



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0461-23

EX PARTE LUIS ALFREDO APARICIO, Appellant

**ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
MAVERICK COUNTY**

KEEL, J., filed a dissenting opinion.

DISSENTING OPINION

I agree with Part A of the Presiding Judge's opinion: Appellant's selective enforcement claim is not cognizable in pretrial habeas, and we should dismiss it. I write separately because the majority opinion jeopardizes future claims of selective prosecution in Texas. Contrary to its understanding, the discriminatory-purpose element of selective-prosecution claims does not depend on hostility or bad faith, and discrimination is not justified by more discrimination. I respectfully dissent.

I. Discriminatory Purpose

The majority claims that the discriminatory-purpose element of a selective prosecution claim means “an unfair or unjust” prosecution “based on a prejudiced viewpoint.” But it doesn’t. Instead, it means a decision to prosecute that was “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Wayte v. United States*, 470 U.S. 598, 608 (1985).

Discriminatory purpose requires the State to select or reaffirm “a particular course of action in part *because of*, not merely in spite of, its adverse effects upon an identifiable group.” *Casarez v. State*, 913 S.W.2d 468, 485 (Tex. Crim. App. 1994) (emphasis in original). If the government purposefully punishes class members more harshly than others for the same conduct, then it has acted with a discriminatory purpose. It does not matter whether it harbored hostility to that class.

This mirrors the treatment of other Equal Protection claims; they do not depend on hostility, either. Last year, for example, the Supreme Court held that an affirmative action policy violated the Equal Protection Clause regardless of its “well-intentioned” or “good faith” implementation. *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 213 (2023); *see also Fisher v. Univ. of Tex.*, 570 U.S. 297, 313 (2013) (reasoning that “good faith would [not] forgive an impermissible consideration of race.”). Similarly, race-based gerrymandering policies are subject to scrutiny “regardless of the motivations underlying their adoption.” *Alexander v. NAACP*, 218 L. ED. 2d 512, 541 (2024) (citing *Shaw v. Reno*, 509 U.S. 630, 645 (1993)). And race-based social programs may be discriminatory even when the racial classifications are “benign” or “remedial.” *Adarand*

Constructors v. Pena, 515 U.S. 200, 225 (1995). Good or bad faith may be relevant to a state-interest justification for the discriminatory policies. *See, e.g., Fisher*, 570 U.S. at 312-14. But discriminatory purpose does not depend on bad faith.

II. Efforts To Justify Discrimination

The majority tries to justify DPS's arrest policy by citing additional evidence of discrimination. The majority points out that Operation Lone Star's processing centers could house only men, but this shows the enterprise was discriminatory from the start—it does not justify the discrimination. The majority also points out that some males were exempt from arrest for trespass; minors, old men, injured men, and men belonging to a family group were not charged. But those exemptions are irrelevant to deciding whether Appellant was charged, at least in part, because he was male. *See Casarez*, 913 S.W.2d at 485. The fact that he was further discriminated against based on, for example, his age, marital status, or health would not rebut the fact that he was charged because he was a man. Discrimination is not justified by more discrimination.

III. Conclusion

The majority errs by entertaining Appellant's selective-enforcement claim and by jeopardizing future claims of selective prosecution. I respectfully dissent.

Filed: October 9, 2024

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