



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1283-15

MILTON RAY CRAWFORD, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE TENTH COURT OF APPEALS
BRAZOS COUNTY**

WALKER, J., joined by HERVEY and ALCALA, JJ., filed a dissenting opinion.

DISSENTING OPINION

Appellant asks whether article 62.102(c) of the Code of Criminal Procedure is the exclusive enhancement of punishment provision for an offender who repeatedly fails to register as a sex offender? He asserts that the question should be answered in the affirmative because the specific enhancement provision of article 62.102(c) controls over the general enhancement provision of Penal

Code section 12.42(d).

As the majority opinion points out, in 1984 appellant was convicted of sexual assault and was later required to register as a sex offender. Twice after that, in 2007 and 2009, he was convicted of felony offenses, failure to comply with sex-offender-registration requirements and failure to register as a sex offender, both being third-degree felonies under article 62.102(b)(2) of the Code of Criminal Procedure. At sentencing, the punishment was enhanced under section 12.42(d) of the Penal Code, which provided a punishment range of twenty-five to ninety-nine years or life because of the two alleged prior felony convictions: failure to comply with sex offender registration requirements and failure to register as a sex offender. Appellant was sentenced to eighty-five years imprisonment. Appellant asserts that such enhancement was improper because enhancement was only available under the special and specific enhancement provision applicable to repeat offenders found guilty of failing to register as a sex offender.

The provision under which appellant's punishment was enhanced, Penal Code section 12.42(d), describes the penalties for habitual felony offenders, generally. Article 62.102(c) is more specific to appellant's circumstances of the specific offense for which he was convicted. The two enhancement provisions are certainly overlapping as they both provide for a way to enhance punishments with prior convictions. We have held that "Article 62.102(c) operates in the same way as Section 12.42, increasing the level of punishment that applies to the primary offense [but does not increase the level of the primary offense], whatever its original designation." *Ford v. State*, 334 S.W.3d 230, 235 (Tex. Crim. App. 2011). In other words, a third-degree felony which is enhanced under article 62.102(c) is still a third-degree felony even though the punishment level is enhanced to that of a second-degree felony. We pointed out that article 62.102(b) "designates different levels

of offense enhancement, starting with state jail felonies, based on specific criteria that pertain to the facts and circumstances involved in the primary offense.” *Id.*

As the majority opinion of the Court notes, article 62.102(c) provides that “[i]f it is shown at the trial of a person for an offense . . . under this article that the person has previously been convicted of an offense under this article, the punishment for the offense . . . is increased to the punishment for the next highest degree of felony.” The statute clearly indicates that a previous conviction for failure to register bumps the punishment range up one level. Because of the fact that a second failure to register conviction would also be “an offense,” a second such previous conviction would bump the punishment range up one more level. In the instant case, appellant had two prior failure to register convictions. Therefore, the first conviction would bump the punishment range up one level, which would raise the punishment level from that of a third-degree felony to that of a second-degree felony. Instead of being subject to a punishment range of two to ten years in prison, appellant would be subject to a punishment range of two to twenty years in prison. TEX. PENAL CODE § 12.33(a). Again, a second previous failure to register conviction would also be “an offense” which would elevate appellant’s punishment range to that of a first-degree felony, being five years to ninety-nine years or life. TEX. PENAL CODE § 12.32(a). Under the majority holding, appellant was instead subjected to the punishment range of an habitual offender, which was twenty-five years to life. Also, the language in article 62.102(c) references enhancement to the “next highest degree of felony.” The use of the word “degree” instead of “punishment range” appears to limit enhancements under 62.102(c) to third degree, second degree, or first degree punishment ranges. Because habitual enhancements are not a “degree” of felony, the language of the statute seems to foreclose the possibility of habitual enhancement under 62.102(c).

The majority holding is based on an assumption that article 62.102(c) can only be construed to apply to an enhancement involving only one prior failure to register conviction, and, therefore, in a case involving multiple prior failure to register convictions, courts must look to conventional enhancement provisions to determine the correct punishment range. The assumption is flawed in that the language “an offense” contained in the statute can be construed to refer to each of multiple prior failure to register convictions. TEX. GOV’T CODE § 311.012(b) (“The singular includes the plural and the plural includes the singular.”) Again, article 62.102(c) states, “If it is shown at the trial of a person for an offense . . . under this article, the punishment for the offense . . . is increased to the punishment for the next highest degree of felony.” Pursuant to Chapter 311 of the Government Code, the Code Construction Act, if a general provision irreconcilably conflicts with a special (i.e. specific) provision, the special (i.e. specific) provision “prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.” TEX. GOV’T CODE § 311.026(a)(b). In this case, the general provision of section 12.42 is not the later enactment, thus the specific provision of article 62.102 prevails.

Article 62.102(c) can be reasonably construed to apply to multiple failure to register enhancement convictions. The first prior failure to register conviction is “an offense,” and the second is also “an offense.” It is my belief that if the Legislature had intended for multiple prior failure to register felony convictions to increase the punishment *only* one level, it would have said previous convictions of “one or more” offenses under this article would increase the punishment to the next highest degree of felony. Furthermore, my review of the legislative history of this article, including the bill analyses and enrolled bill summaries of the various amendments to the statute, fails to reveal any such intent.

Appellant's punishment range should have been that of a first-degree felony, which is five to ninety-nine years or life instead of twenty-five years to life. The indictment in this case only alleged the two prior failure to register convictions for enhancement purposes. Therefore, this dissenting opinion does not address an issue involving three or more prior felony convictions; but, I do note that non-failure to register felony offenses can be alleged and proven within the purview of the provisions of section 12.42 of the Texas Penal Code for punishment enhancement for repeat and habitual felony offenders without corrupting article 62.102(c).

With these comments, I respectfully dissent.

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