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Court of Appeals of Texas, Austin.

Wesley PERKINS, Appellant
v.
The STATE of Texas, Appellee

NO. 03–14–00733–CR
|
Filed: February 19, 2016

FROM THE COUNTY COURT AT LAW NO. 3 OF TRAVIS COUNTY, NO. C–1–CR–13–200882, HONORABLE JOHN LIPSCOMBE, JUDGE PRESIDING

Attorneys and Law Firms

Giselle Horton, Assistant Travis County Attorney, Austin, TX, for Appellee.

Wesley Perkins, Austin, TX, for Appellant.

Before Chief Justice Rose, Justices Goodwin and Field

MEMORANDUM OPINION

Jeff Rose, Chief Justice

***1** A jury found Wesley Perkins guilty of driving while license invalid and assessed punishment at 45 days in jail and a $2,000 fine. Tex. Transp. Code §§ 521.457(a)(2), (f)(2). The trial court suspended the punishment and placed him on community supervision for two years. Perkins raises thirty-one issues on appeal. We will affirm the judgment.

BACKGROUND

In January 2013, a police officer stopped Perkins's wife for speeding on Manchaca Road in Austin. Perkins came to the scene in his Toyota SUV. Perkins was then cited for several offenses, three of which were Class C misdemeanors originally tried in municipal court. [1] He was convicted in the county court at law of driving while license invalid.

DISCUSSION

Perkins raises 31 issues on topics ranging from the conditions of his bond through conditions on his probation. He quarrels with definitions given and not given and asserts constitutional violations. We conclude that these issues do not require reversal.

Transport or commerce generally

Perkins contends in Issue 1 that he did not commit the offense because he was not engaged in transportation as he defines it. This contention underlies several of Perkins's issues on appeal. He contends that, without proof that he was removing people and/or property from one place to another for hire, there can be no proof of a vehicle, motor vehicle, driver, or operator. He also contends that "this state" is a choice of law defined by its currency and that the State must prove the exchange of this currency for hire in order to prove transportation.

But the word "transportation" is not an element of the appellant's offense. Also not present in the relevant law in any way applicable to this offense are the words transport, transportation, commerce, commercial, and hire. The word "transportation" in the statutes' citation simply states the code into which the Legislature placed the offense but does not make it an element of the offense. The word "transport" appears in the text of the definition of "vehicle" in Chapter 541, but that definition is expressly for a different subtitle; further, there is no statutory basis for the argument that the use of the word "transport" carries with it any requirement that the vehicle be used for a commercial purpose. *See id.* § 541.201(23) (vehicle is a "device that can be used to transport or draw persons or property on a highway").

Texas law provides generally that a person may not operate a motor vehicle on a highway in this state without a driver's license. Tex. Transp. Code § 521.021; *see also id.* § 521.027 (exemptions not applicable here). Specifically, "[a] person

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commits an offense if the person operates a motor vehicle on a highway: ... during a period that the person's driver's license or privilege is suspended or revoked under any law of this state." *Id.* § 521.457(a)(2). The offense level is enhanced if the person is operating the motor vehicle in violation of Transportation Code section 601.191. A person also may not operate a motor vehicle in this state unless financial responsibility is established for that vehicle through a compliant motor vehicle liability insurance policy or other specified means. *Id.* §§ 601.051; .191. A surcharge may be assessed if a person is convicted of driving without financial responsibility, and that person's driver's license can be suspended for failing to timely pay the surcharge. *See id.* § 708.103, .152.

***2** Perkins's argument that the driver's license requirement applies only if there is a commercial purpose in his use of the public roads is based in part on his reading of *Lozman v. City of Riviera Beach,* 133 S.Ct. 735, 739 (2013). We have previously rejected this argument. *See Perkins v. State,* No. 03–14–00308–CR, 2015 Tex.App. LEXIS 6426, at *7–8 2015 WL 3918064 (Tex.App.–Austin June 25, 2015, no pet.).[2] Perkins was not charged with violating code provisions that govern **Commercial Driver's Licenses**. *See* Tex. Transp. Code §§ 522.001–.154. The driver's license requirement Perkins was convicted of violating is not limited to persons engaging in commerce or transportation of persons or cargo for hire. *See id.* § 521.457. We overrule Issue 1.

