



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-09-00347-CR**

JEROMY GADDY

APPELLANT

V.

THE STATE OF TEXAS

STATE

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FROM THE 16TH DISTRICT COURT OF DENTON COUNTY  
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**MEMORANDUM OPINION<sup>1</sup>**  
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A jury convicted Appellant Jeromy Gaddy of felony driving while intoxicated (DWI) and assessed his punishment at three years' confinement. The trial court sentenced him accordingly. Appellant brings two issues on appeal, arguing that the trial court erred by admitting into evidence convictions that were void and that the evidence is insufficient to sustain his conviction for felony DWI. Because we

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<sup>1</sup>See Tex. R. App. P. 47.4.

hold that the evidence is insufficient to show that Appellant was twice (or even once) previously convicted of DWI in the State of New Mexico, we sustain Appellant's second issue, reverse the trial court's judgment, and render judgment of acquittal.

### **I. Statement of Facts**

On June 14, 2008, Denton police officer Lisa Martin arrested Appellant for DWI. Appellant was subsequently charged with felony DWI. The indictment alleged that Appellant had been twice previously convicted in "the Municipal Court of Hobbs, New Mexico" of DWI.

In his opening statement at trial, Appellant's counsel stated that Appellant would testify about the prior New Mexico convictions and that he had no lawyer in those proceedings in violation of his rights. In its oral motion in limine, the State asked the trial court to prohibit Appellant from bringing up in front of the jury whether his rights were violated in the two prior New Mexico proceedings because it was a legal issue for the court.

At trial, the State offered the testimony of Tim Phillips, an investigator for the Denton County District Attorney's office. He testified that he obtained prior judgments related to Appellant from the Denton County District Attorney's intake division. Phillips testified that he also ordered a "driver's license packet." He described State's Exhibit 6 as a certified copy of a Texas Department of Public Safety driving record.

The State also offered State's Exhibits 4 and 5, documents purporting to show that Appellant was twice previously convicted of DWI in the municipal court of Hobbs in the State of New Mexico. The trial court conducted a hearing outside the jury's presence on the admissibility of the exhibits.

State's Exhibit 4, which purports to be a copy of a June 23, 1997 judgment and sentence from a municipal court of Hobbs, New Mexico, provides that Appellant pleaded nolo contendere to, among other things, DWI in a municipal court in Hobbs, New Mexico. The judgment states that "the defendant appeared in person and with \_\_\_\_\_, his attorney, and \_\_\_\_\_ appeared on behalf of the City." The space for the name of the defense attorney is blank, as is the name of the attorney appearing on behalf of the city.

Handwritten notations appear in several places on the exhibit, but it is unclear what they mean. Appellant was apparently charged with five offenses: (1) "CONSUME/POSS ALCOHOL-OPEN CONTAINER IN MOTOR," to the right and slightly above which "(35+18PA)" appears in handwriting; (2) "DRIVING WHILE UNDER INFLUENCE OF INTOXICAT[illegible]"; to the right of which "(500+75PF+35BA+18PA) 30 days" appears in handwriting; (3) "STOP OR YIELD SIGN," to the right of which appears "(20+18PA)" in handwriting; (4) "DRIVERS MUST BE LICENSED," to the right of which "(25+18PA)" appears in handwriting; and (5) "EXPIRED PLATES," to the right of which "(25+18)" appears in handwriting.

At the top of the following page are at least two signatures, maybe three. One signature has the word “Judge” printed underneath it. Although illegible, another appears to be similar, but it is unclear why a judge would sign the document twice. Although difficult to read, the second signature is not inconsistent with a stamped signature. Nowhere is there a signature that purports to be that of Appellant. At the bottom of the page is a certification by the purported clerk of the municipal court certifying that “this is a true and correct copy of the original document filed in the City of Hobbs Municipal Court on \_\_\_\_\_,” but the date is blank. The date of the certification is August 7, 2008, weeks after the date of Appellant’s arrest in Denton County, Texas. Nowhere does the purported judgment state that the defendant was tried to a jury or waived a jury trial, nor does it state that the defendant was advised of his right to counsel or waived his right to counsel.

State’s Exhibit 5 contains a purported copy of another Hobbs, New Mexico municipal court judgment. The purported judgment indicates that on December 18, 1997, Appellant pled guilty to DWI, also in Hobbs. As with State’s Exhibit 4, the purported judgment in State’s Exhibit 5 contains unfilled blanks for the names of Appellant’s attorney and of the attorney for the city.

In handwriting is a notation, “DWI–(500+75P[illegible]+65BA)–18PA).” Underneath is the handwritten notation, “[E]xpired license–(25+12PA).” A checkmark next to a typed line indicates that defendant had entered a plea of guilty and that “the court finds the defendant guilty of the following charges.” In

the blank next to the typed text is “DWI, Expired license” in handwriting. On that same page is a certification providing that “this is a true and correct copy of the original document filed in the City of Hobbs Municipal Court on \_\_\_\_\_.” A signature by a person purporting to be the municipal clerk then appears, and underneath that a date of “8/7/08,” again, weeks after Appellant’s arrest in Denton County, Texas.

