

Court of Criminal Appeals  
October 1, 2014

***Ex Parte Al Letroy Smith***

No. WR-79,465-01

Case Summary written by Nicholas A. Pilcher, Staff Member.

Judge Keasler delivered the opinion of the Court, joined by Judges Price, Hervey, Cochran, Alcala, and Presiding Judge Keller. Judge Womack concurred. Judge Johnson dissented but did not join Judge Meyers's dissenting opinion.

In June 2002, Al Smith was found guilty of assault on a public servant, and was sentenced to eight years imprisonment running consecutively with another conviction. It was not until March 2013, ten and a half years after his conviction, that Smith filed an application for writ of habeas corpus. The State entered a general denial in its answer to Smith's motion and did not plead the doctrine of laches.

Smith's application for writ of habeas corpus was originally forwarded to the Court of Criminal Appeals without any findings of fact or law by the habeas judge, upon remand the habeas judge concluded that Smith received ineffective assistance of counsel and recommended that Smith be permitted an out-of-time appeal. The State did not object. The Court then ordered that Smith's habeas application be filed and considered "whether the State must plead the doctrine of laches in order for a court to consider it in determining whether to grant equitable relief." *Ex parte Smith*, Order, No. WR-79,465-01 (Tex. Crim. App. Nov. 24, 2013).

The Court reasoned that habeas corpus, like the doctrine of laches, is focused on working fairness and equity for the parties involved. Additionally, the court reasoned that the habeas corpus process exacts enormous social and administrative costs which potentially undermine the interests of the criminal justice system and society in general. Accordingly, the Court held that a court may consider these interests *sua sponte* by inquiring into habeas corpus applications "demonstrating an excessive delay that undermines or obstructs the principals and virtues the criminal-justice system promotes." Furthermore, the Court affirmed the approach it articulated in *Ex parte Perez*, 398 S.W.3d 206, 218 (Tex. Crim. App. 2013), by directing courts "to determine whether an applicant has slept on his rights and . . . whether it is fair and just to grant him the relief he seeks." The Court also provided that factors such as the length of delay, the reasons for the delay, and the prejudice suffered by the State as a result of the delay, should come into a court's case-by-case analysis. Because Smith's application was forwarded without findings of fact, the Court ultimately remanded the case to the habeas court to determine Smith's reasons for the delay and render judgment accordingly.

Meyers, J., Dissenting

In Judge Meyers's dissenting opinion, he addressed what he viewed as the inequity of the majority's application of the doctrine of laches to habeas corpus applications. Because habeas corpus applicants are necessarily incarcerated, they

initially face an inequitable position. Wholly excusing the State from having to assert laches compounds this inequity even further by forcing an applicant like Smith to not only prove that he is not barred by laches, but that he also received ineffective assistance of counsel. Accordingly, Judge Meyers believes that the majority “handicap[s] applicants” and unfairly aids the State.

## **McClintock v. State**

No. PD-0925-13

Case Summary written by Jake Rutherford, Staff Member.

Judge Price delivered the opinion for a unanimous Court.

The appellant was indicted for the possession of marijuana in a quantity of more than five and less than fifty pounds based on evidence obtained from a search warrant. Based on confidential information, Police began surveillance on the location in question and noticed activity consistent with narcotics activity. Eventually, the police brought a K-9 unit to sniff for drugs and walked up the public access to the second story unit where the narcotics activity was suspected and the dog alerted to the presence of illegal narcotics.

Based on this information, a magistrate issued a search warrant for the premises where the marijuana was found that resulted in an indictment. At trial, the defendant argued that the K-9 walking up the stairs was an illegal search under the fourth amendment. The trial court found that the stairway was open to the public and not afforded the same protection as the curtilage of the house. Based on the denial of the motion to suppress, the appellant pled to a reduced marijuana charge, reserving his right to appeal.

