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

RICHARD DOW,	)	
	)	
Appellant,	)	
vs.	)	No. 97-MCA-2402
	)	
STATE OF TEXAS,	)	
	)	
Appellee.	)	

OPINION

Appellant appeals his conviction in Municipal Court for a violation of El Paso's noise ordinance as contained in Section 9.40.040(a) et seq. of the El Paso City Code. That Section makes it unlawful for any person at any location within the City . . . to create any noise . . . on property owned, leased, or occupied by such person which causes the noise level on any property to exceed those listed in that Section. Specifically for this case, a noise standard exceeding 10 decibels above the allowable noise level of 50 decibels for a cumulative period of more than five minutes in any hour between the hours of 10:00 p.m. to 7:00 a.m. in a Noise Zone 1 area.

Appellant was the president and owner of a nightclub known as the Baja Nightclub located at 1499 Lee Trevino, which is in a Noise Zone 1 area. The evidence, as reflected by the Statement of Facts contained in the record before this Court, reflects that on August 31, 1996, Juan Garcia, an inspector with the Environmental Engineering Department of the City of El Paso, using a noise meter, obtained a reading of 60 decibels or more for a cumulative period of more than five minutes between 10:00 and 11:00 p.m. Such evidence was sufficient to establish a violation of the noise ordinance applicable to this infraction.

On appeal, Appellant contends that the Trial Court was without jurisdiction because the complaint was defective for failing to allege a necessary element of the offense.

Appellant is correct in its contention that if a complaint fails to allege an element of offense, that such issue can be raised, for the first time, on appeal, despite the recent enactment of Article 1.14(b) V.A.C.C.P. and the amendment to Article V, Section 12 of the Texas Constitution. Those changes in the law, nullified over a century of Texas jurisprudence in which the Courts of this State, led by the Court of Criminal Appeals, held that a fundamentally defective indictment or information was void and could be objected to for the first time on appeal. Now clearly, unless a defect in an indictment or information is raised before trial, it is waived, Studer v. State, 799 S.W. 2d 263 (Tex.Crim.App. 1990), but not so, for cases involving complaints.

Although those amendments and enactments only referred to indictments or informations, and did not mention complaints, at least one Court of Appeals held specifically that they did apply to complaints since complaints are also used as charging instruments. The logic of that reasoning seemed appropriate until the Court of Criminal Appeals in Huynh v. State, 901 S.W.2d 480 (Tex.Crim.App. 1995), held to the contrary, and remanded the case to the Court of Appeals. In Huynh v. State, 928 S.W.2d 698 (Tex.App. - Houston, 14th Dist. 1996), on remand, the Court was again thrown into the quagmire of deciding the validity of a charging document, and whether the defect was of form or substance. Reluctantly, the Court had to follow precedent relating only to the validity of indictments or informations, and applied that same law to complaints. So one challenging the validity of a complaint, charging fine-only offenses, can "hide behind the log" and raise any defects in the complaint on appeal for the first time, the above amendments notwithstanding.

The law has uniformly held that a charging instrument that leaves out an element of the offense contains a defect of substance, renders the charging instrument fatally defective and void, and therefore, the instrument would fail to confer jurisdiction on the Court, and such defects can be raised on appeal for the first time. Fisher v. State, 887 S.W.2d 49 (Tex.Crim.App. 1994), American Plant Food Corp. v. State, 508 S.W.2d 598 (Tex.Crim.App. 1974)[1]

However, Appellant's point of error that the complaint failed to allege that the Appellant was in control of the property does not comport with the express language of the complaint itself, or the evidence which supported that allegation in the record before this Court. The complaint clearly alleged that Appellant committed this offense on property that was being owned, leased, occupied, or otherwise controlled by Appellant. The point is overruled.

In his second Point of Error, Appellant contends that the ordinance under which he was convicted is unconstitutionally vague, indefinite, and provides insufficient notice of what conduct is presently proscribed.

Appellant cites only one case, Meisner v. State, 907 S.W.2d 664 (Tex.App. - Waco 1997), in support of his contention. That case held an ordinance for digging out, or causing any vehicle to make unnecessary noise by spinning the wheels, was guilty of an offense. The Court in that case struck the ordinance down because the use of the term "willful" was too broad, and

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[1] This Court is mindful of the case of Vallejo v. State, 408 S.W.2d 113 (Tex.Crim.App. 1966), which held that a complaint is sufficient if it states facts to show the commission of an offense charged, but the same particularity is not required as is necessary in an indictment or information, and further citing Article 45.27 of the Code of Criminal Procedure providing a defendant shall not be discharged by reason of an informality in a complaint filed against him in a Justice Court, and holding that the same rule would certainly apply to a complaint filed in Corporation Court, now known as Municipal Courts. However, the holding in Huynh, 928 S.W.2d 698, cited above, clearly holds that a failure to allege the essential elements of an offense renders the complaint defective and probably constitutes more than a mere "informality."

the use of the term "unnecessary noise" was unconstitutional because it was so vague that men of common intelligence would have to guess as to its meaning and differ as to its application.

That case also stands for the proposition that when a Statute or ordinance is attacked on constitutional grounds, there is a presumption that the Statute is valid, and that the legislative body did not act arbitrarily or unreasonably in enacting the Statute. Ex Parte Granviel, 561 S.W.2d 503 (Tex.Crim.App. 1978). The burden rests on the individual challenging the ordinance to prove its unconstitutionality.

When examining a vagueness challenge, the reviewing Court must make a two-part inquiry in order to determine if a Criminal Statute or ordinance is void for vagueness. State v. Fry, 867 S.W.2d 398 (Tex.App. - Houston[1st Dist. 1993 no pet.]). The first inquiry is whether an individual of ordinary intelligence receives insufficient information from the Statute that his conduct is proscribed by law, and the second, must examine whether the ordinance provides sufficient notice to law enforcement personnel in order to prevent arbitrary and erratic enforcement of the ordinance. Either of these inquiries form an independent ground to find the Statute void for vagueness.

In the instant case, there is no culpable mental state alleged, nor is one required, and therefore the rational of the Meisner decision is not relevant to that inquiry. In Meisner, the standard for violation of the ordinance was "unnecessary noise" which term is ambiguous and subject to uncertain interpretation. In the instant case, we are speaking of "excessive noise," which is proscribed not only by time and place, but by an objective standard of measurement.

As it relates to the vagueness challenge, the challenged enactment must provide an objective standard from which one may gauge its conduct. Briggs v. State, 740 S.W.2d 803 (Tex.Crim.App. 1987). If the enactment requires a person to conform its conduct to an

imprecise but comprehensible normative standard, it is not vague. Rather, there must be a complete absence of a standard of conduct to prevail on a vagueness challenge. Lear v. State, 753 S.W.2d 737 (Tex.App. - Austin 1988).

Not only did City inspectors measure and bring to the attention of the Appellant the fact that he was in violation of this ordinance prior to actually issuing a citation, neighbors who live the surrounding residential area around this nightclub testified as to the excessiveness of the noise and the impact that it was having on their living conditions in the area. Playing rock music on an open patio behind this bar, at levels reaching 75 decibels at their peak, clearly is the type of conduct sought to be proscribed by this enactment.

Therefore, holding that the City's noise ordinance involved in this case is constitutional, Appellant's second Point of Error is overruled.

Having found no reversible error, the Judgment of the Trial Court is hereby affirmed.

SIGNED this 16 day of Dec, 1997.

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 10 day of Dec, 1997.

JUDGE