Another checkmark appears under a sentence stating, “IT IS THE SENTENCE of this Court that the defendant pay a fine to the City of Hobbs in the sum of 701 dollars (\$701).” A signature of “Bill Fowler” fills a blank over “Judge” appearing near the bottom of the page. At the very bottom of the page, “Attorney” followed by a name appears in handwriting, but there is no indication who placed the notation on the document, when it was placed there, or what it means. Nowhere does the purported judgment state that the defendant was tried to a jury or waived a jury trial, nor does it state that the defendant was advised of his right to counsel or waived his right to counsel.

The third page of State’s Exhibit 5 is a separate document that purports to be a waiver of counsel in the municipal court of Hobbs and that names Appellant as the defendant, but the document bears no cause number. Beneath the title of the document, a typed notation provides, “(To be used only if, upon conviction, the defendant may be deprived of his liberty).” No indication of the offense with which the person is charged appears, although the text states,

I understand that I am charged with a felony offense(s): \_\_\_\_\_ (strike inapplicable words or parts) which (is) (are) (misdemeanor(s)) (felony(ies)) under the law and that if I am found guilty I can be given a severe punishment, including imprisonment in (the New Mexico State Penitentiary) (in the \_\_\_\_\_ (City) (County) jail) and a fine.

Nothing shows the case in which this purported waiver was entered, what Appellant was purportedly charged with, or the date on which he purportedly executed the document. And, although text underneath the signature purported to be Appellant's states, "I find that the defendant, knowingly, voluntarily and intelligently with full awareness of his rights, has waived his right to counsel," this text is unaccompanied by any judge's signature or date in the corresponding blanks. Additionally, a line providing, "Approval for District," also has a blank signature line.

Like the other pages in the exhibit, this page is also certified filed on an unknown date in the Hobbs municipal court.

Neither State's Exhibit 4 nor State's Exhibit 5 contains a fingerprint or a photograph of the defendant. Both documents contain a date of birth for the defendant of March 8, 1974.

State's Exhibit 6 purports to be from the Texas Department of Public Safety. The first two pages are certified on the third page. Following the certification are two additional pages. The State urged the trial court to consider the two additional pages. They contain a photograph of Appellant with a date of

birth of February 8, 1974, but no fingerprints. A Texas driving record included in the exhibit shows an accumulation of points but no DWI conviction.

Phillips testified that the March 8, 1974 birthdates appearing on the Hobbs municipal court documents were “alias” dates of birth that Appellant used. Phillips gave no basis for this testimony.

Appellant objected to the admission of State’s Exhibit 4 on the ground that the purported judgment was not entitled to a presumption of regularity because the record was silent about whether Appellant had waived his right to an attorney in that proceeding. He objected to State’s Exhibit 5 on the grounds that the purported waiver of counsel was not approved by a judge and the record contained no finding by a judge that Appellant had voluntarily and intelligently waived his right to counsel. The trial court overruled Appellant’s objections and admitted the exhibits into evidence outside the jury’s presence. The trial court further ruled that Appellant would not be allowed to collaterally attack the convictions. That is, although the enhancement allegations were elements of the offense alleged, Appellant was not allowed to challenge the State’s evidence.

The trial court allowed Appellant to make a bill of exceptions, and Appellant testified that he did not have an attorney in the New Mexico proceedings, that he did not have the money to hire an attorney, and that the trial judge in those cases did not admonish him about his right to an attorney or that he could have an attorney appointed if he was indigent. Appellant testified that he did not recall ever seeing the waiver of counsel form and did not sign anything

at either of his New Mexico court appearances. On cross-examination, Appellant testified that Barry Crutchfield, the name that the prosecutor stated appears on the bottom of the judgment in State's Exhibit 5, had represented him when he had been pulled over for driving with a revoked license but that Crutchfield did not represent him in either of the DWI cases. Appellant concluded his bill and again argued that he had the right to collaterally attack the judgments. The trial court declined to change its position, and Appellant moved for a mistrial, which the trial court denied.

When the State rested, Appellant moved for a judgment of acquittal, arguing that because the two purported New Mexico judgments were void, the State had failed to prove that there had been two prior convictions. The trial court denied Appellant's motion. Appellant then asked the court to allow him "to show that [he had] received an unfair trial" in the prior proceedings. The trial court sustained the State's objection that testimony to that effect was irrelevant and inadmissible.

During Appellant's testimony, his attorney questioned him about his representation and his guilt with respect to the New Mexico convictions. Appellant testified that he was guilty in "the first case" and that he did not challenge the accuracy of the judgment in "the first case" but that he was not guilty "[o]n the second case." Specifically, the following exchange occurred:

Q. Who was your lawyer?

A. Didn't have one.



[PROSECUTOR]: Objection, Your Honor, according to the Court's earlier ruling.

THE COURT: Sustained.

[DEFENSE COUNSEL]: It doesn't show a lawyer on here; is that correct, on this judgment?

[PROSECUTOR]: State objects. This is a violation of the Court's earlier ruling.

THE COURT: Sustained.

