

IN THE MUNICIPAL COURT OF APPEALS  
OF THE CITY OF EL PASO, TEXAS

RICHARD MEDELLIN, Appellant

vs.

No. 88-MCA-1930

STATE OF TEXAS, Appellee

OPINION

Appellant appeals his conviction in Municipal Court for running a red light.

The complaint filed in this case alleges that at the time of the infraction that the Appellant was operating a motor vehicle. However, the record before this Court clearly reflects that Appellant was riding a bicycle at the time of the alleged offense.

A bicycle is clearly not the same as a motor vehicle and are defined differently under the law. (See Article 6701d Section 2(b) for the definition of a motor vehicle, and Section (f) of that same article for a definition of a bicycle.) Additionally, the El Paso City Code in Chapter 12.04, Section 12.04.040 also defines a bicycle specifically as every device propelled by human power rather than being self-propelled as a motor vehicle is, which definition is consistent with state law as cited above.

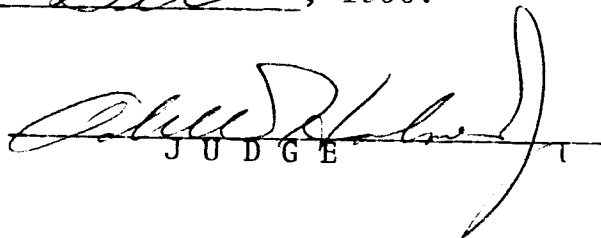
Although, the traffic regulations concerning operating a

motor vehicle are generally equally applicable to the operation of a bicycle, (Chapter 12.04, Section 12.04.220 of the City Code of El Paso), nonetheless, alleging that Appellant was operating a motor vehicle rather than a bicycle in the complaint constitutes a fatal variance of which this Court can take cognizance for the first time on appeal. Hatch vs. State, 87-MCA-1871 (Mun. Ct. App. -1988).

A fatal variance between the allegations and the proof may render the evidence insufficient to sustain a conviction. Hatch vs. State, Supra, Seiffert vs. State, 501 SW2d 124 (Tex. Crim. App. -1973), Franklin vs. State, 659 SW2d 831 (Tex. Crim. App. -1983), Ellis vs. State, 714 SW2d 465 (Tex. App. - Hous. 1st Dist. -1986).

In this case, a fatal variance exists, and therefore, the evidence is insufficient to sustain the conviction, and Appellant is entitled to have the judgment of the Trial Court reversed and rendered in his favor. Burks vs. U.S., 437 U.S. 198 S.Ct. 2141, 57 LEd2d 1 (1978), Greene vs. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 LEd2d 15, (1978).

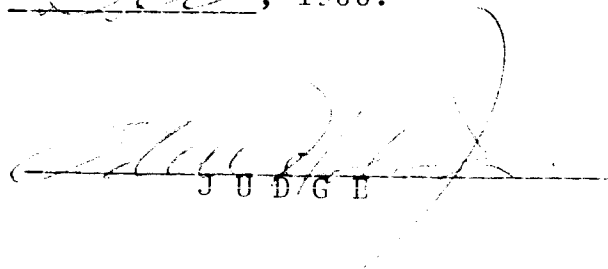
Signed this 2 day of Dec, 1988.

  
J U D G E

J U D G M E N T

This case came on to be heard, 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 in all things reversed and rendered in Appellant's favor, and judgment of acquittal be entered in his behalf.

Signed this 2 day of June, 1988.

  
\_\_\_\_\_  
J U D G E