IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

HARRY GARBAR, Appellant

vs. NO. 83-MCA-1142

STATE OF TEXAS, Appellee

O P I N I O N

Appellant appeals his conviction for violation of Section 11-4.2 of Chapter 11 of the Code of the City of El Paso which provides a penalty for causing or allowing a stationary container to be filled to overflowing at places of business, apartment houses, tenements and lodging houses, trailer courts, hotels, or like places, or office buildings which accumulate more than 50 gallons of garbage within 24 hours.

Appellant was cited on 4 different occasions, November 15, 1983; November 28, 1983; November 28, 1983; December 20, 1983; and January 23, 1984, involving four different locations.

Briefs in each of these cases have been filed by the parties, and oral argument presented to this Court.

There is no question that the Appellant is the owner of the properties at the various locations where the citations were issued, and therefore is the person in charge of such location. There is further no dispute, and the City concedes this, that the Appellant himself was not present or participated in depositing garbage or refuse in the container, but seeks to hold Appellant responsible for causing or allowing such containers to overflow.

There is also no question that the ordinance at issue represents a valid exercise of the City's inherent police power to protect the health and safety of its citizens.

Pope vs. City of Houston, 559 SW2d 905 (Tex.Civ.App - Waco - 1977, Writ ref'd. n.r.e.) See also Article 1175, V.A.T.C.S. providing for the powers which a home rule city can exercise, including the exercise of a police power to provide for the health, safety, morals and general welfare of the inhabitants of such city. Appellant does not contend otherwise.

Unsightly litter and the accumulation of garbage and refuse is both an eyesore and health hazard. The purpose of the ordinance is directed at maintaining not only the esthetic value of cleanliness, but also the health of the City's inhabitants. The accumulation of trash and garbage presents a health hazard of considerable dimensions.

The main thrust of Appellant's attack on these convictions is that he is not chargeable on the basis of being a "party" since he was not physically present at the time that the containers overflowed, nor aided, abetted, or encouraged the commission of such offense. (See Penal Code Sec. 7.02) Appellant's reliance on the distinction between being a party and being charged as the principal to escape criminal responsibility is misplaced.

The ordinance's sanctions are addressed to the person in charge of the establishment as the principal. Although it is true that Appellant is not a "party" as defined by the penal code, he nonetheless is responsible for the criminal sanctions imposed by such ordinance as a principal. Appellant's responsibility for "causing or allowing" a condition declared illegal in the ordinance, does not depend on his status as a party to such offense, but is directed to his own conduct, or lack thereof, as a basis of his criminal responsibility.

This Court fails to see any difference in this situation than if a fire, electrical or plumbing ordinance was being enforced against Appellant as owner of a building for a

condition that constituted a danger to the health or safety of the building's occupants.

Would it be a defense to such enforcement in those cases to say that Appellant did not create the condition and therefore is not responsible for it? This Court thinks not. Appellant enjoys the benefits of ownership and therefore must also bear its burdens.

Appellant can do more than others to prevent the overflow of garbage and refuse by placing locks on the containers, providing better supervision or management at the specific locations, or having the containers emptied more regularly, or take other appropriate action to avoid this problem. Although none of such action is directly required by the law, indirectly it is imposed on the person in charge of such buildings; otherwise, he can be responsible for the condition condemned by the ordinance itself. The ordinance recognizes that responsibility on the part of an owner, and imposes on him that duty.

It is Appellant's own act or failure to act in accordance with the mandates of a valid ordinance that forces Appellant to meet his responsibility or be punished upon conviction accordingly. Section 7.01 of the Texas Penal Code provides that a person is criminally responsible as a party to an offense if the offense is committed by his own conduct.

This Court holds that Appellant is properly chargeable under the particular ordinance involved in this case, and therefore his point of error relating thereto is overruled.

Although Appellant does not specifically brief these points of error, he raised them through his attorney at oral argument, and this Court will briefly consider them. First of all, Appellant claims that some element of mental culpability is required in the instant offense. Not all offenses require a culpable mental state, and this Court holds that

such is the case here. Brune vs. State, 83-MCA-259 (Mun.Ct. App. - 1984).

Next, Appellant contends that the ordinance is invalid because it is arbitrary and capricious, both as it is applied generally, and in particular, as against this Appellant. This Court has already decided that the ordinance in question is valid, and there is a strong presumption in favor of the validity of an ordinance. As to Appellant's contention that this ordinance is being selectively enforced against him, the record in this case does not support such allegation. This Court is aware that citations involving this particular offense have been issued against others who are similarly situated as the Appellant, and further, Appellant has failed to demonstrate that he is being discriminated against by the sanitation officers who issue these citations.

Appellant's additional points of error raised at oral argument and discussed above are overruled. The judgment of the Trial Court is affirmed.

Signed this 11 day of June, 1984.

JUDGE

JUDGMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things affirmed, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

Signed this 11 day of June, 1984.

JUDGE