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COURT OF CRIMINAL APPEALS
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No. PD-18-0745

IN THE TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
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JOSEPH ANDREW DIRUZZO, Appellant

V.

THE STATE OF TEXAS

DIRECT APPEAL FROM THE
24th DISTRICT COURT OF VICTORIA COUNTY, TEXAS
TRIAL COURT CAUSE NUMBER 14-05-27939-A
AND THE THIRTEENTH COURT OF APPEALS, CORPUS CHRISTI
APPELLATE CAUSE NO. 13-16-00638-CR

BRIEF FOR APPELLANT

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TRIAL JUDGE:	Hon. Jack Marr, Judge Presiding 24th District Court 115 N. Bridge Street Victoria, Texas 77901

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STATEMENT OF THE CASE

This is an appeal from a criminal proceeding. Joseph Andrew Diruzzo was indicted by a Victoria County grand jury for sixteen (16) counts of *Illegal Practicing of Medicine*, alleged to be a 3rd Degree felony[1]. The amended indictment (found at CR 233) alleges that on sixteen different dates, Joseph Andrew Diruzzo a/k/a Joe DeLarosa d/b/a Society for the Study of Cell and Molecular Biology (SSCMB) did then and there intentionally or knowingly practice medicine in this state of Texas in violation of Occupation Code Title 3 "Health Professionals", Subtitle B "Physicians" by providing treatment including withdrawal of blood and fluids and injections purported to be "stem cells" in treatment of Nelson Jannsen and Estelle L. Jannsen while not holding a license to practice medicine. The indictment included no allegation of harm caused by Diruzzo's conduct. (CR 233).

On April 28, 2016, Diruzzo filed a motion to quash the indictment alleging that the district court lacked subject matter jurisdiction because Diruzzo's conduct, at best, was a misdemeanor. (CR 274). On May 11, 2016, the trial court heard oral arguments on the motion (3 RR 5 *et. seq.*), which it denied by written order on May 17, 2016. (CR 285). The jury found Diruzzo guilty as charged on all sixteen

[1] The record on appeal contains the Clerk's record (which is one volume) and volumes 1 – 10 of the Reporter's Record (Volume 10 is the Exhibit volume). When DiRuzzo refers to "1 RR," he is referring to volume 1 of the Reporter's Record. When he refers to "CR," he is referring to the Clerk's record.

counts on November 3, 2016 (7 RR 202 - 206). On November 4, 2016, the jury sentenced Appellant to four years confinement. (8 RR 196 *et seq*.).

A hearing was held on Diruzzo's motion for new trial on January 13, 2017 (9 RR). At the conclusion of the hearing, the trial court denied the motion for new trial (CR 552, 9 RR 26). The trial court certified Diruzzo's right to appeal (CR 358). Notice of appeal was timely filed on November 22, 2016 (CR 460). On April 26, 2018, the Thirteenth Court of Appeals modified and affirmed the judgment of the trial court. On September 26, 2018, this honorable court granted Diruzzo's Petition for Discretionary Review. Therefore, the court has jurisdiction to consider this appeal.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 39.1 and 39.2, Appellant does not request oral argument before the Texas Court of Criminal Appeals. Although this is a meritorious appeal of a criminal case, Appellant believes that the facts and legal arguments are adequately presented in this Brief and in the record on appeal. Appellant also believes that the decisional process of the Texas Court of Criminal Appeals will not be significantly aided by oral argument. Therefore, Appellant does not request oral argument and asks that the issues presented in this Brief be considered by the Texas Court of Criminal Appeals by submission only.

ISSUES PRESENTED

Point of Error No. One - When a statute, Section 165.152 of the Texas Occupations Code, generally proscribes conduct that is also proscribed by a more specific statute, Section 165.153 providing for a lesser range of punishment, is it a violation of due process and due course of law to punish the offender in accordance with the broader statute calling for a greater range of punishment?

Point of Error No. Two - Is it proper for a Court to construe a statute, Section 165.153 of the Texas Occupations Code, in a manner that renders the entire statute superfluous?

STATEMENT OF FACTS

Nelson Janssen, one of two alleged victims in this case, was married to Estelle Janssen, the other alleged victim, who died from cancer on May 23, 2016 (5 RR 65). The Janssens came to know Joe Diruzzo through a friend who encouraged them to seek help from Diruzzo (5 RR 66 – 67) after noticing that Janssen's ankles and feet had become dark because of diabetes (5 RR 67). Janssen is a diabetic and has cellulitis (5 RR 67).

