

No. 01-24-0034-CR

IN THE COURT OF APPEALS  
FOR THE FIRST DISTRICT  
AT HOUSTON

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MARK VIROVATZ  
*APPELLANT*  
v.

STATE OF TEXAS  
*STATE*

MARK VIROVATZ’S  
BRIEF ON THE MERITS

Respectfully submitted:

Mark Virovatz

State Bar No. 20593300

Email: markvirovatz@aol.com

527 Moody Avenue, Suite 105

Galveston, Texas 77550

Tel: 832.576.3241

Email: [markvirovatz@aol.com](mailto:markvirovatz@aol.com)

*Pro Se*

**ORAL ARGUMENT IS REQUESTED**

## IDENTITY OF PARTIES AND COUNSEL

### Appellant/Defendant:

Mark Virovatz  
*Pro Se*  
527 Moody Avenue, Suite 105  
Galveston, Texas 77550  
Tel: 832.576.3241  
Email: [markvirovatz@aol.com](mailto:markvirovatz@aol.com)  
SBN 20593300

### STATE'S APPELLATE ATTORNEY:

CRIMINAL DISTRICT ATTORNEY  
GALVESTON COUNTY, TEXAS  
Rebecca Klaren  
Assistant Criminal District Attorney  
59<sup>th</sup> Street, Suite 1001  
Galveston County, Texas 77551  
Tel. (409)766-2355; fax (409)766-2290  
State Bar Number: 24046225

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## **TABLE OF AUTHORITIES**

### **Cases**

*Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990).

*Ex parte Lo*, 424 S.W.3d 10, 28 (Tex. Crim. App. 2014) (op. on State's motion for reh'g).

*.Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865–66 (Tex.1999).

*LTTS Charter Sch., Inc. v. C2 Constr. Inc.*, 342 S.W.3d 73, 75 (Tex. 2011).

*Morano v. State*, 572 S.W.2d 550 (Tex.Cr.App.1978)

*Owens v. State*, 19 S.W.3d 480, 483 (Tex. App.—Amarillo 2000, no pet.).

*Render v. State*, 316 S.W.3d 846, 856 (Tex. App.—Dallas 2010, pet. ref'd)

*Shelby v. State*, 448 S.W.3d 431, 435 (Tex. Crim. App. 2014)

*Sonderup v. State*, 418 S.W.2d 807 (Tex.Cr.App.1967)

### **CONSTITUTION**

Tex. Const. art. 2, § 1.....

Tex. Const. art. 5, § 1

### **Statutes**

Tex. Penal. Code 49.04 (a)

Tex. Transp. Code §709.001(a)(1).....

**NO. 01-24-0034-CR**

<b>MARK STEVEN VIROVATZ</b>	<b>§</b>	<b>IN THE COURT OF APPEALS</b>
	<b>§</b>	
<b>V.</b>	<b>§</b>	<b>FIRST JUDICIAL DISTRICT</b>
	<b>§</b>	
<b>STATE OF TEXAS</b>	<b>§</b>	<b>HOUSTON, TEXAS</b>

**STATEMENT OF THE CASE**

Mark Virovatz was charged by information with Class A Misdemeanor driving while intoxicated with blood alcohol content over .15. (CR8). Pursuant to a plea agreement, he pled no contest and was convicted on March 28, 2024 and was sentenced to 3 days in jail, credit for time served. (CR15) Before sentencing, the Court heard Appellant’s objections to an additional fine of \$3000 pursuant Tex. Transportation Code§709.001(a)(1). (RR4). The objection argued that (1) §709.001(a)(1) violated the separation of powers; (2) it was unconstitutionally vague; and (3) it created double jeopardy in that it caused two punishments from different statutes for the same offense. The Court overruled all objections, found Appellant guilty, and imposed a “statutory fine of \$3000. (RR 5, 6)(CR17) The Court ordered that

## **STATEMENT REGARDING ORAL ARGUMENT**

This case presents novel issues as there is little or no case law regarding the questions raised. Appellant believes it would be productive for the Court to hear oral explorations of the issues.

## **ISSUES ON APPEAL**

**Issue 1.** The \$3000 fine imposed is in violation of the separation of powers clause of the Texas Constitution because it replaces judge's discretion in determining punishment.

**Issue 2.** The statute in question is unconstitutionally vague in that it is subject to more than one interpretation regarding payment of a fine under Transportation Code §709.001.

## **STATEMENT OF FACTS**

On March 28, 2024, Appellant was convicted of driving while intoxicated, a Class B misdemeanor under Tex. Penal. Code 49.04 (a). (CR15; RR 12 & 13) Prior to rendition of judgment and sentencing, Appellant entered his objections to imposition of a fine under Tex. Transp. Code §709.001(a)(1). (RR4-5) His objections were that the fine violated the separation of powers clause of the Texas Constitution; that the statute was unconstitutionally vague. The Court sentenced Appellant to three days in jail and granted credit for two. It also imposed a “statutory fine” of \$3000.00 (RR5,6) and ordered it to be paid at the rate of

\$100,00 per month; (CR17) court costs of \$270.00; and reimbursement of \$62.00, (CR15-16)

## **SUMMARY OF THE ARGUMENT**

**Issue 1.** The \$3000 fine imposed is in violation of the separation of powers clause of the Texas Constitution because it replaces judge's discretion in determining punishment.

