ACCEPTED
02-18-00138-CR
SECOND COURT OF APPEALS
FORT WORTH, TEXAS
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DEBRA SPISAK
CLERK

Debra Spisak, Clerk
Second Court of Appeals District of Texas

Re: Crystal Mason v. The State of Texas, Cause No. 02-18-000138-CR

Dear Ms. Spisak:

We are writing to address (I) this Court's question as to how it may reverse Judge Gonzalez's decision on the basis of a subsequently enacted legislative amendment, (II) the State's improper reliance on the provisional ballot affidavit, which the Court of Criminal Appeals ("CCA") and the legislature have made clear cannot suffice to prove Ms. Mason knew she was ineligible to vote, and (III) the State's improper reliance on notices sent to Ms. Mason's pre-incarceration address while she was incarcerated, even though nothing in the record suggests she received or reviewed those notices such that a reasonable factfinder could infer actual knowledge of her ineligibility beyond a reasonable doubt. Please distribute this letter to the members of the panel.

I. Reversing Judge Gonzalez

At oral argument, Justice Birdwell asked "how are we to reverse [Judge Gonzalez] on the basis of something that the legislature came up with after the fact," referring to the legislature's addition of Section 64.012(c) to the Texas Election Code. Oral Argument at 16:10, Crystal Mason v. State of Texas (No. 02-18-000138-CR), https://www.txcourts.gov/media/1456261/02-18-138-cr-crystal-mason-v-the-state-of-texas.m4a (hereinafter "Oral Argument"). Section 64.012(c) specifies that a

person "may not be convicted solely upon the fact that the person signed a provisional ballot affidavit under Section 63.011 unless corroborated by other evidence that the person knowingly committed the offense." Section 9.03 of SB 1, 87th Leg., 2nd C.S. (2021). The Texas legislature preemptively answered Justice Birdwell's question by deliberately and expressly making Section 64.012(c) retroactive through Section 9.04 of SB 1, which reads: "The change in law made by this article in adding Section 64.012(c), Election Code, applies to an offense committed **before**, on, or after the effective date of this Act, except that a final conviction for an offense under that section that exists on the effective date of this Act remands unaffected by this article." Section 9.04 of SB 1 (emphasis added). As the CCA recognized, this provision applies to Ms. Mason's conviction because her conviction is not a final conviction and is currently on appeal before this Court. *See Mason v. State,* No. PD-0881-20, 2022 WL 1499513, at *4-6 (Tex. Crim. App. May 11, 2022); *see also Fletcher v. State*, 214 S.W.3d 5, 6 (Tex. Crim. App. 2007) citing *Jones v. State*, 711 S.W.2d 634, 636 (Tex. Crim. App. 1986) ("The law is settled that a conviction from which an appeal has been taken is not considered to be a final conviction…").

However, even putting aside the retroactive application of Section 64.012(c), this Court can reverse Judge Gonzalez because he did not consider knowledge of ineligibility an element of Section 64.012(a)(1) and convicted Ms. Mason based on

this misunderstanding of the illegal voting statute. Judge Gonzalez concluded that the "essential elements" of the offense of illegal voting were met because "Defendant voted and that she was ineligible to vote." CR.210. Conspicuously absent is any conclusion that Ms. Mason knew that she was ineligible to vote. CR.210. In fact, far from relying on the provisional ballot affidavit to infer knowledge, Judge Gonzalez found that Ms. Mason's "trial testimony **was the best evidence of her alleged knowledge and intent when she signed the provisional affidavit and cast her vote**" and on that score "Defendant testified extensively at trial that **she did not know she was ineligible to vote on November 8, 2016**, and that she did not read the admonishments about voting eligibility…" CR.203 (internal citations omitted) (emphasis added). As the CCA explained, Section 64.012(a)(1)'s knowledge requirement is not a "negligence scheme wherein a person can be guilty because she fails to take reasonable care to ensure that she is eligible to vote." CCA Op. at 6. But Judge Gonzalez treated the statute as exactly that.

II. Provisional Ballot Affidavit Language

While Judge Gonzalez failed to consider Ms. Mason's knowledge about ineligibility entirely and should be reversed on that basis, the State on appeal has pointed to the provisional ballot affidavit as proof of her knowledge despite the fact that the statute does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit. *Mason v. State*, No. PD-0881-20, 2022 WL

1499513, at *6 (Tex. Crim. App. May 11, 2022); Tex. Elec. Code § 64.012(c). Applying the Rule of Lenity, the CCA held in *Delay* and confirmed in this case that "a statutory requirement that an individually 'knowingly' commit an offense under the Election Code requires the state to prove knowledge of underlying facts giving rise to circumstance and an 'actual[] realiz[ation]' that the specified circumstance renders the conduct unlawful." *Mason*, 2022 WL 1499513, at *6.

