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[SEAL]

**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-16-00437-CR

IN THE MATTER OF
DAVID CHRISTOPHER HESSE

On Appeal from the 251st District Court
Potter County, Texas
Trial Court No. 64,888-C,
Honorable Edward Lee Self, Presiding

August 1, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

David Christopher Hesse appeals from an order denying his writ of habeas corpus. Through the writ application, he sought to stop the prosecution of a contempt proceeding initiated against him for repeating the word “piss” during a hearing. The trial court was entertaining a motion to adjudicate guilt at the time, and Hesse was representing the defendant whose guilt was subject to adjudication. The writ should have been issued, in his estimation, because he had been punished twice for uttering the word before the actual contempt hearing occurred per § 21.002(d) of the Texas

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Government Code. See TEX. GOV'T CODE ANN. § 21.002(d) (West 2004) (stating that “[a]n officer of a court who is held in contempt by a trial court shall, on proper motion filed in the offended court, be released on his own personal recognizance pending a determination of his guilt or innocence. The presiding judge of the administrative judicial region . . . shall assign a judge . . . to determine the guilt or innocence of the officer of the court.”).

The alleged punishments consisted of 1) a brief detention while undergoing processing for release on his personal recognizance as required by § 21.002(d), and 2) an overnight detention resulting from the execution of a writ of attachment which issued after his failure to appear at the § 21.002(d) hearing. Because those detentions were supposedly punishment, the constitutional prohibition against double jeopardy found in the United States Constitution barred the § 21.002(d) guilt or innocence hearing from taking place. The trial court rejected that proposition, as do we.

While the Double Jeopardy Clause appearing in the Fifth Amendment to the United States Constitution may afford several protections, only that barring one from suffering multiple criminal punishments for the same offense is at play here. See *Speights v. State*, 464 S.W.3d 719, 722 (Tex. Crim. App. 2015) (describing the three protections afforded by the Double Jeopardy Clause); *Hudson v. United States*, 522 U.S. 93, 98-99, 118 S.Ct. 488, 492-93, 139 L.Ed.2d 450 (1997) (stating that the “Clause protects only against the imposition of multiple *criminal* punishments for the same

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offense”) (emphasis in original). That the prohibition bars multiple punishments for the same offense leads us to infer two truisms from the Clause. First, one must suffer multiple punishments at some time or another, and two, the multiple punishments must be for the same offense.

Regarding the matter of punishment, a governmental restriction or imposition upon one’s time, freedoms, liberty, or pocketbook is not criminal punishment simply because the person suffering it deems it such. Indeed, various governmental impositions may be viewed as punishment by some but not be punishment within the scope of the Double Jeopardy Clause. *See e.g., Dowling v. State*, 926 S.W.2d 752, 756 (Tex. App. – Amarillo 1996, pet ref’d) (wherein this court held that an administrative suspension of one’s driver’s license is not punishment that bars the State from also prosecuting the person for the criminal offense of driving while intoxicated); *Ex parte Ward*, 964 S.W.2d 617, 633 (Tex. Crim. App. 1998) (holding that imposing a tax on someone who possessed marijuana was not punishment).

Instead, the purpose underlying the imposition or restriction tends to influence its status as punishment. For instance, if its purpose is to extract retribution from or to deter the unlawful conduct by an accused then it approaches the realm of punishment under the Clause. *Dowling v. State*, 926 S.W.2d at 754-55. Yet, if it serves some purpose other than to extract retribution or deter unlawful conduct, then it moves away from that realm. *Id.*; *see also, Hudson v. United States*,

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522 U.S. at 99-100, 118 S. Ct. at 493, 139 L.Ed.2d 450 (stating that factors influencing whether a civil penalty constitutes punishment include, among other things, whether the sanction or penalty 1) has historically been regarded as punishment, 2) promotes the traditional aims of punishment such as retribution and deterrence, and 3) is rationally connected to an alternative purpose distinct from the historical concepts of punishment). With this in mind, we turn to the circumstances at bar.

