AFFIRM; and Opinion Filed May 1, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01400-CR

EX PARTE TAMESHIA LASHAE HOLT

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. WX17-90074-I

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Schenck

Tameshia Lashae Holt appeals the trial court's order denying her pretrial application for writ of habeas corpus in which she argued her pending prosecution for criminally negligent homicide subjects her to double jeopardy. In three issues, appellant contends the trial court erred in concluding the "manner and means" averment of the indictment is not an element of the offense, in further concluding that she would not be subjected to double jeopardy if she was convicted of criminally negligent homicide after receiving a traffic citation charging the same conduct, and in finding, without support in the record, that the complainant died of injuries sustained in the accident that underlies the prosecution. We affirm.

BACKGROUND

On April 3, 2016, appellant was involved in a traffic accident in which the complainant allegedly was killed. A Richardson police officer investigating the accident cited appellant for failure to maintain insurance and a traffic violation described as "STOP-RAN STOP SIGN-STOP

LINE." Appellant entered a "no contest" plea to the stop sign offense.[1] The municipal court deferred disposition of the case and assessed a $230 fine. Appellant paid the fine and the municipal court dismissed the case on August 15, 2016.

On April 27, 2017, appellant was indicted for criminally negligent homicide arising from the April 3, 2016 accident. The indictment charged that she caused the complainant's death "by criminal negligence, to-wit: BY RUNNING A STOP SIGN THEREFORE STRIKING THE MOTOR VEHICLE OCCUPIED BY [the complainant]. . . ." The indictment further alleged appellant used her motor vehicle as a deadly weapon.

Appellant filed a pretrial special plea of double jeopardy and, after that was denied, an application for writ of habeas corpus, asserting that prosecuting her for criminally negligent homicide subjected her to double jeopardy because she had been tried already in the municipal court for the lesser-included offense of running a stop sign. After conducting a short hearing, the trial court concluded that although "criminal negligence" was an element of criminally negligent homicide, running the stop sign was the "manner and means" by which appellant was criminally negligent, rather than an element of the offense of criminally negligent homicide. Thus, the trial court further concluded, it would not violate the double jeopardy prohibitions in the United States Constitution and the Texas Constitution to convict appellant of both the traffic offense and of criminally negligent homicide. The trial court denied relief on appellant's writ application.

STANDARD OF REVIEW

An applicant for habeas corpus relief must prove the applicant's claims by a preponderance of the evidence. *Kniatt v. State*, 206 S.W.3d 657, 664 (Tex. Crim. App. 2006). In reviewing the trial court's order, we view the facts in the light most favorable to the trial court's ruling, and we uphold the ruling absent an abuse of discretion. *Id.* The trial court, as fact finder at the writ

[1] The record does not reveal what transpired with the failure to maintain insurance offense and that charge is not before us.

hearing, is the exclusive judge of witness credibility. *Ex parte Amezquita*, 223 S.W.3d 363, 367 (Tex. Crim. App. 2006). We afford almost total deference to a trial court's factual findings when those findings are based upon credibility and demeanor. *Id*. If, however, the trial court's determinations are questions of law, or else are mixed questions of law and fact that do not turn on an evaluation of witnesses' credibility and demeanor, then we owe no deference to the trial court's determinations and review them *de novo*. *State v. Ambrose*, 487 S.W.3d 587, 596–97 (Tex. Crim. App. 2016).

THE STATE OF THE RECORD

Before considering appellant's issues, we first address the State's contention that appellant has failed to provide an adequate record. Nowhere in the record of the municipal court case is there a complaint or any express statement as to what transportation code statute appellant was charged with violating. The State points to three different transportation code sections regulating motorists' conduct at a stop sign. *See* TEX. TRANSP. CODE ANN. §§ 544.010, 545.151, 545.153 (West 2011). The State contends appellant has failed to show which of the three statutes was at issue in her municipal court prosecution and, therefore, has failed to provide an adequate record for the Court to review her double jeopardy issue. *See Ex parte Kimes*, 872 S.W.2d 700, 703 (Tex. Crim. App. 1993) (placing burden on writ applicant to show facts entitling applicant to habeas relief). Because of the alleged failure to present an adequate record, the State asks that we overrule appellant's first two issues without considering their merits.

