

IN THE MUNICIPAL COURT OF APPEALS  
OF THE CITY OF EL PASO, TEXAS

CHARLIE MCGRUE

Appellant,

vs.

STATE OF TEXAS,

Appellee.

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**No. 02-MCA-2827**

**OPINION**

Appellant appeals his conviction in Municipal Court for a violation of Section 15.13.030 (B1) which is defined as "wasting water". The complaint itself indicates that Appellant unlawfully permitted or caused water to flow, spray, or otherwise move or be discharged from the premises located at 4614 Atlas #205, Sun City Mobile Home Park, upon a street, alley, ditch, drain, or other public right of way.

As seen from the complaint, the site of the alleged illegal discharge of water was in a mobile home park, and Appellant is the manager of that mobile home park. Appellant indicates to this court, in Oral Argument, that there are seventy-eight (78) units in that mobile home park, and a busted pipe in the plumbing of one of the units was the reason for the discharge of water, and that it was promptly repaired when it was brought to his attention.

Appellant first contends that he is not a person responsible for this offense since he was only the manager of the premises. Section 15.12.005 (C) of the City Code of El Paso defines responsible party to include the manager in charge of the property, facility or operation during the period of time the violation is observed. Clearly, Appellant's status as a manager would make him a person responsible for the offense.

Appellant further contends that he did not intend to discharge this water nor was he negligent in this discharge, but was the result of a busted pipe. The City contends that this is a strict liability offense, and did not allege any culpable mental state, but only that the offense occurred unlawfully.

This court tends to agree that this offense is probably a strict liability offense, and therefore whether Appellant intentionally or negligently caused this discharge of water would be immaterial. However, the allegations of the complaint and Section 15.13.030 (B1) clearly use the term "irrigating" or "utilizing" the City water supply system to permit or cause water to flow, spray or otherwise move or be discharged from the premises clearly indicates that something more than an unintentional discharge of water is required. That interpretation of the City Code provision is reinforced when you review Section 15.13.100 relating to exceptions to enforcement. Subsection B of that section indicates that it is an exception to the offense if the flow is a result of temporary failures or malfunctions of the water supply system.

Pursuant to Section 2.02 of the Texas Penal Code, an exception requires the prosecuting attorney to negate the existence of an exception in the accusation charging commission of the offense, and additionally, to prove beyond a reasonable doubt that the defendant's conduct did not fall within the exception. The prosecuting attorney did not allege the exception in the complaint, and Appellant, not being represented by an attorney, did not object to that omission, and probably waived that defect in the complaint pursuant to Article 45.019 (f).

Nonetheless, Section 6.01 of the Texas Penal Code requires a voluntary act or omission before a person can be criminally responsible, and further requires in Section 6.04, that that conduct caused the result which is condemned by the penal statutes of the state or city ordinance. Only responding to a busted pipe, and learning of the resulting water discharge after the fact, clearly is not the type of conduct which would make a person criminally responsible for the act, but rather appears to this court to fall clearly within the exception sited above that a temporary failure of malfunction of the water supply system was the cause of this incident.

So the remaining question is whether the prosecuting attorney proved, beyond a reasonable doubt that the Appellant's conduct did not fall within the exception.

After hearing oral argument, this court is convinced that the State would have failed in that effort, because presumably their only evidence is that they observed the water and did not really address the

reasons that caused the water to be where they found it. Such fact alone would not be sufficient to establish proof beyond a reasonable doubt under this court's review of either legal or factual sufficiency of the evidence. Huynh v. Texas, 901 S.W. 2d. 480 ( Tex. Crim. App. 1995) Clewis v. State,922 S. W. 2d. 126 (Tex. Crim. App. 1996)

Therefore, because this court feels there is a legal question as to whether Appellant committed any act for which he could be criminally responsible, and that the exception discussed above is applicable to this case, this court has decided to reverse and remand Appellant's case to the Trial Court for further consideration.

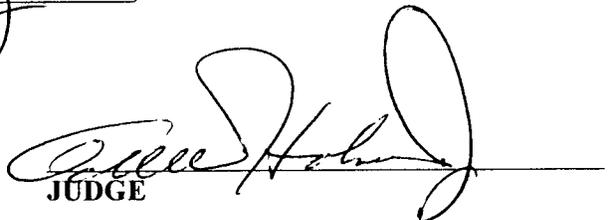
SIGNED this 16 day of July, 2003.

  
JUDGE

### J U D G M E N T

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the case be reversed and remanded to the Trial Court for re-trial.

SIGNED this 16 day of July, 2003.

  
JUDGE