IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

EUGENE MARQUEZ, Appellant

vs. NO. 84-MCA-1192

STATE OF TEXAS, Appellee

O P I N I O N

Appellant appeals his conviction in Municipal Court for the offense of disorderly conduct under Texas Penal Code, Article 42.01(a)(12). The complaint charges that the Appellant exposed his genitals in a public place and was reckless about whether another may be present who would be offended or alarmed by his act.

Appellant was represented by an attorney at the Trial Court level, but who withdrew prior to oral argument with the consent of the Appellant. Appellant's attorney filed an able brief attacking the conviction based on the insufficiency of the evidence, relating to whether the Defendant exposed his genitals as defined under the penal code since the record reflects that the complaining witness only testified that he exposed his private parts. Although, perhaps this Court is not required to consider the contents of such brief because of the fact that Appellant's attorney has been permitted to withdraw, and also in a pro se brief, Appellant expressly withdraws reliance on such point because it constitutes a technicality upon which Appellant does not wish to rely, this Court will do so.

The Penal Code, in defining sexual type offenses, has narrowed the definition applicable to these type of exposure offenses. (Article 21.08, Texas Penal Code.) For instance, the buttocks or female breast are not included within the narrower terminology of that section. Therefore, this Court must determine whether the record which reflects that the

Appellant allegedly exposed his private parts is sufficiently descriptive to support a conviction for exposure of his genitals as defined under Article 42.01(a)(12).

Although the prosecution should be cautioned that more descriptive terminology concerning the facts surrounding such an offense would be appropriate, this Court holds that the term "private parts" is synonymous with the term "genitals" within the meaning of this particular offense. The term "private parts" has a commonly understood meaning within this community, and is defined in Webster's Dictionary as being the "external genital . . . organs". Additionally, the record reflects that the complaining witness not only observed the exposure of Appellant's private parts, but that he was masturbating at the time, which corroborates the description of what she observed and supports the Trial Court's finding in such regard. Appellant's point of error relating thereto is overruled.

Appellant, in a pro se brief, after his attorney was permitted to withdraw, challenges his conviction on the basis that he was not provided effective assistance of counsel for not challenging certain evidence introduced, argument of the City Attorney, and calling additional witnesses in support of his defense of alibi.

The "reasonably effective assistance" standard applies equally to retained as well as to appointed counsel. However, such reasonably effective assistance does not guarantee errorless trial, and the particular circumstances of the individual case must be considered.

The totality of the counsel's efforts decides his effectiveness under the above standard, and isolated failures to object to certain procedural mistakes or improper evidence do not constitute ineffectiveness of counsel, and assertions of ineffective counsel will be sustained only if they are firmly founded by affirmative demonstration in the record.

Yeager v. State, 658 SW2d 639 (Tex.App. 9 Dist. - 1983 - Beaumont); MacKenna v. Ellis, 280 F2d 592, 599 (5 Cir. - 1960); Ferguson v. State, 639 SW2d 307 (Tex.Cr.App. - 1982); Mercado v. State, 615 SW2d 225 (Tex.Cr.App. - 1981); ex parte Gallegos, 511 SW2d 510 (Tex.Cr.App. - 1974); Archie v. State, 615 SW2d 762 (Tex.Cr.App. - 1981); ex parte Duffy, 607 SW2d 507 (Tex.Cr.App. - 1980); and Avery v. Alabama, 308 US 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940).

In reviewing a claim of ineffective assistance of counsel, the Appellate Court is not in position to "second guess" through hindsight, the strategy adopted by counsel at trial.

In determining whether an attorney met the standard, it is basically unreasonable to judge the attorney by what another attorney would have done or says he would have done, or what his clients think he should have done after the fact.

In applying the above rules to the case at hand, this Court has reviewed the statement of facts, which reflect very clearly that counsel effectively cross-examined witnesses, and developed facts favorable to Appellant. He presented Appellant's alibi defense adequately, even though Appellant claims he had additional and credible witnesses available to further substantiate the defensive theory. The attorney's judgment that the alibi defense was adequately raised, and did not need further corroborative testimony cannot be "second guessed". Appellant's cross-examination of the complaining witness made substantial inroads into her credibility, opportunity to observe and identify the Appellant, and her ability to recall accurately the incident itself or subsequent events which were relevant to the offense in question. Also, despite such efforts, the complaining witness positively identified Appellant as the person who exposed himself to her. Appellant did not take

the stand in his own defense at the trial, a judgment that cannot be evaluated by hindsight either.

Nonetheless, the Trial Court as the factfinder involved in this case was free to judge the credibility of the witnesses and the weight to be given to their testimony, and his findings will not be disturbed if they are supported by the evidence viewed in the light most favorable to the verdict. Irvin v. State, 84-MCA-1162 (Mun.Ct.App.) and Jackson v. State, 672 SW2d 801 (Tex.Cr.App. - 1984).

For the reasons stated, the Judgment of the Trial Court is affirmed.

SIGNED this 1 day of Feb, 1985.

JUDGE

JUDGMENT

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, 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.

Signed this 11 day of Feb, 1985.

JUDGE