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CRIMINAL LAW UPDATE

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Criminal Law Update
TABLE OF CONTENTS

United States Supreme Court Cases
TABLE OF CONTENTS

ACCOMPLICE LAW

Smith v. State, 332 S.W.3d 425 (Tex. Crim. App. 2011)

The defendant was convicted of capital murder, partly due to the testimony of her ex-husband. The defendant unsuccessfully requested a jury instruction that the ex-husband was an accomplice to the crime as a matter of law, since his charges were dismissed in exchange for the testimony against defendant. Defendant also argued that the non-accomplice evidence was insufficient to corroborate the accomplice testimony at trial.

The Court ruled that, due to conflicting evidence, the trial court had the discretion to decide whether the ex-husband should be deemed an accomplice as a matter of law. Consequently, the trial court committed no error in rejecting the jury instruction that the ex-husband was an accomplice. Furthermore, the Court held that there was sufficient other evidence to corroborate the ex-husband's testimony as an accomplice witness. This evidence included the defendant's motives, opportunity, presence at the crime scene, and her demeanor before and after the crime.

ACTUAL INNOCENCE

Ex parte Robbins, 2011 WL 2555665 (Tex. Crim. App. 2011)

Medical examiner's trial testimony that 17-month-old child of defendant's girlfriend died from asphyxia due to the compression of her chest and abdomen was not false and did not create a false impression just because examiner's re-evaluation of the evidence resulted in a different opinion, that the cause and manner of child's death were undetermined, and thus the state did not use false evidence to obtain defendant's capital murder conviction, and defendant did not have a due process right to have a jury hear medical examiner's re-evaluation, where neither medical examiner nor any other medical expert could exclude her original opinion as the possible cause and manner of child's death.

Ex parte Spencer, 337 S.W.3d 869 (Tex. Crim. App. 2011)

Applicant filed an application for writ of habeas corpus claiming that he is innocent, that trial counsel rendered ineffective assistance, and that the state violated *Brady v. Maryland*, 373 U.S. 83 (1963), and *Mooney v. Holohan*, 294 U.S. 103 (1935).

Court of Criminal Appeals ordered the parties to brief whether applicant properly raised a free-standing actual innocence claim, whether the evidence he relies on is newly discovered or newly available, whether Court of Criminal Appeals should consider advances in science and technology when determining whether evidence is newly discovered. Question was whether new expert testimony concerning the ability of the witnesses to identify defendant established actual innocence.

The evidence at issue is whether certain eyewitnesses could have facially identified the applicant under various light conditions, as determined by expert witness testimony. Court of Criminal Appeals concludes that, even if the evidence was reviewed as new, it does not unquestionably establish applicant's innocence and fails to meet the threshold elucidated in *Ex parte Franklin*, 72 S.W.3d 671 (Tex. Crim. App. 2002).

State v. Wilson, 324 S.W.3d 595 (Tex. Crim. App. 2010)

One of the convictions that was used to enhance the defendant's misdemeanor DWI to a felony DWI was not final and could not be used. The court found that, under these circumstances, the defendant was "actually innocent" of felony DWI. Actual Innocence jurisprudence includes an individual "not guilty of the charged offense" and "ineligible for the punishment assessed."

BACK TIME CREDIT

Ex parte Thiles, 333 S.W.3d 148 (Tex. Crim. App. 2011)

Applicant, who was legitimately released on appeal bond during pendency of review by Court of Criminal Appeals of judgment of court of appeals reversing his conviction, but who was unaware that his conviction was affirmed on remand to court of appeals, was entitled to day for day credit against his sentence, for time he was erroneously allowed to remain at large.

BATSON

Grant v. State, 325 S.W.3d 655 (Tex. Crim. App. 2010)

The question raised was whether the prosecutor's failure to further question a prospective juror whose wife may have had a relationship with the defendant's wife was sufficient to support a conclusion that the prosecutor's strike of that juror was based on racial reasons and impermissible under *Batson*. While the lack of meaningful questioning may be sufficient to support a *Batson* challenge, it is not under the facts of this case since the record showed a valid, non-racial reason for the strike.

COMMUNITY SUPERVISION

State v. Posey, 330 S.W.3d 311 (Tex. Crim. App. 2011)

The defendant was convicted on two counts of criminally negligent homicide. In addition, the jury found that the defendant's automobile was used as a deadly weapon, making the offense a § 3(g) offense. The jury sentenced the defendant to two years' imprisonment but recommended probation. The defendant subsequently violated his probation and pleaded true to the allegations. The trial court sentenced the defendant to 22 months imprisonment for the violations but suggested to defense counsel that he file a motion for shock probation after 75 days.

Defense counsel did file for, and the trial court granted, community supervision for the defendant. The State appealed, arguing that since the court did not have authority to grant judge-ordered supervision community supervision due to the jury's deadly weapon finding at trial. The Court agreed with the State, ruling that a trial court cannot place a defendant on shock probation unless the defendant was eligible for judge-ordered community supervision at trial.

CONFRONTATION CLAUSE

Woodall v. State, 336 S.W.3d 634 (Tex. Crim. App. 2011)

During the defendant's trial for engaging in organized criminal activity, the defendant called a witness who had testified to the grand jury. Since her grand jury testimony, the witness had suffered memory loss in a car accident, and at trial she testified that she no longer remembered anything relevant to her statements before the grand jury. (These statements had been harmful to the defendant.)

The witness was kept under subpoena, and the State recalled her the day after her testimony. However, the witness had not come to court that day. The State requested to read from her grand jury testimony, and defense counsel objected that this would violate the defendant's right to confrontation and cross-examination. In response, the trial court offered to require the witness's presence through a writ of attachment, but defense counsel declined the offer. Subsequently, the trial court allowed the State to read portions of the witness's grand jury testimony to the jury.

On appeal, the defendant argued that her right to confrontation had been violated, given the witness's loss of memory since her grand jury testimony. The Court held that the right to confrontation remains unviolated so long as the witness is present and testifies. The memory loss, therefore, had no bearing on the question. In addition, the defendant waived her right to appeal on the confrontation clause ground when she declined the trial court's offer for a writ of attachment on the witness.

CRIMINAL STATUTES

Ex parte Chamberlain, 335 S.W.3d 198 (Tex. Crim. App. 2011)

Does lifetime sex offender registration requirement violate substantive due process rights. Before the case was submitted to the Court of Criminal appeals, but after it granted review, the Counsel on Sex Offender Treatment published a list that makes clear that individuals convicted of sexual assault are not eligible for de-registration. The Court of Appeals did not have benefit of this information when it addressed Chamberlin's claim; thus, the case was remanded for the Court of Appeals to address Chamberlin's claim in light of the fact he can avail himself of the de-registration mechanism.

Ford v. State, 334 S.W.3d 230 (Tex. Crim. App. 2011)

The defendant was convicted of the third degree felony offense of failing to comply with sex-offender registration requirements. The Court of Appeals held that the defendant's prior conviction for the same offense raised the primary offense to a second degree felony. The CCA reversed, holding that, because the language in Article 64.102(c) referred only to punishment, it operated the same way as 12.42(b) by increasing only the punishment level of the primary offense.

Howard v. State, 333 S.W.2d 137 (Tex. Crim. App. 2011)

Conviction for aggravated robbery does not require interaction between the defendant and purported victim. Defendant robbed a store but the clerk was in the back and the defendant did not see him. Nevertheless, the court finds the evidence sufficient for conviction.

Shipp v. State, 331 S.W.3d 433 (Tex. Crim. App. 2011)

Store receipt was a commercial instrument under the Texas forgery statute.

DEATH PENALTY/FACTUAL DANGEROUSNESS

Coble v. State, 330 S.W.3d 253 (Tex. Crim. App. 2010)

Forensic psychiatrist's testimony concerning defendant's future dangerousness, offered by state at capital sentencing retrial, did not satisfy the reliability requirement for expert testimony; psychiatrist knew of no book or article that discussed the factors he relied on or their overlap, he was not aware of any studies in psychiatric journals regarding the accuracy of long-term predictions into future violence in capital murder prosecutions or of any error rates concerning such predictions, he was not aware of any psychiatric studies which supported the making of such predictions, he had never gone back and obtained records to try to check the accuracy of the future dangerousness predictions he had made in the past, and he could not tell what his accuracy rate was.