Q. [By DEFENSE COUNSEL] Mr. Gaddy, you pled guilty on these, didn't you?

A. No contest.

Q. Were you guilty, the first case?

A. The first case, yes.

Q. Were you driving a vehicle?

A. Yes.

Q. Now, this judgment's accurate though, right? You don't challenge it, do you?

A. No.

Q. On the second case were you guilty?

A. No.

Q. You're sitting in the car smoking a cigarette?

[PROSECUTOR]: Objection to getting outside the scope of what the defense is allowed to get into with collateral facts.

[DEFENSE COUNSEL]: Well, Your Honor[,] he is allowed to testify to his convictions, surely.

THE COURT: You're aware of the Court's rulings. . . .

[DEFENSE COUNSEL]: I am.

THE COURT: Then stay within those rulings.

[DEFENSE COUNSEL]: I am staying within those rulings.

[PROSECUTOR]: We would ask the jury be instructed to disregard the questions and the responses.

THE COURT: The jury is instructed to disregard the questions and the responses.

The State objected to Appellant's "getting outside the scope of what the defense is allowed to get into with collateral facts" and asked that "the jury be instructed to disregard the questions and the responses." The trial court sustained the State's objections and instructed the jury "to disregard the questions and the responses."

At the jury charge conference, Appellant requested that the jury be instructed that if it concluded that Appellant had not waived his right to an attorney with respect to the prior convictions, then it should not consider the prior judgments as evidence. The trial court did not include the requested instruction. The jury charge submitted instructed the jury that it should find Appellant guilty if it found beyond a reasonable doubt that he was driving while intoxicated on June 14, 2008, and that he "had been twice convicted of the offense of [DWI], to wit: (1) On the 23rd day of June, 1997, . . . [in] Hobbs County, [sic] New Mexico, and; (2) On the 18th day of December, 1997, . . . [in] Hobbs County, [sic] New Mexico," although the indictment alleged that Appellant was previously convicted in the municipal court of Hobbs, New Mexico.

We take judicial notice that the city of Hobbs, New Mexico is in Lea County and that no such county as Hobbs County exists in New Mexico.

## **II. The Enhancement Allegations**

Appellant argues that State's Exhibits 4 and 5 were improperly admitted to prove prior convictions because there is no indication that he had an attorney, was properly admonished regarding his right to be represented by counsel, or knowingly or voluntarily waived his right to be represented by counsel. He also argues that the evidence is insufficient to support his felony DWI conviction because the evidence is insufficient to show that he was twice previously convicted of DWI in New Mexico as alleged in the indictment.

The State must prove each and every element of the offense charged beyond a reasonable doubt.<sup>2</sup> The offense of DWI enhanced by two previous DWI convictions becomes a third degree felony.<sup>3</sup> The two prior DWI convictions are jurisdictional elements of a felony DWI offense, and they must be proved as alleged to obtain a felony DWI conviction.<sup>4</sup> A prior DWI accusation that has not

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<sup>2</sup>*Butler v. State*, 769 S.W.2d 234, 239 (Tex. Crim. App. 1989), *overruled on other grounds by Geesa v. State*, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991), *overruled on other grounds by Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000).

<sup>3</sup>Tex. Penal Code Ann. § 49.09(b)(2) (Vernon Supp. 2010).

<sup>4</sup>*Barfield v. State*, 63 S.W.3d 446, 448 (Tex. Crim. App. 2001).

resulted in a final conviction may not be used as a jurisdictional enhancement to elevate DWI to a felony offense.<sup>5</sup>

A defendant in a criminal case may collaterally attack a prior misdemeanor conviction as void, but not voidable,<sup>6</sup> even if the sentence was probated.<sup>7</sup> Additionally, when, as here, a prior DWI conviction is alleged as an element of the offense of felony DWI, the State bears the burden of proving each and every element of its allegations beyond a reasonable doubt. A defendant has the right to put the State to its proof and to challenge the evidence offered by the State. The Texas Court of Criminal Appeals reminds us that “[p]roof of the misdemeanor conviction being an essential element of the felony driving while intoxicated conviction, it follows that the felony conviction is also void. The petitioner’s conviction . . . cannot be permitted to stand since a prior void felony conviction was utilized.”<sup>8</sup>

Although the State has some latitude in the method by which it may prove the prior DWI convictions for the purpose of enhancing a misdemeanor DWI to a felony, the State must, nevertheless, prove the existence and finality of the prior

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<sup>5</sup>*State v. Wilson*, 288 S.W.3d 13, 16 (Tex. App.—Houston [1st Dist.] 2008), *aff’d*, 324 S.W.3d 595 (Tex. Crim. App. 2010).

<sup>6</sup>*Rhodes v. State*, 240 S.W.3d 882, 887 (Tex. Crim. App. 2007); *New v. State*, 583 S.W.2d 781, 782 (Tex. Crim. App. 1979).

<sup>7</sup>*Tatum v. State*, 846 S.W.2d 324, 327 (Tex. Crim. App. 1993); *see also Ex parte Harrington*, 310 S.W.3d 452, 456–57 (Tex. Crim. App. 2010).

