

R. App. 1

APPENDIX A

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. AP-72,042

FIDENCIO VALDEZ

V.

THE STATE OF TEXAS

On Appeal from Cause Number 20120D00749
384th Judicial District Court of El Paso County, Texas

APPELLANT'S BRIEF

(Filed Feb. 22, 2016)

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ORAL ARGUMENT REQUESTED

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- 4. The evidence is legally insufficient to prove that Valdez committed capital murder because no evidence was adduced at trial to prove that Valdez used or threatened to use force or violence to acquire “property”**

The capital murder indictment filed against Fidencio Valdez alleged the underlying criminal offense of “robbery” as the aggravating circumstance which elevated the murder offense with which he was charged to capital murder. Section 29.02 of the Texas Penal Code codifies the offense of “robbery” as follows:

- (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
 - (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
 - (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. See TEX. PENAL CODE SECTION 29.02.

Subsection (a) of the statute clarifies that to “prove” robbery, the State was required to prove that the conduct a person engaged was “in the course of committing theft as defined in Chapter 31 and with the intent to obtain or maintain control of the property. . . .” There is no definition of “property” in Chapter 31 of the Texas Penal Code or in the Penal Code itself. Thus, the “plain

R. App. 3

language” definition of the term “property” must be ascertained. See *Badgett v. State*, 42 S.W.3d 136, 138 (Tex. Crim. App.2001), citing to *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App.1991) as stating the rule: “When interpreting a statute, we look to its literal text for its meaning, and we give effect to that text unless application of the statute’s plain language would lead to absurd consequences that the Legislature could not possibly have intended, or if the plain language is ambiguous.”

The term “robbery” is part of the literal text of the “robbery” statute. TEX. PENAL CODE SECTION 29.02. Black’s Law (Seventh Edition) provides the following definitions of the term “property:”

- (1) The right to possess, use, and enjoy a determinate thing (either a tract or land or a chattel); the right of ownership . . .
- (2) Any external thing over which the right of possession, use, and enjoyment are exercised.

The Texas Controlled Substances Act specifies that any person found in possession of ecstasy pills (also known as MDMA) is guilty of a felony offense. See TEXAS HEALTH & SAFETY CODE §§ 481.103(a)(1) and 481.116(a). Based on this statute, ecstasy pills are not a thing which a person in Texas has the right to possess, use, or enjoy because possession of ecstasy pills is a felony offense under Texas law. The undisputed evidence adduced during Valdez’ trial reveals that Valdez shot and killed Barrios in the course of taking between

R. App. 4

30 and 40 ecstasy pills from Barrios without paying for these pills. It was “in the course” of committing “robbery” by taking these ecstasy pills that the State based its capital murder charge against Valdez. The State’s theory of prosecution is therefore flawed since a person cannot appropriate ecstasy pills from another and be guilty of theft under Chapter 31 of the Texas Property Code.

According to the Black’s Law definition of “property,” a person must have the “right to possess, use, and enjoy a determinate thing (either a tract land or a chattel)” or the “property” must be an external thing over which the right of possession, use, and enjoyment are exercised. Ecstasy pills would fall within neither definition because an ecstasy pill is not a thing over which the right to possess or a right of possession can be exercised. The Texas Penal Code definition of “owner” therefore does not apply to possession of per se contraband, such as cocaine or ecstasy.³

However, one Texas court of appeals has held that a person can be prosecuted for robbery of contraband such as cocaine or ecstasy. In *Brown v. State*, 56 S.W.3d 915 (Tex.App.-Houston [14th Dist.] 2001, no pet.), the Houston Court of Appeals rejected the appellant’s argument that because possession of cocaine is unlawful, the complainant could not have a greater right to

³ The term “owner” is defined in the Texas Penal Code as a person who either has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor; or is a holder in due course of a negotiable instrument. See Tex. Penal Code Ann. § 1.07(a)(35).

possess cocaine than the appellant. It based its rejection of this argument on that part of the “owner” definition which defined owner as a person who has “possession of the property, whether lawful or not” and concluded that under this part of the Penal Code § 1.07(a)(35) definition the complaining witness was an “owner” of the cocaine. *Id.*, at 919.

