

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00399-CR

The State of Texas, Appellant

v.

Edmund Koko Kahookele, Appellee

**FROM THE 207TH DISTRICT COURT OF COMAL COUNTY
NO. CR2017–356, THE HONORABLE GARY L. STEEL, JUDGE PRESIDING**

OPINION DISSENTING IN PART

I cannot join the majority’s opinion because I disagree that an aggravated state jail felony enhanced under Texas Penal Code section 12.35(c) can be further enhanced to a 25-year minimum punishment under Texas Penal Code section 12.42(d).

Before September 1, 2011, Texas Penal Code section 12.42 governed enhancements for both state jail and regular felonies. The 82nd Legislature changed that. It removed from Section 12.42 the provisions related to enhancements for state jail felonies (former Subsections (a)(1)–(3)) and placed all those provisions, nearly verbatim, into newly enacted Section 12.425. *See* Act of May 25, 2011, 82nd Leg., R.S., ch. 834, §§ 1, 2, 5, 2011 Tex. Gen. Laws 2104, 2104–05. We must interpret statutory language according to its surrounding statutory context (even before reaching any extra-textual factors). *Baird v. State*, 398 S.W.3d 220, 228–29 (Tex. Crim. App. 2013). The context of the 82nd Legislature’s changes confirms that we should look to Section 12.425—and no longer to Section 12.42—for enhancements for state jail felonies, including

aggravated ones. *See* Tex. Penal Code § 12.425(c) (concerning state jail felonies “for which punishment may be enhanced under Section 12.35(c)”).

The 82nd Legislature’s changes to Sections 12.42’s and 12.425’s headings bolsters what the statutory context already confirms. It changed Section 12.42’s heading by adding: “Penalties for Repeat and Habitual Felony Offenders *on Trial for First, Second, or Third Degree Felony*” and called new Section 12.425 “Penalties for Repeat and Habitual Felony Offenders *on Trial for State Jail Felony*.” Act of May 25, 2011, 82nd Leg., R.S., ch. 834, §§ 1, 2, 5, 2011 Tex. Gen. Laws 2104, 2104–05 (emphases added).

Why would the Legislature create new Section 12.425 for enhancements for state jail felonies; expressly transfer the enhancements for repeat and habitual state jail offenders to the new statute, including those “for which punishment may be enhanced under Section 12.35(c)”; but silently retain in Section 12.42(d) an enhancement for habitual state jail felonies punishable under Section 12.35(c)? *Cf. Henderson v. State*, 582 S.W.3d 349, 350 & nn.2–3, 355 (Tex. App.—Amarillo 2018, pet. ref’d) (looking to Section 12.425, and not Section 12.42(d), to enhancement of state jail felony that was otherwise enhanced under Section 12.35(c)). A prominent commentator similarly expresses uncertainty about this situation. *See* George McCall Secrest, Jr., *O’Connor’s Texas Criminal Codes Plus* 895 n.* (2018–2019 ed.). The Texas Court of Criminal Appeals has not directly addressed this issue. But it has noted, in a different context, that “Section 12.42 does not speak to the enhancement of state-jail felons at all.” *Crawford v. State*, 509 S.W.3d 359, 364 n.9 (Tex. Crim. App. 2017).

To support its conclusion about Section 12.42(d)’s silent retention of enhancements for aggravated state jail felonies, the majority relies on *Washington v. State*, 326 S.W.3d 302 (Tex. App.—Fort Worth 2010, pet. ref’d); *Bunton v. State*, 136 S.W.3d 355 (Tex. App.—Austin 2004,

pet. ref'd); and *Smith v. State*, 960 S.W.2d 372 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd). But each of those cases predated the 82nd Legislature's creation of Section 12.425 and related changes to Section 12.42. And to the extent that the majority also relies on *Terrell v. State*, No. 01-14-00746-CR, 2016 WL 4374959 (Tex. App.—Houston [1st Dist.] Aug. 16, 2016, no pet.) (mem. op., not designated for publication), that opinion is unpublished and “ha[s] no precedential value.” Tex. R. App. P. 47.7(a).

The majority's result is that an alleged possessor of less than a gram of methamphetamine, who even with Section 12.35(c) and Section 12.425(c) enhancements would face a maximum punishment of 20 years, now faces 25 years minimum based on three prior offenses that occurred over 20 years ago. Absent clear direction from the Texas Court of Criminal Appeals that Section 12.42(d) still silently governs aggravated state jail felonies, I am unwilling to join the majority's opinion and judgment. I would affirm the trial court's order insofar as it quashed the request for a habitual enhancement under Section 12.42(d). Because the majority does not do so, I respectfully dissent.

Chari L. Kelly, Justice

Before Chief Justice Rose, Justices Triana and Kelly

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