



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-1369-15

ALBERT JUNIOR FEBUS, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
HARRIS COUNTY**

**RICHARDSON, J., filed a dissenting opinion in which ALCALA and WALKER, JJ.
joined.**

DISSENTING OPINION

Appellant, Albert Febus, was convicted and sentenced to 35 years for failing to register as a sex offender under Texas Code of Criminal Procedure Articles 62.055(a) and 62.102(a).¹ He appealed, challenging the sufficiency of the evidence to support the

¹ Under Article 62.055(a), if a person who is required to register as a sex offender intends to change his address, he must report in person to the local law enforcement authority and provide the authority with his anticipated move date and new address. A person commits an offense under Article

conviction. On direct appeal, the First Court of Appeals, obliged to follow this Court's decision in *Robinson v. State*,² affirmed Febus's conviction. Today, the majority continues to uphold *Robinson*, finding that the State was not required to prove an additional culpable mental state related to Febus's failure to register. I did not join the majority opinion in *Robinson*,³ and for the same reasons, respectfully, I dissent in this case.

A. Background

Febus complied with his sex offender registration requirement for six years without any issues. In 2013, Febus was living at La Hacienda Apartments in Houston. La Hacienda is comprised of two buildings—one at 6110 Glenmont and one at 6100 Glenmont. In March of 2013, Febus moved within La Hacienda—from the apartment where he was residing at 6110 Glenmont Drive, Apt. 57, to an apartment in the other building at 6100 Glenmont Drive, Apt. 45. Febus clearly knew that he was required to update his address to comply with the sex-offender registration requirement. Febus signed his registration documents when he moved; however, those documents listed his new address as 6110 Glenmont Drive, Apt. 45, instead of the correct address of 6100 Glenmont Drive, Apt. 45—he got the change of

62.102(a) if that person “is required to register and fails to comply with any requirement of this chapter.”

² 466 S.W.3d 166 (Tex. Crim. App. 2015).

³ I joined Judge Alcala's concurring opinion, wherein she agreed in upholding Robinson's conviction but disagreed with the majority's decision applying a culpable mental state to only the duty to register and not the failure to register.

apartment units correct, but missed one digit on the street number. Seven months later, a compliance officer visited 6110 Glenmont Drive, Apt. 45, to ensure that Febus was living where he was registered. The officer spoke with the property manager and the resident of the apartment identified on Febus's registration. Febus was not listed on the leases for either apartment.⁴ The property manager testified that she did not know Febus and had not seen him on the apartment grounds. After determining that Febus was not living at 6110 Glenmont Drive, Apt. 45, the officer obtained a warrant for his arrest. The officer did not go to Apt. 45 in the other building located at 6100 Glenmont Drive nor ask whether there was an Apt. 45 in the second building.

Febus was charged with intentionally and knowingly failing to provide his new address to the local law enforcement authority.⁵ At Febus's trial, the registration officer, Becky Wilson, testified that Febus told her his address was 6110 Glenmont Drive, Apt. 45. She also testified that the temporary driver's license from DPS, that was given to her by Febus, reflected that Febus's address was 6110 Glenmont, Apt. 45, and she used this

⁴ This is not surprising. Obtaining an apartment lease is difficult for a registered sex offender since one must list criminal history on a Texas Apartment Association Rental Application for Residents and Occupants.

⁵ The indictment charged that Febus did "unlawfully, while a person with a reportable conviction for the offense of indecency with a child, and while subject to registration under the Texas sex offender registration program, and while intending to change his residential address, intentionally and knowingly fail to timely provide in person the defendant's anticipated move date and new address to the local law enforcement authority, Houston Police Department designated as the defendant's primary registration authority, by failing to provide said information in person to said authority at least seven days before the defendant's change of address."

information to fill in his “CR-39” registration form.

