

NO. 000000

STATE OF TEXAS) IN THE COUNTY COURT
VS.) AT LAW NUMBER SIX
MICHAEL SMITH) BEXAR COUNTY, TEXAS

DEFENDANT'S MOTION TO SET ASIDE THE INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

Michael 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:

1. It fails to allege the manner and means by which defendant purportedly made alcohol available to a minor. *E.g.*, *Castillo v. State*, 689 S.W. 2d 443, 449 (Tex. Crim. App. 1984); *Smith v. State*, 658 S.W. 2d 172, 173 (Tex. Crim. App. 1983); *Miller v. State*, 647 S.W. 2d 266, 267 (Tex. Crim. App. 1983); *Jeffers v. State*, 646 S.W. 2d 185, 188 (Tex. Crim. App. 1981); *Ellis v. State*, 613 S.W. 2d 741, 742 (Tex. Crim. App. 1981); *Cruise v. State*, 587 S.W. 2d 403, 405 (Tex. Crim. App. 1979); *Haecker v. State*, 571 S.W. 2d 920, 922 (Tex. Crim. App. 1978).
2. It fails to allege an essential element of the offense, namely that defendant made alcohol available to a minor, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, Article I, §§ 10, 13 and 19 of the Texas Constitution, and articles 21.01, 21.01(7), 21.03, 21.04, and 21.11 of the Texas Code of Criminal Procedure.

3. It does not "allege, with reasonable certainty, the act or acts relied upon to constitute negligence," in violation of article 21.15 of the Texas Code of Criminal Procedure. The Texas Penal Code expressly distinguishes "acts" and "omissions." *See* Tex. Penal Code Ann. § 6.01(a); *compare* Tex. Penal Code Ann. § 1.07(a)(1) *with* Tex. Penal Code Ann. § 1.07(a)(34). This information alleges that defendant was negligent in failing to require the production of a valid proof of age, that is, that he was negligent, not in his actions, but in his omissions. Reliance upon omissions to establish negligence violates article 21.15 of the Texas Code of Criminal Procedure, and requires that the information be set aside.
4. It does not allege with reasonable certainty the act relied upon by the state to show that defendant acted negligently. *See Gengnagel v. State*, 748 S.W.2d 227, 230 (Tex. Crim. App. 1988); *see also* Tex. Code Crim. Proc. Ann. art. 21.15.
5. In Texas, "[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). This information does not identify any law that provides that the omission charged here is an offense, or any law that provides that defendant had any duty to perform the act. An charging instrument 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).
6. It is legally and factually impossible to "negligently" make something available to another person.

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 21st day of September, 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