IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

JOEL HERNANDEZ, Appellant

vs. NO. 83-MCA-421

STATE OF TEXAS, Appellee

O P I N I O N

Appellant appeals his conviction in Municipal Court for the offense of cutting across private property. This Court previously dismissed this appeal for want of jurisdiction on October 17, 1984. That opinion was improvidently rendered since an extension to perfect the appeal had been previously granted.

Turning then to the merits of this appeal in respect to the particular charge in question, Appellant's most serious attack relates to the failure of the complaint to allege a culpable mental state. This Court has addressed this issue previously in the context of another traffic offense, and determined in that case, as well as in many traffic type offenses, that a culpable mental state need not be alleged since they were in the nature of "strict liability" offenses. Brune v. State, 83-MCA-259 (Mun.Ct.App. - 1984).

However, under Section 188 of Article 6701D, V.A.T.C.S., prohibiting cutting across certain property, the legislative intent manifestly appears to be that such conduct is prohibited only when committed "for the purpose" of making either a right or left turn from one street or highway to another street or highway.

In this particular instance involving this offense, if there was no mental culpability required to be alleged and proven, a person would be guilty of cutting across private property when they, in fact, had a legitimate purpose to enter the area, and for whatever reason changed their mind and exited on another street. Surely,

the legislature would not have intended such a result. For instance, if a person enters a shopping center area, which is private property under Section 188, with the intent to make a purchase, and then discovers that they forgot their wallet or purse and did not have the money to make the purchase, and therefore continued on their way and exited at another street adjacent to the shopping center, they would be guilty of this offense if it was to be characterized as a "strict liability offense".

The language of the section itself which states that the movement is unlawful if made "for the purpose of" making either a right or left hand turn from one street or highway to another street or highway reflects that this conduct must be done with some intent. The use of the terminology "for the purpose of" surely reflects that some degree of mental culpability is required.

Therefore, this Court believes that this is a traffic offense which requires a specific mental culpability to be alleged and proven, and since such mental culpability is not alleged in the instant complaint, it is fatally defective, and that the prosecution based thereon cannot stand.

In a properly drawn complaint which alleges that a person intentionally or knowingly committed this offense, the factfinder then can hear the evidence presented and render a decision based thereon. That is, if the prosecution's testimony establishes that a person drove through a shopping center, giving no indication that he was going to stop at any of the stores in that particular area, or that the location was closed at the time, either temporarily or permanently, or other evidence indicating no intention to stop in the area designated for a legitimate purpose, then the court would be free to accept that testimony in support of its verdict. Of course, against such testimony, the trial judge is generally confronted with

the subjective intent expressed by the Defendant that they in fact had a legitimate purpose for going into the particular area, and that it was not done with the intent to avoid an intersection, traffic control device, congested traffic, or to make a right or left hand turn from one street to another. The choice for the trial judge in such cases is a difficult one, but if supported by the evidence would not be disturbed on appeal.

The Court, by judging the conduct of the Defendant, can infer what his intentions were and rule accordingly.

Although this Court has sustained Appellant's point of error in respect to the necessity of alleging a culpable mental state in this type of offense, the Court feels compelled to address other issues raised in Appellant's brief, and although to such extent may be dicta, may also prove helpful for future prosecutions in this area.

Since a complaint in these type of cases must be redrawn in any event because of this Court's holding above, the prosecution would be well-advised to track the particular statute in question more closely and allege that the offense occurred "at an intersection" and "for the purpose of making either a right or left hand turn from one street or highway to another street or highway". Appellant has contended that the failure of the complaint to allege that the offense occurred at an intersection appears to this Court to be well-taken. Certainly, if a person goes into a shopping center in the middle of a block, he is free to exit from that shopping center in either direction without violating the provisions of Section 188, infra. Therefore, this Court would be inclined to rule, if presented with this specific point again, that the failure of the complaint to allege that additional information, and to more closely track the statute in question would constitute fundamental error, and would hold that the complaint would be defective.

Appellant's other points of error that the complaint does not commence in proper form was withdrawn at oral argument, but the Court finds same to be without merit regardless. Appellant's other point of error relating to the City Attorney's authority to prosecute a statewide penal offense is likewise overruled. Hill v. State, 83-MCA-23 (Mun.Ct.App. - 1984).

Appellant's last point attacking the jurat of the complaint for failing to disclose the authority of the swearing officer is likewise overruled. Appellant's contention is that the abbreviation of Assistant City Attorney which is reflected on the complaint as "Asst. City Atty." does not clearly reflect the authority of the swearing officer. Of course, the Assistant City Attorney is a properly designated officer who can swear the affiant to the complaint. Art. 1200ee-1, Sec. 10, V.A.T.C.S. This Court holds that Appellant's point of error in this respect is without merit since well understood abbreviations in a complaint do not render it fatal. A fair reading of the complaint in this case clearly reflects the authority of the officer taking the oath in commonly understood abbreviated form.

Having found the complaint void, the Judgment of the Trial Court is reversed and the complaint is ordered dismissed.

SIGNED this 7 day of Jan., 1984.

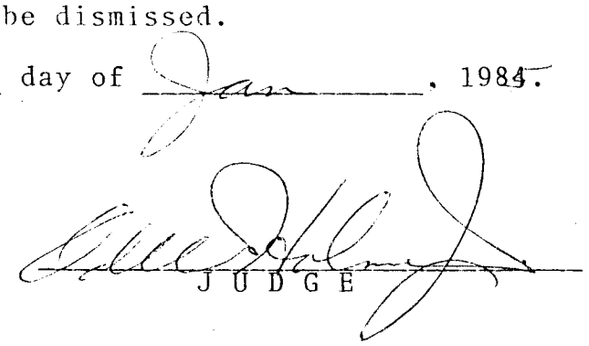
JUDGE

JUDGMENT

This case came on to be heard, the same being considered, because it is the opinion of this Court that there was error in the Judgment, it is ORDERED, ADJUDGED and

DECREED by the Court that the Judgment be in all things reversed and the complaint be dismissed.

Signed this 9 day of Jan. 1984.



JUDGE