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In the Court of Criminal Appeals of Texas
At Austin

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For the Fourteenth District of Texas
At Houston

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No. 2130699
In County Criminal Court at Law Number Ten
Of Harris County, Texas

Phi Van Do
Appellant

v.

The State of Texas
Appellee

State's Reply Brief on Discretionary Review

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Reply to the Appellant's Brief

The failure to read all the elements in the indictment to the jury is trial error subject to a harm analysis, not an abandonment of the unread elements.

The appellant's brief does not address the grounds for review, but instead raises an argument not addressed by the Fourteenth Court or the State's briefing. The appellant claims the prosecutor's failure to read to the jury the allegation that enhanced his offense from a Class B to a Class A was an abandonment of the allegation, so the there was no error in the trial court's jury charge, which asked the jury only about the Class B offense.

The appellant cites no authority for the proposition that the failure to read an element at the beginning of trial means the State has abandoned the element. Such a holding would elevate the reading of the indictment into some sort of jurisdictional event that could negate—or, presumably, expand—the allegations in an indictment. If that were the law, that seems like the sort of thing there would be cases discussing.

Instead, modern case law has treated errors with reading allegations as trial error subject to the harm analysis for non-constitutional errors. For instance, in *Linton v. State*, 15 S.W.3d 615 (Tex. App.—

Houston [14th Dist.] 2000, pet. ref'd) the State failed to read the enhancement paragraphs at the beginning of the punishment phase. If the appellant's theory was correct that anything not read is abandoned, the First Court should have reversed for a new punishment hearing. Instead, it applied the harm analysis for non-constitutional error and held the error did not warrant reversal. *Linton*, 15 S.W.3d at 620.

The only modern cases the State can find about the failure to read elements of the offense before the guilt phase are unpublished, suggesting this is not a controversial area of law. None of the cases reflect a belief that the failure to read an element abandons the element. In *Kincanon v. State*, No. 07-01-0258-CR, 2002 WL 1461838, at *2 (Tex. App.—Amarillo July 3, 2002, pet. ref'd) (not designated for publication), the State seems to have completely failed to read the indictment, and the defendant did not plead to it. Under the appellant's theory, that would have been interpreted as an abandonment of all allegations—*i.e.*, a post-jeopardy dismissal. Instead, the Seventh Court held the error was harmless. *See also Robinson v. State*, No. 05-01-00702-CR, 2002 WL 115579, at *1 (Tex. App.—Dallas Jan. 30, 2002, no pet.) (not designated for publication) (failure to read indictment to jury and have defendant plead to jury harmless); *Lara v. State*, 740

S.W.2d 823, 828 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd) (as an alternative holding, if indictment was not read to jury, error was harmless).

There are older cases holding that error in reading the charging instrument requires reversal without harm analysis, even if the objection is untimely, but even those cases treat the matter as trial error rather than an abandonment of the charges. The appellant's brief relies on *Warren v. State*, 693 S.W.2d 414 (Tex. Crim. App. 1985). There, the State failed to read the enhancement at the beginning of the punishment phase, and the defendant waited until after the jury was dismissed to complain. *Warren*, 693 S.W.2d 415. This Court held the post-verdict motion for mistrial adequately preserved the error,[1] and reversed without a harm analysis. In *Turner v. State*, 897 S.W.2d 786, 789 (Tex. Crim. App. 1995), this Court held the intermediate court erred by applying a harm analysis to the State's failure to read the enhancement allegations to the jury.

[1] The Fifth Circuit has noted the old case law on this subject—which held that if a defendant made a timely objection the remedy was to read the allegations to the jury, but if the defendant waited until after trial to object the remedy was a new trial—made it a reasonable trial strategy for defense counsel to raise untimely objections. *Sharp v. Johnson*, 107 F.3d 282, 290 (5th Cir. 1997).

Turner, though, relied on the now-discredited line of reasoning that automatic reversal was required for violating a "mandatory statute." *Turner* also pre-dates this Court's declaration in *Cain v. State*, 947 S.W.2d 262 (Tex. Crim. App. 1997) that all errors except for "structural" errors were subject to a harm analysis. This Court has not revisited *Turner's* holding since *Cain*, but intermediate courts have held that *Cain* overruled *Turner sub silentio*. *See Hernandez v. State*, 190 S.W.3d 856, 868 (Tex. App.—Corpus Christi 2006, no pet.); *Linton*, 15 S.W.3d at 620.

The appellant's rule would be incongruous with this Court's holding in *Ex parte Preston*, 833 S.W.2d 515 (Tex. Crim. App. 1992). Preston was charged with three counts of robbery in a single indictment. At his trial, the State read only one count at the beginning of trial, and the jury was charged only on that count. After conviction on that count, a grand jury reindicted him on the other counts. When the State went for a new trial, Preston filed a pretrial writ alleging a Double Jeopardy violation. This Court held that Preston was entitled to relief. *Preston*, 833 S.W.3d at 518. This Court reasoned that because the State took no affirmative steps to abandon the unread allegations prior

to the jury being sworn, Preston had faced jeopardy on all three charges despite two of them not being read.

If the appellant's theory that failure to read an allegation constitutes an abandonment of the allegation, and if *Preston* is correct that any allegations abandoned after a jury is sworn are jeopardy barred, the only remedy for this sort of error would be acquittal. But this Court has long acknowledged the remedy for failure to read allegations from a charging instrument is to have the prosecutor read the charging instrument whenever the problem is brought to the trial court's attention. *See, e.g, Castillo v. State*, 530 S.W.2d 952, 954 (Tex. Crim. App. 1976).

The appellant's argument is that the reading of an indictment, rather than the text of the indictment, determines what charges the defendant faces. This argument has little support in the old case law—where any error in reading the charging instrument was a remediable problem—and is completely at odds with modern case law—which holds that failing to read the charging instrument in whole or in part is trial error subject to a harm analysis.

The real error here is the charge error the Fourteenth Court analyzed, and which this Court has granted review of. This Court

should address the granted grounds for review and not be distracted by the appellant's poorly supported theory.

Conclusion

The State asks this Court to reverse the Fourteenth Court and remand the case to that court to address the appellant's remaining point.

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