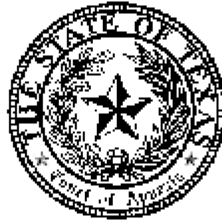
Affirmed and Opinion filed July 13, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-98-01168-CR

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FEDERICO MARTINEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 724,699

O P I N I O N

Appellant, Federico Martinez, was charged by indictment with the felony offense of theft. After the trial court denied his motion to quash the indictment, appellant pleaded guilty and was sentenced to ten years' imprisonment. He presents two points of error arising from the denial of his motion to quash the indictment. We affirm.

According to the Stipulation of Evidence signed by appellant and his attorney, appellant placed advertisements in Houston, Fort Worth and Dallas newspapers, offering to sell his allegedly thriving house cleaning business, "Maid in America." At least nine individuals (the complainants in this cause) responded to the ad and paid money to appellant to purchase of his

business and a purported list of 40-60 existing business customers. However, the complainants merely received advertisement flyers or the names of a few individuals, many of whom had never heard of appellant. When the complainants demanded their money back, appellant disappeared.

Under his first of two points of error, appellant alleges the trial court erred in overruling his motion to quash the indictment, as TEX. PEN. CODE ANN. § 31.03, the theft statute under which he was charged, is impermissibly vague on its face and as applied to appellant. Specifically, he complains that the statutory definition of "deception" under TEX. PEN. CODE ANN. § 31.01 fails to include a mens rea requirement or a standard for whether the subject false impression "is likely to affect the judgment of another in the transaction." Such language, he argues, fails to identify whose sensibilities against which to judge whether any conduct was "likely to affect the judgment of another," and is unconstitutional.

Whenever an attack upon the constitutionality of a statute is presented for determination, we commence with the presumption that such statute is valid and that the legislature has not acted unreasonably or arbitrarily in enacting the statute. *Cotton v. State*, 686 S.W.2d 140, 144 (Tex. Crim. App. 1985). The burden is on appellant to establish its unconstitutionality. *Id.* at 145. It is the duty of the court to uphold the statute if a reasonable construction of the statute at issue can be determined which will render it constitutional and carry out the legislative intent. *Ely v. State*, 582 S.W.2d 416, 419 (Tex. Crim. App. 1979).

The standard for determining whether a statute is void for vagueness is well-established:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process. A law must be sufficiently definite that its terms and provisions may be known, understood and applied; otherwise, it is void and unenforceable.

Cotton, 686 S.W.2d at 145 (citations omitted). Thus, a statute is unconstitutionally vague only where no standard of conduct is specified at all or when no core of prohibited activity is defined. *Briggs v. State*, 740 S.W.2d 803, 806 (Tex. Crim. App. 1987). Where, as here, no

First Amendment rights are alleged or involved, the court need only examine the statute to determine whether it is impermissibly vague as applied to the appellant's specific conduct. *Bynum v. State*, 767 S.W.2d 769, 774 (Tex. Crim. App. 1989).

Under TEX. PEN. CODE ANN. § 31.01(1), "deception" is defined, in relevant part, as

> (A) creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true;
>
> (B) failing to correct a false impression of law or fact that is likely to affect the judgment of another in the transaction, that the actor previously created or confirmed by words or conduct, and that the actor does not now believe to be true;
>
> * * * *
>
> (E) promising performance that is likely to affect the judgment of another in the transaction and that the actor does not intend to perform or knows will not be performed, except that failure to perform the promise in issue is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

Our analysis of the Texas harassment statute in *DeWillis v. State*, 951 S.W.2d 212 (Tex. App. –Houston [14th Dist.] 1997, no pet.) provides appropriate guidance for this issue. In *DeWillis*, the appellant raised arguments similar to those presented here, and we determined that the particular statute was not unconstitutionally vague. Our court noted that the subject statute contained a "reasonable person" standard by its use of the word "another," which word also appears in the statutory provision here under consideration. Moreover, it was clear that it was the sensibilities of the recipient of the allegedly harassing calls that must be offended; here, it is clear that it is the "judgment of another in the transaction" that is at issue. Lastly, even if there were no reasonable person standard, the offense is sufficiently defined to put the offender on notice that his conduct is unlawful. *Long v. State*, 931 S.W.2d 285 (Tex. Crim. App. 1996). While appellant contends that the definitions of "deception" do not set forth an element of "intent," such is not necessary, as the "intent" provision appears under TEX. PEN. CODE ANN. § 31.03: "A person commits an offense if he unlawfully appropriates property of another with the intent to deprive the owner of the property." "Appropriation" is unlawful if

done without the owner's effective consent; consent is not effective if induced by deception. Taken as a whole, the statutory scheme requires that a defendant intend to deprive an owner of property through use of deception, as defined. We conclude that the definitions of "deception" under TEX. PEN. CODE ANN. § 31.01 are not unconstitutionally vague or ambiguous, and overrule appellant's first point of error.

By his second point of error, appellant urges error by the trial court in denying his motion to sever, inasmuch as the aggregation provision of TEX. PEN. CODE ANN. § 31.09 violated his constitutional rights to due process.

Under TEX. PEN. CODE ANN. § 31.09,

> When amounts are obtained in violation of this chapter pursuant to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the amounts aggregated in determining the grade of the defense.

Appellant acknowledges that in *State v. Weaver*, 982 S.W.2d 892 (Tex. Crim. App. 1998), the Texas Court of Criminal Appeals held that this provision of the Penal Code creates one offense for venue purposes, even if some of the acts occurred outside Harris County. He correctly notes, however, that no constitutional due process attack was raised in *Weaver*.

Appellant contends that trans-county aggregation denied him due process because it hindered his ability to prepare a defense, as several complainants and purportedly important witnesses (who are not identified by appellant) resided in the Dallas/Fort Worth area. Appellant, however, only presents this as a conclusory statement in his brief; nothing in the record substantiates his position that he was unable to present a defense because of any particular witnesses' or complainant's unavailability or location. Given this, it would be pure speculation on our part to rule that appellant was denied an opportunity to prepare and present a defense, and absent such substantiation in the record, no unconstitutionality or reversible error is shown. *See Labelle v. State*, 720 S.W.2d 101, 109 (Tex. Crim. App. 1986). Appellant's second point of error is overruled.

The judgment is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed July 13, 2000.

Panel consists of Justices Robertson, Sears and Cannon.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Ross A. Sears, and Bill Cannon sitting by assignment.