Febus testified at his trial with the aid of an interpreter. He stated that, although he is able to speak and understand English, he preferred to testify in his native language of Spanish.⁶ Febus testified that he went to the registration office some time in February and told Officer Wilson that he was going to be moving to 6100 Glenmont, Apt. 45. He said that Officer Wilson told him he needed to first have his address changed with the Department of Public Safety, then return to the registration office to get a “blue card,” which must be carried by registrants at all times. Febus said that he went to the DPS and obtained his temporary license, but when he returned to the registration office, Officer Wilson advised him to stay at his old address until his registration was up for renewal in March. Febus testified that he stayed at 6110 Glenmont, Apt. 57, until he went back to the registration office in early March. Febus said that when he returned to the registration office, he gave Officer Wilson the paper he had received from the DPS office. Febus was adamant that he gave DPS the correct address of 6100 Glenmont, Apt. 45, but he admitted that the temporary paper license he received from DPS reflected the incorrect street number.

Although Febus insisted that he told Officer Wilson that he was moving to 6100 Glenmont, not 6110 Glenmont, Officer Wilson testified at trial that Febus provided her with the incorrect address which resulted in her typing it incorrectly on the forms. She said that

⁶ It was not established whether Febus is able to read English.

Febus signed the registration forms without correcting the address. This resulted in the CR-39 form and the “blue card” correctly reflecting Apt. 45, but incorrectly reflecting street number of 6110 instead of 6100.

However, inexplicably, when Febus received his permanent identification card in the mail from DPS, it had the correct address on it—6100 Glenmont, Apt. 45. A photocopy of his permanent ID with his correct address was introduced into evidence. Therefore, logic would dictate that Febus must have given DPS the correct address because he was issued a permanent ID card with the correct address. It is not clear from the record how DPS could have given Febus a temporary paper license with the wrong address, but have mailed him a permanent ID with the right address. Surprisingly, Febus’s attorney did not pursue that line of questioning. The jury found Febus guilty of failure to register and assessed punishment at 35 years.⁷

B. The Failure To Register

Two distinct statutes come together to form the failure-to-register offense under which Febus was charged. Article 62.055 places a duty on sex offenders to provide registration authorities with change-of-address information.⁸ Article 62.102 makes failing to comply

⁷ At the punishment stage, Febus pled true to past convictions for robbery and for being a felon in possession of a firearm, leading to enhancements that set the minimum punishment at 25 years. He had committed these offenses in California under a different name.

⁸ TEX. CODE CRIM. PROC. art. 62.055(a).

with the duty to register a criminal offense.⁹ Essentially, “[a] person commits an offense if the person is required to register and fails” to do so.¹⁰ No culpable mental state is expressly prescribed in the statute for failing to register, but neither does the statute plainly dispense with a mental element. Under Texas Penal Code § 6.02(b), “If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.” Texas Penal Code § 6.02(c) provides that, “If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.”

C. Robinson—No Culpable Mental State Required For Failing To Register

Nevertheless, this Court held in *Robinson* that a culpable mental state applies to the duty to register (which arises under Article 62.055), *but not* to the failure to register (which is made a criminal offense under Article 62.102).¹¹ I disagree with that particular part of the holding in *Robinson*. As Judge Alcala suggested in her concurring opinion in *Robinson*, the penalties can be severe for “sex offenders who lack any criminal intent as to their conduct in failing to register” because we have “effectively [made] the failure-to-register offense a

⁹ TEX. CODE CRIM. PROC. art. 62.102(a).

¹⁰ *Id.*

¹¹ *Robinson*, 466 S.W.3d at 172 (“We hold . . . that the culpable mental states of knowledge and recklessness apply only to the duty-to-register element of Article 62.012’s [*sic*] failure-to-comply offense.”).

strict-liability crime.”¹² If a person who is required to register fails to successfully do so, even if there was no intent to not register, no knowledge that there was a failure to correctly register, and no reckless disregard for whether registration was accomplished, *Robinson* dictates that the conviction must nevertheless be upheld. I do not agree with that, and I continue to take the position that *Robinson* should be overruled.

