

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

EDITH ROMAN

Appellant,

v.

STATE OF TEXAS

Appellee.

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Nos. 11-MCA-3467, 3468, 3469
Ticket Nos.: 17962299.1,
17962299.2,
17962299.3

OPINION

Appellant appeals her conviction in Municipal Court for defective taillights, Failure to Maintain Financial Responsibility, and no vehicle registration. The cases were consolidated for trial before a jury, which convicted her of all offenses, and assessed fines totaling \$430.00. Likewise, the cases are consolidated on appeal.

Before trial, Appellant filed a timely motion to sever which was denied by the Trial Court, and that ruling is the basis of her appeal.

Although not cited by either party to this appeal, this Court believes the case of Payne v. State, 2001 Tex. App. LEXIS 4852, (Tex. Civ. App. Dallas, 2001) is controlling. In that case, the Defendant had been charged with violating twelve City Ordinances, and also filed a motion to sever stating he wanted the charges tried separately. The Trial Court concluded that the allegations described continuing conduct and therefore consolidated all the charges for trial. The Defendant was convicted of all twelve charges by the jury and fined for each violation. The Appellate Court then found that pursuant to Tex. Penal Code Ann., Section 3.04 (a), the Defendant had the absolute discretion to decide whether to have the cases severed, and the Trial Court's failure to do so upon the Defendant's request violated his substantial right to a fair trial. Therefore, the Defendant was entitled to a new trial. As in Payne, Appellant in this Court

filed a motion for severance and clearly indicated she wanted separate trials of these three offenses. She further insisted that the denial of her right to a severance essentially subjected her to trial for being a law breaker generally, not for any of the specific offenses charged.

The relevant statutory authority is found in sections 3.02 and 3.04 of the Texas Penal Code. Section 3.02(a) provides that a defendant "may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode." TEX. PEN. CODE ANN. § 3.02(a). However, Section 3.04(a) invests the defendant with the absolute discretion to decide whether the offenses so joined should be tried jointly or separately. It provides: "Whenever two or more offenses have been consolidated or joined for trial under Section 3.02, the defendant shall have a right to the severance of the cases." TEX. PEN. CODE ANN. § 3.04(a). Section 3.04(a) is mandatory, and the defendant's right to severance is absolute. *Coleman v. State* 788 S.W.2d 369, 371 (Tex. Crim. App. 1990). The decision to consolidate, rather than sever, is a matter of strategy, tactics, and judgment to be decided by the accused and his counsel. See *Guia v. State*, 723 S.W.2d 763, 767 (Tex. App.-Dallas 1986, pet. ref'd).

The three offenses involved here were part of the same criminal episode as that term is defined in the Texas Penal Code. See TEX. PEN. CODE ANN. § 3.01. But although section 3.02(a) permits prosecution of offenses occurring in the same criminal episode in a single trial, severance remains mandatory upon the defendant's request. The discretion to try the cases separately or jointly rested with appellant, not the trial judge. See *Llamas v. State*, 991 S.W.2d 64, 67 (Tex. App.-Amarillo 1998), *aff'd*, 12 S.W.3d 469 (Tex. Crim. App. 2000).

Two considerations underlay the severance rule:

(1) that the jury may convict a "bad man" who deserves to be punished - not because he is guilty of the crime charged but because of his prior or subsequent misdeeds; and

(2) that the jury will infer that because the accused committed other crimes, he probably committed the crime charged.

The Law has always been careful to guard the jury's deliberative process against contamination by evidence of other offenses. It is therefore reasonable to expect that a formal allegation of another offense will often have a greater influence on the jury's deliberations than mere evidence of other misdeeds admitted to prove a single charged offense. See Payne v. State and Llamas v. State, (cited above).

In Wedlow v. State, 807 S.W.2d 847 (Tex. App.-Dallas 1991, pet. ref'd), the Court observed that "to many jurors, two complaints are more believable than one." *Id.* at 852.

Although this Court, initially questioned whether the right to a severance is equally applicable to fine only offenses as opposed to those offenses which provide for incarceration, the Payne case also addressed that issue as follows:

"In the instant case, if the maximum penalty had been two years' confinement instead of a two thousand dollar fine, in the event of his conviction for all twelve violations, appellant would have been sentenced to serve all twelve two-year terms concurrently. But the maximum sentence that could be assessed for appellant's offenses was a fine, not incarceration. The jury assessed large fines in each case, and appellant is obligated to pay all of them. Thus, the consolidation for trial of all the charges against him did not afford appellant the advantage of

concurrent sentencing. The State, however, still gained the benefit of multiple convictions resulting from a single trial without foregoing the aggregation of the fines levied."

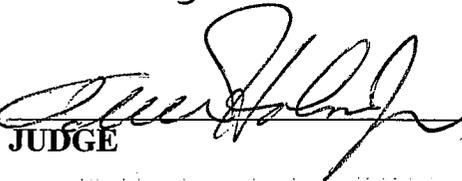
However, that does not end this Court's inquiry into the matter because it still has to conduct a harm analysis as dictated by Cain v. State, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997), where the court held that except for certain federal constitutional errors characterized as structural, "no error . . . is categorically immune to a harmless error analysis." Again, in Llamas v. State, 12 S.W.3d 469 (Tex. Crim. App. 2000), previously cited, the court stated that if concrete data necessary to conduct a harm analysis is absent from the record, "a harmless error test must nevertheless be conducted, and the absence of data is simply taken into account in determining whether or not the harmless error test is passed or failed." *Id.* at 471.

The question then becomes whether or not the error affected a substantial right of the Defendant. *See* Tex. R. APP. P. 44.2(b).

"This Court concludes that the trial court's error affected appellant's right to separate trials and that joint trial of these three offenses together had a substantial or injurious effect upon the jury's verdict. *See* Tex. R. APP. P. 44.2(b). Wrongful consolidation of multiple accusations has been characterized as a violation of the defendant's constitutional right to trial before a fair and impartial jury. *See* Wedlow, 807 S.W.2d at 852. The record is barren of evidence that would lead this Court to conclude that the error did not have a substantial effect on the verdict in this case."

Therefore, this Court finds it was error for the Trial Court not to grant the severance, and the judgment of the Trial Court is hereby reversed and remanded for new trials.

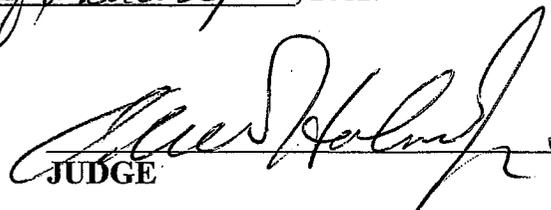
SIGNED this 5th day of January, 2012.


JUDGE

JUDGMENT

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 Trial Court's judgments in Cause Number 11-MCA-3467, Cause Number 11-MCA-3468, and Cause Number 11-MCA-3469 be reversed and remanded to the Trial Court for re-trial.

SIGNED this 5th day of January, 2012.


JUDGE