

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

MAYRA PENA,

Appellant,

vs.

STATE OF TEXAS,

Appellee.

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No. 07-MCA-3163

OPINION

Appellant appeals her conviction in Municipal Court for possessing or consuming an alcoholic beverage in a central business district in El Paso. The boundaries of which are outlined in Section 10.12.050 of the El Paso Municipal Code. A fine of \$161.00 was assessed.

At the same time that Appellant was issued a citation for the above identified offense, she was also charged, on that same citation, with an offense of possessing an open container in a motor vehicle as proscribed by Section 49.031 of the Texas Penal Code. That section prohibits a person from possessing an open container of an alcoholic beverage in a motor vehicle and classifies the offense as a Class C misdemeanor also.

The record before this Court reflects that Appellant was convicted and fined in Municipal Court for both offenses, and that is what she is complaining about. Appellant has also appealed her conviction for possessing an alcoholic beverage in a motor vehicle in a companion case, Pena v State 07MCA3162, and was fined \$160.00 in that case.

Clearly the offenses occurred at the same time and arose out of the same situation, and although Appellant doesn't identify her complaint on appeal in terms of double jeopardy, that is the issue that she raises.

The double jeopardy clause of the 5th Amendment to the United States Constitution protects persons against multiple punishments for the same offenses. Ex parte Broxton, 888 S.W.2d 23(Tex.Crim.App.1994).

When a defendant is tried in a single trial, as here, only the third aspect of the double jeopardy protections against multiple punishments is involved. Ex parte Herron, 79S.W.2d623 (Tex.Crim.App.1990) Convictions of both the greater inclusive and lesser included offense arising out of the same act violates the multiple punishments prohibitions in the double jeopardy clause. Hutchens v State 992 S.W. 2d 629 (Tex. App.-Austin1999). That is what Appellant has invoked in this particular case.

The double jeopardy bar applies only if the two offenses are the same offense. Ex parte Gregerman 974S.W. 2d 800 (Tex. App.-Houston 14th District 1998). That is to say, if the elements of the offenses are different, then the double jeopardy claim is not appropriate.

These offenses are so closely connected they amount to the same offense. The distinctions as to whether the offense occurred in an urban district or in a vehicle seem to be almost immaterial to this Court, and either one could be described as a lesser included offense of the other. Therefore, this Court is inclined to agree with Appellant, that she should not be punished twice for conduct which is so similar in nature. For all intents and purposes, Appellant has been fined twice for the same conduct.

Clearly, however, Appellant's fine in one of the cases was appropriate. Therefore, in this case, the judgment of the Trial Court is affirmed, but her conviction is hereby reversed and rendered in Appellants favor in Cause # 07MCA3163, because convictions in both case for the same offense violates the double jeopardy clause of the United States Constitution.

Therefore, the judgment of the Trial Court in this case is affirmed.

SIGNED this 13th day of Aug, 2007.

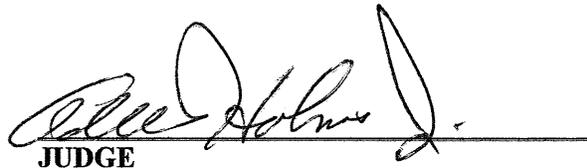
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JUDGE

JUDGMENT

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 Judgment be in all things affirmed in No .07-MCA-3163, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

SIGNED this 13th day of Aug, 2007.

A handwritten signature in cursive script, appearing to read "Paul D. Holmes", written over a horizontal line.

JUDGE