Appellant attached to her writ application as an exhibit, and admitted into evidence during the writ hearing without objection, what counsel described as "the clerk certified copy of the record from the municipal court for the City of Richardson." The document, styled "Clerk's Certified Copy Of Record," contains the municipal court clerk's certification "that the following is a full, true and correct copy of an original document(s) as the same appears of official record in my office

and I am the lawful possessor and custodian of said record(s)." The certification has eleven attached documents beginning with the citation issued to appellant and ending with the order of dismissal of the traffic case. Nothing in the record contradicts counsel's assertion that the certified copy is a complete copy of the record from the proceedings in the Richardson Municipal Court. We cannot agree with the State that appellant has failed to present an adequate record when she has brought forward the entire official record of her prosecution.

Moreover, after reviewing the statutes and the municipal court record, we conclude it is reasonably certain that appellant was charged with an offense for failing to stop as required by section 544.010. Section 544.010, entitled "Stop Signs and Yield Signs," dictates the actions a motorist must undertake to perform a legal stop at a stop sign. *See* TEX. TRANSP. CODE ANN. § 544.010(c) (West 2011) (requiring vehicle operator to stop at stop sign at crosswalk; or if no crosswalk exists, at marked stop line; or if no stop line exists, at place nearest intersecting roadway where operator has view of approaching traffic on intersecting roadway). The other two statutes, while mentioning generically the requirement that an operator obey stop signs and stop, deal primarily with an operator's conduct at an intersection such as yielding the right-of-way, and one of them, section 545.153, expressly states that an operator shall yield "after stopping as required by section 544.010. . . ." *See* TEX. TRANSP. CODE ANN. §§ 545.151, 153 (West 2011); *see also* TEX. TRANSP. CODE ANN. § 544.007(i) (West Supp. 2017) (requiring vehicle operator arriving at non-functioning traffic light to "stop as provided by Section 544.010 as if the intersection had a stop sign."). Additionally, the citation issued to appellant charged her with failing to stop at a "stop line." Only section 544.010 addresses stopping at a stop line. Finally, we note that appellant identifies section 544.010 as the correct statute and, after making its argument about the difficulty of determining the correct statute, the State assumes, without conceding, that section 544.010 is

the correct statute. For purposes of our analysis, we will assume section 544.010 is the statute at issue.

ANALYSIS

In her first issue, appellant contends the trial court erred in its eighth conclusion of law that the "manner and means" averments in the indictment are not considered elements of the offense of criminally negligent homicide. In her second issue, appellant contends the trial court erred in its ninth conclusion of law that a conviction for criminally negligent homicide premised on criminal negligence of running a stop sign and a separate prosecution for running the stop sign resulting in payment of a fine do not violate the double jeopardy provisions of the United States Constitution and the Texas Constitution. The parties chose to address appellant's first two issues together. Because the issues are intertwined, we will likewise discuss them jointly.

The Fifth Amendment's Double Jeopardy Clause, made applicable to the states by the Fourteenth Amendment, protects persons from (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *See* U.S. CONST. amends. V, XIV;[2] *Brown v. Ohio*, 432 U.S. 161, 165 (1977). When the two prosecutions involve distinct statutory provisions, we apply the *Blockburger* test and ask whether the two offenses contain the same elements or whether each provision requires proof of a fact which the other does not. *United States v. Dixon*, 509 U.S. 688, 697 (1993); *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Ex parte Castillo*, 469 S.W.3d 165, 168 (Tex. Crim. App. 2015).

