IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

WILLIAM O'BRIEN, Appellant

vs. NO. 86-MCA-1697

STATE OF TEXAS, Appellee

OPINION

Appellant appeals his conviction in Municipal Court for failing to operate a motor vehicle on a public street at an appropriately reduced speed, when approaching and crossing an intersection, as condemned by Article 6701D, Section 166(c).

Appellant, in a pro se brief, contends that he was charged with the wrong offense, since all the comments by the Judge and officer related to speeding, when in fact, he was not charged with a speeding offense, but rather with failing to reduce his speed appropriately when approaching and crossing an intersection.

No statement of facts was requested at trial, and none is contained in the record before this Court. Therefore, the question relating to whether or not there was a fatal variance between the evidence introduced and the charge cannot be reviewed on appeal.

However, and although not presented to this Court by Appellant, this Court nonetheless has authority to review unassigned fundamental error. Carter v. State, 656 S.W.2d 468 (Tex.Cr.App. 1983).

In doing so, this Court holds that the above section of Article 6701D, Section 166(c) is void for vagueness. In so holding, this Court is mindful that a statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statutes", or if it "encourages arbitrary and erratic arrest and convictions, and either is an independent ground

for declaring the statute void." Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1953); Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937); Goocher v. State, 633 S.W.2d 860 (Tex.Cr.App.1982); Bates v. State, 587 S.W.2d 121 (Tex.Cr.App. 1979); McMorris v. State, 516 S.W.2d 927 (Tex.Cr.App. 1974); Cotton v. State, 686 S.W.2d 140 (Tex.Cr.App. 1985).

In Cotton, supra, the Court held that it is "axiomatic that a criminal statute must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'"

Requiring a person to drive at an "appropriate reduced speed when approaching and crossing an intersection" fails to provide that notice, and fails to provide explicit standards for the enforcement of the statute. "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. It is not sufficient to leave enforcement to the sound discretion of the police, trusting them to invoke the law only in appropriate (whatever that means) cases. A criminal statute must itself be precisely drawn so that it eliminates the risk of capricious application rather than fosters it as the present statute does." See Cotton, supra.

It is interesting to note that the Cotton Court itself, expressed uncertainty as to what the term "appropriate" means. In the instant case, and under the statute being reviewed, there is certainly no precise meaning to the term used. The statute fails to provide any objective criteria by which a person's conduct can be measured, but rather encourages purely subjective judgments totally within the discretion of the police officer, leaving the risk of capricious application to be borne by the alleged offender.

Therefore, this Court holds the above act to be unconstitutionally vague and unenforceable as a penal sanction, and accordingly, reverses the judgment of the Trial Court and orders the dismissal of the Complaint.

Signed this 27 day of May, 1986.

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 27 day of May, 1986.

JUDGE