Janssen met Diruzzo at a meeting in Victoria, Texas (5 RR 67 – 68). Diruzzo and his pilot came once a week, usually on a Wednesday, from 6:30 to 9:30 to Victoria, Texas (5 RR 168) to meet with members of the Society, draw their blood and, at times, inject them with stem cells derived from their own blood.

In order to have the stem cell procedure, Janssen had to sign a contract (5 RR 69). He joined the Society for the Study of Cellular and Molecular Biology (5 RR 70) and the cost of membership was $10 (5 RR 71). State's Exhibit #1, an exemplar contract for the Society for the Study of Cellular and Molecular Biology, was admitted into evidence (5 RR 70) and was referenced numerous times during the trial.

At trial, Janssen reviewed the SSCMB lab fee schedule with the prosecutor and said that it cost $1,500 to have his blood drawn, processed and brought back (5 RR 71). He testified that he would have stem cells from his blood injected back into his body (5 RR 71). Janssen confirmed that Diruzzo never told him that he

was a doctor (5 RR 75), and Janssen did not think Diruzzo was a doctor (5 RR 75). Janssen said that he was supposed to be getting stem cells and that he believed that he was and that it was helping (5 RR 85).

Janssen is a rancher and has been an independent oil and gas operator for about 46 years (5 RR 98). He grosses about $400,000 to $500,000 a year (5 RR 100). He had heart problems in the past (5 RR 101) and diabetes and gout (5 RR 101). He testified that Diruzzo's stem cell treatment added probably five years to his life (5 RR 102). He testified that though his feet had been dark before (because of diabetes), they were almost white now (5 RR 103). He also testified that a lot of people got well and did not come back (5 RR 108). He believed that he was getting better because he felt better every time (5 RR 116).

Robert Seal also received the procedures from Diruzzo (6 RR 220). He said that he read about people that were injected with stem cells and it helped them with their arthritis. (6 RR 228). He testified that what he received from Diruzzo was worth it (6 RR 228).

Hope Dennis, friends of the McMahans for nearly thirty years (6 RR 230), also had Diruzzo's procedures (6 RR 231). She confirmed that Diruzzo did not tell her that he was a doctor, did not tell her that he was a physician, did not tell her that he was providing any kind of treatment and did not tell her that he was making any kind of diagnosis (6 RR 231 – 232).

SUMMARY OF THE ARGUMENT

The Court of Appeals found no conflict between Section 165.152 and any other part of the Act. The Court acknowledged that Section 165.153 addresses behavior (practicing medicine without a license) which is encompassed by Section 165.152. Further, the Court acknowledged that Section 165.153 actually reduces the grade of offense to a state jail felony if financial harm is shown. Nonetheless, the Court determined that there is no conflict between the statutes. However, in the case in which a special statute provides for a lesser range of punishment than the general, an obvious 'irreconcilable conflict' exists and due process and due course of law dictate that an accused be prosecuted under the special provision, in keeping with the presumed legislative intent.

The Court of Appeals misconstrued the statutory scheme in question. First, the Court determined that the plain meaning of the statutory scheme does not lead to an absurd result even though the Court acknowledges that its construction renders Section 165.153 superfluous. Finally, and most notably, the Court recognized that no authority exists to support the State's proposition that the Legislature "implicitly repealed" Section 165.153, which, explicitly, is left intact. However, the Court concluded, nonetheless, that the Legislature intended to render Section 165.153 superfluous. A plain reading of the statutory scheme, which gives effect to every word, phrase or clause used the by the Legislature would be to

conclude that Section 165.152 applies to licensed physicians while Sections 165.151 and 165.153 governs the unlicensed practice of medicine.

ARGUMENT AND AUTHORITIES

I. Standard of Review

This honorable court must review the issues presented *de novo*. A trial court's denial of a motion to quash an indictment based on statutory interpretation is a question of law. *Lawrence v. State*, 240 S.W.3d 912, 915 (Tex.Crim.App. 2007), *cert. denied*, 553 U.S. 1007 (2008). Decisions involving questions of law do not involve the credibility or demeanor of witnesses; therefore, the trial court is in no better position to resolve them. *State v. Moff,* 154 S.W.3d 599, 601 (Tex.Crim.App. 2004). When the trial court is no better position to resolve issues presented for appeal, the appellate court gives no deference to the trial court and reviews the questions presented for appeal *de novo*. Id. Before trial, Appellant filed a motion to quash raising, and preserving for appeal, the issues raised before this court; namely, that the district court lacked subject matter jurisdiction since the indictment alleged a misdemeanor. (CR 274, 295), (3 RR 19). Since the trial court denied Appellant's motion to quash, this court must review the issues presented *de novo*. *State v. Moff,* 154 S.W.3d at 601.