In this case, appellant contends she is being subjected to a second prosecution for the same offense because the transportation code violation she pleaded no contest to in municipal court is a

[2] Although appellant also contends the trial court's ruling runs afoul of the Texas Constitution, she makes no separate constitutional argument under the Texas Constitution and the federal and state protections are similar. *See* TEX. CONST. art. I, §14 (West Supp. 2017); *Ex parte Mitchell*, 977 S.W.2d 575, 580 (Tex. Crim. App. 1997). Thus, we will not analyze separately the requirements of the double jeopardy prohibition in the Texas Constitution.

lesser-included offense of criminally negligent homicide. Greater- and lesser-included offenses are considered legally the same offense for double jeopardy purposes "unless the potential lesser-included offense requires proof of a fact not required to establish the greater offense." *Castillo*, 469 S.W.3d at 168.

To determine whether one offense is a lesser-included offense of another for purposes of double jeopardy, we apply the first step of the cognate pleadings approach used to determine whether a defendant is entitled to a lesser-included offense jury instruction. *Ex parte Watson*, 306 S.W.3d 259, 263 (Tex. Crim. App. 2009); *see also Hall v. State*, 225 S.W.3d 524, 535–36 (Tex. Crim. App. 2007) (explaining the cognate pleadings approach). Under the cognate pleadings approach, an offense is a lesser-included offense "if it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." TEX. CODE CRIM. PROC. ANN. art. 37.09(1) (West 2006). We look to the indictment for the greater offense and determine whether it "1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced." *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009) (op. on reh'g). In determining whether one may deduce all of the elements of the lesser offense from the allegations of the greater offense, we examine the elements of the lesser offense and determine whether they are functionally equivalent or less than those required to prove the greater offense. *Rice v. State*, 333 S.W.3d 140, 144–45 (Tex. Crim. App. 2011).

To perform our analysis, we will compare the elements of criminally negligent homicide as modified by the allegations in the indictment, with the elements of the stop sign offense. *See Hall*, 225 S.W.3d at 536. One commits criminally negligent homicide if one causes the death of

an individual by criminal negligence. TEX. PENAL CODE ANN. § 19.05 (West 2011). Criminal negligence is a defined term within the penal code:

> A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

TEX. PENAL CODE ANN. § 6.03(d) (West 2011). Thus, the statutory elements of criminally negligent homicide are: (1) the accused's conduct causes the death of an individual; (2) the accused ought to have been aware that there was a substantial and unjustifiable risk of death from their conduct; and (3) the accused's failure to perceive the risk constituted a gross deviation from the standard of care an ordinary person would have exercised under like circumstances. *See Montgomery v. State*, 369 S.W.3d 188, 192–93 (Tex. Crim. App. 2012) (identifying what State must prove to make legally sufficient showing of criminally negligent homicide).

Additionally, whenever the State charges a person with an offense that requires a finding of recklessness or criminal negligence, the law requires the charging instrument "to allege, with reasonable certainty, the act or acts relied upon to constitute recklessness or criminal negligence. . . ." *See* TEX. CODE CRIM. PROC. ANN. art. 21.15 (West 2009). In this case, the indictment's averments of criminal negligence were "running a stop sign therefore striking the motor vehicle occupied by [the complainant]."

We next determine the statutory elements of running a stop sign as set out in transportation code section 544.010. *See Hall*, 225 S.W.3d at 536. The statutory elements are: (1) the operator of a vehicle; (2) approaching an intersection with a stop sign; (3) not directed to proceed by a police officer or traffic control signal; (4) shall stop; (5) before entering the crosswalk on the near side of the intersection; (6) in the absence of a crosswalk, at a clearly marked stop line; and (7) in

the absence of a stop line, at the place nearest the intersecting roadway where the operator has a view of approaching traffic on the intersecting roadway.

