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

Overruled by
Huyth v.
State
901SW2d 480
(Tex. Crim. App. 1995)

MARIE B. McINTOSH,)
)
 Appellant,)
vs.)
)
 STATE OF TEXAS,)
)
 Appellee.)

No. 93-MCA-2245

OPINION

Appellant appeals her conviction in Municipal Court for occupying the front seat of a passenger car without being secured by a safety belt.

Appellant filed a Motion to Quash the complaint for failing to state an offense. Although the City contends that the Motion was not timely filed because it was not presented to the Trial Court at the Pre-Trial Conference, the Court, in fact, considered the Motion filed at Trial and overruled it. Therefore, the Motion to Quash was timely and properly presented to the Trial Court.

Appellant contends that the provisions of Article 6701D, Section 107C(b) require, among other things, that the person charged be "occupying a seat" that is equipped with a safety belt, rather than "occupying a vehicle" which was equipped with a safety belt, as the complaint alleged.

The failure to allege an essential element of an offense is a defect of substance, rather than form, and constitutes a fundamental defect in the complaint. Clearly now, because of the amendments to Article 1.14 V.A.C.C.P. and Article 5, Section 12, Tex. Const., an objection to a defective charging document, whether of form or substance, must be timely lodged or it is waived. Studer v. State, 799 SW2d 263 (Tex.Cr.App. - 1990); State v. Murk, 815 SW2d 556 (Tx.Cr.App. - 1991).

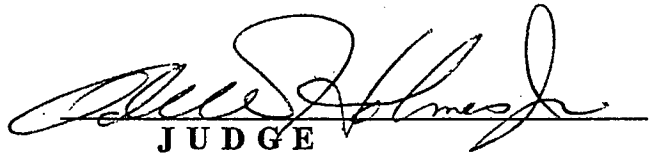
Appellant's contention is well taken, and clearly before an offense can be committed under Article 6701D, Section 107C(b), the allegation and proof must support the fact that the person is occupying a seat that is equipped with a safety belt, and not merely that he occupies a vehicle which is equipped with safety belts.

Although there is some uncertainty as to what the legal requirements of a complaint must be, alleging the essential elements of the offense still seems to be a least a minimum requirement. For instance, in Vallejo v. State, 408 SW2d 113 (Tx.Cr.App. - 1966), the Court held that a complaint must only state facts sufficient to show the commission of an offense charged but not with the same particularity in an indictment or information. It further held that the test of the validity of a complaint was only whether the defendant could ascertain with reasonable certainty that with which he was being charged so he could properly prepare a defense to the charge. See Article 15.05, V.A.C.C.P.; Chapa v. State, 427 SW2d 943 (Tx.Cr.App. - 1967). However, in Adams v. State, 524 SW2d 67, (Tx.Cr.App. - 1975) the same Court held the complaint fundamentally defective for failing to allege certain facts which constituted the essential elements of the offense sought to be charged, and cited Vallejo v State, supra, as authority for doing so. Until clarified by higher authority, this

Court will hold that a complaint which fails to allege the essential elements of an offense is fundamentally defective.

Having found that the complaint is fundamentally defective for failing to allege an essential element of the offense charged, the judgment of the Trial Court is reversed, and the complaint is hereby ordered dismissed.

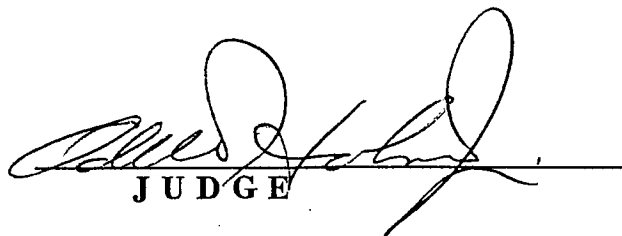
SIGNED this 20 day of Sept, 1993.


JUDGE

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 the complaint be dismissed.

SIGNED this 20 day of Sept, 1993.


JUDGE

26.03