NO. 505452

IN THE

COUNTY COURT AT LAW NO. 1

OF AUSTIN, TRAVIS COUNTY, TEXAS

STEVEN LEE DRAKE,

Appellant

v.

THE STATE OF TEXAS

Appellee.

ON APPEAL FROM MUNICIPAL COURT

OF AUSTIN, TRAVIS COUNTY, TEXAS

CAUSE No. 3425508

JUDGE JOHN VASQUEZ

APPELLANT'S REPLY TO BRIEF FOR APPELLEE

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TO THE HONORABLE JUDGE OF THE COUNTY COURT AT LAW NO. 1, TRAVIS COUNTY, TEXAS:

Comes now, Steven Lee Drake, hereinafter referred to as Appellant, and submits this brief pursuant to the provisions of the Texas Rules of Appellate Procedure in reply to Appellee, City of Austin's brief..

SUMMARY OF ARGUMENT

POINT OF ERROR NUMBER ONE: This point of error was raised by pre-trial motions to quash which the trial court denied at a hearing the day before trial. The motions to quash dealt with constitutional attacks on the statute under which Appellant was charged in the charging instrument. Appellant's timely motions and the judge's denial of said motions at a hearing the day before trial preserved error for appeal. A motion for new trial asks for a new trial because of error which occurred at trial whereas a motion to quash which attacks the charging instrument does not require a trial since it can be decided by the court before trial. Thus the law does not require error in the charging instrument which was preserved by a motion to quash which was denied at hearing before the day of trial to be alleged in a motion for new trial in order to preserve such error for appeal.

"The Texas Constitutional provisions guaranteeing freedom of expression are coextensive with the federal guarantees and the same analysis and principals of construction are applied in interpreting them. Gibbons v. State, 775 S.W.2d 790, 793-794 (Tex. App.--Dallas 1989, pet. ref'd). Appellant did not err in failing to repeat an identical argument.

In the instant case, Appellant's arguments are sufficiently clear for this Court to address even though he included vagueness and overbreadth arguments in separate sections of the same point of error.

Appellant's Original Brief negates Appellee's arguments based on Members of City Council v. Taxpayers for Vincent.

POINT OF ERROR NUMBER TWO: Appellant points out that Judge Vasquez did not ask whether there were any motions from State or Appellant immediately prior to allowing the State to begin its voir dire examination.

POINT OF ERROR NUMBER THREE: Appellant objected to the application paragraph at trial. The misleading character of the application paragraph was fully argued at trial. The judge overruled Appellant's objection. Therefore, the judge and the State were completely aware of Appellant's asserted misleading character of the application paragraph.

ARGUMENT

I. APPELLANT'S RESPONSE TO STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR NUMBER ONE

For all the reasons in Appellant's original brief, and the additional reasons given below, Appellant's Point of Error Number One should be sustained.

A. Point of Error Number One did not need to be in Appellant's Motion for New Trial to preserve error.

As a prerequisite to presenting a complaint for appellate review, the record must show that (1) the complaint was made to the trial court by a timely request, objection, or motion that: (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and (B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and (2) the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule on the request, objection, or

motion, and the complaining party objected to the refusal. TEX. R. APP. P. 33.1(a)(1)(A), (B), (2)(A),(B).

If the defendant does not object to a defect, error, or irregularity of form or substance in an indictment or information before the date on which the trial on the merits commences, he waives and forfeits the right to object to the defect, error, or irregularity and he may not raise the objection on appeal or in any other postconviction proceeding. Nothing in this article prohibits a trial court from requiring that an objection to an indictment or information be made at an earlier time in compliance with Article 28.01 of this code. TEX. CODE CRIM. PROC. art. 1.14(b). Article 1.14 of the TEX. CODE CRIM. PROC. does not apply to complaints in municipal court. Huynh v. State, 901 S.W.2d 480, 481 (Tex. Crim. App. 1995). Huynh dealt with a defective complaint. Id.

