

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

JOHN RAYAS

Appellant,

vs.

STATE OF TEXAS,

Appellee.

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No. 00-MCA-2567

No. 00-MCA-2568

OPINION

Appellant appeals his convictions in Municipal Court for unlawfully permitting the accumulation of certain materials on his property and for violation of zoning ordinances relating to the use of his premises. A fine of \$750.00 was assessed on each charge and this appeal ensued.

Section 9.04.340 (c) declares it unlawful for an owner of property to accumulate garbage, rubbish, junk, ashes, filth, waste paper, discarded handbills or advertising material, weeds, brush, grass cuttings or other objectionable, unsightly or unsanitary matter of any nature on his property, and declares such acts to be a public nuisance.

The complaint charges Appellant with unlawfully permitting the accumulation of cinder blocks, bricks, broken asphalt, concrete, pipes and wood, on his property, but none of those items are specifically identified in Section 9.04.340 (c). However, the City contends that such material falls within the more generic terminology of "other objectionable, unsightly, or unsanitary matter of any nature" and therefore are included in the prohibition of such section. Appellant does not challenge the validity of the complaint or whether there is a fatal variance between the charge and the proof on appeal.

In Appellant's first point of error, he contends that section 9.04.340 (c) of Title 9, Chapter 9.04 of the El Paso City Code is void for vagueness because it fails to give Appellant notice of what conduct is prohibited so that men of common intelligence must guess as to it's meaning and differ as to it's application. **Kolender v. Lawson**, 461 U.S. 352, 123 S. Ct. 1855 75 L. Ed. 2d. 903 (1983); **Ex. parte**

Chernosky, 217 S.W. 2d. 673 (Tex. Cr. App. 1949) He, therefore contends that the ordinance is unconstitutional.

This Court notes that Appellant did not timely challenge the constitutionality of the ordinance in the Trial Court. Therefore, nothing is presented for review in this case. **Al-Omari v. State**, 673 S.W. 2d. 892, 895 (Tex. App. -- Beaumont 1983) Appellant only mentioned once in final argument that a law may be void for vagueness but did not specifically relate his complaint to the Code provisions applicable to this prosecution. (S.F. page 57, line 9-11) That single reference to vagueness clearly did not alert the Trial Court to the constitutional attack that Appellant has mustered on appeal for the first time.

It clearly has been held that a failure to make a specific, timely objection as to a law being unconstitutional because it was vague or uncertain waives the point. **Curry v. State**, 910 S.W. 2d. 490 (Tex. Cr. App. 1995) Constitutional errors may be waived by the failure to object at Trial and rights which have alleged to have been violated at the time of Trial cannot be raised for the first time on appeal. **Garcia v. State**, 887 S.W. 2d. 846 (Tex. Cr. App. 1994) It has long been the rule that constitutional errors may be waived or forfeited by the failure to make a timely and specific assertion of the right. **Hawkins v. State**, 964 S.W. 2d. 767 (Tex. App. - Beaumont - 1998)

Nonetheless, despite this Court's holding that Appellant has waived any challenge to the constitutionality of the ordinances in question, this Court holds that the ordinances in question are constitutional.

The Court, in **Pope v. City of Houston**, 559 S.W. 2d. 950, 907 (Tex. Civ. App. -- Waco 1978, writ *ref'd n.r.e.*), upheld an ordinance detailing nuisances caused by "weeds, brush, rubbish, or objectionable, unsightly, or unsanitary matter." The Court relying on Article 2, Section 5 of the Texas Constitution and Article 1175, V.A.T.C.S., recognized that a city has the power to define all nuisances and prohibit the same within the city, and the city has broad powers to prohibit nuisances by the reasonable and proper exercise of its police power. The Court further recognized that it was a matter of common knowledge that property which is allowed to accumulate weeds, brush, etc. which may present a danger or depreciate property in the neighborhood are proper considerations for the exercise of the city's police power.

In **McDonald v. State**, 693 S.W. 2d. 660 (Tex. App. - Dallas 1985), the Court upheld an ordinance very similar to the one at issue in this case which specifically identified a nuisance as the accumulation of "objectionably unsightly or unsanitary matter" against a vagueness challenge.

Therefore, this Court hereby affirms the Trial Court's decision and holds that Section 9.04.340 of the City Code of El Paso is constitutional and valid.

As to the zoning violation for storage of trailers on his property which is not permitted in an R-4 residential district, Appellant contentions are that such ordinance is unconstitutional for vagueness and violates Appellant's rights to due process for being found guilty for a violation which is not defined in the El Paso Municipal Code.

Again, no timely objection or challenge in the Trial Court is reflected in the record before this Court attacking the constitutionality of the ordinance, and therefore nothing is presented for review. (see previous citations of authority herein)

This Court recognizes that a zoning ordinance is presumed to valid, and the burden is on the one seeking to prevent its enforcement to show otherwise. **City of Fort Worth v. L.C. Johnson**, 388 S.W. 2d. 400 (Tex. 1964) This, Appellant has failed to show.

The provisions of Sections of 20.14.020 relating to uses permitted in an R-4 residential district and 20.14.030 relating to permitted accessory uses, do not allow the open storage of trailers in such zones. Appellant contends that Section 20.14.030 (j), allows temporary buildings or structures including mobile storage units which are incidental to construction operations on the property. There is only one reference in the record to the fact that any type of construction operation might take place on the property as Appellant contended the material was going to be used to build a house. In contrast, there is ample evidence to the contrary, including testimony of the witnesses and the photographs introduced in evidence, which clearly show that the trailers were parked on the property with a large amount of building material and construction waste debris which appear to be totally unsuitable for construction purposes. Clearly, the Trial Court had sufficient evidence to determine that Appellant's use of the property was not within the permitted uses as contended by Appellant.

Therefore, the judgment of the Trial Court as to the zoning violation conviction is also hereby affirmed.

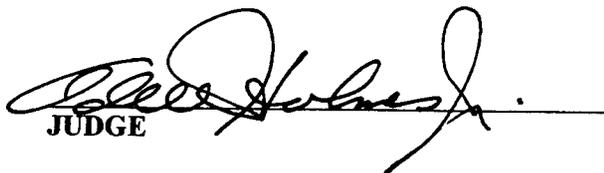
SIGNED this 18 day of June, 2001.


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 cases 00-MCA-2567 and 00-MCA-2568, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

SIGNED this 18 day of June, 2001.


JUDGE