<u>Point of Error No. One</u> - The trial court erred and violated Appellant's right to due process and due course of law by punishing Appellate according to Section 165.152 of the Texas Occupations Code, which generally proscribes conduct that is also proscribed by a more specific statute, Section 165.153 of the Texas Occupations Code, which provides for a lesser range of punishment.

II. The Court of Appeals found no conflict in the statutory scheme.

The applicable statutes construed by the trial court and upheld by the Court of Appeals follow:

> TEX. OCC. CODE § 155.001. *License Required.*
>
> A person may not practice medicine in this state unless the person holds a license issued under this subtitle.

> TEX. OCC. CODE § 165.151. *General Criminal Penalty.*
>
> (a) A person commits an offense if the person practices medicine this state in violation of this subtitle or a rule of the board.
> (b) If another penalty is not specified for the offense, an offense under this section is a Class A misdemeanor.

> TEX. OCC. CODE § 165.152. *Practicing Medicine in Violation of Subtitle.*
>
> (a) A person commits an offense if the person practices medicine in this state in violation of this subtitle.
> (b) Each day a violation continues constitutes a separate offense.
> (c) An offense under Subsection (a) is a felony of the third degree.
> (d) On final conviction of an offense under this section, a person forfeits all rights and privileges conferred by virtue of a license issued under this subtitle.

> TEX. OCC. CODE § 165.153. *Criminal Penalties for Additional Harm.*
>
> (a) A person commits an offense if the person practices medicine without a license or permit and causes another person:
> (1) physical or psychological harm; or
> (2) financial harm.
> (b) An offense under Subsection (a)(1) is a felony of the third degree.

(c) An offense under Subsection (b)(1) is a state jail felony.

The Court of Appeals concluded that Section 165.152(a) contemplates both licensed and non-licensed offenders. *Diruzzo v. State*, 549 S.W.3d 301, 307-08 (Tex.App. – Corpus Christi, 2016). Further, the Court acknowledged that Section 165.153 specifically contemplates only non-licensed offenders. Id at 308. However, the Court upheld Appellant's third-degree felony convictions in the absence of any showing of harm because, according to the Court, there is no conflict between the statutes. Id at 309.

III. The relevant statutes irreconcilably conflict.

The construction applied by the Court of Appeals violates Appellants right to due process and due course of law. In *Azeez v. State*, 248 S.W.3d 182, 191 (Tex.Crim.App. 2008), this Court determined that "a defendant has a due process right to be prosecuted under a 'special' statute that is *in pari materia*, with a broader statute when then statutes irreconcilably conflict." Id. Further, this court concluded, "In the case in which the special statute provides for a lesser range of punishment than the general, obviously an 'irreconcilable conflict' exists and due process and due course of law dictate that an accused be prosecuted under the special provision, in keeping with the presumed legislative intent." Id. The Court of Appeals engaged in no analysis of the *in paria materia* doctrine because the Court simply found no conflict. *Diruzzo v. State*, 549 S.W.3d at 308.

Section 165.153 is a special statute. The Court of Appeals acknowledges, "Under this construction, there is no conceivable scenario under which the State would choose to charge a person under section 165.153, since that section addresses behavior (practicing medicine without a license) which is encompassed by section 165.152." Id at 309. Oddly, in footnote 2, the Court urges the Legislature to revise these statutes to avoid further confusion. Id. However, the Court of Appeals failed to consider the fact that section 165.153 "has more narrowly hewn an offense, complete in itself, to specifically proscribe" the conduct "which could otherwise meet every element of, and hence be punishable under" section 165.152. *See Azeez v. State*, 248 S.W.3d at 191.

