Affirmed and Majority and Dissenting Opinions filed April 19, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00479-CR
NO. 14-99-00517-CR

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SANDRA RODRIGUEZ and HERMAN MENDOZA AGUILAR, Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 14
Harris County, Texas
Trial Court Cause Nos. 98-00867 & 98-00862

M A J O R I T Y O P I N I O N

Appellants were charged by information with the offense of failing to report child abuse. *See* TEX. FAM. CODE ANN. § 261.101(a) (Vernon Supp.1999). Failure to report such abuse is a Class B misdemeanor. *See* TEX. FAM. CODE ANN. § 261.109 (Vernon 1996).

Prior to trial, appellants filed a motion to quash their informations, contending the statute was facially unconstitutional because the term "immediately" was unconstitutionally vague. Appellant, Sandra Rodriguez, also filed a plea for immunity contending she was entitled to immunity under Texas Family Code section 261.106. The trial court denied the motions

and, pursuant to a plea bargain agreement with the State, appellants pled *nolo contendere* and were sentenced to two days in jail and fined $750 each. Appellants gave timely notice of appeal. Appellants now challenge the trial court's denial of the motion to quash the information and plea for immunity. We affirm.

On November 6, 1997, Officer Davis of the Houston Police Department knocked on the door of the apartment where Herman Aguilar, Sandra Rodriguez, Margarita Aguilar, and the complainant lived. Officer Davis was at the apartment to inquire about a report he had received from Hector Agomay that the complainant, a five year old boy, was being physically abused by his mother, Margarita Aguilar. Sandra Rodriguez responded to Davis's knock on the door. Davis attempted to question Rodriguez, but discovered she did not speak English. Because Davis did not speak Spanish, he asked a passing neighbor, Paulette Sousa, to act as an interpreter. He asked Rodriguez if a five year old boy lived in the house. Rodriguez told Davis that no five year old boy lived in the house. Officer Davis then left the apartment.

After Officer Davis left, Rodriguez told Sousa that the boy was in the apartment. Rodriguez took Sousa to the back room of the apartment where Sousa saw the complainant, who was naked and covered with bruises. The complainant was in a closet at the time Sousa discovered him. At that time, Sousa called Officer Davis back to the apartment. Officer Davis attempted to determine where the complainant's mother, Margarita, was. Rodriguez told him she was at "the clinic," but could not tell the officer where the clinic was located. Officer Davis then took the complainant to Texas Childrens Hospital.

Rodriguez later told Sousa that she had witnessed Margarita beating the complainant while he was naked. This beating had taken place weeks or months before November 6, 1997. Rodriguez also told Sousa that Margarita had removed the complainant from school because she was afraid the teachers would discover the abuse.

Rodriguez denied that she had seen Margarita beat the complainant She stated she had cut the complainant's hair after seeing Margarita pull his hair so hard she pulled some of it out. Rodriguez also testified that Margarita took the complainant out of school because she did not

want to get in trouble. In a written statement, Rodriguez stated, "I didn't report to the police because I didn't even – I didn't even know the telephone number from the office."

Officer Gonzalez of the Houston Police Department conducted a follow-up investigation of the abuse. Gonzalez testified that both Herman Aguilar and Rodriguez told him they did not report the abuse to anyone. Rodriguez told him that she had heard Margarita hitting the complainant and had heard the child screaming behind the bedroom door. Gonzalez found and arrested Margarita two weeks after the complainant had been taken to the hospital. It was not until after her arrest that Herman Aguilar gave a statement to the police concerning the allegations.

Herman Aguilar testified that he and Rodriguez came to the United States and began living with Margarita and the complainant in September, 1997. He testified that Rodriguez told him that the complainant had been removed from school so the abuse would not be discovered.

Appellant, Sandra Rodriguez, filed two pretrial motions alleging the statute was unconstitutionally vague and requesting immunity under the statute because she had assisted in the investigation. Herman Aguilar filed a motion alleging the statute was unconstitutional. The trial court denied the motions, stating, "[T]his abuse had been going on for apparently quite sometime in very close quarters and I find it difficult to find good faith when I see this set of circumstances. So, with respects, I'm going to have to deny both your motions."

In their first point of error, appellants claim the trial court erred in denying their motion to quash because the statute under which they were prosecuted is unconstitutionally vague. Texas Family Code section 261.109(a) provides: "A person commits an offense if the person has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect and knowingly fails to report as provided in this chapter." In the instant case, appellants were required to report in the manner provided for under section 261.101(a), which states: "A person having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any

person shall immediately make a report as provided by this subchapter."