Davis v. State, 329 S.W.3d 798 (Tex. Crim. App. 2010)

Court found admissible at the punishment phase of capital murder trial that the defendant

identified himself as a member of a satanic religion that was known to advocate violence, including human sacrifice. This was relevant on future dangerousness.

Martinez v. State, 327 S.W.3d 727 (Tex. Crim. App. 2010)

Admission of unavailable witness's testimony from punishment phase of first capital murder trial did not violate Confrontation Clause in punishment phase of second capital murder trial, although jury charge during first trial did not contain a separate mitigation instruction for jury to consider evidence that might have caused it to determine that a life sentence would be a more appropriate sentence than death; purpose of instructions at each punishment phase hearing was the same, as were the parties, issues, and defense counsel's motive to present mitigating evidence.

DEFECTS IN THE CHARGING INSTRUMENT

Cada v. State, 334 S.W.3d 766 (Tex. Crim. App. 2011)

The defendant was convicted of retaliation. The indictment alleged that the defendant had retaliated against a witness, when in fact the complainant could only be classified as a prospective witness or an informant. The retaliation statute provides for alternative elements regarding the status of the complainant. A complainant may be classified as a witness, public servant, prospective witness, or an informant.

The Court made clear that "…if the State pleads one specific element from a penal offense that contains alternatives for that element, the sufficiency of the evidence is measured by the element that was actually pleaded, not any other statutory alternative element." Thus, the reference to the complainant as a "witness" in the indictment rather than a "prospective witness" or "informant" is not an immaterial variance under *Gollihar v. State*, 46 S.W.3d 243 (Tex. Crim. App. 2001). The Court entered an acquittal for the appellant.

State v. Rodriguez, 339 S.W.3d 680 (Tex. Crim. App. 2011)

The defendant was charged by information with recklessly discharging a firearm. The State failed to allege any facts in the information regarding the element of recklessness. The defendant filed motion and received an order to set aside the information. In essence, the indictment stated that the defendant had recklessly discharged a firearm by discharging a firearm.

The Court affirmed the trial court's order, holding that the indictment was defective for failing to allege any facts regarding the essential element of recklessness.

DISCOVERY

In re District Attorney's Office of the 25th Judicial District v. Dittman, 2011 WL 1235027 (Tex. Crim. App. 2011)

Discretion of the trial court in matters of discovery includes the discretion to exercise the statutory authority to order the state before trial of a criminal action therein pending to produce and permit the inspection and copying by or on behalf of the defendant of any designated photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the state or any of its agencies.

DOUBLE JEOPARDY

Ex parte Amador, 326 S.W.3d 202 (Tex. Crim. App. 2010)

Double Jeopardy Clause violated by convicting a defendant of indecency with a child by exposure when the defendant has already been convicted of the lesser offense of indecent exposure when the defendant committed one act - exposing his penis and rubbing it in front of two adults and three children in a public playground.

Ex parte Garza, 337 S.W.3d 903 (Tex. Crim. App. 2011)

After the jury was empaneled and sworn but before trial commenced in this misdemeanor DWI case, one juror became at least temporarily unavailable and the trial was continued for a few days. Ultimately, the trial court declared a mistrial over Appellant's objection. When the case was reset, Appellant filed a pre-trial application for writ of habeas corpus arguing that because a manifest necessity for the mistrial was lacking, his re-prosecution violated double jeopardy. The convicting court denied relief, but the Court of Appeals reversed and remanded. Court of Criminal Appeals granted the State's petition for discretionary review to consider, *inter alia*, whether Court of Appeals erred to hold that the trial court should not have granted the mistrial without first exploring the option of proceeding to with only five jurors, Appellant having expressed at least a tentative willingness to waive his constitutional right to a full complement of six. Court of Criminal Appeals rejects the state's arguments that there was manifest necessity for a mistrial. Under circumstances which Appellant's counsel suggested a willingness to proceed with less than a full jury, the failure of the trial court even to explore that option cannot be attributed to Appellant, whether or not he obtained an express ruling on his suggested alternative or actually executed a formal waiver.

Ex parte Garza, 337 S.W.3d 903 (Tex. Crim. App. 2011)

The defendant was charged with misdemeanor driving while intoxicated. After the jury was sworn in but before the trial commenced, one of the six jurors became ill. The trial court initially postponed the trial but subsequently – over the defendant's objection – declared a mistrial. Once the case was again set for trial, the defendant submitted a pre-trial application for writ of habeas corpus.

The Court held that defendant could not be re-tried without violating the rule of double jeopardy. Typically, the Court said, a trial should move forward if the defendant so chooses, absent a showing of manifest necessity for mistrial by the State. Here, the trial court could have chosen a less drastic alternative to mistrial, such as continuing the case or proceeding with fewer than six jurors of the defendant was willing to waive his right to trial by a full panel.

Jones v. State, 323 S.W.3d 885 (Tex. Crim. App. 2010)

On prosecution for making false statement to obtain property or credit the unit of prosecution is the materially false statement, not the loan application, such that defendant could be prosecuted for six offenses (three false statements on two loan applications) without violating double jeopardy.

State v. Blackshere, 2011 WL 2463153 (Tex. Crim. App. 2011)

The trial court held its decision on defendant's motion to suppress until the end of the State's case in chief. At that time, the court granted the motion and terminated the prosecution but noted that it did not intend to dismiss the case or direct a verdict of acquittal.

The Court determined that the trial judge had effectively acquitted the defendant by deeming the State's remaining evidence legally insufficient to continue. Since jeopardy had attached, the defendant could not be tried again for the same offense. Further, the State could not legally appeal the trial court's decision on the motion to suppress since it was granted after jeopardy had attached.

DWI BLOOD DRAW

State v. Johnston, 336 S.W.3d 649 (Tex. Crim. App. 2011)

Police officer who was also a EMS provider drew defendant's blood. Court of Criminal Appeals finds the officer was qualified to draw blood and that the police station was an acceptable location to draw the blood.

State v. Robinson, 334 S.W.3d 776 (Tex. Crim. App. 2011)

Appellee was arrested for DWI and consented to have his blood drawn. Appellee filed a motion to suppress the results, claiming his blood was drawn without a warrant and without consent, and that it was not drawn by a qualified person and argued it should have been suppressed under the Fourth Amendment and Tex. Code Crim. Proc. art. 38.23. Court of Criminal Appeals holds that the defendant has the initial burden of proof under 38.23, which shifts to the state only when a defendant has produced evidence of a statutory violation. Here, appellee never produced evidence of a statutory violation. Therefore, the state never had the burden to prove that the blood sample was drawn by a qualified person.

EIGHTH AMENDMENT

Meadoux v. State, 325 S.W.3d 189 (Tex. Crim. App. 2010)

Court finds that life without parole for a juvenile capital offender is not greatly disproportionate to the offense. There is not presently a national consensus against imposing life without parole on juveniles for capital murder. A juvenile capital offender's moral culpability, even if diminished from that of an adult, is still significant. While life without parole is a severe sentence, it finds justification in the penalogical goals of retribution and incapacitation.

ENHANCEMENT

Pelache v. State, 324 S.W.3d 568 (Tex. Crim. App. 2010)

Due process does not require that a defendant receive pretrial notice of sentence enhancements that will be sought by the State during the punishment phase. Notice of such enhancements must simply be given any time prior to commencement of the punishment phase, particularly where the defendant has not requested a continuance and has no defense to the enhancement allegations.

This rule is unaffected when the defendant is convicted of a lesser-included offense rather than the charged offense. The question of sufficient notice turns not on the convicted offense but on whether the defendant received sufficient notice of the enhancements in order to prepare a defense.

State v. Wilson, 324 S.W.3d 595 (Tex. Crim. App. 2010)

The defendant's DWI charge was enhanced to felony level based on his two prior DWI charges. However, the defendant had received probation on the previous charges, and the order stated that the finding of guilty was not final. Furthermore, there was no showing that the defendant violated probation from the previous charges.

