

Court of Criminal Appeals
October 15, 2014

Samaripas v. State

No. PD-135-13

Case Summary written by Jessica Eaton, Staff Member.

Judge Meyers delivered the opinion of the Court, joined by Judges Johnson, Keasler, Hervey, Cochran, and Alcala. Judge Womack concurred and Presiding Judge Keller filed a dissenting opinion, joined by Judge Price.

Appellant, a gang member, participated in a drive-by shooting and high-speed chase in which he was a passenger in the vehicle. During the chase, a colostomy bag containing a nine-millimeter handgun, three magazines, a cell phone, and two quarters was thrown from the vehicle. Appellant used colostomy bags due to an earlier gunshot injury.

The jury convicted appellant of engaging in organized criminal activity and found he had used or exhibited a deadly weapon during the commission. During sentencing, the State brought forth evidence of two prior convictions: (1) assault of a public servant and (2) felony evading arrest—punished as a second-degree felony due to two prior enhancements. The appellant objected to the second, but the jury found both to be true and sentenced appellant to 53 years in prison as a habitual criminal.

Appellant appealed on four grounds: (1) the evidence was insufficient, (2) the trial court abused its discretion, (3) the trial court erred in instructing the jury on the law of properties, and (4) the sentence was improperly enhanced. The Thirteenth Court of Appeals affirmed the conviction and the sentence.

Appellant then petitioned the Texas Court of Criminal Appeals on two issues—whether the court of appeals erred in holding that he failed to preserve the voir dire error and whether his prior state-jail felony could be used for sentence enhancement.

Appellant's first argument is that the trial court abused its discretion by improperly limiting his voir dire examination of a prospective juror. The issue was a particular question asking what type of evidence the prospective juror expected to hear and what evidence would prove someone committed an offense beyond a reasonable doubt. The Court of Appeals assumed the question was proper and its prohibition established abuse of discretion, but after applying general error-preservation standards, the court found that the Appellant failed to object to the trial court's ruling, complied with the ruling, rephrased his questions, and neither discussed nor challenged the ruling's effect on the scope of voir dire. Therefore, the court of appeals held he had failed to preserve the issue.

The Court of Criminal Appeals pointed to reasoning in *Nunfio v. State* that once an appellant posed a specific question and the judge refused to allow it, the appellant had received a specific ruling as to a specific question and properly preserved the issue for review. Abstaining from further questioning or development

does not cause the error to be forfeited. The Court of Criminal Appeals additionally found the court of appeals applied general preservation of error erroneously. It reversed and remanded on this issue to determine whether discretion was abused by prohibiting a proper question about a proper area of inquiry and whether appellant was prejudiced by the error.

The second issue dealt with the sentence enhancement. The court of appeals ruled that the statute was unambiguous in its plain-text reading, allowing this enhancement. The Court of Criminal Appeals agreed with the court of appeals that the plain language of the statute centered on how the previous state-jail felony was punished and precluded from use for enhancement only those state-jail felonies that had not been punished under the range of a higher felony. Here, Appellant was not punished under this particular statute, his prior felony had been augmented, and he was punished for it properly under Section 12.42(a)(2), thus the prior offense was properly used for enhancement purposes here. The Court of Criminal Appeals affirmed this issue.

Keller, P.J., Dissenting, joined by Judge Price

Presiding Judge Keller disagreed with the court's holding in regards to the second issue of sentence enhancement and argued that the language is ambiguous and extraneous factors resolved the ambiguity in the appellant's favor. There are two possible constructions of the statute: (1) a person is punished under § 12.35(a) only if his punishment is not enhanced under any other provision—the State's argument, and (2) the two-tiered construction that states a person is punished under § 12.35(a) if he is not punished under § 12.35(c). Presiding Judge Keller believed this makes § 12.42(e) ambiguous, and looked to the legislative history to resolve it.

State v. Comeaux

No. PD-1440-13

Case Summary written by Sarah Ellison, Staff Member.

COCHRAN, J., delivered the opinion of the unanimous Court. JOHNSON, J., filed a concurring opinion in which HERVEY, J., joined.

Appellant was charged with burglary of a habitation. During voir dire, potential juror number 23 (PJ 23), who was also a former victim of burglary, was asked if he already thought the appellant was guilty and he stated, "I just don't feel I can be fair." The trial judge further questioned PJ 23 regarding his biases and at that point the appellant used all ten of his peremptory strikes, including a peremptory strike on PJ 23. He then asked the trial judge for an additional strike to use on PJ 27 and the request was denied. Although the appellant had failed to use a peremptory strike on PJ 27, he did use one on PJ 34, a juror who was in the "strike zone" and could not actually sit on the jury. As a result of failing to strike PJ 27, PJ 27 ended up serving on the jury which convicted Comeaux of burglary. Appellant

appeals contending the trial judge erred in denying a challenge for cause for PJ 27. The Beaumont Court of Appeals affirmed the trial court, holding the appellant had not suffered detriment because he used a peremptory strike on a potential juror outside of the “strike zone.”

Issue: The issue is one of harm, not preservation, questioning whether the appellant “suffered a detriment” by the trial judge’s denial of his challenge for cause against PJ 23?

