IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0003-20

KYLE DEAN KUYKENDALL, Appellant

v.

THE STATE OF TEXAS

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FIRST COURT OF APPEALS KERR COUNTY

YEARY, J., delivered the opinion of the Court in which KELLER, PJ., and KEASLER, HERVEY, RICHARDSON, KEEL, and SLAUGHTER, J.J., joined. NEWELL, J., concurred in the result. WALKER, J., dissented.

O P I N I O N

Appellant was charged, in a single indictment, with two separate instances of the third-degree felony offense of failure to appear. TEX. PENAL CODE § 38.10(a), (f). He was convicted of both counts and sentenced to concurrent ten-year sentences. On appeal, he argued that punishing him for both offenses violated the Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment.[1] Appellant

[1] *See Benton v. Maryland*, 395 U.S. 784, 794 (1969) ("[W]e today find that the double jeopardy prohibition of the Fifth Amendment . . . should apply to the States through the Fourteenth Amendment.").

argued that, because he had been required to appear on a single occasion to answer for both charges against him, he can only have committed one offense when he failed to appear.

The First Court of Appeals agreed with Appellant. The court of appeals held that, because Appellant failed to appear only once, he could only be punished once under the Double Jeopardy Clause. It vacated his conviction on the second failure-to-appear count. *Kuykendall v. State*, 592 S.W.3d 967, 972, 974 (Tex. App.—Houston [1st Dist.] 2019).

The State Prosecuting Attorney ("SPA") filed a petition for discretionary review to contest the lower court's conclusion that Appellant may not be punished twice for failing to appear at the combined court setting. At least one other court of appeals has held that multiple punishments under these circumstances do not violate double jeopardy. *Figueredo v. State*, 572 S.W.3d 738, 742–43 (Tex. App.—Amarillo 2019, no pet.). We granted the SPA's petition and now reverse the judgment of the court of appeals.

THE COURT OF APPEALS OPINION AND THE ARGUMENTS OF THE PARTIES

The court of appeals relied in large measure upon Judge Johnson's dissenting opinion in a habeas case from this Court called *Ex parte Marascio*. *See Kuykendall*, 592 S.W.3d at 970–73 (citing *Ex parte Marascio*, 471 S.W.3d 832, 853–55 (Tex. Crim. App. 2015) (Johnson, J., dissenting)).[2] In fact, the court quoted extensively from that dissenting opinion:

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[2] In *Marascio*, this Court had filed and set a post-conviction application for writ of habeas corpus to address the same issue presented here, but the Court denied the applicant's double jeopardy claim in a per curiam opinion without providing a unified rationale. *Marascio*, 471 S.W.3d at 832–33. None of the diverse perspectives expressed in the separate opinions gained a

> By the language of the statute, the gravamen of the offense is that the defendant failed to appear. Using the eighth-grade grammar test, a phrase that is preceded by a preposition ("in"), is a circumstance, not a gravamen. Ergo, "in accordance with the terms of his release," is a circumstance that makes failure to appear in court an offense. The sole gravamen of the offense remains the act of failing to appear, thus the unit of prosecution is the number of times the offense was committed.
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> . . . .
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> We do not charge a thief with four thefts if he steals a wallet that contains cash and three credit cards; we charge him with a single theft. And if a burglar enters a home without consent once and commits theft, assault, and arson, he may be charged with only one burglary, not three. Likewise we should not condone three charges for a single act of failing to appear.

See Kuykendall, 592 S.W.3d at 971–72 (quoting from *Ex parte Marascio*, 471 S.W.3d at 853–55 (Johnson, J., dissenting)). The court of appeals then concluded, "[w]e find Justice [sic] Johnson's reasoning in *Ex parte Marascio* persuasive." *Id*. at 972.

Appellant, for his part, echoes the opinion of the court of appeals. He urges this Court to adopt the reasoning from Judge Johnson's dissent in *Marascio*. He argues that "[t]he sole gravamen of the offense [of failure to appear] remains the act of failing to appear," and thus he contends "the 'unit of prosecution' for double jeopardy purposes is the number of times the person failed to appear." Appellant's Brief at 16. Like Judge Johnson's dissent from *Marascio*, he rejects "the assertion that the gravamen of the offense is the 'violation of the terms of release' of each individual bail bond." *Id*. He contends that the "contract has no bearing on the gravamen of the offense." *Id*. at 16–17.

