IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

GARY HAWKINS, Appellant

NO. 83-MCA-75

STATE OF TEXAS, Appellee

Appeal from El Paso Municipal Court

O P I N I O N

This appeal arises out of a conviction for speeding violation under the City Ordinances of El Paso, Texas, and was perfected and is decided under the provisions of Art. 1200ee-1 V.A.T.S.

A threshold issue is presented to this Court in this case because appalant's brief and oral argument are not the same assignments of error contained in his Motion for New Trial filed with the Trial Court as a jurisdictional prerequisite to this appeal. Section 14 of Art. 1200ee-1 in addressing the requirements of a Motion for New Trial states:

"The Motion shall set forth the points of error complained of by the Defendant." (Emphasis added)

Although a Motion for a new trial is no longer required under Art. 1200ee-2, V.A.T.S., the Motion for New Trial under its predecessor, required that the assignments of error relied upon by the Defendant be set forth, and this Court holds that the Appellant is bound by and can rely only on the assignments of error set forth in his Motion for New Trial except those that constitutes fundamental error. None of Appellant's assignments of error outside of the points raised in Motion for New Trial constitute fundamental error, and therefore, nothing is presented for review.

The assignments of error have been determined to be without merit, and same are overruled.

Although not considered by this Court for the reasons stated above, Appellant raised the constitutionality of the City Attorney representing the City in this prosecution citing Favela v. State, 651 SW2d, 936, (Tex. Civ. App. - El Paso - 1983, writ for discretionary review pending). Since this case arises under city ordinance, and not state statutes, that issue is not involved in this case, and therefore has no merit. Further, this Court has recently held that the City Attorney is not precluded from prosecuting state statutes in the city courts, and as long as the County Attorney is not excluded, which he is not, from prosecuting in these courts, there is no constitutional question involved.

Next, Appellant argues, evidently for the benefit of others, that the failure to have a court reporter available at all times to record the testimony, or requiring a Defendant to ask for a record are unconstitutional restrictions on the right to appeal. Appellant admits in oral argument that he knowingly and intelligently waived a record because his assignments of error were legal questions and not factual questions, and therefore has no standing to raise the issue in this case. Therefore, the Court reserves this question until properly presented to it.

Lastly, Appellant raises an issue that has caused concern to the County Courts at Law and to this Court under Article 1200ee-1, V.A.T.C.S, relating to the authority of an Appellate Court to take judicial notice of a city ordinance. See Solis v. State, No. 80-21423-2 (decided by County Court at Law No. 2, and presently pending with El Paso Court of Appeals 8th Supreme Judicial District. Appellant cites the Court to Lange v. State, Number 61, 998, an opinion by the Court of Appeals of Dallas County, which this Court finds persuasive. The Lange case holds that a Municipal Court has the authority to take judicial notice of a city ordinance.

See Solis v. State, No. 80-21423-2, (decided by County Court at Law No. 2, and presently pending with El Paso Court of Appeals 8th Supreme Judicial District.) Appellant cites the Court to Lange v. State, Number 61, 998, an opinion by the Court of Appeals of Dallas County, which this Court finds persuasive. The Lange case holds that a Municipal Court has the authority to take judicial notice of a city ordinance, and when it does so, such constitutes evidence of the ordinance, and no additional proof is necessary. However, when the case is appealed, the Municipal Court should forward or otherwise indicate that judicial notice was taken of a city ordinance, and forward the text of that ordinance to the Appellate Court. Although, such was not done in this case, this Court holds that such failure was waived by not including it in Appellant's Motion for New Trial, and that such does not constitute fundamental error.

It would appear that the passage of Article 1200ee-2, V.A.T.C.S., has resolved this particular problem, by authorizing both the Municipal Trial Court and the Municipal Court of Appeals to take judicial notice of the appropriate City Ordinance involved, and therefore, since September 1, 1983, the Appellate Court itself can take judicial notice of the City Ordinance involved in any particular prosecution, and will do so when the Trial Court's record is silent as to such matters. However, the Municipal Trial Courts are encouraged, and to the extent possible, directed to take judicial notice of city ordinances, and to include a copy of the text of such ordinances in the record on appeal.

For the reasons stated, the judgment of the trial court in this is affirmed.

Dated this 16 day of Dec, 1983.

JUDGE

JUDGMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, because it is the opinion of this Court that there was no error in the Judgment, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things affirmed, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

Dated this 16 day of Dec, 1983

JUDGE