<sup>8</sup>*Ex parte Woodard*, 541 S.W.2d 187, 188 (Tex. Crim. App. 1976).

convictions beyond a reasonable doubt. The only evidence that Appellant was finally convicted in New Mexico in two separate cases of an offense that Texas would classify as DWI is the documents that the State offered from the Hobbs, New Mexico municipal court, the Texas driving record, Appellant's testimony (much of which the court held inadmissible and instructed the jury not to consider), and the testimony of the State's investigator. No evidence was admitted concerning New Mexico law.

To support a conviction of felony DWI by using foreign DWI convictions for enhancement, the State must prove the foreign DWI statute is essentially the same as that of Texas. As the Texas Court of Criminal Appeals has explained,

When a foreign conviction is involved, in absence of proof of the laws of the other state, this Court will presume that its law is the same as that of the State of Texas. In fact, in *McKinney v. State*, we applied such a presumption to the law of Kansas regarding juvenile offenders in absence of any contrary proof.

When an out of state pen packet has been introduced as evidence of [a] prior criminal record at the punishment phase, the State, as proponent of evidence must establish, either by proof, or request that the trial court take judicial notice of, what our sister state considers sufficient documentary proof of a final conviction. In absence of such evidence or judicial notice, we will presume Kansas and Texas law is the same.<sup>9</sup>

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<sup>9</sup>*Langston v. State*, 776 S.W.2d 586, 587–88 (Tex. Crim. App. 1989) (internal citations omitted).

The Texas Court of Criminal Appeals relaxed this holding to some extent in *Flowers v. State*,<sup>10</sup> citing rule 902(4) of the rules of evidence and pointing out that rule 902 permits computer printouts under certain circumstances:

Further, in this modern era of computer-stored data, electronic files, and “paperless” court records, the day may come in which written judgments are largely obsolete. For this reason, Rule 902 of the Texas Rules of Evidence explicitly allows for the self-authentication of certified copies of public records, “including data compilations in any form certified as correct” by their custodian. A computer-generated compilation of information setting out the specifics of a criminal conviction that is certified as correct by the county or district clerk of the court in which the conviction was obtained is admissible under Rule 902.<sup>11</sup>

Although evidentiary rule 902 permits computer printouts under certain circumstances, those circumstances do not apply to the case now before this court. The documents in the challenged exhibits purport to be records of something that occurred in municipal court. The documents mention traffic violations but are so deficient that we cannot tell what they are or what events they seek to memorialize, if, indeed, they do.

Importantly, under Texas law, municipal courts have no jurisdiction over DWI offenses.<sup>12</sup> Municipal courts in Texas have jurisdiction only over criminal

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<sup>10</sup>220 S.W.3d 919 (Tex. Crim. App. 2007).

<sup>11</sup>*Id.* at 922–23 (footnotes omitted); *see also id.* at 923 n.14 (distinguishing *Langston* because it concerned the admission of a pen packet and explaining that a “pen packet custodian cannot attest to the correctness” of “the original judgment or data compilation relating to a defendant’s . . . conviction”).

<sup>12</sup>*See* Tex. Code Crim. Proc. Ann. art. 4.14 (Vernon Supp. 2010); Tex. Gov’t Code Ann. § 29.003 (Vernon Supp. 2010); *Tex. Dep’t of Pub. Safety v.*

cases that are punishable by fine only and not by incarceration.<sup>13</sup> An initial misdemeanor DWI, absent an open container, is a Class B misdemeanor and is punishable by incarceration.<sup>14</sup>

Jurisdiction of misdemeanor DWI properly lies in county court.<sup>15</sup> The Texas Code of Criminal Procedure provides, “The county courts shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the justice court, and when the fine to be imposed shall exceed five hundred dollars.”<sup>16</sup> Because we presume that New Mexico law is the same as Texas law, a defendant cannot be lawfully convicted of DWI in a municipal court.<sup>17</sup>

It is well established law that jurisdiction cannot be created by waiver or by agreement.<sup>18</sup> As the Texas Court of Criminal Appeals has explained,

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*Hamilton*, 304 S.W.2d 719, 722 (Tex. App.—Eastland), *writ ref’d n.r.e.*, 157 Tex. 616, 306 S.W.2d 712 (1957); *see also State v. Xoticas-Laredo, Inc.*, No. 04-03-00584-CR, 2004 WL 33054, at \*1 (Tex. App.—San Antonio Jan. 7, 2004, no pet.) (mem. op., not designated for publication) (holding that municipal court lacked jurisdiction over violation of municipal ordinance regulating sexually oriented business because punishment included confinement).

<sup>13</sup>Tex. Code Crim. Proc. Ann. art. 4.14.

<sup>14</sup>Tex. Penal Code Ann. § 49.04(b).

<sup>15</sup>Tex. Code Crim. Proc. Ann. art. 4.07 (Vernon 2005).

<sup>16</sup>*Id.*

<sup>17</sup>*See Langston*, 776 S.W.2d at 587–88.

<sup>18</sup>*Puente v. State*, 71 S.W.3d 340, 343 (Tex. Crim. App. 2002); *Garcia v. Dial*, 596 S.W.2d 524, 527 (Tex. Crim. App. 1980) (orig. proceeding).

The void judgment exception recognizes that there are some rare situations in which a trial court's judgment is accorded no respect due to a complete lack of power to render the judgment in question. A void judgment is a "nullity" and can be attacked at any time. If the original judgment imposing probation was void, then the trial court would have no authority to revoke probations, since, with no judgment imposing probation (because it is a nullity), there is nothing to revoke. . . .

