Affirmed and Opinion filed October 28, 1999.

In The

Fourteenth Court of Appeals

NO. 14-99-00353-CR

ROBERT CLAYTON SWANSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 806,861

O P I N I O N

Appellant appeals from the denial of his application for a pretrial writ of habeas corpus on the ground that his prosecution is barred by double jeopardy. We affirm.

On May 31, 1995, appellant entered a plea of no contest to the theft of forty-two gold coins. He was convicted and sentenced to one year in the Harris County Jail. Appellant has completed his sentence in that case. That theft was alleged to have occurred on September 26, 1991.

On July 8, 1996, appellant was indicted for the theft of several pieces of jewelry. The indictment alleges the theft occurred on July 12, 1991. Appellant asserts the second indictment places him in double jeopardy. Appellant claims that both indictments allege property taken in a single incident of theft.

Appellant claims all of the property from both indictments was stolen from John Mecom, Jr. on July 12, 1991. He claims the State charged him with theft of a portion of the property in 1995, then charged him with theft of another portion of the property in 1996. The State, on the other hand, asserts that appellant has been charged with two separate offenses occurring on two separate dates.

Whether to grant an application for writ of habeas corpus lies within the discretion of the trial court, and the exercise of that discretion will not be disturbed unless clearly abused. *Ex parte Ayers*, 921 S.W.2d 438, 441 (Tex. App.—Houston [1st Dist.] 1996, no pet.). In determining whether the trial court abused its discretion, we not only accord great deference to the trial court's findings and conclusions, but also view the evidence in the light most favorable to its ruling. *McCulloch v. State*, 925 S.W.2d 14, 15-16 (Tex. App.—Tyler 1995, pet. ref'd), *cert. denied*, 516 U.S. 976 (1995).

The double jeopardy clause provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The double jeopardy clause protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 164-65, 97 S.Ct. 2221, 2224-25, 53 L.Ed.2d 187 (1977). In determining whether the double jeopardy clause has been violated, we apply the *Blockburger* test. The *Blockburger* test states, "that where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1933). In conducting the *Blockburger* test, the elements in the charging instruments, rather than solely those in the penal provisions, control. *See State v. Perez*, 947 S.W.2d 268, 270 (Tex. Crim. App. 1997). The charging instruments control because, in addition to the statutory elements, non-statutory allegations, such as time, place, identity, manner, and means are necessary to consider in each case to identify the unique offenses with which the defendant is charged. *See Parrish v. State*, 869 S.W.2d 352, 354 (Tex. Crim. App. 1994).

In cases where a defendant's conduct allegedly violates the same statute more than once, we must determine whether that conduct constituted more than one offense under the statute as a matter of statutory interpretation. *Vineyard v. State*, 958 S.W.2d 834, 836-37 (Tex. Crim. App. 1998). This

determination is necessary because, although our state courts are bound by United States Supreme Court decisions interpreting the scope of double jeopardy, the determination of what constitutes an offense is largely a matter of state law. *Iglehart v. State*, 837 S.W.2d 122, 127 (Tex. Crim. App. 1992).

Few, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses. *Sanabria v. United States*, 437 U.S. 54, 69, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978). Once the legislative body has defined a statutory offense by the "allowable unit of prosecution," that proscription determines the scope of protection afforded by a prior conviction or acquittal. *Spradling v. State*, 773 S.W.2d 553, 556 (Tex. Crim. App. 1989). For example, because the theft statute defines an offense in terms of depriving "the owner" of property, taking property from two owners during the same criminal transaction constitutes two distinct offenses notwithstanding that both violate the same statute. *See Iglehart*, 837 S.W.2d at 127. Similarly, the theft of different property on different dates constitutes two separate offenses notwithstanding that the property was stolen from one owner.

In this case, the first indictment for theft by receiving stated:

> Robert Clayton Swanson, hereafter styled the Defendant, heretofore on or about September 26, 1991, did then and there unlawfully with intent to deprive the owner of the property, appropriate stolen property of the value of over twenty thousand dollars and under one hundred thousand dollars by acquiring and exercising control over property other than real property, to-wit: FORTY TWO GOLD COINS, the said property having been stolen from JOHN MECOM, JR., its owner, and the said defendant acquired said property from another person whose name is unknown to the Grand Jury, knowing that it was stolen by another.

The second indictment charging appellant with theft stated:

> Robert Clayton Swanson, hereafter styled the Defendant, heretofore on or about July 12, 1991, did then and there unlawfully appropriate by acquiring and exercising control over property, namely, one nineteen piece gold necklace, one ninety-seven inch gold rope chain, and three gold belt buckles, owned by John Mecom, Jr., hereafter called the Complainant, of the value of more than one hundred thousand dollars, with the intent to deprive the Complainant of the property.

The question of whether appellant has been charged with two separate incidents of theft, or of one theft becomes a matter of credibility of the evidence before the trial court at the hearing on appellant's

application for writ of habeas corpus. Appellant asserts that the evidence before the court showed that all of the property had been stolen on July 12, 1991. The State maintains that appellant committed two separate thefts of different property on different dates.

In support of his contention that all of the property was stolen at one time, appellant relies on an affidavit for search warrant signed by Lieutenant R. Rekieta, a police officer with the Houston Police Department, dated June 29, 1996. In that affidavit, Lieutenant Rekieta states that he has been involved in an on-going investigation of the July 12, 1991 burglary of John Mecom's office. He states that, on September 26, 1991, he recovered forty-two of the gold Spanish coins that were taken in the burglary. He further states that Robert and Sandra Swanson were ultimately found guilty of the theft of those coins. In the affidavit, Lieutenant Rekieta requests a warrant to search Swanson's business for the remaining stolen items.

At the hearing on appellant's application for writ of habeas corpus, appellant claims to have established that the items recovered during the search of his business were the items stolen in the July 12, 1991 burglary and are the same items appellant now stands charged with stealing. Thus, appellant claims, the State used the items recovered on September 26, 1991 and the items stolen on July 12, 1991, to support two separate theft indictments.

The State claims appellant's wife, in her testimony at the hearing on the application for writ of habeas corpus, identified two separate thefts by appellant. The first theft was one in which, in the summer of 1991, appellant brought home some stolen jewelry and coins, which he had received from Kelvin Washington, and she placed the stolen property in a safe deposit box. The second theft was one in which appellant called Pedro, a man at appellant's business, and appellant had Pedro purchase more coins from Mr. Washington. The bag of coins was recovered first and was made the basis of appellant's first indictment.

Appellate courts should afford almost total deference to a trial court's determination of the historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). By denying

appellant's application for writ of habeas corpus, the trial court expressed its belief in the State's evidence. The record supports the trial court's findings; therefore, we will not disturb them on appeal.

Appellant was charged and convicted of theft, which occurred on September 26, 1991. He is now under indictment for a separate incident of theft, which occurred on July 12, 1991. The State has not violated the double jeopardy clause. The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed October 28, 1999.

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

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