While the appeal was pending, the Supreme Court handed down *Florida v. Jardines*, holding in an indistinguishable factual scenario, that a K-9 sniff of the type in question is an illegal search. Based on the Supreme Court’s directive, the court of appeals held that the warrant was based on illegally obtained information. Furthermore, the court held other information in the affidavit was too ambiguous to provide independently sufficient probable cause and remanded the case for a new trial.

The Texas Court of Criminal Appeals granted a petition for discretionary review and addresses two points of review brought by the State:

Issue 1: Whether the court of appeals erred in holding that the officer’s own olfactory detection of the odor of marijuana did not provide sufficient, independent probable cause.

The court addressed some ambiguities in the warrant affidavit. It is unclear from the language of the affidavit exactly where the officer was standing when he smelled the odor. The court held that the ambiguity of the affidavit precluded the determination of independent probable cause once the illegal dog sniff was removed from consideration.

Issue 2: Whether the good-faith exception to the exclusionary rule ought to apply, and if so, whether the State had waived that claim.

The good-faith exception is a tool for courts to allow in illegal evidence if it is obtained in a police officer's good-faith reliance on current precedent. The appellant argues that the State forfeited their right to argue this issue since the first time they raised it is in this discretionary review. However, the court holds that the State is not required to raise a particular argument in response to a defendant's appeal in order to later use the argument at a discretionary review. Furthermore, this issue did not come up until the court of appeals remanded the case.

The Court then remanded the case for the determination of whether the officer in question reasonably relied on pre-*Jardine* case law in obtaining a search warrant. No court up to this point had applied the exclusionary rules to facts similar to those at hand, and the Court felt those determinations would be best handled by the lower courts.

***Gutierrez-Rodriguez v. State***

Nos. PD-1026-13, PD-1027-13

Case Summary written by Austin Smith, Staff Member.

KELLER, P.J., delivered the opinion of the Court in which PRICE, WOMACK, KEASLER and HERVEY, JJ., joined. COCHRAN, J., filed a concurring opinion in which MEYERS, JOHNSON and ALCALA, JJ., joined.

Appellant was charged and convicted with misdemeanor theft for stealing two items out of a number of items that were stolen in the commission of two vehicle burglaries. Two complaining witnesses testified that around December 2010, their trucks were burglarized in which several items were stolen including an iPod and GPS. The iPod and GPS were recovered from pawn shops, and Appellant was identified as the person who had pawned them. Appellant was charged by information with two Class B misdemeanors for the theft of the iPod and GPS. At trial, the complainants identified their iPod and GPS and testified to their value, as well as the value of the other stolen items. A jury found Appellant guilty of both offenses. After returning a verdict, the jury was discharged, and the trial court conducted a punishment hearing.

At the punishment hearing, the trial court indicated that it intended to assess punishment at six months' confinement, probated for one year, and an unprobated fine of \$500 for each count. Although the State acknowledged that the iPod and GPS were recovered in working order, the State asked for monetary restitution for the amount of loss suffered by the complaining witnesses. The items that had not been recovered had a combined total value of \$1,215. The trial court agreed that there should be restitution and, after discussing the amount of loss suffered, sentenced Appellant to 180 days confinement and a \$200 fine for each charge, suspended the sentences for one year, and probated the fines. As a condition

of the probation, Appellant was required to pay \$1,215 in restitution to the complaining witnesses for the loss of the unrecovered items.

On appeal, Appellant argued that the evidence did not support the restitution requirement. In response, the State argued that the appellant had waived any challenged to the restitution requirement by failing to object. The court of appeals agreed with appellant and removed the restitution requirement holding that due process requires that the amount of restitution be supported by a factual basis within the record and the restitution requirement in the present case lacked any factual basis in the record.

Issue: “[W]hether Appellant may claim for the first time on appeal that the restitution was for items that she was not charged with stealing.”