The SPA, in contrast, argues that the failure to appear in court "is not criminal unless there is some circumstance that creates a duty to do so." SPA Brief at 7–8. She contends

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majority of the vote. But the issue is squarely before us now, free of any complicating collateral issues of cognizability or procedural default.

that, "[b]ased on the language of the statute, that circumstance is the violation of a term of the agreement or agreements authorizing release." SPA Brief at 19. Thus, she concludes, "[e]ach violation should give rise to an offense because each term is worthy of enforcement." *Id.*

APPLICABLE LAW

The Double Jeopardy Clause provides three types of protection: 1) protection against a second prosecution for the same offense following an acquittal; 2) protection against a second prosecution for the same offense following a conviction, and 3) protection against multiple punishments for the same offense. *Speights v. State*, 464 S.W.3d 719, 722 (Tex. Crim. App. 2015). This case involves the third of these protections.

What constitutes the "same offense" for purposes of the multiple-punishments double-jeopardy protection comes down to this: How many times does the penal provision permit a defendant to be punished when his conduct seems to violate the same penal provision more than once? *Id.*; *Ex parte Cavasos*, 203 S.W.3d 333, 336 (Tex. Crim. App. 2006). Our cases describe this as a "unit of prosecution" inquiry. *Cavasos*, 203 S.W.3d at 336 (citing *Ex parte Hawkins*, 6 S.W.3d 554, 556 (Tex. Crim. App. 1999)). *See Jones v. State*, 323 S.W.3d 885, 888 (Tex. Crim. App. 2010) ("In order to decide how many offenses appellant committed, we must determine the allowable unit of prosecution for the statute that proscribes the offense. Although this inquiry resolves the double jeopardy analysis, it is purely one of statutory construction."). We review the court of appeals' judgment with respect to this issue of statutory construction *de novo*. *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011).

ANALYSIS

So how do we determine the allowable unit of prosecution in the multiple-punishments context? "Absent an explicit statement that 'the allowable unit of prosecution shall be such-and-such,'" the Court has said that the best indicator "with respect to the unit of prosecution seems to be the focus or 'gravamen' of the offense." *Jones*, 323 S.W.3d at 889; *see also Loving v. State*, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013) ("Absent an express statement defining the allowable unit of prosecution, the gravamen of the offense best describes the allowable unit of prosecution."). "Gravamen" is also defined as "the material or significant part of a grievance or complaint." Merriam-Webster.com/dictionary/gravamen.

To discern the gravamen of the offense of failure to appear, we begin with the language of the failure to appear statute itself:

> (a) A person lawfully released from custody, with or without bail, on condition that he subsequently appear commits an offense if he intentionally or knowingly fails to appear in accordance with the terms of his release.

TEX. PENAL CODE § 38.10(a). In *Jones*, the Court observed that "the unit of prosecution tends to be defined by the offense element that requires a completed act." *Jones*, 323 S.W.3d at 890. But here, by the statute's plain terms, an actor completes the offense of failure to appear when he "fails to appear" as required. And so, the "act" to be "completed" before an actor may be prosecuted under Section 38.10(a) is not really an "act" at all; instead, the "conduct" proscribed by the statute is really an omission, namely, the "failure to appear." Such an omission cannot constitute an offense "unless a law . . . provides that the omission is an offense or otherwise provides that [the actor] has a duty to perform the

act." TEX. PENAL CODE § 6.01(c). By itself, then, the element of "failure to appear" in Section 38.10(a) cannot constitute the whole gravamen of the offense, since it does not serve to identify what actually makes the omission of failing to appear an offense.

The failure to appear is only made a crime in accordance with the elements of the offense that describe why the omission is unlawful: that the actor was "lawfully released from custody . . . on condition that he subsequently appear . . . in accordance with the terms of his release." TEX. PENAL CODE § 38.10(a). After all, it is not an offense under Section 38.10(a) to fail to appear in court on any specific occasion in the absence of an obligation to do so. Even an accused who has been released on a pre-trial bond need not show up for court except according to the terms of his release.

The court of appeals itself all but acknowledged that, had Appellant been required to appear on successive days in satisfaction of his two discrete bond obligations, he could have been prosecuted for two discrete instances of failing to appear without violating double jeopardy. *Kuykendall*, 592 S.W.3d at 972 ("This opinion is limited to its facts. It does not address failure to appear when a defendant facing multiple charges fails to appear at more than one separately scheduled court appearance."). As Judge Richardson expressed in his concurring opinion in *Marascio*, we reject the notion that the statute permits the "allowable unit of prosecution" for failing to appear to turn on an administrative decision about whether to combine separate court proceedings into a single setting. *See Marascio*, 471 S.W.3d at 849 (Richardson, J., concurring) ("The scheduling of court appearances on separate files is an administrative matter. A statute's allowable unit of prosecution cannot be a determination based upon such administrative convenience."); *see also State v.*