But a judgment is void only in very rare situations—usually due to a lack of jurisdiction. In civil cases, a judgment is void only when there was "no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter a particular judgment, or no capacity to act as a court." This rule is essentially paralleled in criminal cases. A judgment of conviction for a crime is void when (1) the document purporting to be a charging instrument (i.e. indictment, information, or complaint) does not satisfy the constitutional requisites of a charging instrument, thus the trial court has no jurisdiction over the defendant, [and] (2) the trial court lacks subject matter jurisdiction over the offense charged, such as when a misdemeanor involving official misconduct is tried in a county court at law . . . .<sup>19</sup>

Although State's Exhibits 4 and 5 contain a sheet designated "Complaint," there is no charging instrument that complies with Texas law. This is not to say that the State must offer the charging instrument in order to prove the legitimacy of a lawful judgment. But under Texas law, a valid information is a prerequisite to prosecution of misdemeanor DWI.<sup>20</sup> An "information" is a written statement filed and presented on behalf of the State by the district or county attorney, charging

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<sup>19</sup>*Nix v. State*, 65 S.W.3d 664, 667–68 (Tex. Crim. App. 2001) (footnotes omitted).

<sup>20</sup>Tex. Const. art. V, § 17; *Bender v. State*, 171 Tex. Crim. 628, 353 S.W.2d 39, 39 (Tex. Crim. App. 1962).



the defendant with an offense which may by law be so prosecuted.<sup>21</sup> The requisites of a valid information are statutory, but the requirement of the information for the purpose of conferring jurisdiction and providing sufficient notice to the defendant is constitutional.<sup>22</sup>

An information is sufficient if it has the following requisites:

1. It shall commence, "In the name and by authority of the State of Texas";
2. That it appear to have been presented in a court having jurisdiction of the offense set forth;
3. That it appear to have been presented by the proper officer;
4. That it contain the name of the accused, or state that his name is unknown and give a reasonably accurate description of him;
5. It must appear that the place where the offense is charged to have been committed is within the jurisdiction of the court where the information is filed;
6. That the time mentioned be some date anterior to the filing of the information, and that the offense does not appear to be barred by limitation;
7. That the offense be set forth in plain and intelligible words;
8. That it conclude, "Against the peace and dignity of the State"; and
9. It must be signed by the district or county attorney, officially.<sup>23</sup>

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<sup>21</sup>Tex. Code Crim. Proc. Ann. art. 21.20 (Vernon 2009).

<sup>22</sup>Tex. Const. art. V, § 12(b); Tex. Code Crim. Proc. Ann. art. 21.21.

<sup>23</sup>Tex. Code Crim. Proc. Ann. art. 21.21.

A valid information must be based upon a sworn complaint:

No information shall be presented until affidavit has been made by some credible person charging the defendant with an offense. The affidavit shall be filed with the information. It may be sworn to before the district or county attorney who, for that purpose, shall have power to administer the oath, or it may be made before any officer authorized by law to administer oaths.<sup>24</sup>

The purported complaints in State's Exhibits 4 and 5 contain no jurat or any other writing that would comply with the Texas requirement of an affidavit.

Nothing in the record suggests that New Mexico law is different from that of Texas; we therefore presume that they are the same.<sup>25</sup> We cannot conclude from the documents that Appellant was properly convicted in New Mexico of DWI.

Nor do the New Mexico documents satisfy the requirements of Texas law regarding the form and contents of a judgment in a criminal case or waiver of counsel in a criminal case:

Sec. 1. A judgment is the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant. The sentence served shall be based on the information contained in the judgment. The judgment shall reflect:

1. The title and number of the case;
2. That the case was called and the parties appeared, naming the attorney for the state, the defendant, and the attorney for the defendant, or, where a defendant is not represented by counsel, that

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<sup>24</sup>*Id.* art. 21.22.

<sup>25</sup>*See Langston*, 776 S.W.2d at 587–88.

the defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel;

3. The plea or pleas of the defendant to the offense charged;
4. Whether the case was tried before a jury or a jury was waived;
5. The submission of the evidence, if any;
6. In cases tried before a jury that the jury was charged by the court;
7. The verdict or verdicts of the jury or the finding or findings of the court;
8. In the event of a conviction that the defendant is adjudged guilty of the offense as found by the verdict of the jury or the finding of the court, and that the defendant be punished in accordance with the jury's verdict or the court's finding as to the proper punishment;
9. In the event of conviction where death or any punishment is assessed that the defendant be sentenced to death, a term of confinement or community supervision, or to pay a fine, as the case may be;
10. In the event of conviction where the imposition of sentence is suspended and the defendant is placed on community supervision, setting forth the punishment assessed, the length of community supervision, and the conditions of community supervision;
11. In the event of acquittal that the defendant be discharged;
12. The county and court in which the case was tried and, if there was a change of venue in the case, the name of the county in which the prosecution was originated;
13. The offense or offenses for which the defendant was convicted;
14. The date of the offense or offenses and degree of offense for which the defendant was convicted;

15. The term of sentence;
16. The date judgment is entered;
17. The date sentence is imposed;
18. The date sentence is to commence and any credit for time served;
19. The terms of any order entered pursuant to Article 42.08 of this code that the defendant's sentence is to run cumulatively or concurrently with another sentence or sentences;
20. The terms of any plea bargain;
- ...
22. The terms of any fee payment ordered under Article 42.151 of this code;
23. The defendant's thumbprint taken in accordance with Article 38.33 of this code;
- ...