The Court affirmed the finding of defendant's actual innocence of felony DWI.

EXPERT TESTIMONY

Barshaw v. State, 342 S.W.3d 91 (Tex. Crim. App. 2011)

During a trial for sexual assault of a mentally retarded victim, the State called a psychologist who testified that mentally retarded persons were generally honest and analogized a lie by a mentally retarded person to that of a child. The court of appeals reversed the defendant's conviction and remanded the case for a new trial.

The Court agreed with the court of appeals that the testimony in question was inadmissible but held that the court of appeals should have completed a full harm analysis in light of all the evidence before remanding the case for new trial.

EXTRAORDINARY WRITS

Lykos v. Fine, 330 S.W.3d 904 (Tex. Crim. App. 2011)

Defendant filed a motion to declare the death penalty sentencing statute unconstitutional as applied, specifically asserting that its application has created substantial risk that innocent people have been, and will be, convicted and executed. The Court of Criminal Appeals held that Texas Legislature is the appropriate forum to debate these important policy issues. If the defendant is mounting a facial challenge to the Texas death-penalty scheme, then he must prove that the system can never be constitutionally applied to any Texas defendant charged with capital murder, no matter what the individual facts and circumstances of the particular case. That means he cannot offer evidence to show how it operates in actual practice. The risk that some other possibly innocent person might be executed does not violate a third person's due process rights, nor does it violate the Eighth Amendment. A writ of mandamus or prohibition is an appropriate vehicle to review the propriety of this pretrial motion and the trial court's evidentiary hearing. The Court of Criminal Appeals conditionally granted mandamus and order the trial court to dismiss the motion. There is no basis under Texas law to conduct a pretrial evidentiary hearing to determine the "as applied" constitutionality of a state penal or criminal procedural statute.

FAILURE TO REPORT

Young v. State, 341 S.W.3d 417 (Tex. Crim. App. 2011)

The defendant was a registered sex offender who moved to a new residence and failed to report his change of address to authorities. The indictment and subsequent jury charge allowed for the jury to convict the defendant if it found *either* that the defendant had failed to report the move seven days prior to moving *or* that he failed to report seven days after the move.

The jury charge allowed for conviction of the defendant so long as the jury was unanimous in deciding that the defendant had failed to report. The jury members did not have to agree as to whether he failed to report before the move or after move. The Court held that the indictment and instruction were each proper in setting out a single offense with "two distinct manners and means".

FALSE TESTIMONY

Ex parte Ghahremani, 332 S.W.3d 470 (Tex. Crim. App. 2011)

Applicant was convicted of the sexual assault of J.R. and the aggravated sexual assault of L.S. Applicant alleged that the State failed to disclose favorable evidence - a police report indicating L.S. was

having a relationship with a man other than Applicant, and that L.S.'s parent had knowledge of this. The state presented L.S.'s parents' misleading testimony, which created the false impression that L.S.'s physical, emotional, and psychological problems resulted solely from her sexual encounter with Applicant.

The trial court conducted an analysis under *Brady v. Maryland* finding that the police report was material to the case, favorable to the Applicant, and suppressed by the State. The trial court further found that the State presented false testimony that told the jury that all of L.S.'s psychological treatment was made necessary by the Applicant's assault. The convicting court recommended that the Applicant receive a new punishment hearing.

The court addressed this as a false-testimony claim. To constitute a violation of due process under federal law, the State must knowingly use material false testimony.

The Court found that the testimony was false and that there was sufficient evidence to put the State on notice that the testimony from L.S.'s parents was misleading.

The misleading testimony amplified and exaggerated the impact that the Applicant's actions had on L.S. The CCA accepted the convicting court's finding that there is a reasonable likelihood that the false testimony resulted in a harsher punishment. The court found that Applicant was entitled to habeas relief without making a showing that the due process violation was not harmless.

HABEAS CORPUS – NEWLY-DISCOVERED EVIDENCE

Ex parte Chavez, 2010 WL 4638619 (Tex. Crim. App. 2011)

After the defendant was convicted on two charges of aggravated sexual assault, he filed a motion for forensic DNA testing. The motion was granted, and a hair found at the crime scene was conclusively shown not to belong to the defendant. Expert testimony at trial stated that the hair shared similar characteristics with the defendant's hair; however, the expert made clear in testimony that she could not absolutely match the hair to the defendant.

The Court upheld the conviction. It held that this new evidence was insufficient show that the defendant did not commit the crime for which he was convicted, particularly in light of the fact that the State's expert witness acknowledged at trial that the hair may not be that of the defendant. In addition, other significant evidence was adduced at trial, including the victim's repeated identifications of the defendant as her perpetrator and the defendant's lack of a believable alibi.

Ex parte Robbins, 2011 WL 2555665 (Tex. Crim. App. 2011)

The habeas applicant was convicted for the capital murder of his girlfriend's young child. At trial, the medical examiner testified that the child had died from asphyxia due to strong force against her chest and abdomen. Several years later, the same medical examiner and two others reviewed the materials from the child's autopsy and amended the report so that the cause and manner of death were deemed "undetermined". The medical examiner from trial pointed out that she had more experience when she reviewed the report. She also noted that some of the bruises and other injuries that led to her earlier conclusion may have been caused by the administration of aggressive CPR by untrained persons.

The Court held this re-evaluation of the autopsy to be insufficient evidence for the purpose of unquestionably establishing the defendant's innocence. The Court noted that, in addition to a great deal of other evidence adduced at trial and despite the amended autopsy report, the medical examiners still could not rule out the possibility that the victim's death was in fact consistent with the original autopsy findings.

Ex parte Spencer, 337 S.W.3d 869 (Tex. Crim. App. 2011)

After being convicted of aggravated robbery and given a life sentence, the appellant filed an application for writ of habeas corpus on multiple grounds, though all but his actual-innocence claim were

immediately denied. The appellant's actual-innocence ground was based on the testimony of a new expert in the field of forensic visual testing. The Court acknowledged that this was a new field of science but also asserted that the evidence itself was not new and, in fact, the expert could not study the original crime scene due to changes in the lighting and environment after the passage of several years. According to the Court, the new expert's testimony did not amount to enough evidence to affirmatively prove the appellant's innocence, as required in an actual-innocence claim.

HABEAS CORPUS – PROCEDURAL ISSUES

Ex parte Rendon, 326 S.W.3d 221 (Tex. Crim. App. 2010)

The Court used this case to clarify issues regarding the verification portion of an application for writ of habeas corpus. The applicant did not sign the verification portion of the application, but his attorney did. The Court held that the applicant himself need not sign; rather, a petitioner may sign on behalf of the applicant. Further, the Court deemed the prescribed verification form in the application defective since it did not provide for a petitioner who is not the applicant to sign. The Court dismissed the appeal without prejudice since the applicant used the prescribed form, and it was signed by his attorney.

IMPARTIAL JURY

Uranga v. State, 330 S.W.3d 301 (Tex. Crim. App. 2010)

Evidence at punishment stage of trial showed that the defendant had damaged a juror's property in an extraneous offense. Court found that "implied bias" doctrine did not apply so as to require a mistrial. The trial court's holding of a hearing on actual bias was appropriate and adequate to protect the defendant's right to an impartial jury. The trial court did not abuse its discretion in finding no actual bias on part of the juror.

INDICTMENT

Cada v. State, 334 S.W.3d 766 (Tex. Crim. App. 2011)

A variance between the pleading of one statutory element ("a witness") and proof of a different statutory element ("a prospective witness" or "an informant") is material. In this case, the jury sent out a note asking for a definition of witness which the trial judge could not give as no statutory definition exists. The state must prove, beyond a reasonable doubt, every statutory element of the offense that it has alleged.

Puente v. State, 320 S.W.3d 352 (Tex. Crim. App. 2010)

The physical alteration of a written judicial confession submitted in support of a guilty plea is not sufficient to amend an indictment under Articles 28.10 and 28.11, Texas Code of Criminal Procedure, even when the trial judge approved the parties's agreement to amend the indictment.