Sections 165.151 and 165.152 address the practice of medicine in violation of the Medical Practices Act. *See* TEX. GOV'T CODE §§ 165.151, 152. Under section 165.151(b), the offense is a misdemeanor unless more specifically defined elsewhere. Section 165.152(c) specifically provides for a third-degree felony. Among the three relevant statutes, Section 165.153 is the only one to specifically refer to practicing medicine without a license. *See* TEX. GOV'T CODE § 165.153. The statutes are in irreconcilable conflict because sections 165.151 and 165.153 provide for a lesser range of punishment upon a showing of financial harm than section 165.152. *See* TEX. GOV'T CODE §§§ 165.151(b), 165.153(c) and 165.152(c). Therefore, due process and due course of law dictate the prosecution of

Diruzzo under the special statute, Section 165.151 and 165.153. *See Azeez v. State*, 248 S.W.3d at 191. The trial court violated Appellant's constitutional right to due process and due course of law by rendering a judgment which punished Diruzzo under the more severe statute. Id. The construction applied by the Court of Appeals in upholding the trial court's judgment violates due process and due course of law. Id.

Point of Error No. Two - The trial court erred and abused its discretion by interpreting the statutory scheme of Sections 165.151, 165.152 and 165.153 of the Texas Occupations Code without regard to the *in pari materia* doctrine and Section 311.026 rendering Section 165.153 superfluous

The Court of Appeal's construction contradicts well-established rules of statutory construction. The Court cited *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 389 (Tex. 2014) for the proposition that the court must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous. *Diruzzo v. State*, 549 S.W.3d at 306. Further, the Court acknowledged its awareness of no authority to support the State's argument that the Legislature "implicitly repealed" section 165.153 by its 2003 amendment to section 165.152. Id at 309. Nonetheless, the Court validated, without authority, the repeal of section 165.153 by assuming that the Legislature intended to render section 165.153 superfluous.

The legislative history of the statutory scheme supports Appellant's position. The Court of Appeals' opinion in the case states:

> "At the time of original enactment, the logic of the statutory scheme was clear – the basic offense was described in section 165.152, and section 165.153 specifically contemplated the practice of medicine without a license, there was no reason at that time to believe that the former version of section 165.152 applied only to licensed physicians. In 2003, the Legislature amended section 165.152 to make the basic offense a third-degree felony. (citations omitted). We cannot explain why the Legislature did not concurrently repeal section 165.153 or amend it to provide for increased penalties in harm cases – but we cannot conclude that, by declining to do so, the Legislature intended to create a new restriction limiting the applicability of 165.152 only to licensed physicians." Id at 308.

Prior to 2003, section 165.152 clearly applied to both licensed and non-licensed practitioners. Id. However, the Court neglected to discuss the fact that in 2003 the Legislature not only made a conviction under section 165.152 a third-degree felony, it simultaneously repealed the recidivist enhancement under that section. *See* Act of June 10, 2003, 78th Leg., R.S. ch. 202, § 37, 2003 TEX. SESS. LAW. SERV. ch. 202 (S.B. 104), *see also Diruzzo v. State*, 549 S.W.3d at 305-09. In other words, prior to 2003, a non-licensed offender would face a felony enhancement by either causing harm under section 165.153 or committing repeat offenses under section 165.152, where only a licensed recidivist would face felony enhancement. *See* Id. However, that entire statutory scheme changed in 2003 when the Legislature repealed the recidivist enhancement in section 165.152 and provided for a non-enhanced third-degree felony conviction under that statute while leaving

the enhancement provision for the practice of medicine without a license intact via section 165.153. *See* Act of June 10, 2003, 78th Leg., R.S. ch. 202, § 37, 2003 TEX. SESS. LAW. SERV. ch. 202 (S.B. 104).

The Court needs no explanation for why the Legislature did not repeal section 165.153. The explanation for the Legislature's action lies in Section 311.026 of the Texas Government Code[2] and caselaw. The purpose of the *in pari materia* doctrine is to carry out the full legislative intent, by giving effect to all laws and provisions bearing on the same subject proceeding on the supposition that several statutes relating to one subject are governed by one spirit and policy and are intended to be consistent and harmonious in their several parts and provisions. *See Azeez v. State*, 248 S.W.3d at 192. Rather than implicitly repeal section 165.153, the Legislature removed the only enhancement provision of former section 165.152 and retained section 165.153 to be construed in harmony consistently with Section 311.026 of the Texas Government Code and the *in pari materia* doctrine. *See* Act of June 10, 2003, 78th Leg., R.S. ch. 202, § 37, 2003 TEX. SESS. LAW. SERV. ch. 202 (S.B. 104).

