

NO. 000000

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 186th JUDICIAL DISTRICT
JOE SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that the information filed in this case be set aside by virtue of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I §§ 10 and 19 of the Texas Constitution, and Articles 1.05, 21.01, 21.02, 21.03, 21.04, and 21.11 of the Texas Code of Criminal Procedure for the following reasons:

I.

The information is defective because for the following reasons:

1. The information contains only the general averment that defendant made a false statement under oath. This general allegation does not plead the offense of making a false statement to a peace officer with sufficient certainty. A charging instrument alleging perjury "must designate the particular facts in the testimony which were false, and then it must negative the truth of the alleged false testimony by setting forth the true facts by way of traversal." *Burleson v. State*, 429 S.W. 2d 479, 481 (Tex. Crim. App. 1968)(perjury indictment insufficient because it did not "expressly negative, with certainty, the falsity of any particular fact given in the testimony of the appellant, and [was] nothing more than a conclusion"). See also Tex. Code Crim. Proc. Ann. arts. 21.03 and 21.23(Vernon 1989). A charging instrument alleging making a false statement to a

peace officer should also have to expressly negative the falsity of the allegedly false statement.

2. It describes defendant's allegedly false statement as: "bang my head against the wall many, many times." This description is an incomplete sentence and is taken out of context. It does not fairly state the substance of the allegedly false statement, it varies from the substance of the purported statement, and, the variance in question affects the subject matter and general import of the purported false statement, in violation of article 21.21(7) of the Texas Code of Criminal Procedure, because, by relying on this fragmented statement, the state has failed to set forth the offense "in plain and intelligible words." Nor does the information contain ordinary and concise language in such a manner as to enable a person of common understanding to know that is meant, nor does it contain that degree of certainty that will give the defendant notice of the offense with which he is charged to enable the court, on conviction, to pronounce the proper judgment. Tex. Code Crim. Proc. Ann. arts. 21. 11 (Vernon 1989).

3. The information fails to state an offense under the Texas Penal Code because the allegation, "bang my head against the wall many many times," does not constitute a "representation of fact," and is therefore not a "statement," as defined by § 37.01(3) of that code.

4. The jurat on the complaint upon which the information is based fails to properly reflect the authority or official character of the person before whom the complaint was sworn to and subscribed. An information is invalid if not supported by a proper complaint. *State v. Pierce*, 816 S.W. 2d 824, 830 (Tex. App.--Austin 1991, no

pet.).

5. The information fails to explain how or why the allegedly false statement is material to an assault investigation. A perpetrator is guilty of assault when he intentionally, knowingly or recklessly causes bodily injury to the victim. Intent and injury can be proven by a single blow. It is simply immaterial whether the perpetrator in this case banged Mr. Smith's head against the wall one time, or more than one time, or "many many times."

6. The information fails to allege the manner and means by which the allegedly false statement was made. *See Smith v. State*, 658 S.W.2d 172, 173 (Tex. Crim. App. 1983)(where the state alleged that defendant unlawfully received bets, it had to allege the manner and means of that receipt, that is, whether it was "in person, through a third party, over the telephone, at a drop, or through the mail").

7. The information alleges that the statement in question was "authorized by law to be made under oath," but fails to allege what law authorizes same.

II.

Because of these defects:

1. The information does not accuse defendant of an "act or omission which, by law, is declared to be an offense", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.01.
2. The offense is not "set forth in plain and intelligible words", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.02(7).
3. The information does not state "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.03.

4. The information does not possess "[t]he certainty . . . such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense," in violation of TEX. CODE CRIM. PROC. ANN. art. 21.04 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I §§ 10 and 19 of the Texas Constitution.
5. The information does not "charge[] the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant and with what degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment . . ." in violation of TEX. CODE CRIM. PROC. ANN. art. 21.11 and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, §§ 10 and 19 of the Texas Constitution.

WHEREFORE, premises considered, the defendant prays that the Court set aside the information in the above-numbered and entitled cause.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Information has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 1st day of April, 2018.

MARK STEVENS

ORDER

On this the _____ day of _____, 2018, came on to be
considered Defendant's Motion to Set Aside the Information, and said Motion is hereby
(GRANTED) (DENIED)

JUDGE PRESIDING