



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Ned McDaniel
County Attorney
Wichita County
Wichita Falls, Texas

Dear Sir:

Opinion No. 0-999

Re: Necessity for the state to allege or prove the negative of circumstances set out in Article 666-23 (a) subdivision 1, Vernon's Penal Code of the State of Texas.

Your request for an opinion on the following question:

"Is it necessary for the state to allege or prove the negative of circumstances set out in Article 666-23 (a) subdivision 1?"

has been received by this office.

We have read Article 666-23 (a) subdivision 1 of the Texas Liquor Control Act of Vernon's Penal Code of the State of Texas, which said subdivision of said article we quote in full as follows:

"(1). It is provided that any person who purchases alcoholic beverages for his own consumption may transport same from a place where the sale thereof is legal to a place where the possession thereof is legal."

In our opinion, your question is answered by Judge Lattimore in *Bakers vs. State*, 106 S. W. (2d) 308, in which the court said:

"From what we have said above, and as far as we have been able to ascertain, our courts have uniformly held that when the Legislature sees fit to create exceptions to the general penal provisions of a statute if such exceptions

be placed in a separate section or article from the one containing the definition of the offense, or if they be not such as to be essential to the definition of the offense, it will not be necessary to negative such exceptions in the indictment charging such offenses. This rule seems uniformly adhered to even though the exceptions referred to had in some former enactment, been written into the enacting clause of the offense in such way as to cause this court to hold it necessary for same to be negated in the indictment charging such offense. We feel impelled to say that if there be possibly an exception to the rule above mentioned, it must be when the exception or omission is of the very gist of the offense, and then same would have to be negated in the indictment, no matter where its location in the statute, and the Legislature, in such latter cases could be powerless to enact a statute making it unnecessary to negative such an exception, and this as stated, whether such exception be in the article defining the offense or be in a separate article. In other words, if the thing forbidden by the particular statute under consideration could not be proved or the case could not be made out without proof of the so-called exception or omission, then said exception would be a necessary element of the offense, and its existence should be negated in the indictment."

The holding in the Baker case is supported by that in Sewell vs. State, 106 S.W. (2d) 321.

The real test seems to be, that if the exception be of such form and character as that a prima facie case could be made out against the accused for the violation charged without proof of the omission, or exception, then clearly the omission or exception need not be alleged. If, on the other hand, the omission or exception is the very gist of the offense, and a prima facie case could not be made out without the proof of such omission or exception, then such omission or exception should be alleged in the complaint.

It is our opinion that under circumstances set out in Article 666-23 (a), Subdivision 1, the omission or exception is not the gist of the offense, and that a prima facie case might be made out without proof of such omission or exception, and that, therefore, a complaint charging an offense under this Article, and under Subdivision 1 of same, need not have set forth therein such omissions and exceptions.

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In support of this holding, we cite, in addition to the cases heretofore referred to in this opinion, the following cases:

Taylor vs. State, 106 S.W. (2d) 1056
 Thomas vs. State, 114 S.W. (2d) 562
 Parker vs. State, 106 S.W. (2d) 513
 Fogle vs. State, 111 S.W. (2d) 246

In support of this conclusion we also refer you to Section 9 of the Texas Liquor Control Act, which reads as follows:

"It shall not be necessary for any information, complaint or indictment to negative any exception contained in this Act concerning any prohibited acts; provided, however, that any such exception made herein may be urged as a defense by any person charged by such complaint, information, or indictment."

We trust that this satisfactorily answers your inquiry.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

Fred C. Chandler
 Fred C. Chandler
 Assistant

FCC:FG

APPROVED SEP 14, 1939

Frederic Mann

ATTORNEY GENERAL OF TEXAS

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