In their motion to quash, appellants claim section 261.101(a) is unconstitutional because the term immediately has not been "determined, measured, defined or reduced to a reasonable certainty capable of common and ordinary understanding rendering it vague and uncertain as to the time in which the report required thereby must be made."

Before we can address the merits of appellants' claim that section 261.101(a) is unconstitutional, appellants must first show the statute is unconstitutional as applied to them. *See Vuong v. State,* 830 S.W.2d 929, 941 (Tex. Crim. App. 1992). When a vagueness challenge involves First Amendment concerns, the statute may be held facially invalid even though it may not be unconstitutional as applied to the appellant's conduct. *Long v. State*, 931 S.W.2d 285, 288 (Tex. Crim. App. 1996). Where no First Amendment rights are involved, however, the court need only examine the statute to determine whether it is impermissibly vague as applied to the appellant's specific conduct. *Bynum v. State*, 767 S.W.2d 769, 774 (Tex. Crim. App.1989). Accordingly, it is the appellants' burden to establish that the statute is unconstitutional as applied to them; that it might be unconstitutional to others is not sufficient. *Id*.

Section 261.101(a) provides that if a person has cause to believe that a child is being abused or neglected that person "shall immediately make a report." Appellants' facial challenge fails because the statute is sufficiently clear as applied to them. The record reflects that appellants had lived with the complainant and his mother for approximately two months, during which they witnessed the mother's abuse of the child. Rodriguez acknowledged that she had heard the child being beaten by his mother and had cut his hair so that his mother could not pull it out. When a police officer inquired about the complainant, Rodriguez stated that no five year old boy lived in the apartment. It was not until the police officer left the apartment that Rodriguez told Sousa that the child was in the apartment. Therefore, because appellants never

reported the abuse, their conduct is clearly covered by the statute.[1] *See Sanchez v. State*, 995 S.W.2d 677, 683 (Tex. Crim. App. 1999) (holding that a person who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others). Appellants' first point of error is overruled.

In her second point of error, Rodriguez contends she should be immune from prosecution under Texas Family Code section 261.106(a) because she assisted in the investigation of a report of alleged child abuse. Family Code section 261.106 provides that a person acting in good faith who reports or assists in the investigation of a report of alleged child abuse or neglect or who testifies or otherwise participates in a judicial proceeding arising from a report, petition, or investigation of alleged child abuse or neglect, is immune from civil or criminal liability that might otherwise be incurred or imposed. A person who reports the person's own abuse or neglect of a child or who acts in bad faith or with malicious purpose in reporting alleged child abuse or neglect is not immune from civil or criminal liability.

Although Rodriguez failed to report the abuse, she claims she should be immune from prosecution because she, in good faith, assisted in the investigation of the abuse. To be entitled to immunity, one must have assisted in the investigation of the report in good faith. *See Gonzalez v. Avalos*, 866 S.W.2d 346, 351 (Tex. App.—El Paso 1993), *writ dism'd w.o.j.* 907 S.W.2d 443 (Tex. 1995). The record in this case reflects that Rodriguez did not,

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[1] The dissent takes the position that because the record does not show that appellants knew Margarita Aguilar burned the complainant with an iron, they were under no duty to report such abuse, "much less in an immediate fashion." *Rodriguez v. State*, No. 14-99-00479-CR (Tex. App.—Houston [14th Dist.] 2001, n. p. h.), slip op. at p. 4. The statute appellants challenge as unconstitutional states that a person commits an offense if he or she has cause to believe a child has been or may be adversely affected by abuse or neglect and knowingly fails to report that abuse. The record shows that appellants witnessed Margarita Aguilar's abuse of the complainant for several weeks or months without reporting it. Appellants' conduct is clearly proscribed by the statute. The fact that the record does not show that appellants witnessed a particular instance of abuse alleged in the information does not affect their standing to challenge the constitutionality of the statute. As we noted above, it is the appellant's burden to establish the statute is unconstitutional as applied to them. *See Bynum v. State*, 767 S.W.2d at 774. Whether appellants failed to report the alleged abuse because they were unaware of a specific act of abuse is not a question that is properly before this court. In fact, by their plea of no contest appellants did not contest the allegations in the information.

in good faith, assist in the investigation. To the contrary, when Officer Davis first arrived, she told him no five year old child lived in the apartment. She did not give a statement to the police until the child had been removed from the home. The trial court correctly denied immunity under section 261.106. Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Majority and Dissenting Opinions filed April 19, 2001.
Panel consists of Justices Yates, Fowler, and Baird.[2]
Publish — TEX. R. APP. P. 47.3(b).

[2] Former Judge Charles F. Baird sitting by assignment.