NO. 505,452

STEVEN LEE DRAKE	§	IN THE COUNTY COURT
V.	§	AT LAW NO. ONE
THE STATE OF TEXAS	§	TRAVIS COUNTY, TEXAS

OPINION AND JUDGMENT

Steven Lee Drake appeals his conviction for the offense of installing a sign on a public right of way contrary to §13-2-864 of the Code of the City of Austin. A jury convicted Appellant and fined him $500.00 on the basis of evidence that showed without doubt (all witnesses, including Appellant were in agreement on this issue) that Appellant stuck some white wooden crosses in the ground next to the roadway on the frontage road of South Interstate 35 in Austin, Travis County, Texas

Appellant complains on appeal that the ordinance is vague, that he was denied a shuffle of the jury, that the jury charge was erroneous and that the prosecutor was guilty of misconduct before the jury. The court need not reach any of the complaints which were so extensively briefed in this appeal. The Appellant is just clearly not guilty of committing the offense with which he was charged. He may well have committed an offense, but not this one.

The ordinance that the Appellant was accused of violating states:

> No person shall, either directly or indirectly, cause or authorize a sign to be installed, used, or maintained on any utility pole, traffic signal pole, traffic signal controller box, tree, public bench, street light, or any other structure located on or over any public property or public right-of-way, located within the city's planning jurisdiction, except as authorized by this article.

One may parse that long stretch of prepositional phrases at great length, but it will still require the offending sign to be placed on some sort of structure located in or over the right of way before an offense is committed. This ordinance is aimed at those who plaster our thoroughfares with flyers and signs glued and stapled to poles and boxes for the purpose of offering the latest weight loss fad or advertising a band at a nightspot. It also covers "Lost Dog" and "Garage Sale" postings

would, no doubt, reach the actions of the Appellant herein if he had only been so bold as to affix his crosses[1] to a street light. He did not. He simply stuck his crosses in the ground and stood beside them. He cannot, therefore, be said to have "cause[d] . . . a sign to be installed . . . on any . . . structure located on or over any public right-of-way." He is therefore not guilty of the offense charged.

Appellant may have violated Chapter 393 of the Transportation Code of the State of Texas. Depending upon the status of the roadway[2], Appellant may have violated either § 393.002 or § 393.0025 of the Transportation Code. Unlike the City ordinance, State law says simply: "A person may not place a sign on the right-of-way of a public road . . .". There is herein no requirement that the actor place the sign on a pre-existing structure or erect a structure of his own upon which to place the sign, merely sticking the base of the sign in the ground (or leaning it up against a rock for support) is enough to be a violation.

As has been shown by the lawyers in this case, a lot of briefing can be done on the issue of the constitutionality and the vagueness of this ordinance. In light of the disposition made of the case, this Court will let all that pass without comment, with one exception. The Appellant complains of the application paragraph of the jury charge in this case. That complaint is well founded. Had the jury been instructed in clear language what was necessary to be proved before the defendant could be convicted, the jury may well have acquitted as was proper under this evidence. Instead what the jury got was:

> . . . if you believe from the evidence beyond a reasonable doubt that the Defendant, STEVEN L DRAKE, on or about the 17th day of February, 1996, within Austin,Travis County, Texas, did then and there directly or indirectly cause or authorize a sign to be installed, used or maintained on a public right of way, located within the City's Planning Jurisdiction, contrary to sections 13-2-864 and 13-1-70 of the Code of the City of Austin, 1992, as amended, then you will find the defendant "Guilty" of the offense charged and so say by your

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[1]This assumes *ad arguendo* that the crosses constitute a "sign" according to §13-2-850 of the Austin City Code--an assumption that was hotly contested in pretrial hearings and at trial.

[2]The record does not show whether the right of way lies next to a road or highway maintained by the City of Austin or not. It is the access road to an Interstate Highway, but maintainence authority is not otherwise mentioned.

verdict.

What is missing from this paragraph which applies the law to the facts of the case, and what is missing from the entire charge is any explanation of the contents of "sections 13-2-864 and 13-1-70". It is true that the trial court properly took judicial notice of the Code. Statement of Facts, pages 109-114. At that time the Judge told the jury that he would prepare them instructions about all the material he had just judicially noticed. It is true that the charge contains most of the provisions of § 13-2-864. But nowhere is the Jury told: "This is what 13-2-864 says" or "13-2-864 provides that . . .". This leaves the jury to speculate and to guess whether the defendant violated the applicable law[3]. Counsel for the Defendant brought this to the trial court's attention as required to preserve the right to complain of the error on appeal. Statement of Facts page 149. No jury should be left in that position. Here, the jury just guessed wrong. In future, if one refers to the applicable provisions of the City Code by section number, one should tell the jury someplace in the charge what exactly that provision of the City Code says.

It is therefore ORDERED, ADJUDGED AND DECREED that the judgment of the Austin Municipal Court is reversed and this cause is remanded to the trial court for entry of a judgment of acquittal this 3rd day of November, 1998.

J. David Phillips
Presiding Judge

[3]It is interesting that the abstract portion of the charge defines the offense more nearly correctly than the application portion. There, the court says that "no person shall, either directly or indirectly, cause or authorize a sign to be installed, used, or maintained on any utility pole, traffic signal pole, traffic signal controller box, tree, public bench, street light, or any other structure located on or over any public property or public right-of-way . . ." Emphasis added. Record, page 103. However, but the time we arrive at the application of that law to the actions of this defendant, the jury is told to convict if he caused a sign to be "installed, used or maintained on a public right of way . . .". Emphasis added. Record, page 105. This difference is crucial and likely caused an incorrect verdict.

IN THE COUNTY COURT AT LAW NO. ONE

OF TRAVIS COUNTY, TEXAS

JUDGMENT RENDERED NOVEMBER 3RD, 1998

NUMBER 505,452

STEVEN LEE DRAKE VS. THE STATE OF TEXAS
APPEAL FROM THE CITY OF AUSTIN MUNICIPAL COURT
BEFORE J. DAVID PHILLIPS
REVERSED

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was error in the judgment: IT IS ORDERED, ADJUDGED AND DECREED by the Court that the judgment be reversed and the cause remanded for further proceedings in accordance with the opinion of this Court; and that this decision be certified below for observance.