Unlike other laws under the Transportation Code or the Penal Code, it does not provide a range of punishment; *i.e.*, it presumes to be 'one size fits all.' Thus, a Court cannot use its discretion make the punishment fit the particular circumstances of a defendant.

**Issue 2.** The statute in question is unconstitutionally vague in that it is subject to more than one interpretation regarding payment of a fine under Transportation Code §709.001.

As it reads, the statute is complied with if a lump-sum payment is remitted on the last day of the 36th month. It does not grant the Court power to order it paid in full immediately upon final conviction or by installments over time to be made prior to 36 months.

## **ARGUMENT AND AUTHORITIES**

3 **Issue 1:** The \$3000 fine is in violation of the separation of powers clause of the Texas Constitution because it replaces judge's discretion in

determining punishment and takes away a prosecutor's ability to negotiate a fair plea.

When a criminal statute is claimed to be unconstitutional, an appellant court should grant review. *Render v. State*, 316 S.W.3d 846, 856 (Tex. App.—Dallas 2010, pet. ref'd); *Owens v. State*, 19 S.W.3d 480, 483 (Tex. App.—Amarillo 2000, no pet.).

The Texas Constitution states that “[T]he powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one,† those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, *shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.*” Const. art. 2, § 1(*emphasis added*).

As the Court of Criminal Appeals instructs us, “one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government.” It points out that an added benefit is that the branch each handle those parts of governance to which they are best suited, thus improving government *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990).

There are two ways to violate separation of powers. It is violated when a branch of government assumes power that is invested in another branch *Ex parte*



*Lo*, 424 S.W.3d 10, 28 (Tex. Crim. App. 2014) (op. on State's motion for reh'g).

And it is violated when one arm of government prevents another from effectively exercising its constitutionally assigned powers. *Armadillo Bail Bonds supra*.

The court in the instant case is, *de facto*, part of the Judicial Branch. Tex. Const. art. 2, § 1 A trial judge has broad discretion in sentencing *Morano v. State*, 572 S.W.2d 550 (Tex.Cr.App.1978); *Sonderup v. State*, 418 S.W.2d 807 (Tex.Cr.App.1967). However, the Court is relieved of discretionary power under 709.001. Unlike other laws under the Transportation Code or the Penal Code, it does not provide a range of punishment; *i.e.*, it presumes to be ‘one size fits all.’ Thus, a Court cannot use its discretion make the punishment fit the particular circumstances of a defendant.

**Issue 2.** The statute in question is unconstitutionally vague in that it is subject to more than one interpretation regarding payment of a fine under Transportation Code §709.001.

The statute is unconstitutionally vague because it states: “a person who has been finally convicted of an offense relating to the operating of a motor vehicle while intoxicated shall pay a fine of (1) \$3,000 for the first conviction within a 36-month period...” Tex. Transp. Code §709.001(a)(1}

The clause does not specify when the 36-month period begins. It doesn’t make clear whether a court can order it to be paid in less time, or in installment

payments starting immediately. As it reads, the statute is complied with if a lump-sum payment is remitted on the last day of the 36th month. It does not grant the Court power to order it paid in full immediately upon final conviction or by installments over time to be made prior to 36 months.

In the present case, the Court ordered that the fine be paid in installments of \$100. (CR17). This breaks down to the fine being ordered paid in 30 months, six less than the 36 month mandated period.

When a court is interpreting legislative intents and purpose when reading the text of statute, it must presume “the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind.” *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex.2010). If no ambiguity is seen, the plain meanings of the words in the statute should be used. See *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865–66 (Tex.1999). The court, in its reading of the statutory wording, is “aided by the interpretive context provided by ‘the surrounding statutory landscape.’ ” *LTTS Charter Sch., Inc. v. C2 Constr. Inc.*, 342 S.W.3d 73, 75 (Tex. 2011). See *Presidio Ind. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929–30 (Tex.2010).

The Transportation Code 709.001 states to say the statutory fine does not come due until 36 months have elapsed, whereas, the court has ordered it paid in less than that time. The statute simply does not grant it the authority to do so,

whereas the court appears to interpret it differently. Therefore, due to the vagueness of the statute, different meanings can be derived from the language.

### **CONCLUSION**

Trial court erred in assessing a traffic fine to be paid in installments prior to the end of 36 months due to its reading of the statute. Error also arose when the trial court was unable to determine a lesser fine or waive the fine.

### **PRAYER**

WHEREFORE, premises considered, Mark Virovatz respectfully requests that the \$3,000 fine be removed from his judgment, that the "traffic fine" be declared unconstitutional, or for such other and further relief to which Appellant may be entitled.

Respectfully submitted,

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Mark Virovatz  
Attorney at law  
TBN: 2093300  
527 Moody Avenue, Suite 105  
Galveston, Texas 77550  
832.576.3241  
[markvirovatz@aol.com](mailto:markvirovatz@aol.com)  
*pro se*

### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing instrument has been directed to all counsel of record concurrently herewith via e-serve on August 9, 2024.

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Mark Virovatz

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the Appellee's brief contains 1207 words, exclusive of exempted words, pursuant to Texas Rules of Appellant Procedure.

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Mark Virovatz

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