Garvin, 242 Conn. 296, 306, 699 A.2d 921, 926 (1997) ("To make the unit of prosecution under [the statute] the act of failing to appear for a court appearance, regardless of the number of bonds breached by that single failure to appear, would exalt the consequences of scheduling practice over the underlying purpose of [the statute.]"); *Johnson v. Commonwealth*, 292 Va. 738, 742, 793 S.E.2d 321, 323 (2016) ("The fact that Johnson's three separate felonies were scheduled to be heard at one time for the efficient administration of justice does not change the result. The net effect of his failure to appear were three distinct injuries to the administration of justice, even if these injuries occurred at the same time.").

The court of appeals appears to have been persuaded by the reference in Judge Johnson's dissent to the eighth-grade grammar test. But that test is only one tool, among others, that we use to identify the allowable unit of prosecution permitted by a statute. *See Huffman v. State*, 267 S.W.3d 902, 907 (Tex. Crim. App. 2008) ("We use grammar and we look to other factors bearing on whether different legal theories constitute the 'same' offense or 'different' offenses, but those tools seem useful mainly as an aid to determining focus."). [3] The simple fact that the phrase "in accordance with the terms of his release" begins with a preposition does not mean that it cannot also serve to identify a circumstance that is part of the gravamen of the offense of failure to appear.

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[3] Although *Huffman* involves the issue of jury unanimity, we have often observed, including in *Huffman* itself, that these are two "closely intertwined strands of our jurisprudence[.]" *Huffman*, 267 S.W.3d at 905. *See also Johnson v. State*, 364 S.W.3d 292, 296 (Tex. Crim. App. 2012) ("We are frequently called upon to determine the 'allowable unit of prosecution' in cases involving intertwining strands of our double-jeopardy and jury-unanimity jurisprudence."); *Gamboa v. State*, 296 S.W.3d 574, 583 (Tex. Crim. App. 2009) (quoting *Huffman* to explain that jury unanimity and double jeopardy "address the same basic question").

Circumstances surrounding conduct are routinely regarded as elemental in a penal provision. *See, e.g.*, *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989) ("unauthorized use of a motor vehicle is a 'circumstances' type offense" requiring a culpable mental state). When those surrounding circumstances serve to make otherwise innocuous conduct criminal, they are also essential to successful prosecution of that conduct as an offense. *Id*. at 604; *Delay v. State*, 465 S.W.3d 232, 247 (Tex. Crim. App. 2014). They have certainly been regarded as part of the "focus" or gravamen of the offense in cases examining the requirement of jury unanimity. *See, e.g.*, *Huffman*, 267 S.W.3d at 907−08 (in a prosecution for the offense of failure to stop and render aid, the circumstantial element of "accident" was regarded as part of the "focus" of the offense for jury-unanimity purposes). So especially when, as here, the statutory circumstance surrounding conduct (*i.e.*, the terms of the conditional release) is what makes the *omission* an offense, that statutory circumstance is all the more essential to defining the actionable conduct, and it should therefore be regarded as part of the gravamen. TEX. PENAL CODE § 6.01(c).

Focusing on the circumstance surrounding conduct that makes the offense of failure to appear actionable, we also note that Section 38.10(a) uses a singular form of the noun "release." In *Jones*, we observed that "a legislative reference to an item in the singular suggests that each instance of that item is a separate unit of prosecution." *Jones*, 323 S.W.3d at 891. Use of the singular "release," we think, further supports Judge Richardson's view that the allowable unit of prosecution is the number of discrete conditional releases a specific failure to appear violates, not the number of scheduled hearings at which an accused failed to appear. *See Johnson v. Commonwealth*, 292 Va. at 742, 793 S.E.2d at 323

("The legislature selected the term 'a' felony, thereby indicating that each felony charge could serve as a predicate of a failure to appear conviction.").

CONCLUSION

We conclude that the failure to appear statute actually creates as many actionable offenses as there are conditional releases according to the terms of which the actor failed to appear. In other words, the "allowable unit of prosecution" for the offense of failure to appear under Section 38.10(a) is the number of discrete conditional releases for which he was required to appear and did not; it is *not* simply the number of times he failed to show up before some adjudicative body. In this case, when Appellant failed to appear at the combined setting, he committed two distinct offenses.

The Double Jeopardy Clause of the Fifth Amendment was not violated. Accordingly, to the extent that the court of appeals' judgment vacated Appellant's second conviction for failing to appear, we reverse.

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