2018-CR-0000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	399TH JUDICIAL DISTRICT
JOE SMITH	)	BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Joe Smith moves that the indictment filed in this case be set aside for the reasons set forth below:

I.

The State of Texas charges that Mr. Smith caused his vehicle to collide with another, thereby recklessly causing the death of the complainant by engaging in a series of acts and omissions that are joined disjunctively in the indictment, namely:

1. by failing to keep a proper lookout,

2. **and/or** by looking at a cell phone and not the roadway while driving or operating a motor vehicle,

3. **and/or** by texting while driving a motor vehicle,

4. **and/or** operating a motor vehicle while both unable to hear one's surroundings and to see the roadway,

5. **and/or** by driving and operating a motor vehicle at a speed that was not reasonable and prudent under the circumstances then existing,

6. **and/or** by following another vehicle too closely under the circumstances then existing,

7. **and/or** by failing to apply the brakes in a timely and reasonable manner,

8. **and/or** failing to take proper and necessary evasive action to avoid colliding with another motor vehicle in which Mary Brown was a passenger,

9. **and/or** any combination of the above alleged acts.

II.

To be sure, it is not *always* impermissible for the state to plead in the disjunctive. *E.g.*, *Hunter v. State*, 576 S.W.2d 395, 399 (Tex. Crim. App. 1979)(state may properly allege that defendant intentionally *or* knowingly assaulted another). *Hunter* goes on to make this telling observation. "*This is not to say, however, that there may be some instances in which a particular disjunctive pleading would be so vague, uncertain, and indefinite, as to give no notice of the offense charged*." *Id* (emphasis supplied).

And that is precisely the problem with Mr. Smith's indictment. How many of the multiple, entirely separate "and/or" means alleged in the indictment will the state rely on in its effort to prove that Mr. Smith acted recklessly? How many of these means will have to be proven to establish recklessness? Will the state argue to the jury that it can convict Mr. Smith if it finds any one of the disjunctively alleged theories to be true beyond a reasonable doubt? For example, will the state urge the jury that Mr. Smith acted recklessly if it believes, beyond a reasonable doubt, simply that he texted while driving, which is something countless drivers do regularly on every roadway across the nation? Or – as is necessarily done any time someone texts while driving – that he looked at his cell phone and not at the roadway for some unspecified period of time? Or the

"subjective determinations" that he drove at a speed not reasonable under then existing conditions, or followed too closely?[1] Or that he did any of the other acts or omissions alleged in the indictment, not a single one of which, by themselves, are inherently reckless? It is clear that more proof than this would be required to show that Mr. Smith was reckless. Specifically, to convict a person of being reckless, the jury must believe beyond a reasonable doubt that he was "aware of but consciously disregard[ed] a substantial and unjustifiable risk that" death would result, and that this risk was "of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from" Mr. Smith's standpoint. *See* TEX. PENAL CODE, § 6.03(c). But given the vague, uncertain, and indefinite disjunctive allegations in this indictment, what would prevent the state from arguing – and the jury from finding – that Paul Smith was guilty, even though none of the disjunctively alleged acts, by themselves, meet the legal definition of recklessness? Nothing, we submit. And nothing in this vague, uncertain, and indefinite indictment gives us notice of how many of the means, or which combination of those means, the state will rely on at trial.

Two cases from the Texas Court of Criminal Appeals are key. The information in *Smith v. State*, alleged that defendant had committed indecent exposure and was reckless

---

[1] *See Castro v. State*, 227 S.W.3d 737, 742 (Tex. Crim. App. 2007)(speeding is an example of a driving behavior, like following too closely, that can be an example of a "subjective determination[]," in contrast to failure to signal a lane change, which is not).

about whether another was present, to wit: "the defendant exposed his penis and masturbated." The Court of Criminal Appeals held that the information should have been quashed under article 21.15 "because there is nothing *inherently reckless* about either exposing oneself or masturbating." 309 S.W.3d 10, 12 (Tex. Crim. App. 2010)(emphasis supplied); *see also Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988).

