

Review of Recent Juvenile Cases (2009)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

The offense of consumption of alcohol by a minor does not require a culpable mental state.[Florance v. State](09-3-1)

On May 8, 2009, the Dallas Court of Appeals held that consumption of alcohol by a minor is a strict liability offense and the lack of a culpable mental state does not render the offense unconstitutional.

¶ 09-3-1. **Florance v. State**, No. 05-08-00707-CR, --- S.W.3d ----, 2009 WL 1267350 (Tex.App.-Dallas, 5/8/09).

Facts: Amanda Jean Florance, *pro se*, appeals two county court judgments in her appeal from the municipal court by trial de novo. The first judgment from which she appeals is one acquitting her of the offense of failure to appear in trial court cause no. 003-81451-06. The second judgment is one convicting her of consumption of alcohol by a minor in trial court cause no. 003-81453-06. The second judgment was rendered after a jury found Florance guilty of consumption of alcohol by a minor, a Class C misdemeanor, and the county court assessed her punishment at a fine in the amount of \$75.

Florance raises nine issues on appeal arguing: (1) this case is a civil appeal and, as a result, the municipal court never had jurisdiction; (2) her right to due process is violated by [article 45.0215 of the Texas Code of Criminal Procedure](#), which requires parents of minors subject to municipal and justice court proceedings to be summoned before the court accepts a not guilty plea; (3) her right to due process is violated by [article 4.03 of the Texas Code of Criminal Procedure](#), which provides that courts of appeals do not have jurisdiction over cases appealed from an inferior court to the county court, in which the fine imposed by the county court does not exceed one hundred dollars, unless the sole issue is the constitutionality of the statute on which the conviction is based; (4) her right to due process is violated by [Texas Rule of Appellate Procedure 25.2\(d\)](#), which requires the trial court to certify the defendant's right of appeal; (5) [section 106.04 of the Texas Alcoholic Beverage Code](#) is unconstitutional because it is vague and over broad, invades her right to privacy, it is codified outside the penal law without a commercial nexus, and fails to require a culpable mental state; (6) the evidence is insufficient because there is no evidence to prove a commercial nexus or public context to the offense and no evidence of mens rea; (7) her right to due process was violated by the trial court's instructions to the jury because those instructions failed to include the culpable mental state; (8) the police seized her without probable cause or an arrest warrant and failed to give her the *Miranda* warnings before administering the breathalyzer test; and (9) the county court erred when it entered a judgment of acquittal in the failure to appear case because both the municipal court and county court did not have jurisdiction and should have ordered the case dismissed. In addition, Florance argues we should also consider each issue challenging a statute to include an independent issue seeking a declaratory judgment.

Held: Affirmed

Opinion: [Section 106.04](#) Is Not Required to Have Mens Rea Element

Florance argues [section 106.04](#) is unconstitutional because a criminal offense must require a culpable mental state. She claims [section 106.04](#) does not expressly dispense with the culpable mental state. As a result, she argues section 6.02 of the Texas Code of Criminal Procedure applies and, pursuant to section 1.08, alcohol-related offenses require a mens rea of at least criminal negligence. In her reply brief, she argues "if there is no mens rea, there is simply no definition of a crime. There may be civil/commercial liability without a mens rea element, but there is no *criminal* liability without it." (Emphasis in orig.). She claims that without a mens rea element, the State has made breach of contract a criminal offense. The State responds that not all crimes require a culpable mental state. The State argues that [section 106.04](#) is a *malum prohibitum* offense and, as such, requires no mental state.

1. Applicable Law

A strict liability statute is based on the principle that a person who commits an act in violation of the law may be held criminally liable even though he might be innocent of any criminal intent. See [State v. Walker, 195 S.W.3d 293, 298 \(Tex.App.-Tyler 2006, no pet.\)](#). If a statute plainly dispenses with a culpable mental state as an element of the offense, it is a strict liability statute. See [Walker, 195 S.W.3d at 298](#). Many strict liability offenses are Class C misdemeanors, a conviction for which does not impose any legal disability or disadvantage. [Aguirre v. State, 22 S.W.3d 463, 472 \(Tex.Crim.App.1999\)](#).

Where no mental state is specified in a statute, [section 6.02 of the Texas Penal Code](#) provides a default rule that, unless the definition of the offense "plainly dispenses with any mental element," if a mental state is not specified in a statute, "intent, knowledge, or recklessness suffices to establish criminal responsibility." [Tex. Penal Code Ann. § 6.02](#) (Vernon 2005); see [Robledo v. State, 126 S.W.3d 150, 153 \(Tex.App.-Houston \[1st Dist.\] 2003, no pet.\)](#). The Texas Court of Criminal Appeals has established guidelines for determining whether a statute dispenses with a culpable mental state. See [Aguirre, 22 S.W.3d at 472](#).