This holding resonates in other issues that Perkins raises. He contends that, because the State failed to prove he was engaged in transportation as he defines it to include a commercial or for-hire aspect, the State could not and did not prove that there was a vehicle (Issue 2) or motor vehicle (Issue 3) that he was driving (Issue 4) or operating (Issue 5). We must apply ordinary meanings of terms unless they have acquired a technical or particular meaning, as through legislative definition. *Id.* § 311.011. Some of these terms are legislatively defined elsewhere, but not in chapter 521. *See* Tex. Transp. Code § 521.001. The word "vehicle" is commonly used to mean "any device for carrying passengers, goods or equipment, usually on moving on wheels or runners, as a car or sled; a conveyance."[3] The Am. Heritage Dictionary of the English Language 1419 (1973). A "motor vehicle" is "[a]ny self-propelled, wheeled conveyance that does not run on rails."[4] *Id.* 857. To "drive" is "[t]o guide, control, or direct (a vehicle)." *Id.* 399. To "operate" is "[t]o run or control the functioning of: *operate a machine.*" *Id.* 920. The Texas Court of Criminal Appeals has held that a person "operates" a vehicle when "the totality of the circumstances must demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." *Denton v. State,* 911 S.W.2d 388, 390 (Tex.Crim.App.1995). While these definitions may encompass commercial activities, they are not limited solely to commercial endeavors. We overrule issues 2, 3, 4, and 5.

***3** Perkins argues that "this state" is a "place" that is a "choice of law" where the use of "funny money" is not "instantly fraud." He contends that to prove transportation, the State would have to prove "hire" in the form of "funny money." Because we find that his argument about the meaning of the word "transportation" is not well-founded in relevant law, we reject his discussion of the meaning and implication of the term "this state." We overrule Issue 6.

Pretrial bond

Perkins raises four issues about his pretrial bond. He complains that the trial court added conditions to his bond and compelled him to post more bond. Because Perkins has been convicted, these issues concerning his pretrial bond are moot. *See Danziger v. State,* 786 S.W.2d 723, 724 (Tex.Crim.App.1990); *see also Henriksen v. State,* 500 S.W.2d 491, 494 (Tex.Crim.App.1973). We dismiss issues 13, 14, 15, and 16.

Notice of proceedings

By Issue 18, Perkins contends that Texas Code of Criminal Procedure article 25.04 facially violates due process. Article 25.04 provides that, "[i]n misdemeanors, it shall not be necessary before trial to furnish the accused with a copy of the indictment or information; but he or his counsel may demand a copy, which shall be given as early as possible." Tex.Code Crim. Proc. art. 25.04. The language of article 25.04 follows the Texas Constitutional requirement that an accused "shall have the right to demand the nature and the cause of the accusation against him, and to have a copy thereof." Tex. Const. art. I, § 10.

In addressing a constitutional challenge, this court "must begin with the presumption that the statute is valid and

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that the Legislature did not act arbitrarily or unreasonably in enacting it." *State v. Rosseau,* 396 S.W.3d 550, 557 (Tex.Crim.App.2013). The party challenging the statute "has the burden to establish its unconstitutionality." *Id.* "[T]o prevail on a facial challenge, a party must establish that the statute always operates unconstitutionally in all possible circumstances." *Id.* Due process requires that the accused have notice of the charges against him so that he can prepare a defense. *See State v. Moff,* 154 S.W.3d 599, 601 (Tex.Crim.App.2004).

The record reflects that Perkins knew the charge that was pending against him. His signature appears on a January 2013 cash bond that states he is charged with the misdemeanor of "DWLI." He filed Perkins's Special Appearance and Plea to the Jurisdiction in February 2013 raising many issues that he raises in his brief here. The reporter's record contains a statement from counsel that he showed the complaint and information to Perkins the day before trial and that counsel believed that Perkins read those documents. Perkins has not shown that the statute is facially unconstitutional. We overrule Issue 18.

