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Vol. 30, No. 13; April 11, 2022

Case Name: ***Ex parte Leonardo Nuncio***

- **OFFENSE**: Obscene Harassment
- **COUNTY**: Webb
- **COURT OF APPEALS**: San Antonio 2019
- **C/A CITATION**: 579 S.W.3d 448
- **C/A RESULT**: Trial Court Affirmed
- **CCA. CASE No**. PD-0478-19 **DATE OF OPINION**: April 6, 2022
- **DISPOSITION**: Court of Appeals Affirmed
- **OPINION**: Judge Scott Walker **VOTE**: 5-4
- **TRIAL COURT**: CCL 1; Hon. Hugo Martinez
- **LAWYERS**: Oscar Pena (Defense); David Reuthinger & Marco Montemayor (State)

(**Background Facts**): The Complaint met with Appellant, who operated a restaurant, for a job interview. During the two-hour interview Appellant stared at her breasts and "made several rude comments." Appellant allegedly asked the Complainant if she liked to "party" and asked "what have you and your boyfriend done (sexually)." He also asked if her breasts were "Ds or double Ds" and told the complainant she was "hot." Appellant went on to ask the complainant to text her boyfriend "so you all can do a quickie in the back" of the restaurant." Appellant also told the complainant she "can't be a virgin" and work for him.

§§ 62 **Challenges to Prosecution / Vagueness & Overbreadth**: Appellant was charged with violating Penal Code § 42.07(a)(1), the obscene harassment statute. He filed a pre-trial application for writ of *habeas corpus* on the basis that the statute is unconstitutionally vague and overbroad under the First Amendment. The trial court denied Appellant's *habeas corpus* application, and the Court of Appeals affirmed. ***Ex parte Nuncio***, 579 S.W.3d 448 (Tex.App. - San Antonio 2019)(see §§, Vol. 27, No. 13; 04/15/2019). The Court of Appeals, with one Justice dissenting, accepted the State's argument that Penal Code § 42.07(a)(1) restricted obscenity proscribable under the First Amendment, and held that the statute is not overbroad. As for Appellant's vagueness challenge, the Court of Appeals found that the statute's use of "another" is not unconstitutionally vague. The

Court of Criminal Appeals granted Appellant's petition for discretionary review, which challenges § 42.07(a)(1) as unconstitutionally vague and overbroad.

Holding: Section 42.07(a)(1), the obscene harassment statute, is a content-based restriction of speech implicating the First Amendment. The statute restricts speech that is obscene under the First Amendment [standard of ***Miller v. California***, 413 U.S. 15 (1973)] and also speech that is not obscene under that standard. As a result, the law prohibits some amount of First Amendment protected speech. However, Appellant fails to carry his burden to show § 42.07(a)(1) is overbroad because he does not show that the amount of protected speech prohibited by the statute is substantial relative to its plainly legitimate sweep. *** Further, § 42.07(a)(1) is not unconstitutionally vague on its face. Section 42.07(b)(3) provides examples of what constitute "ultimate sex acts"; "patently offensive" is derived from the ***Miller*** standard and defined by § 43.21(a)(4); the "another" that the defendant intends to harass is plainly understood to mean the "target of the communication"; and § 42.07(a)(1) does not have any of the vagueness issues identified in ***Kramer v. Price***, 712 F.2d 174 (5th Cir. 1983), and ***Long v. State***, 931 S.W.2d 285 (Tex.Cr.App. 1996)(see ☙, Vol. 4, No. 35; 09/16/1996).

> **Concurring / Dissenting Opinions**: **Presiding Judge Sharon Keller**, **Judge Mary Lou Keel**, **Judge Michelle Slaughter**, and **Judge Jesse McClure** concurred, each without note.

Ed Note: The Court of Criminal Appeals rejected the SPA's argument that Appellant failed to present a proper argument challenging § 42.07(a)(1) as constitutionally overbroad before the trial court.

(**David A. Schulman**) As I said at the time of the Court of Appeals' opinion, "that a man could today think these types of comments are acceptable during a job interview is beyond me." Insensitive? Yes. Demonstrative of dated thinking? Most certainly yes. A crime? Up to the Legislature, and, unlike the defendants in either ***Kramer*** or ***Long***, this fellow cannot reasonably argue that he didn't know whether the statute prohibited this behavior.