The flaw in this analysis is that [sic] fails to recognize that a threshold showing which must first be made under this statute is that “property” was appropriated without consent. If the “thing” appropriated is “not property” – such as cocaine, ecstasy, or some other type of per se contraband – then a robbery or theft offense cannot be proven because the “property” element of the offense cannot be proven up. The State cannot prove up this threshold offense element in this case. That is, it cannot show that under the Black’s Law definition of “property” that an ecstasy pill is “property” within the meaning of Texas Penal Code Chapter 31.⁴ To hold

⁴ It is a rule of statutory construction that penal statutes are to be strictly construed to give fair notice to the average person of the conduct which is forbidden. *Thomas v. State*, 919 S.W.2d 427, at 430 (1996). The Houston Court of Appeals disregarded this rule in *Brown v. State*, 56 S.W.3d 915 (Tex.App.-Houston [14th Dist.] 2001, no pet.). It assumes that “any possession of the property, whether lawful or not” language of the Texas Penal Code “owner” definition makes a person who possesses anything, whether lawful or not, an “owner.” This analysis is illogical because it makes the word “property,” as used in the [sic] “owner” definition, superfluous. A more narrow construction of this part of the “owner” definition would be to interpret the reference to unlawful possession of property to mean property that is not per se contraband, but is nonetheless owned unlawfully. An example of this would be where a person unlawfully replevies property which is otherwise legal to

otherwise would be to conclude that the term “property,” as used in the Texas Penal Code is a superfluous word which includes every “thing” in the universe, irrespective of whether that “thing” is capable of being legally owned or possessed.

Adopting this view ignores the fact that a person cannot sue for recovery of ecstasy pills wrongfully appropriated from him or seek restitution in a criminal court against someone who has appropriated ecstasy pills without consent. It also ignore [sic] the fact that contraband per se which comes into possession of the State is destroyed and is not given back to the person from whom it is taken. There is accordingly no “right to possess” an ecstasy pill, nor is it a thing over which a “right of possession” can be exercised. Appellant Valdez’ conviction should therefore be reformed to that of murder because the evidence was legally insufficient to prove the aggravating offense element that the murder was committed in the course of committing a robbery, in that Julio Barrios had no “property” interest in the illegal ecstasy pills appropriated from him through a “robbery.”

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possess. This more narrow interpretation of the statute is not only plausible, but much more logical and sensible since the average person would not consider ecstasy, cocaine, other contraband as a form of “property” which can be owned.

R. App. 7

APPENDIX B

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. AP-77,042

FIDENCIO VALDEZ

V.

THE STATE OF TEXAS

On Appeal from Cause Number 20120D00749
384th Judicial District Court of El Paso County, Texas

APPELLANT'S REPLY BRIEF

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6. The State has failed to address the legal sufficiency challenge Valdez has asserted in point for review four of his principal brief

Appellant Valdez disagrees with the State's failure to address the meaning of "property," as used in the Texas Penal Code Section 1.07(35) definition of "owner." The State emphasizes that the term "owner," as defined in the Texas Penal Code, is a person who:

- (A) has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the actor; or
- (B) is a holder in due course of a negotiable instrument.

The State further argues that the language "whether lawful or not" suffices to make Julio Barrios an "owner" of the ecstasy pills which the State alleges Valdez acquired from Julio Barrios. The flaw in this reading of the Texas Penal Code "owner" definition is that it makes anyone who possesses contraband, such as ecstasy pills, an "owner" of this contraband. Under the Black's Law definition of "property," a person must have the "right to posses [sic], use, and enjoy a determinate thing (either a tract of land of [sic] chattel)" or the "property must be an external thing over which the right of possession, use, and enjoyment are exercised."

The plain meaning definition of "property" does not include contraband. Contraband is not considered "property" under either Texas or federal law. This is

why the State can summarily seize and forfeit contraband whenever it is found in a person's possession, without having to be concerned that suit will be filed alleging that the State has deprived a person of property without due process of law, in violation under the Due Process Clause of the Fourteenth Amendment. The Texas Court of Criminal Appeals, in the case of *Boykin v. State*, 818 S.W.2d 782, at 785 (1991), has explained how ordinary and plain meaning to words used in a statute are to be interpreted when used in a statute:

Thus, if the meaning of the statutory text, when read using the established canons of construction relating to such text, should have been plain to the legislators who voted on it, we ordinarily give effect to that plain meaning. *Smith v. State*, 789 S.W.2d 590, 592 (Tex.Cr.App. 1990).

Giving an ordinary and plain meaning analysis to the term "property" means that contraband such as the ecstasy pills can never be "property." Appellant Valdez could no more be prosecuted for theft of the ecstasy pills he possessed than held accountable for a robbery offense in connection with the "theft" of these pills. The failure of the State to apply a plain and ordinary meaning to the term "property," as used in the Penal Code "owner" definition, has therefore resulted in Valdez facing prosecution for a capital murder offense of which, as a matter of law, he is innocent.

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