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⌘ Vol. 21, No. 1, January 2, 2014

Case Name: [The State of Texas v. Terence Johnson](#)

- OFFENSE: Destruction of a Flag (State's Appeal)
- COUNTY: Houston
- C/A CASE No. 12-12-0425-CR
- DATE OF OPINION: December 20, 2013
- DISPOSITION: Trial Court Affirmed OPINION: [Griffith, J.](#)
- TRIAL COURT: CCL; Hon. Sarah Clark
- LAWYERS: [Joshua Liles](#) (Defense); [Daphne Session](#) & [Amber Bewley](#) (State)

(Background Facts) Video camera surveillance of the area involved showed two African American males and one African American female walking on a covered sidewalk next to a building. One male jumped in the distance reaching towards a hanging flag. Then, the second male (Appellee), reached and jumped for the same flag and caused the flag and its staff to come off its post into his hand. Appellee then threw the flag and its staff into the street. It does not appear that anyone other than the male and female walking with Appellee witnessed Appellee's conduct, but, Appellee said that shortly after the flag was thrown, someone driving on the street stopped and picked up the flag. The surveillance video shows that at almost the same time Appellee threw the flag into the street, the other male knocked over flower pots along the sidewalk. Upon approaching the surveillance camera, Appellee made various hand gestures and walked out of view. In a recorded interview, Appellant admitted that he threw the flag into the street. He explained that he threw the flag because he was "mad." He claimed that he was upset by racial remarks made about his mother by a local merchant [and] in his anger, he "pulled the flag down and threw it on the ground."

Ed Note: (Procedural History) Appellee was charged by complaint and information with the offense of destruction of a flag. He filed a motion to dismiss on the grounds that Section 42.11 of the Penal Code (the Texas flag destruction statute) is unconstitutional and its enforcement interferes with his right to free speech. The State argued that Appellee's conduct was not speech and that the statute is constitutional. The trial court disagreed with the State's contention that Appellee's act of pulling a local business establishment's flag off its post and throwing it into the street did not constitute speech. The court reasoned that if the act of burning the flag is protected speech, then so too is the act of throwing a flag to the ground. Stating that it was bound by the holdings in [United States v. Eichman](#), 496 U.S. 310 (1990); [Texas v. Johnson](#), 491 U.S. 397 (1989); and [State v. Jimenez](#), 828 S.W.2d 455 (Tex.App. - El Paso 1992), the trial court dismissed the case.

⌘ **62 Challenges to Prosecution / Void for Vagueness:** The State contends that application of Section 42.11 did not interfere with Appellee's First Amendment rights because his conduct did not constitute symbolic speech.

Holding: In its findings of fact and conclusions of law, the trial court states that if conduct involving the burning of a flag is protected speech, the act of throwing a flag to the ground can also be protected speech. However, the trial court's findings do not address whether Appellee intended to convey a particularized message and whether the likelihood was great that the message would be understood by those who viewed it. *** Based upon our review of the evidence, we conclude that Appellee's conduct was not "sufficiently imbued with elements of communication" to implicate the First and Fourteenth Amendments. *** The record does not show that Appellee intended to convey a particularized message when he threw the flag into the street. Therefore, Appellee did not satisfy his burden by proving that the Texas flag destruction statute is unconstitutional as applied to him.

§ 62 Challenges to Prosecution / Overbreadth: The State asserts that Section 42.11 is valid on its face. Appellee contends to the contrary. He compares the current statute to the Flag Protection Act of 1989 and argues that Section 42.11, as did the Flag Protection Act of 1989, "attempts to legislate a limitation on expression when that expression includes the negative use of a flag."

Holding: Section 42.11 is not sufficiently narrow to prevent a chilling effect on the exercise of First Amendment freedoms as they relate to conduct involving the flag. *** Even though there appears to be a pattern of nonenforcement of Section 42.11, individuals intending to convey a message by engaging in one of the prohibited acts will nevertheless be subject to arrest and prosecution. The statute, as it currently stands, is unconstitutionally overbroad.