

STATE OF TEXAS) IN THE DISTRICT COURT
VS.) 81ST/218TH JUDICIAL DISTRICT
JACK SMITH) WILSON COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Jack Smith moves that his indictment be set aside for the following reasons:

I.

The indictment is defective because it does not allege with reasonable certainty the act relied upon by the state to show that defendant acted recklessly. *Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see* TEX. CODE. CRIM. PROC. ANN. art. 21.15. Specifically, it alleges that Mr. Smith was reckless as to whether the building in question was occupied, but it does not say how this was a reckless act. The “to-wit” clause in the indictment alleges that “a deputy had his back to Defendant when Defendant discharged the firearm,” but whether the deputy was facing Mr. Smith or had his back to him provides no information at all about Mr. Smith’s state of mind, or whether he was “aware of but consciously disregard[ed] a substantial and unjustifiable risk that the” building was occupied.

II.

The indictment does not state whether Mr. Smith was inside or outside the building

when he allegedly discharged a weapon at or in its direction. This is important because one cannot fire at or in the direction of a building if one is inside the building when the shot is fired. *Reed v. State*, 214 S.W. 3d 626, 628 (Tex. App.—Waco 2006, pet. granted). This indictment should be set aside because “it does not appear therefrom that an offense against the law was committed by the defendant.” TEX. CODE CRIM. PROC. ANN. art. 27.08(1). *See also* TEX. CODE CRIM. PROC. ANN. Art. 21.01.

III.

The indictment is defective because it fails to name the building or allege its “general locality in the county, and the name of the owner, occupant or claimaint thereof” of the building that was the alleged object of the offense, in violation of article 21.09 of the Texas Code of Criminal Procedure. *See Lane v. State*, 621 S.W. 2d 172, 173 (Tex. Crim. App. 1981)(arson indictment defective under article 21.09); *cf. Franks v. State*, 688 S.W. 2d 502, 503 (Tex. Crim. App. 1985)(article 21.09 “applies to real estate alleged qua object of the offense, but not to real estate alleged only qua situs of the offense”).

IV.

The indictment alleges that Mr. Smith discharged a firearm “at or in the direction of a building.” These are two different things. Mr. Smith is entitled to know from the face of the indictment what the state says he did in this case, and he does not, and cannot know, when the state uses this sort of disjunctive language. The indictment must be set aside because it does not give Mr. Smith fair notice of what he is charged with, so that he

can defend himself, and so that he can plead any judgment in this case in bar of a subsequent prosecution.

V.

The disjunctive allegation -- that Mr. Smith discharged a firearm "at or in the direction of a building" -- purports to allege at least two separate offenses in a single paragraph, in violation of article 21.24(b) of the Texas Code of Criminal Procedure.

VI.

The indictment mentions "a deputy" and claims that he "had his back to Defendant when Defendant discharged the firearm." Who was the deputy? Was more than one deputy present at the time of the alleged offense? Mr. Smith is entitled to know the name of the "deputy." Obviously, the state will have to prove this person's name at the time of trial. *See* TEX. CODE CRIM. PROC. ANN. Art. 21.03 (indictment must state "[e]verything . . . which is necessary to be proved"). Additionally, absent this information, 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 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. Finally, because it

does not name the deputy, 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.

VII.

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 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 indictment 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 Indictment was mailed to the District Attorney's Office; 1327 3rd Street; Floresville, Texas 78114 on this the 21st 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 Indictment, and said Motion is hereby

(GRANTED) (DENIED).

JUDGE PRESIDING