This showing of actual notice also resolves Issue 19, by which Perkins asserts that the trial court relieved the State of its "procedural burden" of serving notice on him. He indicates that documents were served on his appointed standby counsel and that no evidence shows that counsel passed the documents along to him. Perkins cannot show harm or a deprivation of due process because the record shows he was aware enough of the charge against him six months before trial to file a 50–page special appearance tailored to the requirement that he have a current license and then he appeared at and participated in the trial of that charge. We overrule Issue 19.

Entering a plea on behalf of the defendant.

***4** Perkins contends by Issue 17 that the trial court erred or abused its discretion by entering a plea on Perkins's behalf. State law requires that, "[i]f the defendant refuses to plead, the plea of not guilty shall be entered for him by the court." Tex.Code Crim. Proc. art. 27.16. Perkins contends that he should not have been compelled to respond when the trial court lacked jurisdiction. His challenge to the court's jurisdiction was rejected by the trial court, which proceeded to comply with state law. Perkins has not shown error in the court's compliance, nor has he shown harm from the statutorily prompted denial of his guilt. We overrule Issue 17.

Criminal jurisdiction and process

Perkins contends that the State never had a criminal case because it never served him with its original pleading and because it never proved transportation, which meant it never had standing. As discussed above, the State is not required to prove transportation as he argues. The classification of the case as "criminal" is determined by the nature of the proceeding. These cases were initiated by the State via complaints that alleged he committed offenses against the peace and dignity of the State, he was found guilty of committing the charged offenses, and he was sentenced to be incarcerated—all hallmarks of a criminal cause of action. *See* Tex.Code Crim. Proc. arts. 21.20, .21 (definition and requisites of information), arts. 21.01, .02 (definition and requisites of indictment), arts. 45.018, .019 (definition and requisites of complaint in municipal court); *cf. Cadle Co. v. Lobingier,* 50 S.W.3d 662, 667 (Tex.App.–Fort Worth 2001, pet. denied) (comparing civil contempt, which is assessed to persuade satisfaction of existing obligation, and criminal contempt, which is assessed to punish previous wrongdoing). The failures alleged might defeat a prosecution, but they do not convert the case to a civil case. We overrule Issue 9.

By Issue 10, Perkins contends that standby counsel cannot be appointed for a civil matter. As this is not a civil matter, we overrule Issue 10.

By Issue 11, Perkins contends that the State may not charge this offense as a misdemeanor. He asserts without authority that all matters outside the penal code are not criminal but are breaches of fiduciary duty or trust. The legislative power is in the Legislature. Tex. Const. art. III, § 1. That power includes defining crimes and prescribing penalties. *See State v. Blackwell,* 500 S.W.2d 97, 104 n.2 (Tex.Crim.App.1973). Neither the constitution nor statutory law require that crimes be defined only in the penal code. *See generally* Tex. Const.; *see also* Tex. Penal Code § 1.03(a), (b). We overrule Issue 11.

Perkins argues by Issue 20 that the case should not have gone to the jury because the trial court lacked jurisdiction. This issue rests on Perkins's argument that the State had to prove transportation and commerce. Having rejected that argument, we overrule Issue 20.

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Admission of evidence

Perkins contends by Issue 28 that the trial court erred by admitting State's Exhibit 1, a Department of Public Safety record that listed his convictions for previous failures to have motor vehicle liability insurance and failing to signal a turn. We review the admission or exclusion of evidence for an abuse of discretion. *Martinez v. State,* 327 S.W.3d 727, 736 (Tex.Crim.App.2010). We will uphold the trial court's decision if it is supported by the record and is correct under any theory of applicable law in light of what was before the court when the ruling was made. *Martin v. State,* 173 S.W.3d 463, 467 (Tex.Crim.App.2005). Perkins objected at trial that the document was irrelevant and complains on appeal that the document contains no probative value and is facially and extremely prejudicial.[5] The State explained at trial that the document was relevant to show that Perkins's license was suspended at the time he was ticketed for driving while his license was invalid. The trial court did not abuse its discretion by concluding that a document showing that Perkins's driver's license had been suspended before the day of the offense and remained so was relevant and not unfairly prejudicial in a prosecution for "driving while license invalid." *See* Tex.R. Evid. 403, 404. We overrule Issue 28.

