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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Jose Oliva v. The State of Texas***

- **OFFENSE**: Driving While Intoxicated
- **COUNTY**: Harris
- **COURT OF APPEALS**: Houston [14th]
- **C/A CITATION**: 525 S.W.3d 286
- **C/A RESULT**: Conviction Reversed
- **CCA. CASE No**. PD-0398-17 **DATE OF OPINION**: May 23, 2018
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Presiding Judge Keller **VOTE**: 6-2-1
- **TRIAL COURT**: CCrCL 1; ***Miranda*** Hon. Paula Goodhart
- **LAWYERS**: Ted Wood (Defense); Patricia McLean (State)

(**Background Facts**): Appellant was charged with DWI in an information which contained two paragraphs: the first alleged the commission of the current DWI and the second alleged a prior DWI conviction. The focus of the guilt stage of trial was solely on the first paragraph. The prior conviction allegation was not read to the jury at the guilt stage, no evidence of the prior conviction was offered at the guilt stage, and there was no mention of a prior conviction in the guilt-stage jury instructions. Appellant was found guilty. At the punishment stage, the State read the prior-conviction allegation to the jury and introduced evidence of a prior DWI conviction. The jury found the prior-conviction allegation to be true and assessed punishment at 180 days' confinement. The judgment labeled Appellant's current conviction as a "DWI 2ND" and the degree of offense as a "Class A Misdemeanor."

22.01 Charging Instruments / Requirements / Elements of Offense: The Court of Appeals held that the existence of a prior conviction is an element of the offense of "Class A misdemeanor DWI." The Court reasoned that a fact that elevates the degree of an offense is necessarily an element of the offense and that § 49.09 lacked the "shall be punished" language present in other statutes containing punishment enhancements. The Court of Appeals held that the evidence was legally insufficient to support the prior-conviction allegation. It reversed and remanded the case to the trial court with instructions to reform the judgment to reflect a conviction for Class B misdemeanor DWI and to conduct a new punishment hearing.

Holding: We are faced with two potential constructions of the statutes before us: (1) the existence of the prior conviction is an element of the offense, or (2) the existence of the prior conviction is a punishment issue. The initial question is whether we can choose one of these constructions as the only one that is consistent with the language of the relevant statutes. Can we say that the statutory language unambiguously leads to the conclusion that the existence of a prior conviction is an element? Conversely, can we say that the statutory language unambiguously leads to the conclusion that the existence of a prior conviction is a punishment issue? We ultimately conclude that the answer to these two questions is "no" -- the statutory scheme is ambiguous. *** [Section] 49.09 contained only prior-conviction provisions when it was first adopted. Article 36.01 does not specify whether the "enhancement" is of the offense or of the punishment, and so, even the words "enhanced offense" would seem to be consistent with it. If, as the title suggests, the legislature had Article 36.01 in mind when it enacted § 49.09, then it would seem probable that the Legislature intended the status of a particular § 49.09 enhancement to depend on whether it is jurisdictional. Under that reasoning, § 49.09(a), the single-prior-conviction provision elevating DWI to a Class A misdemeanor, prescribes a punishment issue because it is not jurisdictional

Concurring / Dissenting Opinions: Judge Richardson delivered a concurring opinion in which he agreed as to the result because of the " policy considerations in preventing prejudice that would arise from informing the jury of extraneous offenses before a finding of guilt." Judge Keasler delivered a dissenting opinion in which **Judge Yeary** joined. He agreed with the Court of Appeals that the fact of the prior conviction is an element of the offense, even in a misdemeanor DWI.

(**David A. Schulman**) As set out in the majority opinion, "*the parties agreed that the existence of a prior conviction is an element of the offense*." The Court made clear, however, that, "*we, of course, are not bound by any agreement or concessions by the parties on an issue of law*." As the Court also noted, the "*case illustrates that an agreed outcome on a particular legal issue can sometimes be in both parties' self-interests. Here, Appellant wants the prior conviction to be decreed an element so that he can prevail on his sufficiency challenge. Such a decree, however, would seem to benefit the State in most cases because it would enable the State to introduce evidence of the prior conviction at the guilt stage of trial instead of having to wait until the punishment stage*. From my perspective, I know that this is the type of case which can challenge appellate defense counsel's mettle. They have an appeal in which their client's best interest run counter to the best interest of almost

every other similarly situated defendant. The answer, obviously, is that you have to represent that particular client's best interest.