Sec. 2. The judge may order the prosecuting attorney, or the attorney or attorneys representing any defendant, or the court clerk under the supervision of an attorney, to prepare the judgment, or the court may prepare the same.

Sec. 3. The provisions of this article shall apply to both felony and misdemeanor cases.<sup>26</sup>

The purported New Mexico judgments are wholly inadequate under Texas law.

The State argues that we must hold the evidence of Appellant's prior DWI convictions to be sufficient because he admitted that he was the person

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<sup>26</sup>Tex. Code Crim. Proc. Ann. art. 42.01 (Vernon Supp. 2010).

convicted in the Hobbs municipal court in both cases, that the convictions were final, and that he was guilty in one case. That is, the State argues that his acquiescence to “this judgment’s accurate though, right? You don’t challenge it, do you?” is sufficient to connect Appellant to the Hobbs offenses. Appellant argues that neither the judgments nor any other document reflects any waiver of attorney or of a jury trial and offered uncontroverted evidence at trial that he waived neither.

We do not understand Appellant to be challenging the sufficiency of the connection of the Hobbs purported judgments to him. We understand his argument to be that the convictions are void. We also note, however, that the trial court sustained the State’s objection to the testimony the State now relies on and instructed the jury to disregard it. It therefore does not constitute admitted evidence.

“It is well settled that criminal defendants in misdemeanor cases are entitled to counsel if there exists a possibility that imprisonment may be imposed.”<sup>27</sup> Deprivation of the constitutional right to counsel renders a prior misdemeanor DWI conviction void.<sup>28</sup> The Texas Court of Criminal Appeals has noted that there are limited situations in which a judgment is void; among them is

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<sup>27</sup>*Empy v. State*, 571 S.W.2d 526, 527 (Tex. Crim. App. 1978) (relying on, among other authorities, *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006 (1972)).

<sup>28</sup>*Woodard*, 541 S.W.2d at 188.

the situation that occurs when “an indigent defendant is required to face criminal trial proceedings without appointed counsel, when such has not been waived, in violation of *Gideon v. Wainwright*.”<sup>29</sup>

The Texas Court of Criminal Appeals has also spoken of the importance of jury waivers: A defendant’s absolute right to jury trial is guaranteed by the federal constitution, the state constitution, and statutory law.<sup>30</sup> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”<sup>31</sup> “The right of trial by jury shall remain inviolate.”<sup>32</sup> “As a matter of federal constitutional law, the State must establish, on the record, a defendant’s express, knowing, and intelligent waiver of jury trial.”<sup>33</sup> Article 1.13 of the Texas Code of Criminal Procedure provides the requisites for a jury trial waiver in Texas:

The defendant in a criminal prosecution . . . shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that such waiver must be made in person by the defendant

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<sup>29</sup>*Smith v. State*, 309 S.W.3d 10, 17–18 (Tex. Crim. App. 2010) (citation omitted) (quoting *Nix*, 65 S.W.3d at 668).

<sup>30</sup>*Hobbs v. State*, 298 S.W.3d 193, 197 (Tex. Crim. App. 2009); *see also* U.S. Const. amend. VI; Tex. Const. art. I, § 15; Tex. Code Crim. Proc. Ann. art. 1.12 (Vernon Supp. 2010).

<sup>31</sup>U.S. Const. amend. VI; *Hobbs*, 298 S.W.3d at 197 n.4.

<sup>32</sup>Tex. Const. art. I, § 15; Tex. Code Crim. Proc. Ann. art. 1.12 (Vernon 2005); *Hobbs*, 298 S.W.3d at 197 n.4.

<sup>33</sup>*Hobbs*, 298 S.W.3d at 197.

in writing in open court with the consent and approval of the court, and the attorney representing the State.<sup>34</sup>

Appellant argues that waiver of counsel cannot be presumed from a silent record, relying on *Burgett v. Texas*.<sup>35</sup> Of course, a salient question is what constitutes a silent record. It is not simply a matter of determining whether the State produces the actual waivers in seeking to prove a prior conviction for enhancement purposes. Rather, we first look to the State's proof of a valid judgment to determine whether the State has presented evidence that is entitled to a presumption of regularity.<sup>36</sup> If it has, the burden shifts to the party challenging the validity of the alleged prior conviction.<sup>37</sup> If the evidence offered is not entitled to a presumption of regularity, or if the evidence does not state whether there has been waiver, the burden does not shift but remains with the proponent of the evidence.<sup>38</sup> The Texas Court of Criminal Appeals has explained the interplay between the presumption of regularity and the burden of proving waiver of a statutory or constitutional right:

[I]n *Samudio v. State*, where the defendant was convicted of a misdemeanor offense, the formal judgment in that cause only contained the following recitation: "No jury having been demanded . . . [.]" This Court agreed with the decision of the court of

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<sup>34</sup>Tex. Code Crim. Proc. Ann. art. 1.13 (Vernon 2005).

