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⚖ Vol. 27, No. 49 --- December 23, 2019

**Case Name:** *Kyle Dean Kuykendall v. The State of Texas*

- **OFFENSE:** Failure to Appeal
- **COUNTY:** Kerr
- **C/A CASE No.** 01-18-00876-CR
- **DATE OF OPINION:** December 17, 2019      **OPINION:** [Justice Lloyd](#)
- **DISPOSITION:** Conviction Affirmed in Part / Reversed in Part
- **TRIAL COURT:** 198th D/C; Hon. Rex Emerson
- **LAWYERS:** [Pat Maguire](#) (Defense); [Scott Monroe](#) & [David Schulman](#) (State)

⚖ **61.03 Challenges to Prosecution / Double Jeopardy / Multiple Punishments:** Appellant pled guilty to two counts of the third-degree felony offense of failure to appear in Cause Number B15-684. At the conclusion of a presentence investigation (PSI) hearing, the trial court found Appellant guilty and sentenced him to ten years' confinement on each count, with the sentences to run concurrently. On appeal, Appellant contends that his convictions for failure to appear on two cases that were set for the same day and in the same court and were the subject of the same two-count indictment violate the Double Jeopardy Clause. Appellant argues that the gravamen of the offense of bail jumping and failure to appear is the failure to appear in court, not the number of cases for which he failed to appear. Thus, Appellant reasons, his multiple convictions for failure to appear arising from a single missed court appearance constitute a double jeopardy violation. In response, the State argues that the violation of the terms of release is part of the gravamen of the offense and, therefore, Appellant's two convictions for violating two separate bonds based on his failure to appear in court to answer charges as to two separate indictment counts do not violate the protection against double jeopardy.

**Holding:** As a preliminary matter, we note that Appellant did not present this double jeopardy claim to the trial court. \*\*\* Typically, the failure to present an issue to the district court prevents the issue from being considered on appeal. \*\*\* However, the Court of Criminal Appeals has determined that "because of the fundamental nature of double jeopardy protections, a double jeopardy claim may be raised for the first time on appeal . . . when the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record and when enforcement

of usual rules of procedural default serves no legitimate state interests.” *Gonzalez v. State*, 8 S.W.3d 640 (Tex.Cr.App. 2000)(see ¶8, Vol. 8, No. 1; 01/10/2000). \*\*\* We find Justice Johnson’s reasoning in *Ex parte Marascio*, 471 S.W.3d 832 (Tex.Cr.App. 2015)(see ¶8, Vol. 23, No. 41; 10/12/2015) persuasive. \*\*\* Further, as Justice Alcala points out in her dissent in *Marascio*, Appellant is only one person who can “be released from his confinement only one time, regardless of the number of cases for which he was being held.” \*\*\* Because Appellant may be convicted of only one failure-to-appear case for his failure to appear at a single court setting on a two-count indictment for which he had been released from confinement, we conclude that a double jeopardy violation is apparent on the face of the record. \*\*\* Under the second prong of the *Gonzalez* exception, a double jeopardy claim may be raised for the first time on appeal if “enforcement of usual rules of procedural default serve no legitimate state interests.” \*\*\* Following *Ex parte Denton*, 399 S.W.3d 540 (Tex.Cr.App. 2013)(see ¶8, Vol. 21, No. 21; 05/27/2013), we conclude that no legitimate state interests would be served by enforcing the procedural rules of default in this case. \*\*\* Because Appellant’s convictions violate double jeopardy, we sustain his first point of error.

**Ed Note:** Appellant also challenged the imposition of attorneys fees, claiming that the evidence is insufficient to support the trial court’s judgment. The State conceded the point and the judgment was reformed as necessary.