

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 144TH JUDICIAL DISTRICT
LINDA SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Linda Smith moves that the indictment 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.

When a defendant is accused of acting recklessly, the charging instrument “must allege, with reasonable certainty, the act or acts relied upon to constitute recklessness. . . .” TEX. CODE CRIM. PROC. ANN. art. 21.15; *see Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988).

Article 21.15 requires that an indictment alleging reckless misconduct allege with reasonable certainty, both “the acts or act relied on to constitute the forbidden conduct committed with recklessness . . . [and] “the acts or circumstances relied on to demonstrate that the forbidden conduct was committed in a reckless manner.” *State v. McCoy*, 64 S.W. 3d 90, 92 (Tex. App.–Austin 2001, no pet.).

The indictment against Ms. Smith fails the second prong of this test because it

does not allege, with reasonable certainty, the acts or circumstances that demonstrate that her driving was done in a reckless manner. Instead, the indictment alleges that Ms. Smith drove and operated a vehicle and that she failed to do certain things, such as: to maintain a single lane of travel; to keep a proper lookout; to maintain control of her vehicle; to apply the brakes in a timely manner; to take necessary and proper evasive action to avoid colliding with complainant's vehicle; and that she drove her vehicle into oncoming traffic. As alleged, none of these driving events demonstrate that Ms. Smith drove in a reckless manner. Drivers regularly do or fail to do some or all these things without being reckless. For example, one might not maintain a single lane of travel intentionally, as when passing another vehicle. Or, a driver might negligently, or even accidentally, fail to maintain a single lane. Finally, the vehicle might malfunction and cause the failure to maintain a single lane. Similar examples could be given regarding the other actions and failures alleged in this indictment. Without more certainty, the actions and failures alleged do not demonstrate that Ms. Smith drove in a reckless manner, in violation of article 21.15. *See State v. McCoy*, at 93.

The indictment should be set aside because it fails to comply with article 21.15 of the Texas Code of Criminal Procedure. Alternatively, those portions of the indictment which purport to allege actions or failures to act on Ms. Smith's part, which do not in fact allege that she acted or failed to act in a reckless manner should be stricken from the indictment, and not submitted to the jury in a way that authorizes Ms. Smith's conviction for non-criminal conduct.

II.

As pointed out in the preceding section of this motion, the indictment is based, with a single exception, on allegations that Ms. Smith *failed* to do certain things. The Texas Penal Code expressly distinguishes “acts” and “omissions. *Compare* TEX. PENAL CODE ANN. § 1.07(a)(1) *with* TEX. PENAL CODE ANN. § 1.07(a)(34). Article 21.15 of the Texas Code of Criminal Procedure requires that when an indictment charges the defendant with recklessness, it “must allege, with reasonable certainty, the *act or acts* relied upon to constitute recklessness. . . .” To the extent that it relies upon omissions, rather than acts, Ms. Smith’s indictment violates article 21.15.

The indictment should be set aside because it fails to comply with article 21.15 of the Texas Code of Criminal Procedure. Alternatively, those portions of the indictment which purport to allege omissions by Ms. Smith should be stricken from the indictment, and not submitted to the jury in a way that authorizes Ms. Smith’s conviction for non-criminal conduct.

III.

The indictment is defective because it accuses defendant of omissions, but does not also allege a law which provides that the omission in question is an offense, or that defendant has a duty to act. In Texas, “[o]mission’ means failure to act.” TEX. PENAL CODE ANN. § 1.07(a)(34). Furthermore, “[a] person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.” TEX. PENAL

CODE ANN. § 6.01(c). An indictment alleging crime by omission is “fundamentally defective for failing to include a statutory duty imposing a punishable omission.”

Billingslea v. State, 780 S.W. 2d 271, 274 (Tex. Crim. App. 1989).

The indictment should be set aside. Alternatively, those portions of the indictment which purport to allege omissions by Ms. Smith should be stricken from the indictment, and not submitted to the jury in a way that authorizes Ms. Smith’s conviction for non-criminal conduct.

IV.

The indictment relies contains words and phrases which are inherently vague, accusing Ms. Smith of “failing to keep a *proper* lookout,” and “failing to maintain *control*,” and failing to apply brakes in a “timely manner,” and “failing to take *necessary and proper* evasive action.” This vague language fails to give a person of ordinary intelligence adequate notice that her conduct is forbidden by law. A defendant is unable to prepare a defense to such charges, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law provisions of the Texas Constitution.

The indictment should be set aside. Alternatively, those portions of the indictment which contain these constitutionally vague and overbroad words and phrases should be stricken from the indictment, and not submitted to the jury in a way that authorizes Ms. Smith’s conviction for non-criminal conduct.

V.

Because of these defects:

1. The indictment 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 indictment does not state "[e]verything . . . which is necessary to be proved", in violation of TEX. CODE CRIM. PROC. ANN. Art. 21.03.
4. The indictment 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 indictment 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 she 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 indictment in the above-numbered and entitled cause.

Respectfully submitted:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205
(210) 226-1433
State Bar No. 19184200
mark@markstevenslaw.com

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Indictment has been delivered to the District Attorney's Office, Bexar County Justice Center, 300 Dolorosa, San Antonio, Texas, on this the 31st day of January, 2018.

MARK STEVENS

ORDER

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

JUDGE PRESIDING