

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

WILLIAM NESLAGE, Appellant

vs.

No. 87-MCA-1859

STATE OF TEXAS, Appellee

O P I N I O N

Appellant appeals his conviction in Municipal Court for a stop sign violation.

Appellant contends that the evidence is insufficient to support the Trial Court's finding of guilt because no evidence was introduced by the State to support their allegation in the complaint that Appellant failed to stop at a stop sign at 10700 Vista Del Sol. Appellant contends that, such allegation as to the specific block where the stop sign was located may not be necessary to the validity of the complaint, but nonetheless, any additional allegations which are descriptive of what is necessary to allege the offense must be proven by the State. Burrell v. State 526 SW2d 799 (Tx.Crim.App.-1975). In that case it was held that allegations not essential to state an offense, and which might be entirely omitted without affecting the charge, may be treated as mere surplusage, and may be entirely disregarded. Otherwise stated, if not descriptive of that which is legally essential to the validity of the indictment, infor-

mation, or complaint, unnecessary words or allegations may be rejected as surplusage. However, the court further recognized the exception to the general rule stated above, that is, where the unnecessary matter is descriptive of that which is legally essential to charge an offense it must be proven as alleged, even though needlessly stated. Additionally it is well established that where a person, place or thing necessary to being mentioned in the indictment is described with unnecessary particularity, all circumstances of description must be proven. Thus, if the pleader makes unnecessary allegations descriptive of the identity of the offense charged, it is incumbent upon the State to establish such allegations by evidence. McClure vs. State 296 SW2d 263 (1956), Burrell v. State, supra.

The test to determine whether language in an indictment must be proven or is mere surplusage is whether that language describes an essential element of the offense. Upchurch v. State, 703 SW2d 638 (Tx.Crim.App. 1985), Casares v. State, 703 SW2d 246 (Tx.Crim.App. No. 13 Dist. 1985), Franklin v. State, 659 SW2d 831 (Tx.Crim.App. 1983).

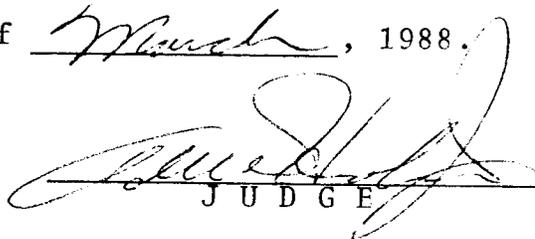
Thus the issue becomes whether the State's failure to prove the exact location of this particular offense by block number as alleged in the complaint was descriptive of the offense and must be proved or whether it could be treated as mere surplusage and be entirely disregarded.

Applying the above rules to the case at hand, is the

location of the stop sign descriptive of an essential element of the offense of failure to stop at a stop sign. Of course, that inquiry must be answered in the affirmative. Thus the exact location of the stop sign becomes descriptive of the offense for which Appellant was convicted.

As in many other situations, the general rule is more easily stated than applied to the facts. In their briefs, both parties indicate that the exact block where the offense occurred probably need not be even alleged, and are probably correct, even though this court need not address that issue at this point. Nonetheless, having alleged it, the State needed to prove it. Having failed to do so, the evidence is insufficient to support the conviction, and therefore the judgment of the Trial Court is reversed and rendered in Appellant's favor. Burks v. U.S., 437 U.S. 198 S.Ct. 2141, 57 LEd2d1 (1978), Greene v. Massey, 437 U.S. 19,98 S.Ct. 2151, 57 LEd2d15, (1978).

Signed this 21 day of March, 1988.

  
J U D G E