Similarly, an information alleging the reckless discharge of a firearm within a city, "by pulling the trigger on a firearm which contained ammunition and was operable" was properly quashed under article 21.15 because "the State must allege something about the setting or circumstances of discharging a firearm within city limits that demonstrates disregard of a known and unjustifiable risk." *State v. Rodriguez*, 339 S.W.3d 680, 681 (Tex. Crim. App. 2011). The Court elaborated on this requirement:

> For example, the State might allege "by shooting into the ground in a crowd of people," or "by shooting a gun in the air in a residential district," or "by shooting at beer bottles in his backyard in a residential district," or "by shooting a gun on the grounds of an elementary school," or "by shooting at a stop sign in a business district," or "by shooting into the bushes at a city park. *These are the sorts of actions that might entail a known and unjustifiable risk of harm or injury to others, risks that the ordinary person in the defendant's shoes probably would not take*."

Id. at 683-84(emphasis supplied).

And so it is with the indictment in our case. There is nothing "inherently reckless" about any one of the acts or omissions it alleges. Nor are any of these acts and omissions "the sorts of actions that might entail a known and unjustifiable risk of harm or injury to others, risks that the ordinary person in the defendant's shoes probably would not take."

The vague, subjective, and conclusory language in Mr. Smith's indictment fails to give a person of ordinary intelligence adequate notice that his conduct is forbidden by law. A defendant is unable to prepare a defense to such charges, in violation of articles 21.02.7, 21.04, 21.11, of the Texas Code of Criminal Procedure, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Due Course of Law provisions of the Texas Constitution. And it fails to allege recklessness with the "reasonable certainty" expressly mandated by article 21.15 of the Texas Code of Criminal Procedure. This defective indictment must be set aside.

III.

Additionally, the disjunctive manner in which the state has pleaded these offenses will certainly make it at least difficult – and more likely impossible – to instruct the jury in such a way as to insure that its verdicts are unanimous. If the jury is charged in conformance with the indictment, and it returns a guilty verdict, which of the disjunctively alleged means did it rely on? How would this Court, or any appellate court, know? This failure to insure unanimity will violate Article V, § 13 of the Texas Constitution and article 36.29(a) of the Texas Code of Criminal Procedure. Proceeding in this manner will also violate Mr. Smith's rights to Due Process of Law and Due Course of Law, guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, §§ 13 and 19 of the Texas Constitution, respectively.

IV.

The indictment contains words and phrases which are inherently vague, accusing Mr. Smith of driving and operating "." How long was he "looking" at a cell phone? How was he "unable . . . to see the roadway"? What speed did he travel at? What was the posted speed limit? What were the "circumstances then existing" and why was the speed (whatever it was), "not reasonable and prudent" under those circumstances, (whatever they were)? What is meant by the subjective determination, "following too closely?[2] This vague and conclusory language fails to give a person of ordinary intelligence adequate notice that his conduct is forbidden by law, and no defendant would be able to prepare a defense to such charges, in violation of articles 21.02.7, 21.04, 21.11, and 21.15 of the Texas Code of Criminal Procedure, 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 must be set aside.

V.

The indictment alleges that Mr. Smith failed to (1) "keep a proper lookout," (2) "apply the brakes in a timely and reasonable manner," (3) and "take proper and necessary evasive action to avoid colliding with another motor vehicle." The problem is that the indictment accuses Mr. Smith of omissions, but does not also allege a statute which provides that the omission is an offense, or that Mr. Smith had a duty to act. In Texas

---

[2] *See* note 1.

"`[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 § 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).

VI.

As demonstrated in section I, above, Counts I, IIA, and IIB of the indictment each themselves charge more than one offense, in violation of article 21.24 of the Texas Code of Criminal Procedure.

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:

MARK STEVENS
310 S. St. Mary's Street
Tower Life Building, Suite 1920
San Antonio, TX 78205-3192
(210) 226-1433
State Bar No. 19184200
mark@markstevenslaw.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of defendant's Motion To Set Aside The Indictment has been delivered to the Bexar County District Attorney's Office, 101 W. Nueva St., San Antonio, Texas, on this the 19th day November, 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