First, the statute is examined to determine whether it contains an affirmative statement that the conduct is a crime though done without fault. [Id. at 471](#). Silence about whether a culpable mental state is an element of an offense leaves a presumption that one is required. See [Lomax v. State, 233 S.W.3d 302, 304 \(Tex.Crim.App.2007\)](#); [Aguirre, 22 S.W.3d at 472](#).

Second, in the absence of an express intent to dispose with the requirement of a culpable mental state, the statute is examined to determine whether such an intent is manifested by other features of the statute. See [Lomax, 233 S.W.3d at 304](#); [Aguirre, 22 S.W.3d at 472](#). These features include: (1) the language of the statute; (2) the nature of the offense as either *malum prohibitum* or *malum in se*; (3) the subject of the statute; (4) the legislative history of the statute; (5) the seriousness of harm to the public; (6) the defendant's opportunity to ascertain the true facts; (7) the difficulty in proving a culpable mental state; (8) the number of prosecutions expected; and (9) the severity of the punishment. [Aguirre, 22 S.W.3d at 472-76](#).

2. Application of the Law to the Facts

In order to address Florance's issue, we must first ascertain whether [section 106.04](#) is a strict liability offense or requires a culpable mental state. Then, we must determine whether the absence of a culpable mental state in [section 106.04](#) renders the statute unconstitutional.

[Section 106.04](#) does not contain an affirmative statement that the conduct is a crime though done without fault. As a result, to determine whether [section 106.04](#) requires a culpable mental state, we must examine whether such an intent is manifested by other features of the statute.

First, we examine the language of [section 106.04](#). That section states "a minor commits an offense if he consumes an alcoholic beverage." [Tex. Alco. Bev. Code Ann. § 106.04\(a\)](#). It clearly omits a culpable mental state. When considering the language of a statute, the omission of a culpable mental state is a clear implication of the legislature's intent to dispense with a mental element in that section. *See* [Lomax, 233 S.W.3d at 304](#); [Aquirre, 22 S.W.3d at 473](#). If any section of the statute prescribes a mental state while another section omits a mental state, it is presumed the legislature intended to dispense with a mental element in that section. [Aquirre, 22 S.W.3d at 473](#). Other sections in chapter 106 of the Texas Alcoholic Beverage Code prescribe a mental state. *See* [Tex. Alco. Bev. Code Ann. §§ 106.03, 106.06](#) (criminal negligence). This factor weighs against requiring a culpable mental state.

Second, we examine the nature of the offense proscribed in [section 106.04](#). Strict liability is associated with civil violations that incur only a fine and criminal offenses characterized as *malum prohibitum*. [Aquirre, 22 S.W.3d at 472](#); *see also* [State v. Howard, 172 S.W.3d 190, 193 \(Tex.App.-Dallas 2005, no pet.\)](#). *Mala prohibita* offenses are acts that are crimes merely because they are prohibited by statute, although they are not necessarily immoral. *See* [Howard, 172 S.W.3d at 193](#). By contrast, *mala in se* offenses are acts that are inherently immoral and require a culpable mental state. *See id.* The implication is that a strict liability offense must be *malum prohibitum*. [Aquirre, 22 S.W.3d at 473](#). Because a violation of [section 106.04](#) cannot be considered inherently immoral, it is a *malum prohibitum* offense. This factor weighs against requiring a culpable mental state.

Third, we examine the subject of the [section 106.04](#). Strict liability statutes are traditionally associated with laws protecting the public health, safety, or welfare, as to the element of a child's age in statutes that protect children, and laws designed to protect children. *See id. at 473, 475*; [Grice v. State, 162 S.W.3d 641, 647 \(Tex.App.-Houston \[14th Dist.\] 2005, pet. ref'd\)](#) (laws designed to protect children). The class of public safety statutes courts have found to impose strict liability comprises statutes that punish dangerous activities which may result in serious physical injury or death to members of the public. *See id. at 475 & n.47*. [Section 106.04](#) regulates the consumption of alcohol by minors and is designed to protect children. This factor weighs against requiring a culpable mental state.

