IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

ALPHONSE BRUNE, Appellant

v. 83-MCA-259

STATE OF TEXAS, Appellee

OPINION

Appellant was found guilty in Municipal Court of failure to yield right of way, and appeals that decision.

His First Point of Error contends that the complaint for such offense was fatally defective for failing to allege a culpable mental state, relying on Article 6.02 of the Texas Penal Code. The argument goes that an offense requires a culpable mental state unless the definition of the offense plainly dispenses with any mental element. When such an offense as is involved in this case is alleged, as in many traffic offenses, the statute or ordinance is generally silent as to any mental culpability required to attach criminal responsibility to the conduct sought to be prohibited by the act. Thus, the argument goes, some mental culpability is required to be alleged and proven.

A review of the cases in which this issue has been addressed reveals that such argument, although convincing, is nonetheless, without merit. There is no question that complaints alleging the offense of speeding require no allegation of a culpable mental state. Zulauf v. State, 591 S.W.2d 869 (Tex.Crim.App. - 1979), nor do informations charging the offense of driving while intoxicated require an allegation or proof of some culpable mental state although silent as to that requirement. Reed v. State of Texas, 624 S.W.2d 708 (Tex.Civ.App. - Houston - 1981, no writ). Greer v. State, 544 S.W.2d 125 (Tex.Cr.App. 1976). Owen v. State, 525 S.W.2d 164 (Tex.Cr.App. 1975). In fact, the law

states that "silence" as to a culpable mental state in such cases is indicative of the legislature's intent not to require a culpable mental state as a part of the offense. See Zulauf v. State, 591 S.W.2d 869.

Even in Honeycutt v. State, 627 S.W.2d 417 (Tex.Crim.App. - 1981), involving a negligent collision case, the Court although requiring "a culpable mental state in such a case, clearly indicated that a culpable mental state was not required in all criminal offenses . . . nor for many of the other traffic type offenses set out in Article 6701d, V.A.T.C.S." Even the practice commentary to Article 6.02 of the Texas Penal Code indicates that the legislature is free to dispense with the requirement of a culpable mental state as it has done in creating the so-called strict liability offenses. This Court holds that no culpable mental state need be alleged or proven in the instant offense, and therefore Appellant's point of error is overruled.

Next, Appellant contends that the complaint is insufficient because it does not identify the other person to whom he failed to yield right of way. The statute does not require such allegation or proof, but rather requires a driver to "yield to other traffic", and the complaint alleged such, and the evidence as reflected in the statement of facts revealed such an offense. The point is overruled.

Appellant next contends that the complaint is defective because it sets out two offenses in one count, that being, failing to stop at a stop sign and also failing to yield the right of way. The complaint in this case "tracks" the statute in question, and such has been held to be sufficient under the law. The point is overruled.

Appellant next contends that the complaint was defective because it does not allege whether the prosecution is based

on state statute or city ordinance. This Court judicially notices that complaints in Municipal Court under city ordinances allege the particular ordinance involved. The complaint in this case does not allege any city ordinance, and provided adequate and fair notice to Appellant that the prosecution was being pursued under state statute.

Evidently, Appellant contends the failure to allege under which law the prosecution is being pursued places him at a disadvantage because under a prosecution based on a city ordinance, perhaps a culpable mental state must be alleged or proven, and that under a state statute, same may not be required. This Court's disposition of Appellant's contention in such respect having been overruled, the point is without merit.

Appellant next contends that the evidence is insufficient to sustain the conviction because the complaint alleged that the Appellant "failed to stop, yield and grant the privilege of immediate use" and the evidence showed and was uncontradicted that Appellant had in fact stopped. Appellant in fact contends that the State alleged that the Appellant failed to stop but proved that he in fact stopped. If this was a stop sign violation, of course, Appellant's contention would be correct and there would be a fatal variance between the allegation and proof, but the essence of this offense is failure to yield right of way and not failure to stop. Suffice it to say, at this point, this Court's review of the statement of facts persuades it that the evidence is sufficient to sustain a failure to yield right of way offense unless Appellant's contention as above set out is fatal to the prosecution.

This Court construes this Point of Error to involve the issue as to the existence of a fatal variance between the pleading and proof more so than the question of the sufficiency of the evidence. It is fundamental that the evi-

dence must correspond with and support the material allegations in the accusatory pleading. However, substantial compliance between the allegation and the proof has been held to be sufficient. The accused cannot complain unless he is not provided with reasonable notice from the pleading as to what he will be called on to defend. The Court holds that there is not a fatal variance as to a material allegation in this case because the essence of the offense was failure to yield right of way, and the complaint provided the accused reasonable notice of the charge. 19 Tex.Jur3d Section 639 et seq Crim.Law. The point is overruled.

The Judgment of the Trial Court is affirmed.

Dated this 28 day of July, 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 28 day of July, 1984.

JUDGE