INEFFECTIVE ASSISTANCE

Ex parte Martinez, 330 S.W.3d 891 (Tex. Crim. App. 2011)

The applicant was convicted of capital murder and sentenced to life in prison. At trial, the State

offered evidence as to the applicant's gang-member status and gang-related activity. Defense counsel objected to this evidence initially but failed to continue objecting or state a running objection. Consequently, the error was not preserved for appeal; the applicant filed application for writ of habeas corpus based on ineffective assistance of counsel.

The Court ruled that, although defense counsel may have erred in failing to object to all gang-related evidence, the applicant was not prejudiced at trial in light of the other evidence put forth against her. The applicant's accomplice had testified against her, and this testimony was corroborated by the applicant's own videotaped confession.

Ex parte Niswanger, 335 S.W.3d 611 (Tex. Crim. App. 2011)

On the advice of counsel, the applicant pled guilty to a ten year sentence for impersonating a public servant. The applicant alleged that defense counsel was ineffective in advising the applicant to take the plea offer and failing to object to the indictment.

The Court held that defense counsel was not ineffective. The applicant was a habitual offender and faced a minimum of 25 years if convicted at trial. Further, the facts seemed to show that the case would come down to a "he said, she said" between the defendant and the arresting officer. Based upon these facts, it was reasonable for defense counsel to suggest accepting the State's plea offer. As for failing to object to the indictment, the State could have simply fixed the indictment and re-indicted the applicant.

Lopez v. State, 2011 WL 2408942 (Tex. Crim. App. 2011)

At trial, defense counsel failed to object to multiple outcry-witnesses testifying as to the same event. Defense counsel also failed to object to inadmissible opinion testimony by two State witnesses. The defendant appealed on the ground of ineffective assistance of counsel, and the Court of Appeals reversed his conviction.

The Court reversed the decision of the Court of Appeals, holding that the defendant failed to show that defense counsel's representation at trial fell below an objective standard of reasonableness. The Court came to this conclusion because the record was utterly silent as to whether defense counsel's decisions not to object were based on tactical determinations.

INFORMATION

State of Rodriguez, 339 S.W.3d 680 (Tex. Crim. App. 2011)

State, in charging defendant by information with recklessly discharging a firearm, failed to allege with reasonable certainty the act or circumstance indicating that defendant discharged the firearm in a reckless manner, such that dismissal of information was warranted; state was required to allege something about the setting or circumstances of discharging a firearm within city limits that demonstrated disregard of a known and unjustified risk, but state merely alleged in the information that defendant recklessly discharged a firearm "by pulling the trigger on a firearm which contained ammunition and was operable," without alleging any circumstances surrounding his act from which trier of fact could infer that defendant acted with the required recklessness.

INTERLOCUTORY APPEAL – MOTION TO SUPPRESS

State v. Chupik, 2011 WL 2409166 (Tex. Crim. App. 2011)

The trial court granted defendant's motion to suppress evidence. The State made an interlocutory appeal regarding the order, and the Court of Appeals asserted that it had to affirm the order since there was no description of the evidence in the record. The Court held that it is not necessary for the record to

contain information regarding the suppressed evidence in order to overturn an order suppressing that evidence. Rather, the State must simply certify that the evidence is substantially important to the case.

INTERSTATE AGREEMENT ON DETAINERS ACT (IADA)

Davis v. State, 2011 WL 2200812 (Tex. Crim. App. 2011)

The defendant escaped from custody and fled to another state, where he was arrested. The defendant was extradited back to the county he escaped from, and trial was set for the charge of felony escape. Under the IADA, an extradited prisoner should be put on trial no more than 120 days after arriving in the receiving state, unless the trial court grants a "necessary or reasonable continuance".

Here, the defendant's trial was continued once by each party, with the requests being made on the record. Apparently the trial was continued once more at the request of the State, but this request was not recorded by the court. On the day the defendant received a trial, defense counsel objected to the court's most recent grant of the prosecution's continuance motion.

Subsequently the defendant appealed his conviction, arguing that the trial court had abused its discretion by granting the State's final request for continuance without good cause. The Court held that the defendant's appeal could not be granted on this ground absent any information in the record as to why the trial court granted the continuance. Defense counsel was obligated to object to the absence of a court reporter to ensure that the trial court's reasoning for granting the continuance was memorialized. Without this information in the record, a reviewing court cannot make a determination that the trial court abused its discretion in granting the continuance.

JURY ARGUMENT

Archie v. State, 340 S.W.3d 734 (Tex. Crim. App. 2011)

Court of Criminal Appeals concluded that at least two of the rhetorical questions posed by the prosecutor directly to appellant during his final argument constituted improper comment on his failure to testify. However, the prejudice caused by the prosecutor's improper questions was not so great that a jury would necessarily have discounted the trial court's instructions to disregard them. It is unlikely that the jury would have ignored the court's explicit instructions and convicted appellant, not on the compelling evidence introduced against him, but because he failed to take the witness stand to explain himself. Under these circumstances, the Court of Criminal Appeals holds that it was within the trial court's discretion to deny appellant's motion for mistrial.

JURY CHARGE

Taylor v. State, 332 S.W.3d 483 (Tex. Crim. App. 2011)

At defendant's trial on three counts of aggravated sexual assault, the victim testified as to instances of abuse by the defendant up until the defendant had reached the age of 20. Much of the testimony focused on acts committed by the defendant before he turned 17. However, the trial court failed to instruct the jury as to Tex. Penal Code § 8.07(b), which prohibits the prosecution or conviction of a defendant for acts committed before he turned 17 years old. Defense counsel did not object to this omission.

The Court held that the trial court had a *sua sponte* duty to instruct the jury as to § 8.07(b), regardless of any request or objection by defense counsel. However, the Court found that the trial court's error did not cause egregious harm since the victim testified as to instances of abuse while the defendant was 17, 18, 19, and 20 years of age.

JURY UNANIMITY

Young v. State, 341 S.W.3d 417 (Tex. Crim. App. 2011)

Court holds that jury unanimity was required as to whether offender failed to report a change of address but not as to whether he committed the offense by failing to report before the move, after it, or both.

JUVENILE SENTENCING

Meadoux v. State, 325 S.W.3d 189 (Tex. Crim. App. 2010)

The defendant, a 16-year-old who was tried as an adult for capital murder, was convicted and sentenced to life without parole. The Court affirmed the conviction, holding that it is not cruel and unusual punishment to sentence a juvenile capital offender to life without parole.

LESSER-INCLUDED OFFENSES

McKithan & Welsh v. State, 324 S.W.3d 582 (Tex. Crim. App. 2010)

The Court reaffirmed the functional-equivalence concept from *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007), which stated that a lesser-included offense exists if the charging instrument either "1) alleges all the elements of the lesser-included offense or, (2) alleges elements plus facts…from which all of the elements of the lesser-included offense must be deduced."

Here, the court concluded that bodily injury assault was not a lesser-included offense of aggravated sexual assault and that assault – offensive contact was not a lesser-included offense of bodily injury assault. Each of the purported lesser-included offenses contained an element that was not alleged or described in the charging instrument. Specifically, "physical force and violence" is not functionally equivalent to an allegation of bodily injury.

Rice v. State, 333 S.W.3d 140 (Tex. Crim. App. 2011)

Under the indictment at issue, reckless driving was not a lesser-included offense of aggravated assault with a deadly weapon. The indictment did not state that the defendant was driving, an element of reckless driving. Further, a motor vehicle could be used or displayed as a weapon in other ways outside of driving.

MAILBOX RULE

Campbell v. State, 320 S.W.3d 338 (Tex. Crim. App. 2010)

A pro se inmate's pleadings are deemed filed at the time they are delivered to prison authorities for forwarding to the court clerk.

PAROLE CONDITIONS

Ex parte Evans, 338 S.W.3d 545 (Tex. Crim. App. 2011)

The appellant had been convicted for injury to a child, with no finding of sexual abuse. In granting his parole, the parole board imposed the sex-offender "Special Condition X". After violating this condition, the appellant's parole was revoked. He subsequently applied for writ of habeas corpus to seek his release.

The Court asserted that since the appellant was not a convicted sex offender, he was entitled to

the minimum due process protections of notice and a hearing before the board could impose a sex-offender condition on his parole.