Trial court statements and instructions

***5** By Issue 21, Perkins contends that the trial court unfairly biased the jury with errant legal argument about what transportation means. By Issue 23, Perkins asserts that the trial court unfairly biased the panel by presuming commercial intent. As discussed above, "transportation" and other terms discussed above do not have the strictly commercial meaning that Perkins ascribes to them. Instead, commercial intent is irrelevant to the law violated. Further, the trial court did not assert or presume commercial intent. We overrule issues 21 and 23.

Issue 22 is similar, but focuses on the court's description of the offense at voir dire:

> This is [a] driving while license invalid case and that is a Class B misdemeanor. What it means is that the person has allowed their license to be invalidated by the Department of Public Safety for one reason or another. Everyone, as we know, has to have a driver's license to drive in the state of Texas. Do we agree with that? Because driving is not a right, it's a privilege.
>
> Does anybody believe that it should be a right? You shouldn't have to do anything? You should just be able to drive without a license? Okay.
>
> We do that because we want people to be responsible in case they have a boo boo. We require people to have insurance for the same reason, because we want people to be responsible. And we either all live within the law or we decide to live outside of the law, and there are consequences for that as well. I stated that as Mr. Perkins sits before you, he's innocent of anything.

Perkins's argument hinges on his belief that "driving" is a commercial activity and that only one engaged in commercial activity needs a license. We have discussed the definitions of relevant terms including "drive" above, and conclude that the trial court's discussion is within the bounds of those definitions. *Cf. Mundy v. Pirie–Slaughter Motor Co.,* 206 S.W.2d 587, 589 (Tex.1947) (describing purpose of licensing requirement). The trial court's remarks at voir dire regarding the Texas requirement for a driver's license did not unfairly bias the jury. We overrule Issue 22.

By Issue 24, Perkins asserts that the trial court erred or abused its discretion by failing to define transportation for the jury. Trial courts are required to instruct the jury on the law applicable to the case. *See* Tex.Code Crim. Proc. art. 36.14; *Abdnor v. State,* 871 S.W.2d 726, 731 (Tex.Crim.App.1994). It is not necessary to define terms that are simple and used in their ordinary meaning; jurors are presumed to know such common meaning and terms. *Penry v. State,* 903 S.W.2d 715, 752 (Tex.Crim.App.1995). Again, "transportation" is not a word used in the statute Perkins failed to comply with and does not have an exclusively commercial aspect as used in this statute. Also, the jury did not express any confusion about its meaning. We find no error in the trial court's choice not to define transportation for the jury. We overrule Issue 24.

Similarly, we find no error in the trial court's choice not to define drive, operate, or motor vehicle for the jury. There is no showing that the words have any meaning in this statute that departs from their ordinary meaning. *See Penry,* 903 S.W.2d at 752. We overrule Issue 25.

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By Issue 29 he contends that the trial court erred by overruling his objections to the "commercial semantics." He contends that, by insisting on using criminal-case-style instructions, the trial court compelled him (and the jury) to accept that this was a criminal case and not a commercial case. We have concluded that his interpretation of the law and this case is not well-founded and conclude that this is a criminal case. We overrule Issue 29.

***6** Perkins asserts by two issues that the trial court should have included additional instructions. By Issue 26 he contends that the trial court erred by failing to explain the algebraic connection between "transportation" and the key commercial, semantic terms of legal conclusion and by Issue 27 he contends that the trial court erred by failing to include any of his proposed instructions. He contends that the jury should have been told that transportation requires that the movement of persons or cargo must be for hire, that without transportation as so defined, there is no vehicle or motor vehicle to be operated; without a vehicle to be operated, there is no operator or driver, and without an operator or driver, there is no need for a driver's license. These issues rest on Perkins's mistaken interpretation of transportation and other terms in the statutes. We overrule issues 26 and 27.