Fourth, we examine the legislative history of [section 106.04](#), its title, and context. The only significant legislative history for this statute is the addition of an affirmative defense and to move the prescribed punishment to section 106.071. The statute is titled "Consumption of Alcohol by a Minor." It is found in chapter 106 which is titled "Provisions Relating to Age." This factor weighs against or is at least neutral regarding whether a culpable mental state is required.

Fifth, we examine the seriousness of the harm to the public which may be expected to follow from the forbidden conduct. *See* [Aquirre, 22 S.W.3d at 476](#). Generally, the more serious the consequences to the public, the more likely the legislature intended to impose liability without regard to fault. *See* [Walker, 195 S.W.3d at 299](#). In most strict liability offenses, the statutes protect unwitting and unwilling members of the public from the noxious and harmful behavior of others in situations in which it would be difficult for members of the public to protect themselves. *See id.* Such statutes involve serious risk to the public, including serious physical injury or death. *See id.* [Section 106.04](#) is designed to protect minors from the risks associated with the consumption of alcohol. These risks could conceivably include intoxication and alcohol poisoning, among other things, which could result in serious injury or death to the minor or members of the public. This factor weighs against requiring a culpable mental state.

Sixth, we examine Florance's opportunity to ascertain the true facts. A minor would have little difficulty in determining he was consuming alcohol and his incentive to ascertain he was consuming alcohol would seem high given its intoxicating effects. Even if his beverage were "spiked," in most situations, it is possible for the minor to detect the alcohol and immediately cease consuming the beverage. We would have difficulty saying a

minor is not in a position to prevent the violation. Further, it is well-known that persons under the age of twenty-one may not purchase or consume alcohol in this state. This factor weighs against requiring a culpable mental state.

Seventh, we examine the difficulty prosecutors would have in proving a mental state for this type of crime. See [Aguirre, 22 S.W.3d at 476](#). The greater the difficulty in proving a mental state, the more likely legislators intended to create a strict liability offense to ensure more effective law enforcement. *Id.* A defendant's intentions or culpable mental state can be inferred from circumstantial evidence, such as his words, acts, and conduct. See [Walker, 195 S.W.3d at 300](#) (citing [Smith v. State, 965 S.W.2d 509, 518 \(Tex.Crim.App.1998\)](#); [Guevara v. State, 152 S.W.3d 45, 50 \(Tex.Crim.App.2004\)](#)). Because intent may be inferred from a defendant's words, actions, and conduct, proving a mental state in this statute is no more difficult than proving a mental state in another offense. See [Walker, 195 S.W.3d at 300](#). This factor weighs in favor of requiring a culpable mental state.

Eighth, we examine the number of prosecutions expected. The fewer the expected prosecutions, the more likely the legislature meant to require the prosecutors to go into the issue of fault. [Aguirre, 22 S.W.3d at 476](#). The greater the number of prosecutions, the more likely the legislature meant to impose liability without regard to fault. *Id.* Neither Florance nor the State attempted to argue the number of prosecutions for this offense. Based on the information and arguments before us, this factor is neutral.

Finally, we examine the severity of the punishment for an offense under [section 106.04](#). The greater the punishment, the more likely some fault is required. *Id.* The presumption against strict liability becomes stronger for offenses punishable by confinement. See [Robledo, 126 S.W.3d at 153](#). Conversely, the lighter the punishment, the more likely the legislature meant to impose liability without fault. *Id.* An offense under [section 106.04](#) is a Class C misdemeanor. See [Tex. Alco. Bev. Code Ann. §§ 106.04\(c\), 106.071\(b\)](#). An individual adjudged guilty of a Class C misdemeanor shall be punished by a fine not to exceed \$500. [Tex. Penal Code Ann. § 12.23](#). Conviction of a Class C misdemeanor does not impose any legal disability or disadvantage. *Id.* § 12.03(c). However, if it is shown the minor has previously been convicted at least twice of an offense, the offense is punishable by a fine of not less than \$250 or more than \$2,000, confinement in jail for a term not to exceed 180 days, or both. *Id.* [§ 106.071\(c\)](#). In most cases, a violation of [section 106.04](#) is punishable by fine only. Punishment by confinement is a possibility only after two prior convictions for the offense. This factor weighs against requiring a culpable mental state.

Conclusion: A majority of the factors we have considered weigh against requiring a culpable mental state and demonstrate a violation of [section 106.04](#) is a strict liability offense. Accordingly, we conclude the absence of a required culpable mental state does not render [section 106.04](#) unconstitutional. The county court's judgment in trial court cause no. 003-81453-06 is affirmed.