[2] Section 311.026 codified the *in pari materia* doctrine. *See Azeez v. State*, 248 S.W.3d at 192. It states: (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both. (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local 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. *See* TEX. GOV'T CODE § 311.026. The Court of Appeals avoided any entanglement with determining whether, or not, the manifest intent of the legislature by amending Section 165.152 while leaving Section 165.153 intact, was to render the practice of medicine without a license in the absence of any showing of harm a third-degree felony. Instead, the Court simply found no conflict between the statutes.

The opinion of the Court of Appeals contradicts this Court's *Arteaga* opinion. In *Arteaga v. State*, 511 S.W.3d 675, 695 (Tex.App. – Corpus Christi, 2015), Justice Perkes dissented and pointed out, in construing Section 22.011(f) of the Texas Penal Code, "The majority's construction of section 22.011(f) renders two of the three prohibitions without any clear definition." Id. Citing *Ludwig v. State*, 931 S.W.2d 239, 242 n.9 (Tex.Crim.App. 1996) and *Cook v. State*, 902 S.W.2d 471, 478 (Tex.Crim.App. 1995), he then proclaimed, "We are to avoid a construction of a statute that would render a provision, meaningless, nugatory or mere surplusage."

This Court agreed with Justice Perkes. In *Arteaga v. State*, 521 S.W.3d 329, 336 (Tex.Crim.App. 2017), this Court reversed the Thirteenth Court of Appeals and essentially adopted the construction of Justice Perkes. In explaining its holding, the Court stated, "This interpretation gives effect to each word, phrase, and clause used by the legislature and comports with the rules of grammar." Id at 337. Once again, the Thirteenth Court of Appeals construed a statute in a manner that does not give effect to each word, phrase and clause used by the Legislature in direct contrast to this Court's opinion in *Arteaga. Diruzzo v. State*, 549 S.W.3d at 305-09.

Each and every word of every relevant statute in the case can be read harmoniously. Under section 165.151, practicing medicine without a license

remains a Class A misdemeanor unless the state pleads and proves harm under section 165.153. A licensed physician, whether a repeat offender, or not, that violates the Medical Practices Act faces a third-degree felony conviction and will forfeit all rights and privileges conferred by virtue of a license under section 165.152. This construction is consistent with section 311.026 of the Texas Government Code, the *in pari materia* caselaw, and most importantly preserves and protects Appellant's precious right to due process and due course of law by giving effect to each word, phrase and clause used by the Legislature. *See Azeez v. State*, 248 S.W.3d at 192; *see also Arteaga v. State*, 521 S.W.3d at 336-337.

IV. Harm Analysis.

The trial court and Court of Appeal's error require reversal. When error involves a violation of the federal constitution not amounting to a structural defect, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt. TEX. R. APP. PROC. 44.2(a); *Jimenez v. State*, 32 S.W.3d 233 (Tex.Crim.App. 2000). However, in *Azeez*, this Court determined that the court of appeals erred in allowing the appellant to be punished more severely than he could have been under the special statute. *Azeez v. State*, 248 S.W.3d at 194. This Court determined that such an error is a defect in the judgment that can be raised at any time on appeal, including for the first time on appeal. Id. Without engaging in any analysis of harmless error or mentioning Texas Rule of Appellate Procedure 44.2(a), the court reversed the judgment of the court of appeals and remanded to

the trial court. Since the Court of Appeals allowed Diruzzo to be punished according to section 165.152 rather than section 165.151 or 165.153, the judgment convicting Diruzzo is structurally defective; therefore, the court must reverse the judgment and remand to the trial court for a new trial.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that upon appellate review, the Texas Court of Criminal Appeals reverse the judgment of conviction and sentence and enter a judgment of acquittal. In the alternative, Appellant prays the Texas Court of Criminal Appeals reverse the judgment of conviction and sentence and remand this case back to the trial court for a new trial.

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CERTIFICATE OF COMPLIANCE

Relying on the word count function in the word processing software used to produce this document, I certify that the number of words in this Brief (excluding any caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix) is 2,322.

Steven Lafuente, Esq.

CERTIFICATE OF SERVICE

I, Steven Lafuente, counsel for appellant, do hereby certify that a true and correct copy of the foregoing document was delivered to counsel for the State, Stephen Tyler, Victoria County District Attorney, and Brendan Guy, Assistant District Attorney at 205 N. Bridge St., Ste 301, Victoria, Texas 77901, on this the 26th day of October, 2018 in accordance with the Rules of Appellate Procedure.

Steven Lafuente, Esq.