In this case, the record indicates that Febus did not intentionally fail to register. It might be a close call as to whether the evidence shows that Febus had the culpable mental state of knowledge (i.e., he *knew* that he had registered an incorrect address), or recklessness (he consciously disregarded the risk that his registration papers reflected an incorrect address). But, as the law stands under *Robinson*, the State has no duty to prove any culpable mental state, which means that there is zero margin of error.

I believe the facts of this case could be interpreted as illustrating how a sex-offender registration mistake could have been made through inadvertence or negligence, given the complicated nature of the registration requirements, but not intentionally, knowingly, or recklessly.¹³ Even if this is not *that* case, I can anticipate a set of facts where the failure to successfully register *could* occur through no fault of the person required to register (unintentionally, unknowingly, and not recklessly); yet, that person would still be held in

¹² *Id.* at 181 (Alcala, J., concurring).

¹³ A review of the 2014 Edition of West Texas Statutes and Codes, Code of Criminal Procedure Chapter 62, reflects a 27-page long statute with over 50 articles, each having multiple sections and subsections.

violation of the statute. That is why a culpable mental state should be tied to the failure to register, not just to the duty to register.¹⁴

The majority holds that a rational jury could have concluded that Febus had provided incorrect information regarding his new address—in other words, Febus’s failure to register was not done *involuntarily*. That is true. But I believe the sufficiency analysis needs to be taken one step further to determine whether a rational jury could have concluded that Febus intentionally, knowingly, or recklessly provided incorrect information regarding his new address. This would require overturning *Robinson* and holding that a culpable mental state applies to not only the duty to register, but also to the failure to register.

D. The Cases The Court Relied Upon In *Robinson* Are Distinguishable

The majority opinion in *Robinson* followed the Court’s rationale in *McQueen v. State*¹⁵ and *Huffman v. State*.¹⁶ Both cases held that a culpable mental state must attach to the circumstances of the conduct. *McQueen* involved the unauthorized-use-of-a vehicle statute, under which a person commits an offense if he “intentionally or knowingly operates another’s boat, airplane, or motor-propelled vehicle without the effective consent of the

¹⁴ Under Texas Penal Code section 6.02(b), “If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element. Texas Penal Code § 6.02(c) provides that, “If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.”

¹⁵ 781 S.W.2d 600 (Tex. Crim. App. 1989).

¹⁶ 267 S.W.3d 902 (Tex. Crim. App. 2008).

owner.”¹⁷ In *McQueen*, this Court held that the culpable mental state applied only to the actor’s knowledge of whether he or she had the consent of the owner—the circumstances surrounding the conduct. Similarly, *Huffman* involved the failure-to-stop-and-render-aid statute, where the accident—the circumstances surrounding the conduct—triggers a person’s duty under that statute, and the Court held that the culpable mental state applied to whether the person had knowledge that they had been involved in an accident. While I agree that *McQueen* and *Huffman* support a conclusion that a culpable mental state must be applied to the circumstances surrounding the conduct, which, in this case, would be the duty to register, I do not agree that those two cases support the conclusion that a culpable mental state must be applied *only* to the duty to register. The difference lies in what facts are required to prove that an offense has been committed.

In *McQueen*, it was logical for the Court to apply the culpable mental state to the actor’s knowledge of whether he had consent of the owner—the circumstance surrounding the conduct—because it is difficult to envision a situation where one could operate a vehicle unintentionally or unknowingly. Similarly, it was logical for the Court in *Huffman* to ascribe the culpable mental state of knowledge to the circumstances surrounding the conduct—an accident and a victim suffering injury. Again, it is difficult to envision a situation where, knowing an accident had occurred and a person is potentially injured, a person could inadvertently, unknowingly, or unintentionally fail to stop, remain, or return. In other words,