<sup>35</sup>389 U.S. 109, 114–15, 88 S. Ct. 258, 262 (1967).

<sup>36</sup>*Breazeale v. State*, 683 S.W.2d 446, 450–51 (Tex. Crim. App. 1984).

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

appeals in that cause that this recitation was insufficient to establish that the defendant had waived his right to trial by jury. *Samudio*, however, emphatically distinguished between the absence in the record of a demand for a jury trial *and* an affirmative waiver thereof, and held that such could be challenged on direct appeal. Because of the difference in the wording of the judgments in the causes before us, and the judgment in *Samudio*, *Samudio* is inapplicable to this cause.

The recitation in the judgments of these causes complies with the provisions of Art. 42.01, which defines the legal term “judgment,” and what should be placed in the formal judgment.

. . . .

. . . [T]his Court will indulge every presumption in favor of the regularity of the documents in the trial court. This means that the recitations in the records of the trial court, such as a formal judgment, are binding in the absence of direct proof of their falsity. In this instance, neither appellant has ever attacked or challenged the truthfulness of the recitation that is found in each of their formal judgments. They rely in support of their contention, that they did not formally waive a trial by jury, on the absence of any such document in their respective appellate record. This, of course, is insufficient to overcome the presumption that the recital in a formal judgment, that the defendant formally waived his right to trial by jury is true, and that such presumption attains until and unless the contrary is made to appear.

While it is true that a silent record cannot support a presumption that the defendant formally waived his right to trial by jury, it is equally certain that the formal judgment of the trial court carries with it a presumption of regularity and truthfulness, and such is never to be lightly set aside.<sup>39</sup>

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<sup>39</sup>*Id.* (citations omitted).



Additionally, article 1.051(f) of the code of criminal procedure requires that waiver of counsel in a case in which incarceration is a possibility be in writing.<sup>40</sup>

That statute also sets out the requirements of the written waiver:

(g) If a defendant wishes to waive the right to counsel for purposes of entering a guilty plea or proceeding to trial, the court shall advise the defendant of the nature of the charges against the defendant and, if the defendant is proceeding to trial, the dangers and disadvantages of self-representation. If the court determines that the waiver is voluntarily and intelligently made, the court shall provide the defendant with a statement substantially in the following form, which, if signed by the defendant, shall be filed with and become part of the record of the proceedings:

“I have been advised this \_\_\_\_\_ day of \_\_\_\_\_, 2 \_\_\_\_\_, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)[.]”<sup>41</sup>

Appellant’s testimony that no such warning occurred is uncontroverted. There is no evidence that the trial court made the required finding, and there is no evidence that Appellant was represented by counsel in the Hobbs, New Mexico municipal court. The purported judgments, in fact, support Appellant’s

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<sup>40</sup>Tex. Code Crim. Proc. Ann. art. 1.051(f) (Vernon Supp. 2010).

<sup>41</sup>*Id.* art. 1.051(g).

testimony that he was not represented by counsel because the portion of the document relating to counsel is blank.

The State argues that none of this is of any importance because Appellant did not “preserve and present the reporter’s records of the New Mexico proceedings.” Again, no one offered proof of New Mexico law, and we have not been asked to take judicial notice of New Mexico law. We therefore presume that it is the same as Texas law, which has been discussed by our sister court in Texarkana:

A municipality may choose to have either a “municipal court” or a “municipal court of record,” but not both. A primary distinction between these types of municipal courts is that a “municipal court” established under Section 29.002 of the Texas Government Code is not a court of record. Thus, an appeal from such a municipal court is necessarily by trial de novo because there is no “trial record” for the county court to consider on appeal.<sup>42</sup>

We note that the record before us includes an indication that, under Texas law, the Hobbs municipal court is not a court of record. The purported judgment in each case advises the defendant that “YOU MAY HAVE A NEW TRIAL IN THE DISTRICT COURT BY FILING A NOTICE OF APPEAL WITHIN 15 DAYS FROM THE DATE OF ENTRY OF THIS JUDGMENT AND SENTENCE.” Under Texas law, appeals from municipal courts of record are appeals on the record

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<sup>42</sup>*Tex. Vital Care v. State*, 323 S.W.3d 609, 610 n.2 (Tex. App.—Texarkana 2010, no pet.) (citations omitted).

only. Appeals from municipal courts, as opposed to municipal courts of record, are trials de novo.<sup>43</sup>

Nevertheless, the face of the judgment is presumed to speak the truth unless rebutted.<sup>44</sup> Each judgment shows that Appellant's lawyer was \_\_\_\_\_ . If we take the recitations of the purported judgments as true, Appellant was not represented by counsel and there is no statement that he waived a jury trial. Nothing in the purported judgments suggests that he was advised of his right to counsel or to a jury trial or that he waived those rights. The sole document that purports to be a waiver of counsel does not comply with Texas law. Additionally, not only do the purported judgments in the case now before this court fail to contain the statement required in Texas judgments regarding the right to trial by jury: "Whether the case was tried before a jury or a jury was waived," the form used for both purported judgments does not contain a provision for any jury trial at all. It provides only for a court's determination of guilt on a plea of guilty, not guilty, or nolo contendere.

