

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.

This information is defective because:

1. It fails to allege the manner and means by which defendant purportedly escaped from custody. *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. The information is defective because the allegation that defendant did "escape" is vague and overbroad. Nor does the information allege which statutory definition of "escape" the state will rely on. "Escape" is defined in at least three different ways under Texas law. See Tex. Penal Code Ann. § 38.01(2). Accordingly, the information should specify which definition the state intends to rely upon. See *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981).

3. The information is defective because the allegation that defendant did escape from "custody" is vague and overbroad. Nor does the information allege which statutory definition of "custody" the state will rely on. "Custody" is defined in multiple ways under Texas law. *See* Tex. Penal Code Ann. § 38.01(1). Accordingly, the information should specify which definition the state intends to rely upon. *See Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981).
4. The information alleges that defendant escaped from custody "after being charged with an offense, namely Minor in Possession of Alcohol." There is no such offense in Texas. Instead, Texas law provides, among other things, that a person commits an offense if he escapes from custody "when he is . . . charged with . . . an offense." By purporting to charge this offense the way it did, the state has omitted an essential element of the offense, thereby failing to give defendant proper notice so that he can defend himself, 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.
5. The information alleges in a wholly conclusory way that defendant escaped "after being charged with an offense, namely Minor in Possession of Alcohol." There are many ways a person can be "charged with an offense" under Texas law. This information is defective for not giving defendant notice of how he was "charged with" the offense of Minor in Possession of Alcohol at the time he allegedly escaped from custody, 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.

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

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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