The record discloses that after finding Hesse in contempt for uttering the objectionable word, the trial court directed the bailiff to “take him back.” It also stated that “[h]e is going to get a P.R. bond” and that “[y]ou have got to go back there, and then I will give [the P.R. bond] to you.” This evidence can reasonably be viewed as illustrating that Hesse was detained to afford third parties opportunity to process his release from custody via a personal recognizance bond as required by § 21.002(d). Indeed, they liken to the circumstances before our sister court in *In re Hesse*, No. 01-15-00401-CR, 2016 Tex. App. LEXIS 8667, at *15-17 (Tex. App. – Houston [1st Dist.] Aug. 11, 2016, pet. ref’d) (mem. op., not designated for publication). There, Hesse had again allegedly committed some objectionable act and been cited with contempt. This led to his brief detention “solely for the administrative purpose of processing his personal bond and [being] released without payment.” *Id.* at *15-17. And because his detention served that administrative purpose, the Houston Court of Appeals found there, as do we here, that

the imposition on his liberty was not punishment encompassed within the Double Jeopardy Clause. No less is true of the detention arising from the subsequent execution of a writ of attachment.

The writ itself disclosed that it was issued because Hesse failed to appear (irrespective of his reason) at the § 21.002(d) hearing. Through it, the trial court directed the local sheriff to take Hesse into custody and bring him to the 251st District Court “to show cause why he has failed to appear as requested [by] said Court, said person having disobeyed a court order.” So, the underlying purpose for this detention had nothing to do with extracting retribution from or deterring unlawful conduct by Hesse; it served to afford him opportunity to explain why he did not appear at the hearing.

That Hesse was seized due to his failure to appear at the 21.002(d) hearing also negates one other requirement of the Double Jeopardy Clause. As previously mentioned, the accused must face multiple punishments for the same offense. The supposed “offense” resulting in his attachment was not his previous utterance of an objectionable word but rather his failure to appear when his guilt or innocence for that conduct was being adjudicated. Thus, it cannot even be said that the “same offense” was involved.

In sum, the trial court did not abuse its discretion when denying Hesse’s application for a writ of habeas corpus. *Constancio v. State*, No. 07-14-00335-CR, 2015 Tex. App. LEXIS 7154, at *5-6 (Tex. App. – Amarillo July 10, 2015, no pet.) (stating that the pertinent

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standard of review is one of abused discretion). So, we affirm the order doing so.

Brian Quinn
Chief Justice

Do not publish.

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[SEAL]

Court of Appeals

BRIAN QUINN
Chief Justice

VIVIAN LONG
Clerk

JAMES T. CAMPBELL
Justice

MAILING ADDRESS:

P. O. Box 9540

PATRICK A. PURTLE
Justice

79105-9540

(806) 342-2650

Seventh District of Texas
Potter County Courts Building
501 S. Fillmore, Suite 2-A
Amarillo, Texas 79101-2449
www.txcourts.gov/7thcoa.aspx

September 5, 2017

Tracy D. Cluck
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TRACY D. CLUCK
12600 Hill Country
Boulevard, Suite R-275
Austin, TX 78738

L.T. "Butch" Bradt
Attorney at Law
14090 Southwest Freeway,
Suite 300
Sugar Land, TX 77478
* DELIVERED VIA

* DELIVERED VIA E-MAIL * E-MAIL *

John L. Owen
Assistant District Attorney
501 South Fillmore, Suite 5A
Amarillo, TX 79101
* DELIVERED VIA E-MAIL *

RE: Case Number: 07-16-00437-CR; Trial Court
Case Number: 64,888-C

Style: In the Matter of David Christopher Hesse

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Dear Counsel:

By Order of the Court, Appellant's Motion for Re-hearing is this day overruled.