¹⁷ *McQueen*, 781 S.W.2d at 603 (quoting TEX. PENAL CODE § 31.07).

once the culpable mental state is attributed to the circumstances,—that one knows that the owner has not consented (*McQueen*), or knows that an accident has occurred (*Huffman*)—the operation of the vehicle or the failure to stop, remain, or return, is in violation of the statute. Whereas, in a failure-to-register scenario, even if one knows that he has a duty to register, it is quite possible that the failure to successfully comply with registration requirements is neither intentional nor knowing. A person may fail to register because of another person’s mistake, and the failure to discover the mistake may occur inadvertently rather than intentionally or knowingly.

The *Robinson* majority also relied on this Court’s opinion in *Young v. State*¹⁸ to support its conclusion that the culpable mental states of knowledge and recklessness apply to only the duty-to-register element of the failure-to-register offense. This Court held in *Young* that, “[b]ecause Article 62.055 punishes what would otherwise be innocent behavior—moving to a new address—under the circumstances that the person is a registered sex offender, we conclude that the statute creates a ‘circumstances surrounding the conduct’ offense.”¹⁹ While I agree that it is the circumstance of having a duty to register that is one essential element of the offense of failure to register requiring a culpable mental state, I do not agree that Article 62.055 punishes the innocent behavior of “moving to a new address.” Rather, it is Article 62.055’s *failing to notify law enforcement* when moving to a new address

¹⁸ 341 S.W.3d 417 (Tex. Crim. App. 2011).

¹⁹ *Id.* at 427.

that is punished as an offense under Article 62.102. That second element should also require a culpable mental state. In fact, this Court held in *Young* that the gravamen of the offense created by Article 62.055(a) is the “forbidden act” of “failing to inform law enforcement about an impending or completed change of residence.”²⁰ It is true that, in *Young*, this Court drew “obvious parallels” between Article 62.055 and the failure-to-stop-and-render-aid statute in *Huffman*. However, such parallels were in the context of our analysis regarding unanimity and the manner and means of violating the statute, not in ascribing a culpable mental state.

E. Conclusion

Therefore, I believe that the majority in *Robinson* incorrectly limited its assessment of the culpable mental state required by the offense of failure to register to only the duty-to-register element. Instead, I would hold that the offense of failing to register under the statute is violated when one (1) knows or should know that he has a duty to register and (2) *intentionally, knowingly, or recklessly* fails to comply with that duty to register. Therefore, I would ascribe a culpable mental state to both the *duty* to register and the *failure* to register, and not just to the duty to register, as this Court did in *Robinson*.

Since the evidence was clear that Febus was aware of the registration requirements—the forms he signed, the six years he maintained his registration, and his own testimony—this constituted sufficient evidence that he had knowledge of the duty-to-register

²⁰ *Id.* at 426.

element of the offense. The appellate court correctly noted that, under *Robinson*, the State did not have to prove that Febus had a culpable mental state when failing to provide the correct address. “The evidence shows that the required documents listed the incorrect address and that Febus signed them. That is sufficient evidence to satisfy the second element, failure to comply with the requirements of the statute. . . . The holding in *Robinson* is dispositive of this case.”²¹ Therefore, the court of appeals properly held that the evidence was sufficient to support the jury’s determination that Febus knew he had a duty to register.

However, for the reasons outlined above, I believe this Court should overturn *Robinson*, vacate the decision of the court of appeals, and remand this case so that the court of appeals could assess whether the evidence was legally sufficient to support the jury’s verdict that Febus intentionally, knowingly, or recklessly failed to register. Therefore, respectfully, I dissent.

FILED: February 14, 2018

PUBLISH

²¹ *Febus v. State*, 2015 WL 6081647, at *3 (Tex. App.—Houston [1st Dist.] 2015). The court of appeals was bound by our decision in *Robinson* that “the requirement of a culpable mental state applies only to the circumstances of the conduct—the duty to register, not the conduct of failing to do so.” *Id.*