Comparing the statutory elements and indictment averments of the criminally negligent homicide charge with the statutory elements of the stop sign offense, it is clear that criminally negligent homicide has elements that the traffic offense does not: the causation of a death and a gross deviation from the standard of care. *See Ex parte Pritzkau*, 391 S.W.3d 185, 190 (Tex. App.—Beaumont 2013, pet. ref'd). Thus, the question is whether the traffic offense also contains distinctive elements the State would not have to prove in its case.

In pondering this question, we think it is instructive to consider the outcomes of two cases with somewhat similar circumstances: *Ex parte Watson* and *Ex parte Pritzkau*. In its opinion on rehearing in *Watson*, the court of criminal appeals determined that the traffic offense of failing to yield the right of way while making a left turn was not a lesser-included offense of intoxication assault filed with a descriptive averment that the defendant failed "to yield the right of way while turning left." *See Watson*, 306 S.W.3d at 271–74. Although the averment closely matched the description of the traffic offense, the court concluded the traffic offense was not a lesser-included offense because it had an element not charged in the indictment for the greater offense: the traffic statute only applied if the left turn was made while a vehicle was approaching from the opposite direction. *Id*. at 273–74. The Court noted that there were a number of ways a motorist could fail to yield the right of way while turning left that would not require proof of a violation of the traffic offense such as failure to yield the right of way to a vehicle traveling from another direction or under other circumstances. *Id*. at 274.

In *Pritzkau*, the defendant was involved in a traffic accident in which two people died. *See Pritzkau*, 391 S.W.3d at 186. The defendant pleaded no contest to a charge that he "Ran Stop Sign," was fined, and had the case dismissed. *Id*. at 186. Subsequently, he was charged with two

counts of criminally negligent homicide alleging he was criminally negligent "by failing to maintain a proper lookout for traffic and road conditions, operating his motor vehicle at an improper speed, and by taking improper evasive action there by driving into [the victims' car]." *Id*. at 186–87. In challenging the indictment on double jeopardy grounds, appellant argued that the indictment's descriptive averments were the functional equivalent of "running a stop sign" in that the State would prove the alleged acts of negligence at trial by proving that he ran the stop sign. *Id*. at 189. The State disagreed, insisting that it need not rely upon the failure to stop offense to prove the defendant's criminal negligence. *Id.* The court of appeals concluded there was no double jeopardy violation because the traffic offense did not include proof of a gross deviation from the standard of care or a death while the indictment for criminally negligent homicide, including the descriptive averments did not require proof that the intersection where the collision took place was controlled by a stop sign. *Id*. at 190. The court of appeals dismissed the argument that the descriptive averments were functionally equivalent to the traffic offense elements because "[t]he descriptive averments in the indictment are allegations of conduct, only some of which may be 'embraced by' the traffic offense, and none expressly so." *Id*.

Like *Watson*, the descriptive averments in the present indictment are very similar to the traffic offense that was charged. Like *Pritzkau*, the present case involves successive prosecutions for failure to stop at a stop sign and criminally negligent homicide. In both *Watson* and *Pritzkau* the reviewing courts concluded the accused was not subjected to double jeopardy because the new charges did not require proof of certain elements of the traffic offenses previously adjudicated.

The State contends there are two distinctive elements in section 544.010 that it would not need to prove in its case for criminally negligent homicide: that appellant approached an "intersection" governed by the transportation code and the existence of a clearly marked stop line. We agree with the State.

The provisions in the transportation code relating to the operation of a vehicle apply only to the operation of a vehicle on a "highway." *See* TEX. TRANSP. CODE ANN. § 542.001 (West 2011). A "highway or street" is defined as "the width between the boundary lines of a publicly maintained way any part of which is open to the public for vehicular traffic." TEX. TRANSP. CODE ANN. § 541.302(5) (West 2011). An intersection is "the common area at the junction of two highways, other than the junction of an alley and a highway." TEX. TRANSP. CODE ANN. § 541.303(a) (West 2011). It is possible to commit the offense of criminally negligent homicide by "running a stop sign" that does not sit at a public highway intersection as defined within the transportation code. For example, a private landowner could erect an unofficial stop sign not subject to the transportation code to regulate traffic within a parking lot.

