

the Jasuta / Schulman report



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TIBA's Case of the Week Court of Criminal Appeals

Case Name: [Daryl Joe v. The State of Texas](#)

- **OFFENSE:** Cargo Theft
- **COUNTY:** Navarro
- **COURT OF APPEALS:** Waco 2021
- **C/A CITATION:** 620 S.W.3d 834
- **C/A RESULT:** Conviction Affirmed
- **CCA. CASE No.** PD-0268-21 **DATE OF OPINION:** June 22, 2022
- **DISPOSITION:** Court of Appeals Reversed
- **OPINION:** [Judge Mary Lou Keel](#) **VOTE:** 7-1-1
- **TRIAL COURT:** 13th D/C; Hon. James Lagomarsino
- **LAWYERS:** [Damara H. Watkins](#) (Defense); [John Messinger](#) (SPA)

(Background Facts): The goods at issue are mattresses and box springs made by Corsicana Bedding, which has loading docks at its factory and a shipping yard within its gated grounds. Mattresses and box springs are loaded into trailers at the loading docks. When the trailers are full, they are sealed with the necessary paperwork inside and moved to the shipping yard where they await transport to their intended destinations by third party truckers who unseal the trailers to check their contents and paperwork. When Appellant arrived at Corsicana Bedding, he was driving a blue Volvo semi truck with no license plate and with cardboard covering the trucking company information. He entered the shipping yard without using a gate code when the gate opened for another truck. Without checking in with shipping yard personnel, Appellant backed his truck under a loaded JB Hunt trailer,

causing it to automatically connect to his truck. The next steps for hooking up the trailer were to manually connect lines for brakes and lights and raise the jacks. Appellant had not yet taken these steps when he was approached by Corsicana Bedding employees. The shipping yard supervisor, Juan Carlos Perez, was suspicious because Appellant was not driving a JB Hunt truck but was in the process of hooking up to a JB Hunt trailer. Perez also found it suspicious that the company information on the side of the truck was covered. Perez took photos of Appellant while he was out of the truck to connect the lines for the air brakes and the lights. The plant manager, Raphael Lemus, asked Appellant where he was taking the load. Appellant did not have paperwork or know the intended destination for the trailer. He showed Lemus a number he had written on his hand that was supposed to be the trailer number for the load he was sent to pick up. Appellant called his dispatcher and gave the phone to Lemus, but there was a bad connection, and Lemus could get no information from the dispatcher. Lemus had someone call the police. Appellant left the shipping yard without the trailer and went to a nearby gas station where he was later arrested.

[§§ 541 Sufficiency of the Evidence / Theft:]: Appellant told the police he had been employed for four days as a driver for Holland Trucking Company and that a man named Cliff had paid him cash to pick up the trailer. Cliff had covered the information on the side of the truck and told Appellant to remove the expired temporary tag that had been displayed in the truck's window. Police found the temporary tag registered to Clifford Lewis inside the truck. An investigator with the district attorney's office testified that he believed Lewis was involved in the incident, but there was not enough evidence to arrest him. Lewis refused to testify at Appellant's trial, but his interview with the investigator was played for the jury. In the interview Lewis denied any involvement in the incident at Corsicana Bedding. He told the investigator the truck was owned by his friend, Harley, who allowed Appellant to live in the truck. Lewis said "Stephen" hired Appellant to pick up the load. According to Lewis it was "supposed to be a legit load" and Appellant had a pick-up number, but something was not right with the number when Appellant arrived to pick up the load. The Court of Appeals affirmed Appellant's conviction. *Joe v. State*, 620 S.W.3d 834 (Tex.App. - Waco 2021)(see §, [Vol. 29, No. 8](#); 03/08/2021). It concluded that the goods were cargo and were "moving in commerce" because a bill of lading had been issued which transferred possession of the goods from the manufacturer to the carrier. The fact that the goods were still in the shipping yard did not matter because that was merely a temporary stop. As for possession of the goods, the Court of Appeals found it irrelevant that Appellant could not have moved the trailer without having hooked up the brake lines or raised the lifts. The Court of Appeals looked to the general theft statute and reasoned that asportation -- the act of carrying away or removing property -- is not an element of theft, so Appellant's inability to move the cargo was irrelevant. The Court said Appellant engaged in conduct, i.e., hooking up the trailer to his truck, that demonstrated possession of the goods. At this Court, Appellant argues that the mattresses were not cargo because, as a matter of law, they were never moving in commerce. He maintains that they never left their point of origin at Corsicana Bedding and that differentiating between its loading dock and

its shipping yard stretches the meaning of “point of origin.” He cites internet definitions of “point of origin” that suggest that the shipping yard was part of the point of origin, e.g., “the location at which a shipment is received by a transportation line from the shipper.