The Court first held that because of the contractual relationship in is involved in probation cases, concepts of error-preservation that apply in non-probation cases, specifically a claim regarding the sufficiency of evidence, do not necessarily apply to probation cases. Probation conditions that are not objected to are affirmatively accepted as terms of the contract, unless the condition is found to be intolerable or unconscionable and therefore, not an available contractual option for the parties. As long as Appellant had an opportunity to object and challenge the condition, the condition is upheld even if Appellant’s connection to the theft of these items was not specifically established at trial. The Court did not find requiring restitution for stolen items that were not included in the charging instrument to be intolerable or unconscionable. The Court held that because Appellant had an opportunity to object, but failed to do so, she affirmatively accepted the terms of the contract and had forfeited her claim for appellate review. The Court reversed the judgment of the court of appeals and affirmed the trial court’s judgment.

Justice Cochran, Concurring, joined by Justice Meyers, Johnson and Alcala

Justice Cochran agrees with the majority’s resolution of the case and much of the reasoning behind it. He specifically concurs to warn that not all potential issues and claims regarding restitution ordered as a term of probation are waived because the defendant failed to object at the sentence hearing. A probationer may still complain for the first time on appeal if she was not personally present in the courtroom, therefore having no opportunity to object to the restitution condition, there was no factual basis for the restitution or a component of it, and possible other scenarios.

He notes that in the case at hand, there was a detailed back-and-forth conversation of how much the restitution should be that included clarification questions by defense counsel on decreasing the fines and probating them. Appellant did have a plausible complaint that restitution was not an available remedy for losses that did not result from her criminal conviction for theft. Instead of objecting at trial, Appellant specifically agreed to the precise restitution terms, which Justice Cochran noted was a wise decision due to the harsher original punishment. He opines that Appellant waived her claim on appeal by failing to object at the trial

level and because she obtained a benefit from the agreement, she is estopped from complaining about the exchange of the \$1,000 fine for \$1,200 in restitution.

## **Marsh v. State of Texas**

PD-1034-13

Case Summary written by Ross Smith, Staff Member.

Judge Meyers, delivered the opinion of the Court in which Price, Womack, Johnson, Keasler, Hervey, Cochran, and Alcala joined.

Robert Marsh, defendant, pled nolo contendere according to a plea bargain he agreed to after his pretrial motion to suppress was denied. The plea bargain included a waiver of the defendant's right to appeal. The defendant knew of the waiver, and the Court spoke to the defendant about the waiver at least twice during the proceedings. The trial court then certified that the defendant had no right to appeal. One month after the plea bargain was signed, the defendant made a motion for new trial and motion to amend the trial certification claiming that he had not waived his right to appeal the motion to suppress. The court of appeals decided that the defendant did have a right to appeal pursuant to Texas Rules of Appellate Procedure (TRAP) 25.2(a)(2)(A). After making those motions, the defendant appealed the denial of his motion to suppress and his conviction. The State, for the first time in the appellate brief, argued that the court of appeals should not have amended the trial courts certification of no right to appeal, but the court of appeals decided that TRAP 25.2 required the State to file a motion to strike the amended certification separate from the appellate brief.

Issue: (1) Does TRAP 25.2(f) require the State to file a motion to strike an amended certificate reinstating a defendant's right to appeal before a defendant exercises his right to appeal? (2) Did the court of appeals overstep its bounds by dictating exactly what the amended certificate of right to appeal should say? (3) Did the court of appeals incorrectly find that the defendant had not waived his right to appeal the motion to suppress based on TRAP 25.2(a)(2)(A)?

The State is not required to challenge an amended certification before raising the issue in an appellate brief. The plain language of TRAP 25.2(f) does not require the State to raise the issue before appeal, and to do so would cause practical problems for the State because it often does not know the accuracy of an amended certification until it can view the entire record. Additionally, in *Menefee*, the Court previously suggested the court of appeals should review the claim when the State makes it, so case law supports the holding that the State is not required to raise the issue before appeal.