We also agree with the State that proof of criminally negligent homicide as charged would not require the State to prove which specific stopping point on the pavement appellant crossed as required by section 544.010. *See, e.g., State v. Police*, 377 S.W.3d 33, 38 (Tex. App.—Waco 2012, no pet.) (rejecting argument that section 544.010 requires motorist to stop behind stop sign); *see also Mumper v. State*, No. 05-08–00141-CR, 2009 WL 201142, at *2 (Tex. App.—Dallas 2009, no pet.) (not designated for publication) (concluding there was no traffic violation under section 544.010 where motorist crossed stop line but stopped before marked crosswalk).

The descriptive averment in the indictment alleging appellant ran a stop sign and therefore struck a vehicle is simply an allegation of conduct not sufficiently detailed or complete enough to fully encompass the traffic offense set out in section 544.010. *See Watson*, 306 S.W.3d at 274; *Pritzkau*, 391 S.W.3d at 190. Thus, we conclude the traffic offense of failure to stop at a stop sign is not a lesser-included offense of criminally negligent homicide as charged by the State in this case.

After correctly noting that the descriptive averment in the indictment is not an element of the offense of criminally negligent homicide, the trial court incorrectly reasoned that it should be excluded from the double jeopardy analysis. *See Watson*, 306 S.W.3d at 273 (concluding double jeopardy analysis requires that both statutory elements and descriptive averments alleged in the indictment for the greater offense should be compared to elements of alleged lesser-included offense). Although its reasoning was flawed, the trial court nevertheless reached the correct result. Accordingly, we overrule appellant's first two issues.

In her third issue, appellant contends the trial court erred in finding, without evidentiary support in the record, that she caused the death of the complainant. The State responds that supplementation of the record would show appellant acquiesced in the State's trial court rendition that appellant caused the complainant's death and, therefore, sufficient evidence was presented to support the trial court's finding. Determining whether one offense is a lesser-included offense of another and thus violates the prohibition against double jeopardy is a question of law we review *de novo* and does not depend on what evidence the State will produce at trial to prove the charge. *See Rice*, 333 S.W.3d at 144; *Hall*, 225 S.W.3d at 535. Thus, the trial court's finding is immaterial to our review of the double jeopardy question.

As a stand-alone issue, a challenge to the trial court's finding is not cognizable in a pretrial habeas application. *See Ex parte Perry*, 483 S.W.3d 884, 895 (Tex. Crim. App. 2001) (pretrial habeas unavailable when resolution of question presented, even if resolved in applicant's favor, would not result in immediate release or when resolution of claim may be aided by development of record at trial); *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010) (pretrial habeas appeal is extraordinary remedy and courts must be careful to ensure writ not misused to secure pretrial appellate review of matters that should not be resolved by appellate courts at pretrial stage). Accordingly, we dismiss appellant's third issue without addressing the merits. *See Perry*, 483

S.W.3d at 895; *Ellis*, 309 S.W.3d at 79; *see also* TEX. R. APP. P. 47.1 (requiring judicial opinion to address only issues necessary to final disposition of the appeal).

We affirm the trial court's order denying relief on appellant's pretrial application for writ of habeas corpus.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EX PARTE TAMESHIA LASHAE HOLT	On Appeal from the Criminal District Court No. 2, Dallas County, Texas
No. 05-17-01400-CR	Trial Court Cause No. WX17-90074-I. Opinion delivered by Justice Schenck. Justices Lang and Fillmore participating.

Based on the Court's opinion of this date, the order of the trial court denying relief on appellant's pretrial application for writ of habeas corpus is **AFFIRMED**.

Judgment entered this 1st day of May, 2018.