PAROLE CONDITIONS/SEX OFFENDER

Ex parte Evans, 338 S.W.3d 545 (Tex. Crim. App. 2011)

The Texas Department of Criminal Justice-Parole Division places "Special Condition X" (sex offender conditions) on Applicant after he had been released on mandatory-supervision parole. Based on the evidence in the record, the habeas judge entered findings that applicant had not been convicted of a sex offense and that his conviction for Injury to a Child did not involve evidence of sexual abuse. The habeas judge further found that Applicant was not afforded constitutional due process before the sex-offender conditions were imposed. The judge recommended that the Court of Criminal Appeals grant relief. Court of Criminal Appeals agrees with the habeas judge that under *Meza v. Livingston*, 623 F.Supp.2d 782 (W.D. Tex. 2009), aff'd in part, 607 F.3d 392 (5th Cir. 2010), Applicant is entitled to immediate reinstatement of his release on mandatory supervision and removal of "Special Condition X" from the terms of his parole.

POSSESSION

Blackman v. State, 2011 WL 1376732 (Tex. Crim. App. 2011)

The defendant was arrested, charged, and convicted of possessing with intent to deliver a controlled substance after police found cocaine behind the driver seat of a vehicle in which the defendant was in the front passenger seat. The court of appeals held that this evidence was insufficient to support the possession element of the offense.

The Court reversed the court of appeals and affirmed the defendant's conviction. The Court noted that the relevant question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". Here, the Court asserted, there was sufficient evidence for a reasonable jury could to conclude that the defendant had indeed possessed the cocaine.

PRESERVATION OF ERROR

State v. Rhinehart, 333 S.W.3d 154 (Tex. Crim. App. 2011)

The defendant was charged with aggravated robbery at the age of 16. When the defendant turned 18, the State sought and received a waiver of jurisdiction from the juvenile court; the case was transferred to criminal district court. Defense counsel filed a motion to quash the indictment, arguing that the State had not exercised due diligence in proceeding with the case before the defendant turned 18. In essence, the defendant was challenging the validity of the juvenile court's transfer order. The trial court granted defendant's motion to quash.

The State appealed on the grounds that the district court lacked jurisdiction to review the juvenile court's transfer order and that the motion to quash could not properly be granted on the basis of insufficient evidence to support the juvenile court's transfer order. The State did not bring up either of these objections at the motion hearing. Rather, its arguments pertained to the due diligence issue set forth by the defendant.

The Court held that it was within the trial court's purview to set aside the indictment. Further, the State could not bring up its issues for the first time on appeal, having not objected to the district court's jurisdiction or grounds at the motion hearing.

REASONABLE SUSPICION

Martinez v. State, 2011 WL 2555712 (Tex. Crim. App. 2011)

The defendant was stopped pursuant to an anonymous tip to the police that a similar-looking truck in the same vicinity was carrying two stolen bicycles. The defendant was found to be driving while intoxicated and in possession of marijuana, and he was charged with both offenses.

The Court held that the arresting officer lacked reasonable suspicion to make an investigatory stop on the defendant. The officer did not find any evidence to corroborate the tip or any other crime before the stop. Furthermore, the caller was anonymous and conveyed very little information.

RECUSAL

Ex parte Sinegar, 324 S.W.3d 578 (Tex. Crim. App. 2010)

The civil rule regarding recusal of judges – Rule 18a – applies not only in criminal cases, as set forth in *Arnold v. State*, 853 S.W.2d 543 (1993), but also in habeas proceedings at the trial court level. The three-day notice requirement of Rule 18a is satisfied when the trial judge responds to the motion, despite the absence of notice language in the motion.

Gaal v. State, 332 S.W.3d 448 (Tex. Crim. App. 2011)

A trial judge's open refusal to consider a plea bargain for less than the maximum sentence does not, on its own, require the judge's recusal. Here, the judge's decision was based on the history of the case – including several bond violations – and not on any extrajudicial information. Furthermore, a defendant has no absolute right to enter into a plea bargain.

In stating its grounds for hearing the case, the Court held that the non-reviewability doctrine set forth by Texas Rule of Civil Procedure 18a(f) does not apply at the appellate level. "Rule 18a(f) applies only when the recusal is granted at the trial court level, not when the recusal judge's denial of the motion is reversed on direct appeal."

RIGHT AGAINST SELF-INCRIMINATION

Archie v. State, 340 S.W.3d 734 (Tex. Crim. App. 2011)

The defendant was convicted of murder, and evidence showed that the defendant had heard the victim's girlfriend scream after the victim was shot. During closing argument, the prosecutor turned to the defendant, addressed the defendant by his first name, and asked if he could still hear the victim's girlfriend screaming. The trial court sustained defense counsel's objection but denied his motion for mistrial, instructing the jury to disregard the prosecutor's comments.

The Court held that the prosecutor had violated the defendant's right against self-incrimination by alluding to his failure to testify. However, the Court upheld the conviction after examining three factors: the severity of the violation, the judge's response to the violation and objection, and the weight of evidence against the defendant absent the violation.

RIGHT TO A SPEEDY TRIAL

Newman v. State, 331 S.W.3d 447 (Tex. Crim. App. 2011)

Defendant's trial on an intoxication-assault indictment was delayed for eight years. The defendant filed a motion to dismiss based on his right to a speedy trial. The trial court denied the motion, but the hearing was not recorded. The Court ruled that the appellant did not meet his burden of showing that the trial court erred given that there was a hearing on the motion, the trial court denied the motion,

and the appellant has no record of the hearing by which an error could be shown.

RIGHT TO COUNSEL OF CHOICE

Bowen v. Carnes, 2011 WL 2408749 (Tex. Crim. App. 2011)

Kevin and Jennifer Bowen, were charged by separate indictments with the capital murder of Jennifer's ex-husband. Both retained Phillips to represent them. Before trial, Ballenger, a jailhouse informant, gave a statement to police in which he detailed what he asserts Kevin told him with respect to this offense. Ballenger had also retained Phillips to defend him against unrelated charges of capital murder, murder, and aggravated assault. As of February 2010, when the state first revealed Ballenger's statement to Phillips, Ballenger had already entered a negotiated plea to murder, but his sentencing had not taken place. In April 2010, the state filed its motion to disqualify Phillips from representing relators. The state claimed that in the event that the state called Ballenger to testify against the Bowens, Phillips would be put in the position of either having to vigorously attack Ballenger's credibility on cross-examination, in the Bowens's interest, or to refrain from doing so, which would be in Ballenger's best interest but detrimental to the Bowen's best interest.

Court of Criminal Appeals questions whether, under these circumstances, respondent abused his discretion to deprive the Bowens of their Sixth Amendment right to counsel of choice on the sole basis of his concern with the public's perception of fairness. Court of Criminal Appeals finds no actual or serious potential for conflict of interest; this overrides the concern about the public perception of fairness that can defeat the Sixth Amendment presumption in favor of retained counsel.

SEARCH AND SEIZURE

Derichsweiler v. State, 2011 WL 255299 (Tex. Crim. App. Jan. 26, 2011)

The requirement that there be "some indication that unusual activity is related to crime" does not mean that the information must lead inexorably to the conclusion that a particular and identifiable penal code offense is being committed. It is enough to satisfy the lesser standard of reasonable suspicion that the information is sufficiently detailed and reliable to suggest that something of a criminal nature is brewing.

Foster v. State, 326 S.W.3d 609 (Tex. Crim. App. 2010)

Defendant pulled behind a police car at a red light. After the defendant's car made some "lurching" movements, another police car "pulled alongside" of the defendant's car, "effectively preventing [him] from moving." The question was whether the defendant was detained when the second police car pulled beside the defendant and blocked him in and whether there was reasonable suspicion to justify the detention. Court held that time of the night, the defendant's aggressive driving, and the officers' training and experience combined to let the officers rationally infer that the defendant may have been intoxicated. The CCA criticized that Court of Appeals for applying the "as consistent with innocent as with criminal activity" standard. That standard is no longer used to determine reasonable suspicion. Reasonable suspicion existed using the totality of the circumstances test.

