IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

GEORGE A. RANCICH, Appellant

vs.

NO. 86-MCA-1698;
86-MCA-1699

STATE OF TEXAS, Appellee

OPINION

Appellant appeals his convictions in Municipal Court for speeding and failure to signal his intention to turn.

A review of the statement of facts contained in the record before this Court reveals that the Appellant was charged with driving at an extremely high rate of speed and numerous lane changes as he proceeded down the freeway.

First, this Court notes that there is a fatal variance between the allegation that he failed to give a signal of his intention to turn and the evidence which supports that he changed lanes on numerous occasions in an unsafe manner. Such a variance between the charge and the evidence constitutes fundamental error of which this Court is required to take cognizance. Lopez v. State, 708 S.W.2d 446 (Tex.Cr. App. - 1986), Valdez v. State, 555 S.W.2d 463 (Tex.Cr.App. - 1977), Carter v. State, 656 S.W.2d 468 (Tex.Cr.App. - 1983). Therefore his conviction for that offense cannot stand.

Secondly, however, Appellant contends that although ably represented by counsel, he did not waive a jury trial and relies on the recent case by the Court of Criminal Appeals in Samudio v. State, 648 S.W.2d 312 (Tex.Cr.App. - 1983). In Samudio, the Court held that the State failed to meet its constitutional burden of establishing a waiver of a jury trial, even though the Defendant was represented by an attorney, where the record was silent on that point. The charge in that particular case involved a misdemeanor

offense of assault with intent to cause bodily injury. In that case, the Court concluded that a waiver of a jury trial cannot be presumed from a silent record. What is somewhat startling about the rationale of the decision, is that, like our case, the Defendant was represented by an attorney who proceeded to the trial of the case before the Court, and not until appeal, raised the jury waiver issue. The Court approved this "hiding behind the log" strategy, and held that counsel's failure to object did not waive his complaint on appeal.

However, subsequent to the Court's decision in Samudio, the Court of Criminal Appeals has addressed this issue, and although with some difficulty, has ameliorated the impact of Samudio. Breazeale v. State, 683 S.W.2d 446 (Tex.Cr.App. - 1984) (Opinion on State's Motion for Rehearing), Lopez v. State, 708 S.W.2d 446 (Tex.Cr.App. - 1986).

In the Breazeale case, the Court distinguishes its holding in Samudio because the recitation that the Defendant did not demand a jury was insufficient to establish his waiver of his right to trial by jury. Initially, the the distinction between demanding and waiving a jury trial is narrow indeed, and seems to be based more on semantics than logic, but its importance is significant when one realizes that no demand for a jury need be made in a criminal case, but rather that a Defendant must waive that right affirmatively.

In both Breazeale and Lopez, the rationale of the Court's decision is based on the presumption of the regularity and truthfulness of the judgment entered by the Trial Court, which is sufficient to establish the fact of jury waiver.

Therefore, although Appellant would be absolutely correct if the record before this Court was silent as to his jury trial waiver, he is likewise incorrect if the record

speaks to the jury waiver in the Court's judgment. In that connection, there are two documents which reflect that a right to a jury trial was waived, and both of which have been signed by the presiding judge who heard this case. The first such document is reflected in what is known as the material docket entries, and which is a part of this Court's record. More importantly, the docket sheet contains a judgment which is also signed by the Trial Judge which indicates the Defendant waived a trial by jury and submitted the decision of his case to the Court. Based on the rationale of Brazeale and Lopez, supra, and being bound by such decisions, this Court holds that the judgment of the Trial Court carries with it a presumption of regularity and truthfulness, and therefore finds that the record is not silent as to this essential element. Appellant's second point of error is overruled.

Having found a fatal variance between the charge and evidence in Cause No. 86-MCA-1699, Appellant's conviction in that case is hereby reversed and the Complaint ordered dismissed, and the Judgment in Cause No. 86-MCA-1698 is affirmed.

Signed this 2 day of July, 1986.

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 the Judgment be reversed and the Complaint dismissed in Cause No. 86-MCA-1699, and the Judgment of the Trial Court in Cause No. 86-MCA-1698 be affirmed.

Signed this 2 day of July, 1986.

JUDGE