Here, contrary to the State's cramped application of the Rule of Lenity, the CCA held, as it did in *Delay*, that the application of the Rule in this context requires a showing of actual knowledge, not merely a failure to take reasonable care. Thus, even if Ms. Mason had read the left side of the provisional ballot affidavit (which cannot be rationally inferred from the evidence) and even if she had understood from it that "federal supervised release" was the same as "supervision" (which, again, cannot be rationally inferred from the evidence), she could not have understood from the affidavit that her circumstance rendered her ineligible to vote. Justice Birdwell highlighted this at oral argument when he asked the State: "Where in [the provisional ballot affidavit] language does it actually say that if she's a felon, she's disqualified from voting? I'll help you. It's not in there." Oral Argument at 22:54.[1]

[1] Justice Birdwell also noted other deficiencies in the provisional ballot language, including that the provisional ballot affidavit here did not "actually [have] a box with the admonishment in it with the signature line" as to post-conviction voter eligibility statuses. Oral Argument at 33:45.

III. 2013 Notices Regarding Voter Registration

During oral argument, the State improperly relied on two notices sent to Ms. Mason's pre-incarceration address in 2013 as support for Ms. Mason's actual knowledge that she was ineligible to vote at the time she submitted her provisional ballot. Oral Argument at 17:18-17:33. The first notice sent to Ms. Mason's pre-incarceration address in 2013 stated that the elections office had learned of Ms. Mason's felony conviction and the second notice stated that her voter registration had been cancelled. The two notices concerning Ms. Mason's eligibility were mailed to her pre-incarceration address in May and June of 2013—while Ms. Mason was incarcerated, and was not living at that address. Over three years passed before Ms. Mason returned to the address where the notices had been mailed. As the State acknowledged at argument, there is no record evidence indicating that Ms. Mason ever received those notices. Oral Argument at 17:28. Any leap from the mere sending of the 2013 notices to Ms. Mason's pre-incarceration address to Ms. Mason having actually received and read those notices requires inferences from facts that have no evidentiary basis in the record and is thus pure speculation.

The 2013 notices are yet another example of how the State's purported evidence of actual knowledge is highly speculative and, ultimately, insufficient. The mere fact that these notices were sent to Ms. Mason's home address in 2013 would not support a rational inference that Ms. Mason actually realized she was ineligible

to vote when she submitted the provisional ballot affidavit. The Court "cannot defer to facts that weren't proved nor to inferences that aren't reasonable." *Riles v. State*, No. 02-19-00421-CR, 2021 WL 4319600, at *7 (Tex. App.— Fort Worth Sept. 23, 2021); *see also Hacker v. State*, 389 S.W.3d 860, 873-74 (Tex. Crim. App. 2013) (rejecting sufficiency of the evidence where it was merely "suspicion linked to other suspicion").

Respectfully submitted,

Hani Mirza
Texas Bar No. 24083512
Christina Beeler
Texas Bar No. 24096124
Texas Civil Rights Project
1405 Montopolis Drive
Austin, TX 78741-3438
Telephone: (512) 474-5073 ext. 105
Fax: (512) 474-0726
hani@texascivilrightsproject.org
christinab@texascivilrightsproject.org

Alison Grinter
Texas Bar No. 24043476
6738 Old Settlers Way
Dallas, TX 75236
Telephone: (214) 704-6400
alisongrinter@gmail.com

Kim T. Cole
Texas Bar No. 24071024
2770 Main Street, Suite 92
Frisco, Texas 75033
Telephone: (214) 702-2551
kcole@kcolelaw.com

/s/ Sophia Lin Lakin
Sophia Lin Lakin**
New York Bar No. 5182076
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 519-7836
Fax: (212) 549-2654
slakin@aclu.org

Savannah Kumar
Texas Bar No. 24120098
Thomas Buser-Clancy
Texas Bar No. 24078344
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 77007
Telephone: (713) 942-8146
Fax: (915) 642-6752
skumar@aclutx.org
tbuser-clancy@aclutx.org

**admitted pro hac vice

Counsel for Appellant, Crystal Mason

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Motion has been served on counsel of record and the State Prosecuting Attorney via e-service on May 2, 2023.

/s/ Savannah Kumar
Savannah Kumar