



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

YEARY, J., filed a dissenting opinion.

I agree with Presiding Judge Keller about the distinction between selective prosecution and selective enforcement. *See* Dissenting Opinion at 1 (“The claim before us is really a ‘selective enforcement’ claim rather than a ‘selective prosecution’ claim.”). A decision to arrest or detain is distinct from a decision to prosecute. As the Presiding Judge points out, these claims are different, and for the other reasons she explains, selective enforcement claims should not be considered cognizable.

So, I agree with both the Presiding Judge, and Judge Keel, that such claims are not cognizable on pre-trial habeas. But that is all that I think needs to be said about this matter today. I would not go on, as the Presiding Judge’s opinion does, to suggest that selective, and vindictive, prosecution claims should not ordinarily be considered cognizable.

This Court has embraced the idea that “certain types of as-applied claims may be raised by pretrial habeas because the particular constitutional right at issue . . . is the type that would be effectively undermined if not vindicated prior to trial.” *Ex parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016). A prosecution motivated by reasons that are in conflict with an accused’s constitutional right to equal protection of the law is an unconstitutional prosecution. *City of Grants Pass Oregon v. Johnson*, 144 S. Ct. 2202, 2220 (2024) (“[T]he Constitution provides many additional limits on state prosecutorial power, promising fair notice of the laws and equal treatment under them, *forbidding selective prosecutions*, and much more besides.”) (emphasis added). This strikes me as exactly the kind of right that would be undermined if not vindicated before trial. The whole point of claiming selective prosecution is to advance the argument that the defendant would not have been prosecuted but for the selectively motivated decision to prosecute in the first place.

Seeming to address this consideration, Presiding Judge Keller contends that “a right not to be subject to a trial motivated by vindictiveness is not the same as a right not to be tried.” Dissenting Opinion at 8. But I am not so sure. After all, it is not just *any trial* that a defendant claiming selective prosecution seeks to prevent. It is, rather,

the prosecution that the defendant claims is being pursued *selectively* that he seeks to prevent.

Because I agree that the actual claim that Appellant is making is a non-cognizable selective enforcement claim, it should be dismissed, not denied on the merits. I respectfully dissent.

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