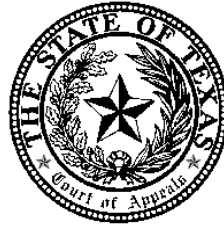


**Affirmed in Part as Reformed, Reversed and Remanded in Part, and Majority and Concurring Opinions filed October 21, 2010**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-09-00247-CR**

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**THOLONAUS DARRELL POMIER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 212th District Court  
Galveston County, Texas  
Trial Court Cause No. 07CR1549**

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**C O N C U R R I N G   O P I N I O N**

This is an uncommon case: the charging instrument filed against appellant alleged misdemeanor stalking under a prior statute; the charging instrument was filed in district court—not county court; and appellant was convicted of and sentenced to 20 years in district court for felony stalking—not misdemeanor stalking as alleged in the indictment. The Court of Criminal Appeals has recently held that a district court is vested with subject-matter jurisdiction over a charging instrument alleging a misdemeanor offense if the instrument notifies the accused that the State intends to charge a felony. *See Garza v.*

*State*, No. 1761-08, 2010 WL 454942, at \*3 (Tex. Crim. App. Feb. 10, 2010); *see also Kirkpatrick v. State*, 279 S.W.3d 324, 329 (Tex. Crim. App. 2009). Following *Kirkpatrick*, the majority opinion in this case concludes that the district court was vested with jurisdiction over appellant’s misdemeanor stalking offense. And because this Court is bound by *Kirkpatrick*, I agree with the majority opinion’s disposition of appellant’s jurisdictional argument. However, as a matter of constitutional jurisprudence, I concur to express that *Kirkpatrick*’s holding runs afoul of the constitutional and statutory mandates for district court jurisdiction.

***A. Constitutional and Statutory Mandates For District Court Jurisdiction***

Subject-matter jurisdiction is mandatory and cannot be judicially created or conferred—this type of jurisdiction exists by reason of that authority vested in the court by the state’s constitution and statutes. *See Garcia v. Dial*, 596 S.W.2d 524, 527 (Tex. Crim. App. 1980). Unless the authority of a court to perform a contemplated act can be found in the Texas Constitution or laws enacted thereunder, that court is without jurisdiction. *Id.* (quoting *Ex parte Armstrong*, 110 Tex. Crim. 362, 8 S.W.2d 674, 675–76 (1928)). Further encompassed by subject-matter jurisdiction is the court’s authority to carry the sentence or the judgment of the court into execution. *Id.* at 528.

Article V, section 8 of the Texas Constitution provides that district courts have original jurisdiction in all criminal cases of the grade of felony. Tex. Const. art. V, § 8. Furthermore, article 4.05 of the Texas Code of Criminal Procedure provides that district courts have subject-matter jurisdiction over felonies, misdemeanors involving official misconduct, and misdemeanor cases transferred to the district court under article 4.17 of the Code of Criminal Procedure. Tex. Code Crim. Proc. Ann. art. 4.05 (Vernon 2005). However, subject-matter jurisdiction over all misdemeanors of which exclusive jurisdiction is not given to the justice court, and when the fine to be imposed exceeds \$500, is conferred upon the county courts by statute and the Texas Constitution. Tex. Const. art. V, § 16; Tex. Code. Crim. Proc. Ann. art. 4.07.

***B. Kirkpatrick Improperly Confers  
Subject-Matter Jurisdiction Over Misdemeanor Offenses to District Courts***

The defendant in *Kirkpatrick* was charged with misdemeanor tampering with a government record; however, the charging instrument was filed in a district court. 279 S.W.3d at 324–25. The *Kirkpatrick* court vested the district court with subject-matter jurisdiction over the misdemeanor offense, reasoning:

[A]lthough the indictment properly charged a misdemeanor and lacked an element necessary to charge a felony, the felony offense exists, and the indictment’s return in a felony court put appellant on notice that the charging of the felony offense was intended. . . Appellant had adequate notice that she was charged with a felony.

*Id.* at 329. Under *Kirkpatrick*, a district court is vested with subject-matter jurisdiction over a misdemeanor offense so long as the accused has notice that a felony is intended to be charged. While the indictment serves two functions—it provides notice of the offense to allow a defendant an opportunity to prepare a defense and serves to vest a court with jurisdiction—*Kirkpatrick* confuses these distinct functions. Contrary to *Kirkpatrick*’s reasoning, subject-matter jurisdiction does not relate to an accused’s right to notice. See *Garcia*, 596 S.W.2d at 528 n.5 (quoting 15 Tex. Jur. 2d § 50 (1960)). Subject-matter jurisdiction vests only upon the filing of a valid indictment in the ***appropriate court***. *Cook v. State*, 902 S.W.2d 471, 476 (Tex. Crim. App. 1995). Notice that the State intends to charge a felony does not vest a district court with subject-matter jurisdiction over a misdemeanor. See *id.* By conferring subject-matter jurisdiction over a misdemeanor to a district court merely when the accused has notice, *Kirkpatrick* improperly bestows subject-matter jurisdiction to district courts outside the Texas Constitution and the Code of Criminal Procedure. See *Garcia*, 596 S.W.2d at 527 (reasoning that subject-matter jurisdiction exists by reason of that authority vested in the court by the Constitution and statutes).

In the instant case, appellant was charged with misdemeanor stalking. A district court's jurisdiction is limited to felony cases, except for instances that do not apply here. Tex. Const. art. V, § 8; Tex. Code Crim. Proc. Ann. art. 4.05. Thus, under the Texas Constitution and the Code of Criminal Procedure, the district court was without subject-matter jurisdiction. Because the trial court had no jurisdiction over the charged misdemeanor offense, any action taken by the trial court should be deemed void. *See Garcia*, 596 S.W.2d at 528 n.5; *see also Silva v. State*, No. 01-02-01137-CR, 2003 WL 21805497, at \*1 (Tex. App.—Houston [1st Dist.] Aug. 7, 2003, no pet.) (mem. op. on reh'g, not designated for publication). However, because this Court is bound by the precedent set forth by the Court of Criminal Appeals in *Kirkpatrick*, I join the opinion of this Court and respectfully concur only to address the unconstitutionality of *Kirkpatrick*.

/s/ Adele Hedges  
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Boyce (Yates, J. majority).  
Publish — TEX. R. APP. P. 47.2(b).