IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-91,503-01

EX PARTE JASON JERMAINE COOK, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS CAUSE NO. 19739-A IN THE 369TH DISTRICT COURT FROM CHEROKEE COUNTY

KELLER, P.J., delivered the opinion for a unanimous Court.

Punishment for simple driving while intoxicated is a Class B misdemeanor, but the separate offense of driving while a child is in the car is a state jail felony. The question in this case is whether, when two children are in the car, a defendant commits one offense or two.

I. BACKGROUND

Applicant pled guilty to two counts of driving while intoxicated with a child passenger under 15 years of age, under Texas Penal Code § 49.045. Both counts arose from the same driving incident, with each count alleging a different child. After pleading true to enhancements, Applicant was sentenced to ten years on each count, to run concurrently.

Applicant filed a *pro se* application for a writ of habeas corpus alleging that conviction on

both counts violated double jeopardy. The habeas court agreed with Applicant and recommended that we vacate the second count. We filed and set this case to determine the appropriate unit of prosecution for offenses under § 49.045. In briefing before this Court, the parties agree that the unit of prosecution is each driving incident and that Applicant has suffered a double jeopardy violation.

II. ANALYSIS

For double jeopardy purposes, the proper unit of prosecution is a question of statutory construction, subject to *de novo* review.[1] Absent an explicit legislative direction, the best indicator of legislative intent regarding the unit of prosecution is the gravamen, or focus, of the offense.[2] The statute in this case provides:

> A person commits an offense if:
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> (1) the person is intoxicated while operating a motor vehicle in a public place; and
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> (2) the vehicle being operated by the person is occupied by a passenger who is younger than 15 years of age.[3]

Two courts of appeals have held that the proper unit of prosecution under the statute is each act of driving, not each child occupant.[4] We agree.

There are three overarching types of gravamen for unit of prosecution purposes: (1) the result of conduct, (2) the nature of conduct, or (3) the circumstances surrounding the conduct.[5] An offense

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[1] *Harris v. State*, 359 S.W.3d 625, 625 (Tex. Crim. App. 2011).

[2] *Id.* at 630.

[3] *See* TEX. PENAL CODE § 49.045(a).

[4] *See State v. Bara*, 500 S.W.3d 582, 587 (Tex. App.—Eastland 2016, no pet.); *Gonzalez v. State*, 516 S.W.3d 18, 22 (Tex App.—Corpus Christi–Edinburg 2016, pet. ref'd).

[5] *Stevenson v. State*, 499 S.W.3d 842, 850-51 (Tex. Crim. App. 2016).

may have more than one of these types of conduct elements, but the question is which conduct element is the focus of the statute.[6] The offense at issue here has both a nature of conduct element (driving while intoxicated) and a circumstance surrounding the conduct element (presence of a child under age 15).[7] A circumstance element can prescribe the gravamen of the offense if it makes otherwise innocent conduct criminal.[8] But here, the circumstance element (the presence of a child under age 15) does not make otherwise innocent conduct criminal; it merely aggravates otherwise criminal conduct. It is often the case that an aggravating element does not affect the unit of prosecution,[9] and that is so here. The circumstance element in this case—presence of a child under age 15—does not describe the focus of the offense. Rather, the focus, for unit of prosecution purposes, is the act of driving while intoxicated. Consequently, we conclude that each incident of driving describes the unit of prosecution for the offense at issue, not the presence of each child.

We vacate the judgment of conviction for count two.

Delivered: September 15, 2021

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[6] *See id.*

[7] *See Ex parte Benson*, 459 S.W.3d 67, 81 (Tex. Crim. App. 2015) (For felony DWI, "there is a nature-of-conduct element (driving while intoxicated) and a circumstance-surrounding-the conduct element (having two prior DWI convictions).").

[8] *Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011).

[9] *See Hernandez v. State*, 556 S.W.3d 308, 327 (Tex. Crim. App. 2018) (For an aggravated assault with "deadly weapon" as the aggravating element, "the offense is result oriented and . . . the gravamina of the offense are the victim and the bodily injury that was inflicted."); *Saenz v. State*, 451 S.W.3d 388, 390 (Tex. Crim. App. 2014) (Jury need not agree on elements that elevate a murder to a capital murder and they are part of the same unit of prosecution "so long as the same victim is alleged for the predicate murder.").