Limon v. State, 340 S.W.3d 753 (Tex. Crim. App. 2011)

Police received consent to search common areas of a home by a teenage boy who answered the door. The question is whether the boy had apparent authority to consent to the search. The Court refused to create or recognize any bright line rules but held that in this case, it was reasonable for the officers to

believe that the boy had the authority to consent to the search. The Court noted the following facts in support of its decision: the boy answered the door alone at 2:00am, he was not a young child, he consented to mere entry into the home and not into more private areas, and the officers requested entry by stating that they there to serve an emergency public-safety function.

Lujan v. State, 331 S.W.3d 768 (Tex. Crim. App. 2011)

The defendant was stopped at a checkpoint, the purpose of which was to check for drivers' licenses insurance. The defendant did not have his license, so he was asked to pull over to be given a citation. The defendant's passenger was found to have outstanding warrants and was placed under arrest. The arresting officer then performed a Terry frisk on the defendant and found two large rolls of cash. The defendant then consented to a search of his car, in which the officer found a bag of cocaine.

The defendant filed a motion to suppress the evidence, claiming that the checkpoint's purpose was to check for general criminal activity. The trial court denied the motion without making any express findings of fact. The Court upheld the trial court's ruling, finding that the record supported the trial court's implicit finding that the checkpoint's primary purpose was permissible as a point to check for motorists' licenses and insurance.

Martinez v. State, 2011 WL 2555712 (Tex. Crim. App. 2011)

Police officer lacked reasonable suspicion for investigatory detention of pickup truck driven by defendant based on an anonymous caller's report that a pickup truck of the same make and of similar color had stopped at a particular intersection, where driver placed two bicycles in bed of truck and drove west, though investigative stop occurred close in time to caller's report and within three quarters of a mile west of the reported incident; there was no complaint of stolen bicycles, anonymous caller did not report contextual factors reasonably linking the unusual and suspicious activity to a theft, and officer did not see any bicycles in bed of truck until he approached the truck.

Meekins v. State. 340 S.W.3d 454 (Tex. Crim. App. 2011)

The defendant was pulled over after leaving a suspected narcotics distribution house. The officer who stopped the defendant asked six times if he could search the defendant's car. The defendant repeatedly evaded the question until finally answering, "I guess". A bottle containing marijuana was found on the defendant's person during the officer's pat-down after the defendant stepped out of the car. Defendant moved to suppress evidence obtained from the search, but the trial court denied the motion based on what it deemed to be the defendant's voluntary consent to the search. Defendant pled guilty and immediately appealed.

The Court affirmed the defendant's conviction, stating that the defendant had indeed given voluntary consent to the search. The Court acknowledged that there was "more than one permissible view of the totality of the evidence" in this case. Given that, the Court could not say the trial court had abused its discretion in finding that the defendant had voluntarily consented to the search.

State v. Castleberry, 332 S.W.3d 460 (Tex. Crim. App. 2011)

Police approached a pedestrian at 3 a.m. behind a closed business in a high crime area asking for identification and explanation as to why he was there. This was not a detention but rather a consensual encounter which requires no objective justification. The court concluded that a reasonable person in Castleberry's person would have felt free to decline Officer Barrett's request for id and info. Because an officer is just as free as anyone to question and request id from a fellow citizen, the officer's conduct shows that the interaction was a consensual encounter.

State v. Dobbs, 323 S.W.3d 184 (Tex. Crim. App. 2010)

Police were executing a search warrant for narcotics in Dobbs's apartment. The officers see two new sets of golf clubs and T-shirts embossed with the name of a local golf club in plain view. They ask

the dispatcher to check into any recent burglaries and confirm that the golf-club shop had been burglarized. The officers seized the clubs and shirts.

Dobbs was charged with theft. On a motion to suppress, Dobbs claims that it had not been "immediately apparent" to the officers that the clubs and shirts were stolen goods because the officers had to conduct "some further investigation" before developing probable cause.

Court holds that the officers' "further investigation:" into the status of the items did not impact Dobbs's privacy interests or possessory rights beyond the scope of that already authorized by the warrant. As long as there is probable cause to believe that the items in plain view constitute contraband while officers are still lawfully on the premises and any "further investigation" into the nature of the items does not entail any additional and unjustified search or presence on the premises, there is no Fourth Amendment violation.

State v. Jordan, 2011 WL 2555708 (Tex. Crim. App. 2011)

The defendant was charged with driving while intoxicated. He moved to suppress evidence obtained as the result of a warrant executed to seize his blood. The motion was granted, and the State filed an interlocutory appeal to this order by the trial court.

The Court held that the warrant affidavit should be viewed as a whole when considering whether it showed probable cause. Along this vein, it was within the purview of the magistrate to infer that the facts set forth in the affidavit occurred on the date specified as the date of offense in the introductory statement. Further, the Court reiterated that reviewing courts should use a commonsense and deferential approach when examining the validity of a warrant. The case was reversed and remanded to the trial court.

State v. McLain, 337 S.W.3d 268 (Tex. Crim. App. 2011)

The defendant was arrested for possession with intent to deliver methamphetamine after the police executed a search warrant on the defendant's property. Defense counsel filed a motion to suppress evidence found in the search. The trial court granted the motion, asserting that the warrant affidavit did not state a specific time in which any of the activity alleged to support the warrant took place.

The Court reversed, noting the great deference that should be given to a magistrate's decision to issue a search warrant. Here, the affidavit contained somewhat ambiguous language which indicated that illegal activity had taken place 72 hours prior to issuance of the warrant. The Court emphasized that a reviewing court should interpret such an affidavit in a commonsense rather than a hyper-technical manner, and deference should be given to the issuing magistrate's reasonable inferences.

State v. Robinson, 334 S.W.3d 776 (Tex. Crim. App. 2011)

Defendant in a driving while intoxicated case sought and received an order to suppress evidence of his blood-test results. The trial court made its decision based on the fact that the State failed to show that a "qualified person" had drawn the blood, as required by statute. (The arresting officer could not remember the name of the person who drew the blood.)

The State appealed, arguing that the trial court incorrectly placed the burden on the State to show that the blood had been drawn in accordance with statute. The Court agreed with the State, holding that the defendant, in moving to suppress evidence due to the violation of a statute, held the burden to produce evidence of a statutory violation. Absent such evidence, the State had no burden to prove its own compliance with the statute. Order to suppress overturned.

State v. Rodriguez, 339 S.W.3d 680 (Tex. Crim. App. 2011)

Officers' repeated use of stun guns on defendant in order to compel defendant to remove narcotics from his mouth was unreasonable, and therefore defendant was entitled to suppression of narcotic evidence in drug prosecution; although preventing defendant from swallowing narcotics was a valid state interest, one officer testified that he did not believe that defendant would have swallowed the

narcotics, and officers used stun guns on defendant's groin or inner though area eight to 11 times long after the initial arrest was made, and no other methods were used to attempt to retrieve the narcotics.

State v. Woodard, 341 S.W.3d 404 (Tex. Crim. App. 2011)

Defendant drove his car off the road into a ditch and then abandoned it by walking away. He filed a motion to suppress, claiming that his warrantless arrest for DWI, about a quarter of a mile from the accident, was unlawful. Court held that the initial interaction on the sidewalk between defendant and officer, which began with officer asking defendant if he had been involved in an accident, was a consensual encounter. The court also concludes that the encounter, which resulted in defendant's arrest for DWI, was supported by probable cause.

York v. State, 2011 WL 2555688 (Tex. Crim. App. 2011)

Appellant was prosecuted separately for failure to identify. This case discussed whether the doctrine of collateral estoppel requires the suppression of evidence in a subsequent prosecution when that evidence was suppressed in an earlier prosecution arising from the same facts.

In the first prosecution, the legality of the detention was an ultimate issue. That status as an ultimate issue does not help appellant because of the lesser burden of proof with respect to suppression hearings. If, on the other hand, he relies upon the county court at law's resolution of the detention issue solely as a suppression issue - so that the burden of proof in the two prosecutions is the same - then Court of Criminal Appeals would be confronted with an issue that was not an ultimate issue in either prosecution. To accord collateral protection, on the basis of double jeopardy, to such an issue would stray far from the theoretical groundings of the Double Jeopardy Clause and the Supreme Court's decisions on collateral estoppel. Court of Criminal Appeals reaffirms precedence; the state is not barred by the Double Jeopardy Clause from relitigating a suppression issue that was not an ultimate fact in the first prosecution and was not an ultimate fact in the second prosecution. Court of Criminal Appeals overrules both of appellant's grounds for review.