Very truly yours,

/s/ Vivian Long

VIVIAN LONG, CLERK

xc: Honorable Edward Lee Self (DELIVERED VIA
E-MAIL)

Caroline Woodburn (DELIVERED VIA E-MAIL)

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CAUSE NO. 64,888-C

IN THE MATTER OF IN THE DISTRICT COURT
DAVID CHRISTOPHER 251ST JUDICIAL DISTRICT
HESSE POTTER COUNTY, TEXAS

ORDER ON SPECIAL PLEA
OF DOUBLE JEOPARDY

On November 30, 2016, the Special Plea of Double Jeopardy filed herein by David Christopher Hesse was heard by the Court pursuant to a pre-trial Writ of Habeas Corpus.

The State appeared by its Assistant District Attorney, Jason Howell.

The Applicant, David Christopher Hesse, appeared in person with counsel, L. T. "Butch" Bradt.

After presentation of the evidence and hearing the arguments of counsel, the Court does not find that David Christopher Hesse will be twice placed in jeopardy for the same conduct within the meaning of the prohibition against double jeopardy as a result of the Writ of Attachment issued herein and his being taken into custody pursuant thereto.

Accordingly, the Special Plea based on a claim of double jeopardy is denied and the request for relief pursuant to the Writ of Habeas Corpus is likewise denied.

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SIGNED on the 30th day of November, 2016.

/s/ Ed Self

Senior District Judge Ed Self
Judge Presiding
By Assignment

FILED
CAROLINE WOODBURN
DISTRICT CLERK
2016 DEC 5 PM 1 49
POTTER COUNTY, TEXAS
BY [Illegible] DEPUTY

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OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

10/25/2017 **COA No 07-16-00437-CR**
 Tr. Ct. No. 64,888-C
HESSE, EX PARTE DAVID CHRISTOPHER
PD-1063-17

On this day, the Appellant's petition for discretionary
review has been refused.

Deana Williamson, Clerk

L.T. "BUTCH" BRADT
14090 SOUTHWEST FREEWAY
SUITE 300
SUGAR LAND, TX 77478
* DELIVERED VIA E-MAIL *

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No. 64,888-C

STATE OF TEXAS	§	IN THE 251ST
V.	§	DISTRICT COURT
ADOUAN PHOMMIVANG	§	IN AND FOR
	§	POTTER COUNTY,
	§	TEXAS

ORDER

On the 29th day of July, 2016, came on to be heard the State's Application for Attachment of **David Christopher Hesse**, a necessary party who was served Notice of Hearing in the above styled and numbered cause. The Application for Attachment is hereby GRANTED.

The Clerk of this Court is hereby ORDERED to issue a Writ of Attachment for **David Christopher Hesse**, WM, dob 04/30/1973, 112 W. 8th Ave, Suite 301 and/or 2021 Crockett Street, Amarillo, Potter County, Texas, to appear and present before the Court Instantly and that he appear before this Court to show cause why he has failed to appear as requested.

It is the further Order of the Court that the Sheriff of Potter County or his duly appointed deputies take immediate custody and control of **David Christopher Hesse** and hold and retain custody of the said **David Christopher Hesse** pending further order of this Court.

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SIGNED AND ENTERED this 29th day of July,
2016. [at 2:35 p.m.]

/s/ Paul Davis
Judge Presiding

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**Potter County
Caroline Woodburn
DISTRICT CLERK**

www.co.potter.tx.us/districtclerk.index.html

P.O. Box 9570	806 / 379-2300
Amarillo, Texas	FAX: 806 / 372-5061
79105-9570	districtclerk@
501 S. Fillmore –	co.potter.tx.us
Suite 1B	

**WRIT OF ATTACHMENT WRIT OF ATTACHMENT
CAUSE NO. 64888-C**

THE STATE OF TEXAS

**TO THE SHERIFF OR ANY CONSTABLE OF
POTTER COUNTY, SAID STATE:**

You are commanded to take the body of DAVID CHRISTOPHER HESS WM DOB 04-30-1973, 112 W 8TH AVE, SUITE 301 AND/OR 2021 CROCKETT STREET, AMARILLO, POTTER COUNTY, TEXAS and bring him/her before the 251ST District Court of Potter County, at the Potter County Courthouse in Amarillo, in Potter County, Texas **INSTANTER** to appear before this court to show cause why he has failed to appear as requested before said Court, said person having disobeyed a court order.