Burden of proof

By four issues, Perkins challenges whether the State carried its burden of proof. He contends by Issue 7 that the State never proved standing by proving "transportation," by Issue 8 that the trial court improperly relieved the State of its burden to prove transportation, by Issue 12 that the State never proved him liable in the capacity charged—i.e., somebody engaged in commercial transportation or somebody who has agreed to be bound by the driver's license requirement—and by Issue 30 that the trial court erred (or abused its discretion) by accepting the jury's recommendation on guilt. We have concluded that the law does not require the State to prove the interpretation of transportation that Perkins favors which means we must overrule issues 7, 8, and 12. The State was required to prove Perkins "operate[d] a motor vehicle on a highway ... during a period that the person's driver's license or privilege [was] suspended or revoked." *See* Tex. Transp. Code § 521.457(a)(2). The State introduced documentary evidence that Perkins's driver's license was suspended indefinitely and testimony that he operated a motor vehicle on the highway after it was revoked. The State provided evidence on the elements required by the law properly interpreted and the trial court properly assessed the State's burden and accepted the jury's verdict. We overrule issues 7, 8, 12, and 30.

Terms of community supervision

By Issue 31, Perkins contends that the trial court erred or abused its discretion by adding "ultimate issue" conditions on his probation. The trial court may impose "any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant." Tex.Code Crim. Proc. art. 42.12, § 11(a). We afford the trial court wide discretion in selecting the terms and conditions of community supervision. *See Butler v. State,* 189 S.W.3d 299, 303 (Tex.Crim.App.2006); *Tamez v. State,* 534 S.W.2d 686, 691 (Tex.Crim.App.1976). The trial court set as a condition of probation that Perkins must obtain a valid driver's license and insurance within 30 days and not drive without valid insurance covering any family-owned vehicle or personal conveyance. Perkins contends that the sentencing is improper based on his previous arguments that there is no jurisdiction, evidence of guilt, proof of driving in the commercial sense he advocates, or agreement to the requirement of insurance or licensing. We have rejected all of these complaints. As this marked the second time Perkins had been ticketed for driving without insurance, and his license was suspended for failure to pay a surcharge assessed because he failed to have insurance when driving, we conclude that the trial court did not abuse its discretion in assessing these terms of community supervision. We overrule Issue 31.

CONCLUSION

We affirm the judgment.

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Footnotes

1 These other offenses—driving a vehicle with expired registration and expired inspection as well as failing to maintain financial responsibility—resulted in convictions that were appealed to the county court at law and then this Court. *See Perkins v. State,* Nos. 03–14–00308–CR, 03–14–00309–CR, 03–14–00310–CR, 2015 Tex.App. LEXIS 6426 2015 WL 3918064 (Tex.App.–Austin June 25, 2015, pet. denied).

2 The central issue in *Lozman* was whether maritime law applied to a floating home, which turned on whether the home was a vessel, an issue that itself turned on the federal statutory definition of "vessel" as something capable of being used as a means of transportation on water. *Lozman v. City of Riviera Beach,* 133 S.Ct. 735, 740 (2013); *see also* 1 U.S.C. § 3. The Supreme Court concluded that the structure was not a vessel because it could not practically convey things or persons from one place to another. 133 S.Ct. at 740–41 (citing 19 Oxford English Dictionary 424 (2d ed.1989)). The Supreme Court noted the absence of a steering mechanism or a raked hull, its dependence on connections to land for power, the presence of non-water-tight doors and windows instead of portholes, and the absence of the ability of self-propulsion. *Id.* at 741. Neither the opinion nor the dictionary mention hiring or commerce being part of the transportation analysis. *See id.* The *Lozman* opinion does not support Perkins's argument because it did not concern a criminal offense or Texas law but did involve navigable waters, and its definition of transportation is not limited to commercial transactions. *See generally id.*

Perkins asserts his rights under maritime law, but that body of law is not applicable to the facts of this case. *See Schlumberger Tech. Corp. v. Arthey,* 435 S.W.3d 250, 253 (Tex.2014) (discussing tort jurisdiction) (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 531–534, 547–548 (1995)).

3 Perkins agreed that he came to the place where his wife was stopped in "a Toyota SUV." We note that the letters "SUV" are an abbreviation for sport utility vehicle.

4 This definition is consistent with the Legislature's definition of "motor vehicle" in another subtitle as a "self-propelled vehicle or a vehicle that is propelled by electric power from overhead trolley wires." Tex. Transp. Code § 541.201(11).

5 Perkins also contends that this evidence should not have come in because there should not have been a trial due to the absence of proof of transportation, service, or driving by Perkins. These are separate issues dealt with elsewhere in this opinion. Here, we will focus on whether the trial court exercised its discretion acceptably when admitting the evidence.

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