STATUTE OF LIMITATIONS

Phillips v. State, 2011 WL 2409307 (Tex. Crim. App. 2011)

The statute of limitations had run for the defendant, who was later charged and convicted on several counts related to sexual abuse of a child. The State argued that the defendant could still be charged because of recent amendment to the statute of limitations regarding sexual abuse crimes. The Court held that all defendants have an absolute, unwaivable right against ex post facto laws. (Defendant had not objected regarding the statute of limitations in trial.) Since the defendant had already passed the statute of limitations period in place before the amendment was created, the Court held that he could not be charged under the new statute of limitations.

SUFFICIENCY OF THE EVIDENCE

Benavidez v. State, 323 S.W.3d 179 (Tex. Crim. App. 2010)

Upon finding on appeal that indictment alleging aggravated sexual assault did not authorize conviction for lesser-but-included offense of aggravated assault., Court of Appeals was not justified in ordering the entry of an acquittal absent finding that evidence was insufficient to support the lesser-but-included offense of aggravated assault; Court of Appeals did not address the sufficiency point of error, presumably because it ordered the entry of a judgment of acquittal in any event, and thus, remand to

Court of Appeals was necessary to review the issue on the merits.

Byrd v. State, 336 S.W.3d 242 (Tex. Crim. App. 2011)

On a prosecution for misdemeanor theft for shoplifting, the state alleged the wrong owner. The Court of Appeals found this to be an immaterial variance. Court of Criminal Appeals holds that "variance' ought to be used to describe instances in which there is a minor discrepancy between the facts alleged and those proved, such as a difference in spelling, in numerical digits, or in some other minor way." However, when the discrepancy between the charging instrument and the proof at a theft trial is that of an entirely different person or entirely different property, that discrepancy is not merely a variance, it is a failure of proof. Here, the state failed to prove that the named owner had any ownership interest in the property appellant stole, the evidence is insufficient.

Gear v. State, 340 S.W.3d 743 (Tex. Crim. App. 2011)

The defendant was convicted for Burglary of a Habitation after breaking a window and attempting to enter the complainant's home. The complainant met the defendant just as he was entering the window, and the defendant ran away. The Court of Appeals held that there was insufficient evidence to show beyond a reasonable doubt that the defendant intended to commit a felony, theft, or assault once inside the home.

The Court reversed, affirming the trial court and defendant's conviction. The Court distinguished this case from *Solis v. State*, 589 S.W.2d 444 (Tex. Crim. App. 1979), in which the defendant had been uninterrupted in his attempt, later abandoned, to enter the home. Here, the defendant was interrupted while attempting to enter the home, and circumstantial evidence showed that he intended to commit theft while in the home. The defendant had recently become unemployed and had about one dollar on his person.

Holz v. State, 320 S.W.3d 344 (Tex. Crim. App. 2010)

A non-expert property owner's testimony about the cost of repairing or restoring his property based on an estimate received can be sufficient without further evidence to prove the loss element of a criminal mischief offense.

Sorrels v. State, 2011 WL 2463136 (Tex. Crim. App. 2011)

The defendant assaulted his victim by threatening and hitting him with a gun. After the assault, the victim was missing his necklace. The victim and others described the defendant as wearing a black leather jacket. Nearby, the defendant was found with two companions, one of whom was female and wearing an oversized black leather jacket. The jacket contained a gun and a necklace, both of which were identified by the victim.

Based upon the facts above, the Court determined there was sufficient evidence as to the identity of the defendant and that he committed assault in the course of committing theft. The State was not required to prove that the defendant committed the assault with a motive to rob the victim.

Winfrey v. State, 323 S.W.3d 875 (Tex. Crim. App. 2010)

Murder conviction reversed and a judgment of acquittal entered. "Scent line-up" conducted three years after the murder. Three dogs alerted on the can containing appellant's scent sample. Based on this the dog training deputy concluded that the defendant's scent was on victim's clothing. "Identifying someone's scent at a crime scene is not an indication of complicity; it simply establishes a direct or indirect relationship to the scene." Scent discrimination lineups, whether conducted with individuals or inanimate objects, are not the same as dog-scent tracking evidence. The court held that: when inculpatory evidence is obtained from a dog-scent lineup, its role in the court room is merely supportive. Dog scent line up evidence alone is insufficient to establish a person's guilt beyond a reasonable doubt.

Conviction reversed and judgment of acquittal entered.

TRANSPORTATION CODE

Spence v. State, 325 S.W.3d 646 (Tex. Crim. App. 2010)

Under Transportation Code Section 502.404(a), the front license plate must be displayed at the "foremost" front of the vehicle, which is "most commonly the front bumper." Displaying the front license plate "propped up" between the dashboard and front windshield is not sufficient and this constitutes a traffic offense.

VOIR DIRE

Cardenas v. State, 325 S.W.3d 179 (Tex. Crim. App. 2010)

During voir dire, defense counsel asked the panel whether they could ever consider the minimum sentence of five years imprisonment or probation for the charged offenses of aggravated sexual assault and indecency with a child. A large portion of the panel members admitted that they could not consider the minimum sentence. Defense counsel challenged these members of the venire for cause and the trial court denied the challenges.

The Court found that the trial court had abused its discretion in denying the challenges. The Court emphasized that defense counsel's question was phrased permissibly; therefore the panel members in question should have been removed for cause.

Davis v. State, 2011 WL 1135373 (Tex. Crim. App. 2011)

During voir dire, defense counsel asked the panel what factors were important to them regarding the sentencing on an aggravated robbery charge. The trial court stopped defense counsel, ruling that the question was an improper commitment question. The court of appeals affirmed the trial court's decision.

The Court of Criminal Appeals held that defense counsel's question was not improper. The question related to the jurors' general philosophies rather than asking the panel members how specific facts would influence their deliberations.

WRIT OF MANDAMUS

Bowen v. Carnes, 2011 WL 2408749 (Tex. Crim. App. 2011)

The trial court granted the State's motion to disqualify codefendants' mutual defense counsel based on defense counsel's prior unrelated criminal representation of one of the State's principal witnesses in the present case. The codefendants brought an action for writ of mandamus to compel the trial court to rescind its order granting the disqualification.

The Court granted relief, holding that (1) the codefendants had no other adequate remedy at law, and (2) the disqualification by the trial court was a "ministerial act" for purposes of mandamus relief. As to the first point, the Court acknowledged that requiring the codefendants to endure the trial process and then attempt an appeal would be inefficient and unfair to the defendants. Defendants satisfied the "ministerial act" requirement by showing they had a clear right to the representation of their choosing. The trial court abused its discretion by disqualifying defense counsel without a finding of any serious potential for conflict.

In re District Attorney's Office of 25th Judicial District, 2011 WL 1235027 (Tex. Crim. App. 2011)

In a sexual assault case, the trial court ordered the State to produce a copy of the complainant's interview for defense counsel. The interview was videotaped at the Child Advocacy Center. The State

sought a writ of mandamus to require the trial court to rescind its order. The Court held that the order was both reasonable and authorized by Tex. Crim. Pro. Art. 39.14(a).

UNITED STATES SUPREME COURT CASES

§ 1983 ACTION

Connick v. Thompson, 131 S.Ct. 1350 (2011)

Former state prisoner brought action against county prosecutors and prosecutor's office, asserting claims under § 1983 and various state law claims. The United States District Court for the Eastern District of Louisiana granted summary judgment in favor of defendants on the state law claims, denied defendants' motions for judgment as a matter of law, for a new trial and for remittitur, awarded damages in the amount of $14 million following a jury verdict in favor of prisoner, and finally, awarded costs and attorney fees. Defendants appealed. The Fifth Circuit Court of Appeals affirmed in part, reversed in part, and remanded with instructions, and on rehearing en banc, an equally divided Fifth Circuit Court of Appeals affirmed. Certiorari was granted.

