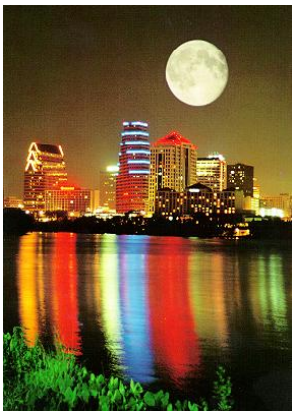

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Vol. 22, No. 10 - March 10, 2014

Case Name: Damien Hernandez Cortez v. The State of Texas

- OFFENSE: Fraudulent Possession of Identifying Information
- COUNTY: Potter
- C/A CASE No. 07-12-0165-CR
- DATE OF OPINION: February 28, 2014
- DISPOSITION: Conviction Affirmed OPINION: Quinn, CJ.
- TRIAL COURT: 320th D/C; Hon. Don Emerson
- LAWYERS: Eric Coats (Defense); Jack Owen (State)

(Background Facts) Appellant was one of two passengers in a truck in which the driver was arrested for driving with a suspended license. During an inventory search of the vehicle, police discovered a blue backpack in the bed of the truck. The backpack contained a folder and inside the folder were numerous documents containing "identifying information" of persons other than the driver or passengers. Although Appellant was not initially arrested, his fingerprints were later discovered on several of the documents, and that resulted in his arrest and prosecution.

321.04 Court's Charge / Application Paragraph: Appellant claims that the trial court erred by substituting the defined term "identifying information" for the term "item of identifying information" in the application paragraphs of the court's charge. He claims that this altered the proof requirement of the statute to allow conviction of a higher level of offense than intended under the law.

Holding: Given that the Legislature provided us with a list or series of things it deemed to be "identifying information," an "item" within that series would necessarily be a distinct part of that series. In other words, an "item of identifying information" would be one of the many categories of material within the definition of "identifying information." The phrase does not refer to the physical object or document upon which the identifying information appears. And, the jury charge here comported with that interpretation. It allowed the jury to tally each bit of identifying information appearing on the particular documents when deciding the number of "items of identifying information" Appellant possessed.

537 Sufficiency of the Evidence: Appellant claims that the evidence was legally insufficient to establish that he possessed the items of identifying information that did not bear Appellant's fingerprints. Appellant is linked to those items by his proximity to them and his having touched other papers located in the backpack. He claims there was nothing to indicate Appellant was voluntarily in possession of those items, knew the items were contraband or had any intent with regard to them.

Holding: Here, evidence appears of record illustrating that Appellant's fingerprints appeared on the documents containing the five or more but less than ten items of identifying information. From this, a juror could rationally infer, beyond reasonable doubt, that Appellant exercised care, custody, or control over the contraband (i.e. identifying information). As for his doing so while knowing it to be contraband, it is clear that the documents on which his prints appeared belonged to and contained information about third parties. Additionally, one of those third parties (i.e., Archer) testified to having seen Appellant in her home shortly before the documents went missing and that Appellant did not have her permission to possess them. The owner of the other set of documents containing Appellant's prints also testified about Appellant lacking her permission to possess the information contained in them. This is some evidence from which jurors could rationally infer beyond a reasonable doubt that Appellant knew the documents containing his prints were contraband. *** Thus, the evidence was legally sufficient to support his conviction.

321 Court's Charge / Definitions & Instructions: Appellant claims that the trial court erred by omitting the instructions on a presumed fact mandated by Penal Code section 2.05(a)(2). He argues that, without such an instruction, a presumption becomes a mandatory presumption instead of the permissive presumption intended by the Legislature.

Holding: [T]he record supports the inference that identifying information of only two people formed the basis of his conviction, and that, in turn, tends to render irrelevant the presumption arising from the possession of material belonging to three or more individuals. To that, we add those excerpts from the record indicating that 1) the State informed the jury during voir dire that the presumption could be overcome or disbelieved, 2) the State said nothing of the presumption in its closing argument, and 3) only Appellant mentioned the presumption at closing and did so by arguing that it had been overcome because his fingerprints were found on the information of only two persons. *** Given these circumstances, we necessarily conclude that Appellant did not suffer egregious harm arising from the defect in the jury charge at issue. *** Simply put, the record fails to support the notion that the presumption was utilized in convicting Appellant; so, the deficient manner in which it was described in the charge was inconsequential.

321 Court's Charge / Definitions & Instructions: Appellant contends that it was error to omit an instruction on voluntariness as directed by Penal Code section 6.01 of the Texas Penal Code. He argues that, such instruction is normally required in any possession case.

Holding: First, the instruction omitted apparently was one informing the jury that 1) a person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession *** and 2) possession "is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control." *** Yet, Appellant did not request it below. Nor did he cite us to authority indicating that the trial court was obligated to provide the instruction sua sponte. *** Second, the case authority he did cite *** states that "if the evidence at trial raises the issue of whether the defendant voluntarily engaged in conduct, the jury must be instructed on the issue." *** In other words, there must appear evidence of record establishing a question of fact regarding whether the accused voluntarily engaged in the conduct. *** Here, Appellant failed to cite us to evidence affirmatively illustrating that he did not 1) voluntarily possess the identifying information in question or 2) know the nature of the information appearing in the documents carrying his fingerprints. Consequently, he did not satisfy his burden on appeal to show that the trial court erred in omitting the instruction.