The court of appeals went outside of its authority when it dictated to the trial court exactly what the certification should say. The court of appeals can order an amended certification to correct a defective one, but it cannot dictate exactly what the certification should say based on TRAP rules, and *Greenwell v. Court of Appeals for the Thirteenth Dist.*

The court of appeals incorrectly concluded the defendant did not waive his right to appeal the motion to suppress evidence. A defendant may “voluntarily, knowingly, and intelligently” waive his right to appeal that is granted by TRAP 25.2(a)(2)(A). Here, the facts clearly supported the States claim that the defendant waived his right to appeal, so the court of appeals should not have amended the certification.

Presiding Judge Keller, concurring.

Presiding Judge Keller writes to note that he understood the court of appeals opinion differently from the rest of the court. She thinks the court of appeals referenced TRAP 25.2, requiring the State to file a motion to strike the amended certification, as evidence the defendant did not waive his right to appeal. The court of appeals also rejected the State’s claim that the defendant waived his right to appeal because “. . . the record showed no waiver of that right.” Presiding Judge Keller rejected that contention, claiming it was clear from the record and the plea bargain that the defendant had waived his right to appeal, and concurred in the opinion.

*Delay v. State*

No. PD-1465-13

Case Summary written by Sara Thornton, Staff Member.

Judge Price delivered the opinion of the Court. Judge Johnson delivered a concurring opinion in which Judge Cochran joined. Judge Meyers delivered a dissenting opinion.

Thomas Delay, Appellant-Defendant, was charged with (1) money laundering Campaign funds in violation of the Texas Election Code in the amount of \$190,000 and (2) conspiracy to commit money laundering in the same amount. At the time of the alleged offense, in 2002, Delay was the Republican Majority Whip of the U.S. House of Representatives. In his capacity as Majority Whip, Delay set in motion the events that formed the Texans for a Republican Majority (TRMPAC), a general-purpose political committee that raised money to help Texas Republican candidates run and win their campaigns. Delay was named as a TRMPAC board member. TRMPAC hired two fundraising managers, one for corporate fundraising, and one for political fundraising. TRMPAC was more successful with raising corporate contributions, which went into a “soft money” account that paid staff salaries and administrative expenses. The less lucrative individual contributions were put into a “hard money” account that funded Republican candidates more directly. Typically, hard money is considered more valuable than soft money.

In September 2002, Jim Ellis, a TRMPAC board member, agreed to contribute soft money to the Republican National State Election Committee (RNSEC) in exchange for RNSEC’s contribution to Texas candidates from RNSEC’s hard money account. TRMPAC’s director signed a blank check from TRMPAC’s soft

money account and forwarded it to Ellis, who completed the check for \$190,000, payable to RNSEC. RNSEC never transferred funds from its soft money account to its hard money account. Weeks later, RNSEC contributed a total of \$190,000 to seven Texas Republican candidates. Delay was informed of the swap soon after and expressly approved of it.

The State, Plaintiff-Appellee, argues that the prior agreement between TRMPAC and RNSAC to swap funds from TRMPAC's soft money account for the same amount from RNSAC's hard money account violated Subchapter D of Chapter 253 of the Texas Election Code (the agreement theory). Alternatively, the State argued—on appeal only—that the corporations that contributed to TRMPAC in the first place violated the Election Code by contributing with the intent to fund specific campaigns (which is illegal), so the swap between TRMPAC and RNSEC involved tainted funds and thus violated the Texas Election Code (the corporation theory).

At trial, the jury found Appellant-Defendant guilty, and he was sentenced to five years' confinement for the first offense (which was later suspended) and three years' confinement for the second offense. The Austin Court of Appeals reversed both convictions and acquitted Delay, determining that the evidence was legally insufficient to support the convictions. The Austin Court of Appeals noted that Texas corporations can legally contribute to organizations involved in out-of-state elections, and the RNSEC could also legally contribute to Texas campaigns. Importantly, the Austin Court of Appeals noted that since the RNSEC never transferred funds from its soft money account to its hard money account, the contribution from the RNSEC to the TRMPAC could not have involved tainted funds. Ultimately, The Texas Court of Criminal Appeals affirms.