The issue in this case is not whether the State sufficiently connected the purported Hobbs municipal judgments to Appellant; the issue is whether the

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<sup>43</sup>See *id.*

<sup>44</sup>See *Breazeale*, 683 S.W.2d at 450–51.

purported judgments are sufficient to satisfy the requirements of section 49.09(b)(2).<sup>45</sup>

Based on all the above, we hold that the State did not satisfy its burden of proving either alleged prior New Mexico DWI conviction beyond a reasonable doubt. We sustain Appellant's second issue.

### **III. Disposition**

The State proved the underlying Denton County, Texas, misdemeanor DWI, and Appellant does not challenge the sufficiency of the evidence to support that conviction except as to the enhancement allegations. In a case in which the appellant was convicted of an offense and the appellate court determines that the evidence is insufficient to support the conviction for that offense but sufficient to support a conviction for a lesser included offense, the appellate court lacks authority to modify the judgment *unless* (1) the jury was instructed on the lesser included offense at trial or (2) one of the parties requested an instruction on the lesser included offense and the request was denied.<sup>46</sup> Appellant argues that because the jury was not instructed on the lesser included offense of misdemeanor DWI, we must enter a verdict of acquittal.

During the charge conference at the guilt phase of the trial, the following exchange occurred:

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<sup>45</sup>Tex. Penal Code Ann. § 49.09(b)(2).

<sup>46</sup>*Haynes v. State*, 273 S.W.3d 183, 184–85 (Tex. Crim. App. 2008); *Herrin v. State*, 125 S.W.3d 436, 443–45 (Tex. Crim. App. 2002).

[DEFENSE COUNSEL]: The Judge of the Court has an obligation to provide a[n] instruction to the jury that is in compliance with the law. The proposed Charge of the Court that I've been given fails in a number of things.

The first is that it has a general verdict on the back, guilty or not guilty. The Court actually poses a burden on the State in a DWI trial to prove prior convictions beyond a reasonable doubt. All the indictment shows is a misdemeanor offense of driving while intoxicated, which would have to have enhancement. If you were pleading to this, you would ask them as to the enhancement charges: How do you plead: True or untrue? It's done every day. To the enhancement: How do you plead: True or untrue? Because that's necessary, two different parts.

The instructions we've been given here contains instructions about, A, the DWI portion of the trial, and then—and then if you further find 1 and 2 on these indictments. You do not give the jury a form to find 1 or 2 as true, and that is the fundamental flaw of this charge. And if they do not find true on 1 or 2 as raised by the evidence in this case, then there would be a lesser-included offense of misdemeanor DWI.

So by finding him guilty on the final verdict here, you're telling them you've got to find these are true, but you do not give them the opportunity to say untrue. And they could find untrue on that but guilty of DWI.

THE COURT: Your response?

[PROSECUTOR]: These are not enhancement paragraphs, but jurisdictional prayers. I believe it's proper to include them this way in an application paragraph because we are required to prove the prior convictions beyond a reasonable doubt.

[DEFENSE COUNSEL]: I don't disagree with that.

[PROSECUTOR]: And leave it to the Court's discretion as to whether or not a lesser-included would be in the Jury Charge.

However, Defendant took the stand, he admitted he was the same person convicted of both of those. So I don't think we have evidence that would support a lesser-included.

[DEFENSE COUNSEL]: The problem with this is: They have introduced evidence which does not show waiver of a trial by jury. It does not show he had a lawyer. And the jury may say, we don't care about this. It's within their purview to say, We don't find the evidence is sufficient to convince us. I don't care if he got up here and said, Yeah, I was the guy that did it or not. They might still find the other way.

There is no such thing as to instruct a verdict of guilty which is what she's asking you to do here. That's my objection to the Charge and the general Verdict Form.

The question presented is whether Appellant's objecting that the jury was not given the opportunity to determine whether the individual jurisdictional enhancement allegations were true or not true was, as the State now suggests, a request for an instruction on the lesser included offense of misdemeanor DWI. Nowhere below did Appellant specifically request a charge on misdemeanor DWI, and his two rejected written requests for instructions concern the two enhancements, not a request for an instruction on a lesser included misdemeanor DWI. The State responded to Appellant's objections below that the prior DWIs were not alleged as traditional enhancement allegations but as jurisdictional prerequisites. The State also did not request an instruction on a lesser included misdemeanor DWI but in fact stated that such an instruction would be in the trial court's discretion and that the evidence would not support it. We therefore hold that neither party requested a jury instruction of misdemeanor DWI.

Accordingly, because an instruction on Class B misdemeanor DWI was neither requested nor given, we reverse the trial court's judgment and render judgment of acquittal.

LEE ANN DAUPHINOT  
JUSTICE

PANEL: DAUPHINOT, WALKER, and GABRIEL, JJ.

WALKER and GABRIEL, JJ. concur without opinion.

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Tex. R. App. P. 47.2(b)

DELIVERED: March 3, 2011