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

KEASLER, J., filed a dissenting opinion, in which HERVEY and NEWELL, JJ., joined.

DISSENTING OPINION

Under Article 12.05(b) of the Code of Criminal Procedure,"[t]he time during the pendency of an indictment . . . shall not be computed in the period of limitation."[1] This means that, so long as "an indictment" is pending against the defendant, the relevant limitation period is put on pause. We have rejected the idea that "*any* indictment for *any*

[1] TEX. CODE CRIM. PROC. art. 12.05(b).

unrelated offense" will allow the State to take advantage of this provision.[2] Otherwise, "a person could be continually indicted for any offense that the State felt inclined to charge," and the State could thereby perpetually skirt the statute of limitations.[3] So the question is: What kinds of indictments will give rise to tolling under Article 12.05(b)?

In *Hernandez v. State*, the defendant was initially charged with possession of amphetamine.[4] More than three years later, the State filed another indictment alleging possession of methamphetamine. This was a different statutory offense from the one originally alleged, but we held that, pursuant to Article 12.05(b), the three-year limitation period for the subsequent indictment had been tolled by the pendency of the first. Acknowledging that the legislative history weighed "in favor of reading Article 12.05(b) broadly,"[5] we began by laying out the two interpretive extremes in order to find a possible middle ground. First, for the reasons explained above, we declined to interpret the phrase "an indictment" to mean "any indictment for any unrelated offense."[6] But we also declined to interpret that phrase to require both indictments to allege the same offense, for we noted that this requirement was present elsewhere in the Code and conspicuously absent from

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[2] *Hernandez v. State*, 127 S.W.3d 768, 772 (Tex. Crim. App. 2004) (emphasis in original).

[3] *Id.*

[4] 127 S.W.3d at 769.

[5] *Id.* at 771.

[6] *Id.* at 772 (emphasis omitted).

Article 12.05(b).[7] Somewhere between these two extremes, we ultimately decided that, under Article 12.05(b), a prior indictment tolls the limitation period for a subsequent indictment "when both indictments allege the same conduct, same act, or same transaction."[8]

We did not, in *Hernandez*, undertake to provide precise definitions of the terms "conduct," "act," or "transaction." But the kinds of considerations the Court relied upon in adopting this test shed some light. Specifically, we sought to ensure that a defendant subjected to a second indictment would still receive "adequate notice so that he may prepare a defense."[9] This concern may be satisfied, we said, "if the prior indictment gives adequate notice of the substance of the subsequent indictment."[10] For, "[i]f the defendant has adequate notice of a charge, he can preserve those facts that are essential to his defense."[11] We also quoted approvingly of a federal district court opinion that emphasized "the factual basis of an indictment" over the "specific charge alleged" in determining whether a second indictment is proper under the federal analogue to Article 12.05(b).[12]

Applying the *Hernandez* test to the facts of this case, I disagree that the two sets of

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[7] *Id.*

[8] *Id.* at 774.

[9] *Id.* at 772 (citing *United States v. Gengo*, 808 F.2d 1, 4 (2d Cir. 1986); *United States v. O'Neill*, 463 F.Supp 1205, 1208 (E.D. Pa. 1979)).

[10] *Id.*

[11] *Id.*

[12] *Id.* at 773 (citing *United States v. Hill*, 494 F.Supp. 571, 573 (S.D. Fla. 1980)).

indictments alleged impermissibly divergent conduct. Both sets of indictments targeted the same three incidents, on the same three dates, arising from the same set of facts, made criminal within the same Private Security Act.[13] "[R]eading Article 12.05(b) to allow the tolling of the statute of limitations for an indictment charging a similar offense does not undermine the purpose of the statute of limitations."[14] Though not identical, the offenses in this case are undeniably similar, and that is all that *Hernandez* requires. I do not contest that the two theories of guilt contained within these indictments would have required different proof. But this will almost always be true when different statutory violations are alleged. *Hernandez* makes it abundantly clear that whether two offenses are elementally different is not the proper test for tolling under Article 12.05(b).[15] So, instead of restricting our analysis to the particular wording of the indictments, we ought to look at their underlying factual basis[16]—Marks's providing private-security services without the proper license.

With these facts in mind, it seems highly unlikely that Marks, charged with one violation of the Private Security Act, would have sought and preserved any different defensive evidence had he known that the State would ultimately prosecute him for an

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[13] *See* TEX. OCC. CODE ch. 1702; *id.* § 1702.001 ("This chapter may be cited as the Private Security Act.").

[14] *Hernandez*, 127 S.W.3d at 772.

[15] *See id.*

[16] *Id.* at 773 ("[T]he factual basis of an indictment, rather than the specific charge alleged, is crucial in determining whether the second indictment is proper[.]").

alternate Private-Security-Act violation bearing a strong resemblance to the first. After all, Marks's primary defensive theories were that (1) the Private-Security-Act licensing requirements did not apply to him because, at the time he engaged in private-security services, he was a full-time peace officer; and (2) even if he had not met the requirements of being a full-time peace officer, he believed in good faith that he had. The first of these defensive theories, if credited, would have acquitted him of both the initial, guard-company allegation and the subsequent, armed-security allegation.[17] And the second defensive theory likely would not have helped him with respect to either alleged offense, since the Private Security Act's penalizing statute does not prescribe a culpable mental state with respect to either of these discrete licensing requirements.[18] It follows that any harm resulting from the State's untimely amendment should not be attributed to the switch from a guard-company allegation to an armed-security allegation, because this switch had no absolutely effect on either of Marks's defensive theories. This is a strong indication that Marks would have understood both indictments to reach the same core conduct or act.

Even if I am wrong about that, I would conclude that the indictments at the very least alleged the same transaction, as each corresponding indictment alleged the same date. It is true that both indictments contain "on or about" language, potentially broadening the time period in which the State might prove an offense at trial. But this was also true in

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[17] *See* TEX. OCC. CODE § 1702.322(1).

[18] *See id.* § 1702.388(a).

Hernandez,[19] and *Hernandez* did not describe "on or about" language as preventing a finding that two indictments reach the same transaction.[20] Furthermore, even assuming that the phrase "on or about" casts doubt over whether two same-date-alleging indictments refer to the same transaction, there were two sets of three indictments in this case, and all three corresponding indictments match up day-for-day. This makes it exceedingly unlikely that Marks was initially preparing to defend against allegations pertaining to one span of time, and then was surprised to learn that he would have to defend against allegations pertaining to another. With three day-for-day matches, it is far more likely that Marks understood both indictments to target the same transaction.

Because they often have "nothing to do with the guilt or innocence of the persons charged," *Hernandez* sought to limit the impact that "procedural errors and defects in form" would have on the State's ability to re-indict an offender.[21] To that end, *Hernandez* instructs us to construe Article 12.05(b) "broadly."[22] Today's opinion takes a decidedly narrow view of what that statute permits. I respectfully dissent.

Filed: October 3, 2018

Published

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[19] *Hernandez v. State*, 74 S.W.3d 73, 74 (Tex. App.—Eastland 2002), *rev'd*, 127 S.W.3d 768 (Tex. Crim. App. 2004).

[20] *Hernandez,* 127 S.W.3d at 773–74.

[21] *See id.* at 771 (citations omitted).

[22] *Id.*