The Supreme Court, Justice Thomas, held that:

1. prior, unrelated *Brady* violations by attorneys in his office was insufficient to put district attorney on notice of need for further training, and
2. need for training was not so obvious that district attorney's office was liable on failure-to-train theory when nondisclosure of blood-test evidence had resulted in defendant's wrongful conviction and in his spending 18 years in prison.

Reversed.

Skinner v. Switzer, 131 S.Ct. 1289 (2011)

State prisoner, who had been convicted of capital murder and sentenced to death, filed § 1983 action, alleging that district attorney's refusal to allow him access to biological evidence for purposes of forensic DNA testing violated his right to due process. The United States District Court for the Northern District of Texas adopted report and recommendation of Clinton E. Averitte, United States Magistrate Judge, and dismissed complaint. Prisoner appealed. The United States Court of Appeals for the Fifth Circuit affirmed. Certiorari was granted.

The Supreme Court, Justice Ginsburg, held that:

1. *Rooker–Feldman* doctrine did not bar claim, and
2. convicted state prisoner may seek DNA testing of crime-scene evidence in § 1983 action; abrogating *Harvey v. Horan,* 278 F.3d 370, *Kutzner v. Montgomery County,* 303 F.3d 339.

Reversed and remanded.

CONFRONTATION CLAUSE

Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011)

Defendant was convicted in the District Court, San Juan County, of aggravated driving while under the influence of intoxicating liquor (DWI), and he appealed. The Court of Appeals of New Mexico affirmed. On grant of certiorari, the Supreme Court of New Mexico affirmed. Certiorari was granted.

The Supreme Court, Justice Ginsburg, held that:

1. defendant had right to confront analyst who certified blood-alcohol analysis report, and
2. report was testimonial within the meaning of the Confrontation Clause.

Reversed and remanded.

Michigan v. Bryant, 131 S.Ct. 1143 (2011)

Defendant was convicted by a jury in the Wayne County Circuit Court of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. The Michigan Court of Appeals affirmed. The Supreme Court of Michigan remanded for reconsideration. On remand, the Court of Appeals again affirmed. The Supreme Court of Michigan reversed. Certiorari was granted.

The Supreme Court, Justice Sotomayor, held that admission of victim's statements to police officers did not violate the confrontation clause. Vacated and remanded.

CONTEMPT OF COURT

Turner v. Rogers, 131 S.Ct. 2507 (2011)

Father was ordered to show cause why he should not have been held in contempt for failing to comply with child support order. The South Carolina Family Court, Oconee County, found father in willful contempt and sentenced father to 12 months' imprisonment. Father appealed. The Supreme Court of South Carolina affirmed. Certiorari was granted.

The Supreme Court, Justice Breyer, held that:

1. fact that father completed his prison sentence did not render moot his claim that he was entitled to counsel at his contempt hearing;

2. Due Process Clause did not require provision of counsel at father's civil contempt proceeding, abrogating *Pasqua v. Council*, 186 N.J. 127, 892 A.2d 663, *Black v. Division of Child Support Enforcement,* 686 A.2d 164, *Mead v. Batchlor,* 435 Mich. 480, 460 N.W.2d 493, *Ridgway v. Baker,* 720 F.2d 1409, *In re Grand Jury Proceedings,* 468 F.2d 1368; but

3. father's incarceration violated the Due Process Clause.

Vacated and remanded.

CRUEL AND UNUSUAL PUNISHMENT

Brown v. Plata, 131 S.Ct. 1910 (2011)

California prisoners with serious mental disorders brought class action against Governor in the United States District Court for the Eastern District of California, alleging that due to prison overcrowding, they received inadequate mental health care, in violation of Eighth Amendment prohibition of cruel and unusual punishment. Separately, California prisoners with serious medical conditions brought class action against Governor in the United States District Court for the Northern District of California, asserting constitutional claims similar to those in other action. In case concerning mental health care, the District Court found Eighth Amendment violations and appointed special master to oversee development and implementation of remedial plan. In case concerning medical care, State stipulated to remedial injunction, and, after State failed to comply with that injunction, the District Court appointed receiver to oversee remedial efforts. The plaintiffs in each case requested that three-judge district court be convened pursuant to Prison Litigation Reform Act (PLRA). The two district judges independently granted those requests, and the Chief Judge of the Court of Appeals for the Ninth Circuit convened three-judge district court, consisting of the two district judges, as well as Stephen Reinhardt, Circuit Judge, and cases were consolidated before that district court. The three-judge district court entered remedial order requiring State to reduce its prison population to 137.5 percent of design capacity within two years. Governor appealed, and the Supreme Court postponed further consideration of question of jurisdiction until hearing of case on the merits.

The Supreme Court, Justice Kennedy, held that:

1. Supreme Court had jurisdiction to directly review merits of decisions of district judges that three-judge district court should be convened;

2. PLRA's requirement of allowing state reasonable amount of time to comply with previous court orders was satisfied;

3. evidence supported finding that crowding was primary cause of Eighth Amendment violations;
4. evidence supported finding that no other relief would remedy Eighth Amendment violations;
5. three-judge district court satisfied PLRA's requirement of giving substantial weight to public safety; and
6. evidence supported determination that prison population should be capped at 137.5 percent of design capacity.
Judgment of three-judge district court affirmed.

HABEAS CORPUS

Cullen v. Pinholster, 131 S.Ct. 1388 (2011)

After his conviction for first-degree murder, and sentence to death were affirmed and his applications for state habeas relief denied, petitioner filed application for federal habeas relief. The United States District Court for the Central District of California granted habeas relief on prisoner's death sentence, but otherwise denied the petition. The United States Court of Appeals for the Ninth Circuit reversed in part. On rehearing en banc, the Court of Appeals affirmed. Certiorari was granted.

The Supreme Court, Justice Thomas, held that:
1. federal habeas review of state-court proceeding was limited to record before the state court;
2. California Supreme Court could have reasonably concluded that petitioner failed to rebut presumption of competence mandated by *Strickland*; and
3. California Supreme Court could have reasonably concluded that petitioner was not prejudiced by counsel's allegedly deficient performance.
Reversed.

MIRANDA WARNINGS

J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011)

Juvenile was adjudicated delinquent for committing felonious breaking and entering and larceny, and juvenile appealed. The Court of Appeals of North Carolina affirmed, and juvenile appealed. The Supreme Court of North Carolina affirmed. Certiorari was granted.

The Supreme Court, Justice Sotomayor, held that a child's age properly informs the *Miranda* custody analysis, so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer.
Reversed and remanded.

SEARCH AND SEIZURE

Davis v. U.S., 131 S.Ct. 2419 (2011)

Defendant was charged with unlawful possession of a firearm based on discovery of revolver in stopped automobile in which he was the only passenger. The United States District Court for the Middle District of Alabama adopted in part the report and recommendation of Terry F. Moorer, United States Magistrate Judge, and denied motion to suppress firearm found during search incident to driver's arrest. Defendant was convicted and sentenced to 220 months' imprisonment on basis of that evidence, and he appealed. The Court of Appeals for the Eleventh Circuit affirmed. Certiorari was granted.

The Supreme Court, Justice Alito, held that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. Affirmed.

Kentucky v. King, 131 S.Ct. 1849 (2011)

Defendant pleaded guilty in the Circuit Court, Fayette County, to trafficking in controlled substance, possession of marijuana, and being a persistent felony offender. Defendant appealed. The Court of Appeals

of Kentucky affirmed. Defendant appealed. The Supreme Court of Kentucky reversed. Certiorari was granted.

The Supreme Court, Justice Alito, held that:

1. case was not rendered moot by dismissal of charges against defendant, and

2. warrantless entry to prevent the destruction of evidence is allowed where police do not create the exigency through actual or threatened Fourth Amendment violation; abrogating *U.S. v. Mowatt*, 513 F.3d 395, *U.S. v. Chambers*, 395 F.3d 563, *U.S. v. Gould*, 364 F.3d 578, *U.S. v. Rengifo*, 858 F.2d 800, *U.S. v. Socey*, 846 F.2d 1439, *Mann v. State,* 357 Ark. 159, 161 S.W.3d 826.

Reversed and remanded.