter requirement that applies to each element of the offense. This scienter element of intent, as we interpret the statute, applies both to (1) the actor's intent to engage in sexually explicit communication or distribute sexually explicit material and (2) the actor's conduct toward the minor who is receiving the communications or materials. Additionally, section 33.021(b) applies only to sexually explicit communications or materials. * * * We conclude that the legitimate goal of section 33.021, including subsection (b), far exceeds any potential unlawful applications of the statute. Moreover, there is no evidence in the record before us that the statute reaches "a substantial amount of constitutionally protected conduct." * * * The scope of the statute is narrowed by the statutory requirement that the defendant must have (1) the intent to sexually arouse or gratify a person (here, the adult himself), (2) the intent to furnish sexually explicit communications and materials, and (3) the intent to direct those communications or materials to a minor. Accordingly, we hold that section 33.021(b) is not facially invalid for overbreadth.

§ 62 Challenges to Prosecutions / Vagueness: Appellant argues that section 33.021(b) is unconstitutionally vague in violation of the First Amendment because the definition of "sexually explicit" is "highly problematic" and "makes no sense." He notes that the Texas Legislature has incorporated within the definition of "sexually explicit" the term "sexual conduct" as used in section 43.25 of the Penal Code, and asserts that a prohibited communication could include "anything from the word 'breast' to a picture of a swimsuit" or a commercial advertisement for jeans. Appellant further asserts that the "intent to arouse" element creates no real limit to the statute and "the danger of arbitrary enforcement is real" because Texas law permits a jury to infer intent from the circumstances.

Holding: Section 33.021 defines "sexually explicit" communications and, materials, and although the statute does not tie the definition of the term "sexually explicit" directly to the definition of "obscenity" as used in the Texas Penal Code or the variant definition of "obscenity for minors" that has been approved by the United States Supreme Court, the statute does use language that is both closely related to these definitions and that has been approved in cases in similar contexts. Section 33.021 also requires that a defendant intentionally make sexually explicit communications or distribute sexually explicit materials to a minor with the intent to arouse or gratify the sexual desire of any person, including the defendant. We conclude that section 33.021(b) is sufficiently clear to provide adequate notice of what conduct constitutes a criminal offense. Accordingly, we hold that section 33.021(b) is not facially invalid for vagueness.

§ 60 Challenges to Prosecutions / General Constitutional Issues: Appellant argues that section 33.021(b) violates the Dormant Commerce Clause because it "unduly burdens interstate commerce by attempting to place regulations on the entirety of the Internet." Appellant complains that "Texas's attempt to regulate online speech has the effect of restricting protected speech around the country and even the globe."

Holding: Section 33.021(b) criminalizes the conduct of an adult who, with the specific intent of arousing or gratifying a sexual desire, and with the use of electronic messaging or online services, intentionally communicates in a sexually explicit manner with a minor or distributes sexually explicit material to a minor. The statute includes a scienter requirement for each element of the offense. It is clearly targeted at criminalizing the conduct of adults who engage in sexually explicit communications or distribute sexually explicit material to minors for gratifying a sexual desire. "It is difficult to conceive of any legitimate commerce that would be burdened by penalizing" the conduct targeted by Texas' online solicitation of a minor statute. * * * Accordingly, we hold that the statute does not violate the Commerce Clause.