A denial by the trial judge of a motion to quash based upon a defect in the charging instrument preserves error for appeal according to the law, as pointed out above. This is logical. The attack in such a motion is upon the charging instrument, not on errors committed at trial. Grounds for a motion for new trial depend upon error committed at trial. See TEX. R. APP. P. 21.3. The Motions to Quash in this case were denied by Judge Vasquez the day before the trial. Appellant therefore needs no new trial based on his Motions to Quash, and it was unnecessary for him to include his attacks on the charging instrument in the Motion for New Trial. Judge Vasquez made his decision without trial. Appellant asks for a New Trial based upon his Points of Error Numbers 2, 3, and 4 which dealt with errors at trial.

Defects in a charging instrument which may be attacked in a Motion to Quash include defects of substance in the charging instrument (of which there are several that may be attacked), defects of form in the charging instrument (there are several which may be attacked), irregularities with respect to the grand jury,

information not based on proper complaint, discriminatory enforcement, and unconstitutionality of statute. 2 B. Helft & J. Schmolesky, TEXAS CRIMINAL PRACTICE GUIDE § 41.07[2] at 41-36.18 through 41-39 (1998).

As pointed out on page 20 of Appellant's Brief, Appellant raised the constitutional attacks on the complaint in Appellant's Point of Error Number I in his Motions to Quash Numbers 3 and 4 in Trial Court. A pre-trial hearing was held on March 11, 1998 on those Motions. (CR 00093-00098; RR 00160-1-12). Appellant's Motions to Quash the Complaints No. 3 and No. 4 were denied by Judge Vasquez on that date (CR: 00095 and 00098; RR: 00160-1-12). Trial was on March 12, 1998.

B. Not a multifarious point of error:

Nothing in Appelle's Brief supports the state's contention. Appellee incorrectly asserts that Martinets v. State, 884 S.W.2d 185, 189 (Tex. App.--Austin 1994) and Thomas v. State, 723 S.W.2d 696 697 (Tex. Crim. App. 1986) both say that "Normally, when multiple legal theories are presented in a single point of error, it is multifarious and presents nothing for review." Neither case says that.

Martinets does say, "If sufficient distinction between state and federal constitutional grounds of review is not provided, courts may overrule the ground as multifarious." 884 S.W.2d at 188-189. Appellant pointed out in his brief on page 8, "The Texas Constitutional provisions guaranteeing freedom of expression are coextensive with the federal guarantees and the same analysis and principals of construction are applied in interpreting them. Gibbons v. State, 775 S.W.2d 790, 793-794 (Tex. App.--Dallas 1989, pet. ref'd).

Thomas does say,

> "While [appellant's] arguments all involve state law, they present at least three different legal theories in a single ground of review. In the instant case, appellant's arguments are sufficiently clear for this Court to address. However, by combining more than one legal theory in a single ground, an appellant risks rejection on the ground that nothing is presented for review."

723 S.W.2d 696, 697 fn2. Appellant in this case clearly separated his overbreadth and vagueness arguments. The facial and as applied overbreadth arguments need not be separated. The overbreadth argument addresses whether the statute can be used to suppress constitutionally protected activity. All that "as applied" means is that the activity of Appellant in this case is constitutionally protected activity. These two issues go hand in hand. The vagueness argument, although in the same point of error, was clearly separated from the overbreadth arguments. Appellant contends that the arguments are more than sufficiently clear for the court to address.

C. Members of City Council v. Taxpayers for Vincent.

Appellant's brief negates Appellee's arguments under this point. Of special note, Appellant points out that Appellee is incorrect in asserting that the Austin Sign Ordinance is content neutral. As the United States Supreme Court pointed out in Members of City Council, had the ordinance excepted political signs and other signs (the ordinance there applied to all signs) and not other types of signs with assertions such as "Jesus Saves," that "Abortion is Murder," and others might create a risk of engaging in constitutionally forbidden content discrimination. 466 U.S. 789, 815, 104 S.Ct. 2118, 2134 (1984); see Appellant's Brief at 26-27. Under the Equal Protection Clause of the Fourteenth Amendment, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. Police

Department of City of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972); Appellant's Brief at 27. The Austin Sign Ordinance is not content neutral as explained on pages 25-28 of Appellant's Brief.