Herein fail not, and due return make of this writ, **INSTANTER.**

Witness my signature and seal of office on this the 29TH day of JULY, 2016.

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[SEAL]

Caroline Woodburn, Clerk
District Court, Potter County, Texas

BY /s/ [Illegible]
Deputy

RETURN

Came to hand on the 1 day of August, 2016 and
duly served by producing the body of David Christo-
pher Hess before the Honorable _____
District Court of _____ County, Texas.
Fees: _____.

[Illegible] Sheriff

[Illegible] County, Texas

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OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[SEAL]

12/20/2017 **Tr. Ct. No. 64,888-C**
HESSE, EX PARTE DAVID CHRISTOPHER
PD-1063-17

On this day, the Appellant's motion for rehearing has
been denied.

Deana Williamson, Clerk

L.T. "BUTCH" BRADT
14090 SOUTHWEST FREEWAY
SUITE 300
SUGAR LAND, TX 77478
* DELIVERED VIA E-MAIL *

App. 17

No. 64,888-C

STATE OF TEXAS	§	IN THE 251ST
V.	§	DISTRICT COURT
ADOUAN PHOMMIVANG	§	IN AND FOR
	§	POTTER COUNTY,
	§	TEXAS

APPLICATION FOR ATTACHMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the State of Texas in the above entitled and numbered cause, and makes application to the Court for an attachment for **David Christopher Hesse**, WM, dob 04/30/1973, 112 W. 8th Ave, Suite 301 and/or 2021 Crockett Street, Amarillo, Potter County, Texas and in support of such application shows:

I.

Notice of a Due Process Hearing was issued for **David Christopher Hesse**, of Potter County, Texas, to appear before the 251st District Court on July 29, 2016 at 1:30p.m. **David Christopher Hesse** was served with said notice by Certified Mail, but he failed to appear before the Court.

II.

The appearance of **David Christopher Hesse** is necessary to conduct the said hearing.

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WHEREFORE, the State prays the Court grant this application and order an attachment be issued for **David Christopher Hesse**, for his appearance before this Court to show cause why he has failed to appear as requested.

/s/ Jason Howell

Jason Howell
Assistant District Attorney

FILED
251st DISTRICT COURT
POTTER COUNTY, TEXAS

29th day of July, 2016
at 2:52 o'clock PM.

/s/ Paul Davis

Judge

STATE OF TEXAS
COUNTY OF POTTER

BEFORE ME, the undersigned authority, on this day personally appeared Assistant District Attorney, Jason Howell, representing the State in the above entitled and numbered cause, to me well known, who being by me duly sworn, upon his oath deposes and says the matter and things set forth in the foregoing application for attachment are true and correct to the best of his knowledge and belief.

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WITNESS my hand and seal of office on the 29th
day of July A.D. 2016.

DANIEL M AGUIRRE	/s/ <u>Daniel Aguirre</u>
NOTARY PUBLIC	NOTARY PUBLIC
STATE OF TEXAS	
MY COMMISSION EXPIRES	
03-05-2018	

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POTTER COUNTY
Caroline Woodburn, District Clerk
[http://w5.co.potter.tx.us/districtclerk/](http://w5.co.potter.tx.us/districtclerk/index.html)
[index.html](http://w5.co.potter.tx.us/districtclerk/index.html)

P.O. 9570 Phone: 806-379-2300
Amarillo, Texas 79105-9570 Fax: 806-372-5061
501 S. Fillmore-Suite 1B districtclerk@
co.potter.tx.us

