In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00391-CR

SCOTT FOLKERTS, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 140th District Court
Lubbock County, Texas
Trial Court No. 2016-409,519, Honorable Jim Bob Darnell, Presiding

November 28, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

Scott Folkerts (appellant) was convicted of manslaughter when, after drinking alcohol, he caused the death of the passenger who rode in his vehicle. The death occurred when appellant drove the vehicle at a speed far in excess of the posted limit and struck the rear of another vehicle. Within the indictment charging him of manslaughter, the State also averred that he had used a deadly weapon, the latter being the vehicle he drove. Appellant contended that the 5th and 14th Amendments to the United States Constitution required the State to append a scienter to the deadly

weapon allegation.[1] That is, he believed that those Amendments obligated the State of Texas to allege and prove, beyond reasonable doubt, that he intended to use the vehicle to cause death or serious bodily injury. The trial court apparently rejected the argument when it denied his motion to quash the deadly weapon paragraph of the indictment and his motion to dismiss. We too reject the contention.

Our Texas Legislature defined deadly weapon as 1) "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury;" or 2) "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE ANN. § 1.07(a)(17)(A),(B) (West Supp. 2017). Finding that the defendant used or exhibited a deadly weapon during the commission of the crime underlying the prosecution is not without effect. As explained in *Prichard v. State*, __ S.W.3d __, 2017 Tex. Crim. App. LEXIS 586 (Tex. Crim. App. June 28, 2017), one found to have used or exhibited such a weapon is subject to "a stricter penalty." *Id*. at *9-10.

Despite the Court of Criminal Appeal's observation of the effect such a finding has on the penalty, it has not required the State to prove the accused intended to cause death or serious bodily injury with the weapon. Quite the contrary, the Court has held that a deadly weapon finding is not dependent upon proof that the actor intended to cause death or serious injury when using or exhibiting the purported weapon. *Moore v. State*, 520 S.W.3d 906, 908 (Tex. Crim. App. 2017). Yet, appellant suggests that the United States Constitution says otherwise and cites us to the United States Supreme Court opinions in *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed.

[1] Though invoking the 5th and 14th Amendments, appellant failed to inform us of the particular clauses within those amendments that provide the foundation for his argument. We assume the pertinent clauses to be those relating to due process.

288 (1952), *Elonis v. United States,* 575 U.S. ___, 135 S. Ct. 2001, 192 L. Ed.2d 1 (2015) and *Alleyne v. United States*, 570 U.S. ___, 133 S. Ct. 2151, 186 L. Ed.2d 314 (2013). None however support the contention.

We begin with *Morissette*. There, the United States Supreme Court dealt with a federal statute (i.e., 18 U.S.C. § 641) criminalizing the theft of federal property. It was asked to determine if proof of a criminal intent or scienter was needed to secure a lawful conviction of the offense. In answering the question in the affirmative, the Supreme Court uttered such things as "'[i]t is alike the general rule of law and the dictate of natural justice that to constitute guilt there must be not only a wrongful act, but a criminal intention.'" *Morissette*, 342 U.S. at 274 (quoting *People v. Flack*, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891)). Yet, missing from the opinion is any mention of the requirement being founded in due process. Rather, the Court ruled as it did because of the relationship between the federal crime and the common law. It viewed the former as akin to a common law conversion, and prohibitions against conversions or thefts in the common law fell within the category of "crimes of intendment." *Id.* at 272-73. That those prohibitions historically resided in such a category led the Court to find "no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which the defendant was charged." *Id.* Thus, the holding in *Morissette* had little to do with due process but much to do with the adoption of common law precepts into the realm of federal criminal law.

Additionally, the statement that no grounds existed for inferring that Congress thought to eliminate intent from the offense with which Morissette was charged is quite interesting in its own right. It indicates that there may be some criminal offenses for

which the elimination of intent by the particular legislative body is lawful. Indeed, the Supreme Court expressly recognized as much when it drew the distinction between crimes having their foundation in common law and those which do not. For instance, the high court observed that "'public welfare offenses'" "do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property or public moral." *Id*. at 255. "Many . . . are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." *Id*. "In this respect, whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity. Hence, legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element." *Id*. at 256. The Court also alluded to its own precedent wherein it acknowledged the legitimacy of some statutory crimes dispensing with the need to prove scienter, those opinions being *United States v. Balint*, 258 U.S. 250, 42 S. Ct. 303, 66 L. Ed. 619 (1922) and *United States v. Behrman*, 258 U.S. 280, 42 S. Ct. 303, 66 L. Ed. 619 (1922). So too did it reaffirm the conclusions in *Balint* and *Behrman*. *Morissette*, 342 U.S. at 260 (stating that "[t]he conclusion reached in the *Balint* and *Behrman* cases has our approval and adherence for the circumstances to which it was there applied."); *see also*, *United States v. Rodriguez*, 416 F.3d 123, 126 (2d Cir. 2005) (citing *Balint* while noting that the federal criminal statute there involved, 8 U.S.C. § 1326, "defines a statutory offense rather than enshrining in statute a common law offense" and concluding that there was no need to prove specific intent to secure a conviction under it).

We need not jump into a debate on whether the Texas statutes concerning deadly weapon findings and their effect fall within the realm of public welfare offenses or the like under *Morissette*; that is irrelevant to our discussion. What is relevant is *Morissette's* recognition that not all crimes require scienter to be lawful. And, if scienter is not required in all instances then it can hardly be suggested that *Morissette* stands for the proposition that either the 5th or 14th Amendments of the United States Constitution require proof of scienter. The common law may have mandated it, but *Morissette* did not say that the U.S. Constitution or due process required it.

The same is no less true of *Elonis*. The former dealt with another federal criminal statute, 18 U.S.C. § 875(c), and the question of whether scienter must accompany the communication of a threat under that federal provision. The Court held that it did. The decision was reached after 1) noting that the absence of such an intent would incorporate into the particular statute a standard of negligence, *Elonis*, 135 S. Ct. at 2011; 2) stating that "'the presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct,'" *id*. (emphasis in original); and 3) stating that "[f]ederal criminal liability *generally* does not turn solely on the results of an act without considering the defendant's mental state." *Id.* at 2012, *quoting Morissette*, *supra* (emphasis added). Missing from *Elonis*, though, is any utterance that 1) liability under criminal statutes generally enacted by any of the fifty States may not stand without considering the mental state of the accused or 2) either the 5th or 14th Amendments of the United States Constitution mandate the proof of scienter. Simply put, the *Elonis* Court was addressing federal criminal laws and whether common law tradition like that discussed in *Morissette* applied to them. It dealt

not with Texas criminal statutes and whether their enforcement required proof of scienter under our United States Constitution. Indeed, mentioning the "presumption in favor of a scienter" is most telling. If the United States Constitution, as opposed to the common law and its application to current criminal statutes, mandated scienter, then there would be no need for a presumption that scienter is favored.

As for *Alleyne*, it dealt with whether certain findings which increase the mandatory minimum sentence for a crime must be made by a jury, instead of the jurist, per the Sixth Amendment of the United States Constitution. *Alleyne*, 570 U.S. at ___, 133 S. Ct. at 2155. Neither the 5th or 14th Amendments nor the question of scienter were in play there.

In short, we overrule appellant's issue. He did not illustrate that the Due Process Clauses of the 5th or 14th Amendments of the United States Constitution required Texas prosecutors to prove the accused used or exhibited a deadly weapon with the intent to cause death or serious bodily injury as a prerequisite to securing a sustainable deadly weapon finding.

The judgment of the trial court is affirmed.

Brian Quinn
Chief Justice

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