Appellant points out in his brief on pages 32-33 some important distinctions between the ordinance in Members of City Council and the Austin Sign Ordinance.

II. APPELLANT'S RESPONSE TO STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR NUMBER TWO REGARDING APPELLANT'S REQUEST FOR A JURY SHUFFLE.

The facts from the record are correctly stated in Appellant's Brief and, according to statute and caselaw cited, are grounds for a new trial.

The state incorrectly says in its brief:

> However, when the jury panel was seated in the courtroom, and prior to recognizing the State to begin its voir dire examination, the Court inquired as to whether there were any motions from either party. Both the State and Appellant indicated that there were none.

Appellee's Brief, page 13. The Court never inquired as to whether there were any motions from either party. Therefore, neither the State nor Appellant indicated there were none. That is why the State could not give a cite to the above quote.

III. APPELLANT'S RESPONSE TO STATE'S RESPONSE TO APPELLANT'S POINT OF ERROR NUMBER THREE REGARDING THE APPLICATION PARAGRAPH.

For all the reasons stated in Appellant's Brief supplemented by the argument below, the case should be remanded for a new trial because of the reasons stated in Appellant's Point of Error Number III.

As indicated in Appellant's Point of Error Number III, both the Trial Court and the State were fully aware of Appellant's reason's for the misleading character of the application paragraph. The objection was argued at trial and Appellant submitted a written requested application paragraph to the court. See Appellant's Brief at pages 43-46. The court denied said request. Id.

Appellee, in his brief, states:

> "Generally, the application paragraph should track the charging instrument. To do otherwise, risks prejudicial error, because it would authorize the jury to convict on a theory not alleged in the charging instrument."

Appellee's Brief at page 16. Appellee cites no authority for such a statement.

Mere inclusion in the abstract portion of the charge of the text of a statute under which a defendant is being tried without applying the law to the facts in the application paragraph requires reversal. Gonzales v. State, 800 S.W.2d 621 (Tex. App.--Dallas 1990)(Court which gave general instruction in the abstract section of the charge on the law under which defendant was being tried erred in not applying that law to the facts of the case); Jones v. State, 815 S.W.2d 667 (Tex. Crim. App. 1991); Williams v. State, 547 S.W.2d 18 (Tex. Crim. App. 1977)(The court stated, "The prosecutor as advocate for the State's position may emphasize some elements in his argument and defense counsel as advocate for the accused may emphasize others in his argument, but the court is the only neutral source to which the jury may look for an unbiased application of the law to the facts of the case. An abstract charge does not inform the jury of what facts, if found by it, would constitute proof of the elements of the offense.")

PRAYER FOR RELIEF

Appellant respectfully that the Court grant the following relief to him:

A. Reverse the Trial Court's Judgment and Render judgment holding Chapter 13 of the Austin Land Development Code (the Sign Ordinance) of the City of Austin unconstitutional under the United States and Texas Constitutions and the laws of Texas and Order that the Complaint be dismissed on the ground of such unconstitutionality and unlawfulness (Point of Error No. I);

B. If the Court does not grant the relief requested in Paragraph A, Reverse the Trial Court's Judgment and Render judgment acquitting the Appellant of the charge on the ground that the Sign Ordinance of the City of Austin is unconstitutional and unlawful under the United States and Texas Constitutions and Texas law as applied to the facts of the case, or that the Sign Ordinance does not apply to the complained of conduct of Appellant (Points of Error No. I);

C. If the Court does not grant the relief requested in the above paragraphs, Reverse the Trial Court's Judgment and Remand the cause for a new trial (Points of Error No. II, III, and IV);

D. Grant to appellant such other, and further, relief to which he is entitled justly or which the Court believes to be necessary or appropriate in the interests of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day I served a true copy of the foregoing Brief on the State of Texas in the within cause by delivering the same to the offices of the City of Austin, Texas at 700 East 7th Street, Austin, Texas 78701.

Date:

Jerald C. Finney