Holding: (Were the Mattresses “Cargo”) In common usage “point of origin” means the place where something comes from or originates. *** The context of the phrase includes the statute’s discounting of “any temporary stop[.]” Penal Code § 31.18(a)(1). So the issue is whether the evidence was legally sufficient to show that the trailer was between the place where it originated or came from and its final destination, regardless of any temporary stop it made. The evidence showed that the loaded trailer had been shuttled via a “yard truck” from the factory to the shipping yard. A rational jury could find from that evidence that the shipment originated or came from the factory, and the loaded trailer made a temporary stop at the shipping yard. Neither the proximity of the shipping yard to the factory nor Corsicana Bedding’s ownership of both facilities defeated as a matter of law the factory’s status as the point of origin. Thus, the evidence was legally sufficient to support the jury’s finding that the mattresses and box springs were moving in commerce and therefore were cargo. *** **(Could a Rational Jury Find that Appellant Possessed the Mattresses?)** The jury found Appellant guilty of conducting an activity in which he possessed stolen mattresses by “hooking up” his truck to the trailer that contained the mattresses. Appellant argues that no rational jury could so find because backing the truck under the trailer did not amount to “hooking up” the trailer, the trailer could not move without the brake lines having been connected and the lifts having been raised, the trailer never left the shipping yard, and Corsicana Bedding always had control over the trailer and its contents. These arguments fail because a rational jury could have concluded that he hooked up when he backed the truck under the trailer, and in doing so he exercised control over the trailer and its contents. Furthermore, possession of property does not depend on exclusive control of it or its removal from one location to another. *** Appellant’s failure to finish hooking up the trailer or to remove it from the shipping yard did not compel the jury to find he did not exercise control over the trailer. *** **(Did Appellant conduct an activity in which he possessed stolen cargo?)** Appellant argues that even if he possessed the mattresses, making them stolen cargo, any activity he is alleged to have conducted occurred before the cargo became stolen. He says the cargo theft statute was not intended to reach his conduct, and the evidence did not establish a violation of the statute. He relies on *Lang v. State*, 561 S.W.3d 174 (Tex.Cr.App. 2018)(see [§§](#), [Vol. 26, No. 47](#); 11/26/2018), and its interpretation of the organized-retail-theft statute. Although this issue was raised on appeal, the Court of Appeals failed to address whether Appellant conducted an activity in which he possessed stolen cargo, so we remand the case to it to consider this issue.

Concurring / Dissenting Opinions: [Judge Scott Walker](#) dissented, arguing that the mattresses “were not yet “cargo” within the meaning of the statute -- the mattresses had not yet left their point of origin and were not yet a commercial shipment of

freight moving in commerce.” He suggested that, at most, “the Court of Appeals on remand should consider whether Appellant’s conviction should be reformed to attempted cargo theft, regular theft, or attempted theft. “

([David A. Schulman](#)) I agree with the Court and disagree with Judge Walker as to the mattresses constitute “cargo.” I think that once the trailer was “sealed with the necessary paperwork inside and moved to the shipping yard,” it became cargo. I disagree with the Court’s statement “Appellant’s failure to finish hooking up the trailer or to remove it from the shipping yard did not compel the jury to find he did not exercise control over the trailer.” He certainly **attempted** to exercise control, but hadn’t been able to do so. This is like saying that someone who intends to burgle cars that are open is guilty if he puts his hands on a car door but hasn’t attempted to open it. This type of interpretation renders Penal Code section 15.01 all but meaningless, as taking any steps beyond thinking about an offense will render one guilty of it. It appears that Judge Walker and I agree with CJ Gray’s dissent below --- “this is a classic case of attempting to steal the cargo.”