Affirmed and Opinion filed November 16, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-01121-CR

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ERIC JEROME DORSEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 800,270

O P I N I O N

Appellant was charged with the offense of assault on a public servant. *See* TEX. PEN. CODE ANN. § 22.01(a)(1), (b)(1) (Vernon Supp. 2000). Without an agreed recommendation on punishment, appellant pleaded guilty to the charged offense. The trial court sentenced appellant to two years in the Texas Department of Criminal Justice--Institutional Division. On appeal, appellant raises one point of error alleging "the trial court committed reversible error by sentencing appellant to a felony punishment when the indictment and stipulation alleged a misdemeanor." We affirm.

The indictment in this case states:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, ERIC J. DORSEY, hereafter styled the Defendant, heretofore on or about DECEMBER 12, 1998, did then and there unlawfully, intentionally and knowingly cause bodily injury to B. Tatum, hereinafter called the Complainant, a person the Defendant knew was a public servant while the Complainant was lawfully discharging an official duty, to-wit: a peace officer by striking the Complainant with his hand.

A person commits assault if he intentionally, knowingly, or recklessly causes bodily injury to another person. *See* TEX. PEN. CODE ANN. § 22.01(a)(1) (Vernon Supp. 2000). Assault, as defined by section 22.01(a)(1) is a misdemeanor; however, if an assault is committed against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, it is a third-degree felony. *See* TEX. PEN. CODE ANN. § 22.01(b)(1) (Vernon Supp. 2000).

Appellant argues the indictment in this case is defective because it does not allege a felony offense. Specifically, appellant contends the indictment fails to describe or define the official duty the complainant was discharging at the time of the assault. Appellant argues that describing or defining the duty as "peace officer" is insufficient to describe a lawful discharge of an official duty. Essentially, appellant is arguing that an element of the felony offense of assault has been omitted from the indictment, and therefore, appellant should have been sentenced as if pleaded to a misdemeanor. We disagree.

Assuming, without deciding, that the use of the term "peace officer" is insufficient to describe "lawfully discharging an official duty," for purposes of charging a person with violating section 22.01(b)(1), we find appellant has waived any complaint on this issue.

An indictment serves two functions. *See Cook v. State*, 902 S.W.2d 471, 475 (Tex. Crim. App. 1995); *Saathoff v. State*, 891 S.W.2d 264, 266 (Tex. Crim. App. 1994). First, it provides notice of the offense in order to allow a defendant to prepare a defense. *See id.* Second, an indictment serves a jurisdictional function. *See Cook*, 902 S.W.2d at 475; *Labelle v. State*, 720 S.W.2d 101, 106 (Tex. Crim. App. 1986). The filing of an indictment is essential to vest the trial court with jurisdiction over a felony offense. *See Cook*, 902 S.W.2d at 475. Before 1985, the Court of Criminal Appeals consistently

held that "substantive" defects in a charging instrument failed to vest the trial court with jurisdiction, and, therefore, a conviction on a substantively defective charging instrument could be challenged for the first time on appeal. *See id.* at 476 (citing *Studer v. State*, 799 S.W.2d 263, 267 (Tex. Crim. App. 1990)). Accordingly, where the charging instrument omitted an element of the offense, the courts held the indictment was void, the trial court lacked jurisdiction, and any complaint about the defective charging instrument could be raised for the first time on appeal. *See Cook*, 902 S.W.2d at 476.

After the amendment of article V, section 12(b) of the Texas Constitution and the enactment of article 1.14(b) of the Texas Code of Criminal Procedure, however, the effect of a substantive defect was changed. *See Ex parte Patterson*, 969 S.W.2d 16, 19 (Tex. Crim. App. 1998); *Cook*, 902 S.W.2d at 476. After those events, a substantive defect in the charging instrument remained a defect subject to a motion to quash, but the courts held it did not render the conviction void and further held that a failure to lodge a pre-trial objection waived any complaint about the defect on appeal. *See id.*; *Studer*, 799 S.W.2d at 272. Consequently, an indictment or information flawed by a defect of substance, but which purports to charge an offense and is not fundamentally defective, will support a conviction in the absence of a pre-trial objection. *See id.*

In this case, appellant has alleged an omission of an element of the offense of felony assault, i.e., no allegation or description of the precise official duty B. Tatum was discharging at the time he was struck by appellant. The omission of an element of the offense is a defect of substance. *See Patterson*, 969 S.W.2d at 19; *Cook*, 902 S.W.2d at 477. Thus, appellant was required to make a pre-trial objection to this defect in order to raise this complaint on appeal. *See id.* The record establishes appellant did not file a pre-trial motion to quash the indictment or file any other pre-trial objection to the indictment. Accordingly, appellant has waived this complaint.

We overrule appellant's sole point of error and affirm the trial court's judgment.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed November 16, 2000.

Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.

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