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Reversed - See 762 SW2d 228 (Tx. App. - El Paso)

IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

GERALD FRANKLYN, Appellant

vs. No. 86-MCA-1753

STATE OF TEXAS, Appellee

O P I N I O N

Appellant appeals his conviction in Municipal Court for failing to discontinue and cease operating an adult theater after more than five years of non-conforming use had passed, when the establishment was within 1,000 feet of a church contrary to Section 25-11.2(6) of Chapter 25 of the Code of the City of El Paso.* After a jury trial, Appellant was found guilty and assessed a fine of $1,000.00.

Appellant's first contention on appeal is that the complaint is void because it was amended prior to trial. The record reflects that Appellants name was changed on the complaint from "JERRY FRANKLIN" to "GERALD FRANKLYN", at his attorneys request.

In numerous cases, which Appellant cites, the general rule is well settled that a complaint may not be changed by amendment, since the nature of the complaint is that it is an affidavit, and when amended it no longer is the affidavit

*Now see 20.62.020 El Paso Municipal code

of the affiant. Addison vs. State 283 SW2nd 55 (Tex. Cr. App. - 1955), Givens vs. State 235 SW2nd 899 (Tex. Cr. App. - 1951), Toliver vs. State 294 SW2nd 405 (Tex. Cr. App. - 1956), Balbuena vs. State 262 SW2nd 727 (Tex. Cr. App. - 1953), Broadhead vs. State 252 SW2nd 194 (Tex. Cr. App. -1952).

In each of the cases relied upon by the Appellant, there was a change or an amendment to the complaint either over the objection of the Appellant or without notice to him. In each of those cases, the Court correctly held that such an amendment vitiated the complaint.

However, in the instant case, Appellant's counsel admits, and the record reflects, that the change in the Appellant's name was made at the request of Appellant.

Therefore, Appellant had notice of the change and brought it to the Court's attention that his name was misspelled. Although Appellant's attorney insists that his motion at the trial court level was not intended to mislead the trial court into error, and that he now only raises this issue out of his legal duty to his client, the result is still the same. The trial court responds to the Appellant's motion, and then on appeal, Appellant contends that the relief he sought should not have been granted and that the trial court's doing so constituted error. This Court holds that such a result should not occur, and that Appellant has waived any complaint on appeal by inviting the error, if

any.

Further, pursuant to Article 28.10 of the Code of Criminal Procedure, any matter of form or substance in an indictment or information may be amended even after the trial commences if the Appellant does not object. Such article is equally applicable to any other charging instrument such as a complaint. Therefore, the point is overruled.

Appellant's second point of error complains that he did not receive proper notice of the charges against him because the State did not plead, nor prove any connection between Appellant and the operation of the El Cine Theater. The complaint alleges that Appellant committed an offense by his own conduct, and therefore this Court believes that the more difficult questions relating to a person's responsibility for conduct performed in the name of or in behalf of a corporation need not be addressed. Pursuant to Section 7.01 of the Penal Code, a person is criminally responsible for his own conduct, and this Court believes the allegations of this complaint addressed Appellant's culpability in this particular matter, and not that of any other entity.

However, the State in its brief assumes the burden of establishing a connection between the Appellant and the El Cine Theater, relying on Section 7.23 of the Penal Code to establish Appellant's legal responsibility for conduct which he performed in the name of or in behalf of the corporation.

Although this court, as stated above, does not agree that the State legally needed to assume such burden, the evidence is clear that Appellant had a sufficient connection with the operation of the El Cine Theatre to be criminally responsible for the conduct alleged. A former employee who worked for the El Cine Theatre testified that he knew the Appellant, and that the Appellant was the person in authority to the extent that he was the one who was involved in the day to day operations of the theatre, and ultimately had the authority to fire him. Additionally, the State established that the Appellant had executed an assumed name certificate indicating that he was an officer, representative or attorney in fact of the corporation. Such evidence was sufficient to establish the Appellant's criminal responsibility in connection with the operation of the El Cine Theatre. Point of error number two is overruled.

Appellant contends that the Court erred in overruling Appellant's objections to the charge. Orginially, the Court's charge was omitted from the record, but a true and correct copy of the charge of the Court is now a part of this record by agreement of the parties. This Court has reviewed Appellant's objections to such charge, and finds there is no merit in them, and consequently, point of error number three is overruled.

Appellant next contends that certain hearsay testimony was introduced over objection which connected him as owner

of the El Cine Theatre. This Court has reviewed the statement of facts in connection with the testimony of witness Von Kolb, and the objections made by the Appellant during his testimony, as well as at the conclusion of the City's case, and determined that the objections were properly overruled. Point of error number four is overruled.

In points of error number five and six, Appellant attacks the constitutionality of the ordinance involved, but cites no authority to support such position, and therefore nothing is presented for review.

However, this Court notes that similar ordinances have been held constitutional by the United States Supreme Court in both Young vs. American Mini Theatres, Inc., 427 U.S. 50 96 S.Ct. 2440, 49Le2d 310, and City of Renton vs. Playtime Theatres, 106 S.Ct. 925, 89 Le2d 29.

Finding no reversible error, the Judgment of this Trial Court is affirmed.

SIGNED this 9 day of Feb, 1988.

JUDGE

J U D G M E N T

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 7 day of July, 1988.

JUDGE