The two, closely-related issues in this case are (1) whether the state proved the facts to establish that Delay laundered \$190,000, and (2) whether the state proved Delay conspired to launder \$190,000. These issues were analyzed on both of the State's theories.

Under the State's agreement theory, The Texas Criminal Court of Appeals failed to perceive how the TRMPAC's contribution to RNSEC and the RNSEC's contribution to Texas Candidates, both legal contributions, taken together, was turned into a single illegal transfer due to a prior agreement. Additionally, since the contributions never changed character from soft money to hard money, Texas candidates never received corporate contributions, even indirectly. Thus, the agreement between TRMPAC and RNSEC did not violate the Texas Election Code. The Court went further, noting that even if the prior agreement somehow changed the contributions' character, Delay did not partake in money laundering because there is nothing in the record to support that Delay knew he was "conducting, supervising, or facilitating a transaction that involved the proceeds of criminal activity." (quoting Tex. Penal Code § 34.02(a)(2)). Importantly, the Court found that the actor must be aware of such criminal activity to commit money laundering. In fact, the record supports that Delay believed the agreement to be lawful under the Texas Election Code. As a result, the State failed to establish the requisite mental state for both money laundering and conspiracy to commit money laundering.

The State's corporation theory also failed. The Court noted that of the two relevant provisions in the Texas Election Code that criminalize unauthorized corporate political contributions, § 253.094 does not identify a culpable mental state. But § 6.02(b) and (c) does define the culpable mental state as "knowingly", and since both provisions prohibit identical conduct and carry an identical range of punishment, the Court found that the knowingly culpable mental state for corporate liability is implied in § 253.094. In addition to a showing of the unlawful conduct—and contrary to *Osterberg v. Peca*—the Court found that the State must also show that the actor was aware of the existence of circumstances that made the actor's conduct unlawful. Since, unlike *Osterber v. Peca*, this case involves a criminal provision, it is construed more strictly than civil provisions.

Although there was some evidence in the record of the possible risk of corporate contribution violations, such as the TRMPAC's flyers stating that the contributions went directly to the campaigns, nothing in the record shows that the corporations who made contributions actually understood that making contributions under those circumstances violated the Texas Election Code. In fact, every corporate executive who testified stated his intent to follow Texas law. Moreover, there was "an utter lack of circumstantial evidence" showing any illegal intent on behalf of the contributing corporations. And since negligence or recklessness does not meet the mental culpability required for money laundering or conspiracy to money laundering, the corporate contributions were not tainted under § 253.003(a) at the time TRMPAC transferred the funds to RNSEC.

As a matter of law, the State failed to prove the facts that establish that Delay committed either money laundering or conspiracy to commit the same. Accordingly, the Court affirmed the judgment of the court of appeals.

Judge Johnson, concurring:

The State provided no evidence that proved Delay was directly involved in the transfer of funds, only that he was aware of it. And regardless of the donors' intent, TRMPAC corporate funds went into the corporate funds of RNSEC so no corporate funds went to Texas campaigns. Though this was "a tad shady", this transaction was legal.

Judge Meyers, dissenting:

The Court directly misapplied the sufficiency of the evidence standard by ignoring the facts of the case to reach its desired outcome. Requiring a knowingly mens rea in § 253.003(a) places an impossible burden on the State and effectively repeals the statute. Even when the burden was much less in the civil case of *Osterberg v. Peca*, the Texas Supreme Court still found that knowledge of the illegality was not required. Additionally, if the Legislature intended a knowingly culpable mental requirement, the Legislature would have expressly provided it in § 253.003(b). This holding allows corporations who are ignorant of the law to avoid culpability when making illegal contributions.



If the elements are considered absent the new culpable mental requirement, the State provided sufficient evidence to support the conviction. Thus, the jury rationally could have decided that corporations contributed with the intent that the funds would go directly to campaigns. Because Judge Meyers would not read a culpable mental requirement into the statute and would hold that a rational jury could have found the elements of the crime met beyond a reasonable doubt, he respectfully dissents.