IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. PD-0549-17, PD-0550-17, PD-0551-17

WILLIAM MARKS, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTEENTH COURT OF APPEALS HARRIS COUNTY

KELLER, P.J., delivered the opinion of the Court in which ALCALA, RICHARDSON, KEEL and WALKER, JJ., joined. KEASLER, J., filed a dissenting opinion in which HERVEY and NEWELL, JJ., joined. YEARY, J., filed a dissenting opinion.

Appellant was charged in three indictments with acting as a guard company without a license. The indictments, which alleged the same conduct on three separate dates, were later amended to charge him with accepting employment as a security officer to carry a firearm without a security officer commission. The question in this case is whether the original indictments tolled the running of limitations for the amended indictments. We conclude that they did not and affirm the judgment of the court of appeals.

I. BACKGROUND

On September 20, 2012, Appellant was indicted in three cases (for three different dates) for

"act[ing] as a guard company, by providing security services" without a proper business license.[1] On November 13, 2014, over Appellant's objection, the State amended the indictments to allege that Appellant "accept[ed] employment as a security officer to carry a firearm" without a security officer commission.[2] Both offenses are Class A misdemeanors,[3] with a statute of limitations of two years.[4] Appellant was convicted and placed on probation.

On appeal, he contended that the trial court erred to allow the State to amend the indictments. He argued that each of the amended indictments charged a different offense than that alleged in each of the corresponding original indictments, so the State was required to obtain new indictments. He also argued that he was harmed by the amendments because, by the time the State moved to amend the indictments, the statute of limitations had run for the new offenses. The State responded that each original and amended indictment alleged the same statutory offense and also targeted the same conduct.

The court of appeals first found that each of the amended indictments fundamentally changed the nature of the allegations and did not allege the same statutory offense.[5] Having determined that

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[1] *See* TEX. OCC. CODE §§ 1702.102(a)(1) ("Unless a person holds a license as a security services contractor, a person may not . . . act as [a] . . . guard company"); 1702.108 (defining "guard company" as someone who engages in the business of or undertakes to provide a . . . guard . . . on a contractual basis to another person to" prevent certain crimes, or protect property or persons).

[2] *See id.* § 1702.161(a) ("An individual may not accept employment as a security officer to carry a firearm in the course and scope of the individual's duties unless the individual holds a security officer commission.")

[3] TEX. OCC. CODE § 1702.388(b).

[4] *See* TEX. CODE CRIM. PROC. art. 12.02(a).

[5] *Marks v. State*, 525 S.W.3d 403, 412-13 (Tex. App.—Houston [14th Dist.] 2017).

the trial court erred in allowing the indictments to be amended, the court conducted a harm analysis for non-constitutional error. The State argued that the error was rendered harmless because, rather than amending the indictments, the State could have simply obtained new indictments, with the original indictments tolling limitations. But the court of appeals found that the original and amended indictments did not allege "the same conduct, the same act, or the same transaction," so the original indictments did not toll limitations for the amended indictments.[6] Noting that the record would not support convictions for the offenses alleged in the original indictments, the court held that Appellant was harmed.[7] On discretionary review, the State takes issue with the court of appeals's tolling analysis.

II. ANALYSIS

In *Hernandez v. State*, we held that a prior indictment tolls the statute of limitations for a subsequent indictment "when both indictments allege the same conduct, same act, or same transaction."[8] The original and amended indictments do not appear to comply with this requirement. The original indictments alleged that Appellant provided security services as an unlicensed guard company, i.e., operated an unlicensed business.[9] The amended indictments alleged that he accepted employment to carry a firearm without being personally commissioned to be a security officer.[10] Under the amended indictments, Appellant did not even need to actually provide security

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[6] *Id.* at 416-17.

[7] *Id.* at 417.

[8] 127 S.W.3d 768, 774 (Tex. Crim. App. 2004).

[9] *See supra* at n.1.

[10] *See supra* at n.2.

services—the act alleged in the original indictments. And to provide security services under the original indictments, Appellant need not have carried a firearm or entered into any agreement to do so.

There are some common requirements for obtaining a security services license and a security officer commission,[11] but a security officer commission, which allows the carrying of a firearm, involves some extra requirements.[12] Suppose a defendant *did* have a license to be in the guard company business and was facing one of these original indictments accusing him of not having such a license. What would make him think that the State was accusing him of (or that he needed to defend against) the allegation that he carried or agreed to carry a firearm without having been personally commissioned to do so?

It might be that a "guard company" indictment could contain enough specific facts to make it clear that the indictment was in fact alleging the same act, conduct, or transaction as a later indictment for agreeing to carry a firearm without a security officer commission. But the indictments in the cases before us do not contain much in the way of facts—they largely track the respective statutes on which they are based. And although the original and amended indictments in each case allege the same date, the indictments use "on or about" language—so that it is not at all clear that the same transaction, much less the same act or conduct, is being alleged.[13]

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[11] *See* TEX. OCC. CODE § 1702.113.

[12] *See id.* § 1702.163.

[13] *See Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997) ("It is well settled that the "on or about" language of an indictment allows the State to prove a date other than the one alleged in the indictment as long as the date is anterior to the presentment of the indictment and within the statutory limitation period.").

We agree with the court of appeals that the offenses alleged in the original indictments did not toll limitations for the offenses alleged in the amended indictments. Consequently, we affirm the judgment of the court of appeals.

Delivered: October 3, 2018

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