



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-15-00342-CV

CITY OF KRUM, TEXAS

APPELLANT

V.

TAYLOR RICE

APPELLEE

FROM THE 367TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 15-02186-367

DISSENTING OPINION

Appellee Taylor Rice attacks an ordinance that the parties agree is a criminal ordinance proscribing the parameters of where he wanted to live, that is, with his parents, when the same proscription was part of his probationary conditions. Even if Rice prevailed on his attack on the ordinance, he would still be precluded from living in his parents' house because of the restrictions in his probation received after pleading guilty to the criminal offense of sexual assault of a child. Because the issue of whether he can legally reside with his parents is

moot, further review of this case is a fruitless endeavor and a total waste of judicial resources.

In context, Rice challenges the constitutionality of Appellant City of Krum, Texas's Sex Offender Registration Restrictive Ordinance (SORRO). This ordinance¹ was passed by the City of Krum on January 23, 2012, and provides in part that it is “unlawful for a sex offender to establish a permanent residence or a temporary residence within 2000 feet of any premises where children commonly gather.” Any person violating a provision of this section² shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine not to exceed \$500.

The record shows and the parties do not dispute that pursuant to a plea bargain, Rice pleaded guilty to sexual assault of a child, adjudication was deferred, and he was placed on ten years' probation on October 24, 2014. The terms of his probation contain the following restriction: “Do not go in, on, or within 1,000 feet of a premise[s] where children commonly gather.” Rice was required to register as a sex offender.³

¹Krum, Tex., Ordinance 2012-01-01 (Jan. 23, 2012) (amending chapter 8 of Krum's Code of Ordinances to add the SORRO, codified at Krum, Tex., Code of Ordinances ch. 8, art. 8.05 (2016)).

²*Id.* § 8.05.003(b).

³Rice acknowledges he was placed on probation as an “undisputed” fact.

According to his petition,⁴ the core of Rice's complaint arises from his lifelong residence with his parents, whose house is located only seventy-seven feet from a public park frequented by children. Rice alleged his fervent desire to return and live at his parents' house in Krum or establish his residence at another location in Krum prohibited by the SORRO; however, he cannot because of fear of criminal prosecution due to the SORRO's prohibition.

Thus, Rice's parents' house was within the area subject to prohibitions contained in both the city's ordinance (2,000 feet) and Rice's probationary conditions (1,000 feet).

Krum responded in its Amended Answer and Plea to the Jurisdiction that Rice lacked standing, had unclean hands, and Rice's claims were moot. In part, Krum stated in its Plea that:

Even if this Ordinance was struck down as requested by Plaintiff, he still could not live in his home on 137 W. Sixth Street without constantly being in violation of his probation terms. In that his Plea Bargain and sentence in his Second Degree felony case was for Deferred Adjudication, any violation of the Terms and Conditions of his Community Supervision could result in a prison sentence of 2–20 years and a \$10,000.00 fine.

⁴Rice's petition alleges that "[t]he Plaintiff [Appellee] is 22 years old, and has resided since his birth with his parents at 137 W. 6th Street in the City of Krum." The parties agree that this residential address is located within seventy-seven feet of the Krum Municipal Park where children commonly gather. The petition alleges Rice was forced to vacate the residence in Krum because of the threat of criminal prosecution under the void ordinance. Rice desires to return to his parents' residence or establish a residence at another location within Krum prohibited by the SORRO, but he is unable to do so because of fear of criminal prosecution under the SORRO. According to his Petition, Rice did not live within Krum when the petition was filed. Based on these factual allegations, the petition alleges that Krum's ordinance is void and unconstitutional, in violation of article XI, section 4 of the Texas Constitution, and seeks to enjoin its enforcement.

Rice responded by repeating his allegations in his petition, that Rice had a fervent desire to return and live at his parents' house in Krum or establish his residence at another location in Krum prohibited by the SORRO, and, therefore, the issue was not moot.

On appeal, Krum continued to argue that regardless of the SORRO and its application, Rice could not live at his parents' house because of the restrictions in his probationary terms.

On appeal, Rice argued that the Original Petition alleged he wanted to return to his parents' house and "his continuing desire to 'establish his residence at another location within the City of Krum prohibited by Defendant's SORRO' *which is not prohibited by the condition of his community supervision.*" (emphasis added). However, Rice's position, emphasized by the italicized phrase, is woefully disingenuous because this phrase does not appear in the petition. Rice never referred to the conditions of his community supervision in his petition. The petition only alleged in vague terms a general desire to continue to search for a location elsewhere which would be somewhere within the SORRO's restrictions. Rice, therefore, misrepresented his position in his brief before this court and has misled the majority.

Rice also responded on appeal that his probationary conditions could be modified by the District Court and that eventually the SORRO restrictions would outlast the term of the probationary conditions. Rice's arguments, based on pure speculation and cast in uncertain terms, have no merit.

The record shows the issue of mootness was raised and argued in the trial court. The record also shows Rice never attempted to amend his petition to assert residency beyond the 1,000-foot limit but within the 2,000-foot limit in order to avoid the prohibitions of his probationary conditions.

Krum's mootness argument stands independently on its own merits. It does not turn on the resolution of the SORRO's validity or whether the SORRO is a criminal or civil law. Thus, Krum's argument remains viable regardless of the resolution of Rice's constitutional attack upon the SORRO. Krum clearly asserts that whatever the outcome of Rice's constitutional challenge to the SORRO, Rice is still bound by his probationary conditions and is prohibited from living within 1,000 feet of the park commonly frequented by children, an area including his parents' house.

Krum's argument that the case is moot should prevail in view of the terms and conditions of Rice's probation. This jurisdictional argument should be addressed.⁵

In *Heckman v. Williamson County*,⁶ the court addressed mootness, stating in part that if a justiciable controversy does not exist between the parties, that is, if the issues presented are no longer "live," a court may not decide the case.

⁵*Meeker v. Tarrant Cty. Coll. Dist.*, 317 S.W.3d 754, 758–59 (Tex. App.—Fort Worth 2010, pet. denied).

⁶369 S.W.3d 137, 162 (Tex. 2012).

In *In re Estate of Hemsley*,⁷ the court stated an appellate court may not decide a moot controversy, a prohibition rooted in the separation of powers doctrine in the Texas and United States Constitutions that prohibits courts from rendering advisory opinions. An issue becomes moot when one seeks a judgment on some matter which, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy.

Thus, if a case is moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.⁸

CONCLUSION

The court should vacate the order denying the defendant's Plea to the Jurisdiction and dismiss the case for want of jurisdiction. I respectfully dissent.

/s/ Kerry FitzGerald
KERRY FITZGERALD
JUSTICE

DELIVERED: December 15, 2016

⁷460 S.W.3d 629, 638 (Tex. App.—El Paso 2014, pet. denied); see also *City of Dallas v. Woodfield*, 305 S.W.3d 412, 416 (Tex. App.—Dallas 2010).

⁸*Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 228 (Tex. 1993) (holding that if a case is moot, the appellate court is required to vacate any judgment or order in the trial court and dismiss the case); *Blackwood v. Bunton*, No. 02-12-325-CV, 2013 WL 5498186, at *1 (Tex. App.—Fort Worth Oct. 3, 2013, no pet.) (mem. op.).