NOTICE OF HEARING TO SHOW CAUSE

Cause No. 64888-C

Style: The State of Texas

VS

Aduan Phommivong

To: David Christopher Hesse, 112 West 8th Street, Amarillo, Texas 79101 Greetings:

Whereas, Judge Ana Estevez, of the County of Potter, State of Texas, did on the 14th day of June, 2016, file in the 251st District Court, Potter County, Texas, Notice of Allegations of Contempt in the above numbered and styled cause, and makes allegations set forth in the following:

*****see attached true and correct copy of Notice of Allegations of Contempt*****

AND WHEREAS, The Honorable Ana Estevez, Judge of said Court, has entered the following order, to wit:

Show Cause Order

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AND WHEREAS, the said Notice of Allegations of Contempt will be heard by the said Court at Potter County Texas, on the 29th day of July 2016 at 1:30 o'clock p.m.

YOU ARE, THEREFORE, ordered to appear at the time and place as above stated, and answer said Order showing cause, if any you can, why same should not be granted.

GIVEN under my hand and seal of office in Amarillo, Potter County, Texas, this the 14th day of June 2016.

Caroline Woodburn, District Clerk

Potter County, Texas

By /s/ [Illegible] Deputy

(Return of Service follows)

[SEAL]

Certified Article Number

9414 7266 9904 2034 3259 56

SENDER'S RECORD

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RETURN OF SERVICE

CAUSE NO. 64888-C in the 251st District Court

STYLE: The State of Texas

vs.

Aduan Phomminvong

OFFICER'S RETURN

Came to hand on the ____ day of _____, 20__, at ____,
o'clock __.m., and executed in _____ County,
Texas by personally delivering to the named defend-
ant(s), a true copy of this Notice of Hearing to Show
Cause with the date of delivery endorsed thereon, to-
gether with accompanying copy of Notice of Allegations
of Contempt, in person, at the following times and
places, to-wit:

**Name of Individual, Corporation, or Agent
served:**

Address: _____

Date: _____, 20 __ at _____ o'clock __.m.

And not executed as to the defendant(s),

The diligence used in finding said defendant(s) being:

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And the cause or failure to execute this process is:

And the information received as to the whereabouts of
said defendant(s) being:

FEES:

Serving Citation \$_____

_____, Sheriff

_____ County, Texas

By: _____, Deputy

_____, Affiant

**COMPLETE IF YOU ARE A PERSON OTHER
THAN A SHERIFF, CONSTABLE, OR CLERK OF
THE COURT.**

In accordance with Rule 107: The officer or authorized person who serves, or attempts to serve, a citation shall sign the return. The return must either be verified or be signed under penalty of perjury. A return signed under penalty of perjury must contain the statement below in substantially the following form:

“My name is _____, my date of
birth is _____, and my address is _____

_____.

**I DECLARE UNDER PENALTY OF PERJURY
THAT THE FOREGOING IS TRUE AND COR-
RECT.**

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Executed in _____ County, State of
_____, on the _____ day of, 20__.

Declarant/Authorized Process Server

ID # & expiration of certification

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2. Article Number		COMPLETE THIS SECTION ON DELIVERY	
 7414 7266 9904 2034 3259 56		A. Received by (Please Print Clearly)	B. Date of Delivery
3. Service type ☒ CERTIFIED MAIL® ☐ BY		C. Signature x <i>Cathy Beas</i> ☐ Agent ☐ Addressee	
4. Restricted Delivery? (Extra Fee) ☐ Yes		D. Is delivery address different from item 1? If YES, enter delivery address below: ☐ Yes ☐ No	
1. DAVID CHRISTOPHER HESS 112 WEST 8TH STREET AMARILLO, TX 79101		Reference Information 64888-C Phommivong DC CRIM	

FILED
CAROLINE WOODBURN
DISTRICT CLERK
JUN 11 2016
2016 JUN 11 9:12 AM
AMARILLO, TX 79101

PS Form 3811, January 2005 Domestic Return Receipt