

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

SYLVIA SANTOS,

Appellant,

vs.

STATE OF TEXAS,

Appellee.

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No. 06-MCA-3116

OPINION ON MOTION FOR REHEARING

Appellant filed what she designated as Appellant's second brief after this Court rendered an opinion on April 20, 2007 affirming the Trial Court's decision. That decision was primarily based on the fact that there was no record before the Court, and therefore the Trial Court's decision could not be reviewed for either factual or legal sufficiency, and that the Appellate Court had no legal authority to second guess the fact finders decision.

Pursuant to that decision, this Court issued its Mandate on May 24, 2007, without being aware that Appellant had filed a second brief, which this Court will now consider as a motion for rehearing.

The original of Appellant's second brief has a file stamp showing it was received by the Municipal Court clerk's office on May 21, 2007, and even though that is untimely, this Court will consider the issues raised in Appellant's second brief.

First, Appellant contends that she requested a speedy trial at her arraignment, but does not assert that she raised that issue with the regular Municipal Court which heard the case. Appellant appeared before the Arraignment Judge, plead not guilty, and as required by law, he referred the case to a regular Municipal Court Judge for a hearing on the merits. Appellant was obligated, if she thought it was applicable, to raise any issues concerning a denial of a speedy trial at that hearing on the merits. She did not do so, and therefore, that matter is waived. Additionally, there is nothing in the record showing that Appellant attempted to introduce any evidence on that issue, nor does she outline any in her brief.

Further, this Court is of the opinion that there was no unreasonable or unnecessary delay from the time she was cited until her trial that prejudiced her ability to appear and contest the citation. The point of error is overruled.

Next, Appellant reiterates her contentions that the police officer did not recall the citation, or in fact, perjured himself, because he did not recall searching her vehicle. Obviously, the tenure of that cross examination could well have impacted the officer's credibility, but it was for the Trial Judge to make that determination, and not this Court. Additionally, the search of her vehicle may well have been considered by the Trial Judge to be irrelevant to the issue before him, if in fact a search even occurred. Clearly, if drugs or some other contraband had been seized as a result of that search, the issues as to whether the officer had her consent to search the vehicle or had probable cause to do so, would present a search and seizure issue if contraband had been found. That is not the case before this Court nor was it before the Trial Court, only a speeding offense was being decided.

More troublesome to this Court is Appellants last contention that she had requested a record, but it was not provided to her by the Trial Court. This Court's original opinion rested primarily on the fact that no record was before this Court at that time to review Appellants contentions as asserted at that time. Appellant did not raise in her original brief any denial of a record at that point, and probably did not realize the significance of the absence of a record, until she received a copy of this Court's Opinion.

The record before this Court at this point only contains her assertion that she requested a record, but she had to wait several hours before the clerk could arrange that a record be taken, and Appellant seems to suggest the judge indicated that her case could be heard more promptly if she had waived the right to a record. Perhaps that is why the Court's docket sheet, which is a part of the record before this Court clearly indicates that Appellant waived the record which controverts her assertion that the right was denied to her.

Even if a record had been taken, Appellant raises issues concerning the credibility of the witnesses testimony and the weight to be given to that testimony, and it is the exclusive function of the Trial Judge acting as a fact finder, to decide that issue. Appellant contended that the officer couldn't

remember if he searched her vehicle or his location when he turned the sirens on, or if he had some type of memory loss, or in fact, was perjuring himself. Those are matters which only the Trial Judge can decide after hearing all the evidence. Appellant contended that she was not speeding, and this Court is sure that that raised a conflict in the evidence and a disputed fact issue that the Trial Judge had to resolve. It appears to this Court that even if a record had been taken, and Appellant had taken the necessary steps to insure that that record was before this Court, that Appellant would still not prevail on appeal on the issues that she has raised both in her original and second brief because they do not question the sufficiency of the evidence, but its credibility.

Therefore, her motion for rehearing is denied.

This Court's original mandate issued on May 24, 2007 is hereby ordered withdrawn and no effort to collect the fine and court costs assessed in this case shall be undertaken until the clerk receives a new mandate issued as a consequence of overruling this motion for rehearing and pending any further appeal by Appellant beyond this Court's jurisdiction. This Court will not consider any further motions for rehearing in this matter.

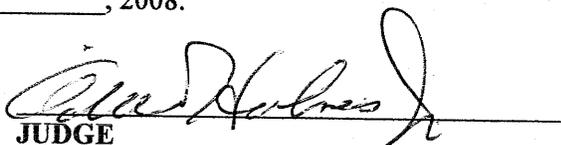
SIGNED on this 25th day of March, 2008.


JUDGE

JUDGMENT

Appellants motion for rehearing is hereby denied, and it is ORDERED ADJUDGED and DECREED by the Court that the judgment be and all things affirmed in 06MCA3116, and that Appellant pay all costs in this behalf expended and this decision be certified below for observance.

SIGNED this 25th day of March, 2008.


JUDGE