This Court reasoned that to establish harm for an erroneous denial of a challenge for cause, the defendant must show on the record that “(1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of venire member; (3) his peremptory challenges were exhausted; (4) his request for additional strikes was denied; and (5) an objectionable juror sat on the jury.” The purpose of the five-step test is to demonstrate that the defendant suffered a detriment as a result of the loss of a peremptory strike. The defendant is harmed as a result of a trial judge denying a valid challenge for cause when the defendant would have used that peremptory strike on a different objectionable juror. A defendant who is able to comply with the five steps demonstrates that the peremptory strike was necessary for another biased juror.

The Court held that in this case it was entirely the defendant’s fault that an objectionable juror served on the jury. While the defendant could have used a peremptory strike against PJ 27, he instead chose to strike PJ 34, a later panel member outside of the strike zone. Thus, the appellant failed to show harm because the judge’s ruling did not force him to waste a peremptory strike.

JOHNSON, J., filed a concurring opinion in which HERVEY, J., joined.

Justice Johnson analyzes the five-step process of showing harm on a challenge for cause and categorizes each step of the process as either preserving error or harm. First, he considers challenging a juror for cause under preserving error. Second, he places using a peremptory challenge on the challenged juror under the harm category. Third, exhausting the statutory peremptory challenges falls under harm. Fourth, asking the court for additional peremptory challenges is considered preserving error. Lastly, identifying an objectionable juror that served on the jury would also be categorized as preserving error.

Burt v. State

NO. PD-1563-13

Case Summary written by Tyler Frankel, Staff Member

Justice Cochran delivered the opinion of the unanimous Court.

A jury convicted Defendant Lemuel Carl Burt (Burt) of misapplication of fiduciary property in excess of \$200,000, and sentenced him to fourteen years in

prison with a \$10,000 fine. At the end of the punishment hearing, after sending the jury to deliberate, the trial judge orally ordered restitution on the record, but he did not specify the amount of restitution. Instead, the trial judge said if the parties could not agree on an amount of restitution, then there would have to be a restitution hearing, stating, “The sooner we can get that restitution matter taken care of, the better.” The following day, without the parties’ agreement or their presence and without a hearing, the trial judge entered the written judgment with a restitution order for \$591,000. Defendant appealed, arguing that the restitution order should be deleted because the amount was not orally given in open court. The court of appeals vacated the order and remanded to the trial court for a restitution hearing, holding it would be improper to delete the order because both parties were on notice that restitution was proper, the issue was the parties did not know *how much* restitution was ordered.

Issue: When the record is clear that the trial judge orally made restitution as part of the sentence, but either the amount or the person(s) to whom it is owed is unclear, incorrect, or insufficient, should the restitution order be deleted or should the case be remanded to the trial court for a hearing on restitution?

The Texas Court of Criminal Appeals held that the restitution order should be vacated and remanded to the trial court for a hearing on restitution. It reasoned that the restitution order should not be deleted because the trial judge, in his oral sentencing pronouncement, notified the Defendant that restitution would be ordered as part of his sentencing. The only issue was that the trial judge never told the Defendant the specific amount of restitution. Therefore deleting the restitution order would be improper. This Court held that the order should be vacated and remanded to the trial court for a hearing because the Defendant, not knowing the specific amount, was unable to exercise all of his due process rights.

State v. Story

No. PD-0590-13

Case Summary written by Josue Galvan, Staff Member.

Justice Meyers delivered the opinion of the Court.

Sheriff’s deputy officers responded to an anonymous tip about a vehicle chasing a man and possibly attempting to run him over in a field. They found the empty SUV parked in the field and subsequently found the man described in the report, James Kuykendall, nearby. After taking him back to where the SUV was parked, the Appellee appeared. Kuykendall and the Appellee explained that after having an argument inside the vehicle, Kuykendall exited, prompting the Appellee to follow him in efforts to convince him to reenter the SUV. Although both agreed that “nothing had happened,” and “that it was just an argument,” the officers arrested the Appellee for misdemeanor assault. Before arresting the Appellee, however, a deputy officer walked by the Appellee’s vehicle and saw what he suspected to be marijuana, in plain view. Kuykendall admitted it was his; the

officers removed the marijuana from the car and proceeded to arrest him. While searching the Appellee's vehicle, they also found several checks, which they suspected "were fraudulently written out and stolen[,] possibly." After the Appellee's brother confirmed that the Appellee was not in proper possession of the checks, she was indicted for forgery. The Appellee subsequently filed a motion to suppress evidence of the checks, and the trial court granted her motion. The trial court found that: (1) The officers did not have probable cause to arrest her for assault; (2) The officer did not have any reason to look into her vehicle; (3) The officer trespassed when he entered the field and looked through her vehicle's windows; and (4) The seizure of the marijuana and subsequent seizure of the checks was illegal. The court of appeals affirmed, holding that because the circumstances failed to constitute a warrantless arrest, suppression was proper since "the evidence support[ed] the conclusion that the checks were obtained by exploiting Story's unlawful arrest."

Issue: Whether the trial court abused its discretion in finding that the Appellee's arrest and subsequent evidence-collection were unlawful.

Reviewing the facts de novo, the Court affirmed the court of appeals' decision. While the State argued that searching the Appellee's vehicle was incident to Kuykendall's arrest, the Court noted that because the State failed to provide any evidence concerning the open field doctrine, it could not analyze whether the trial court erred in rejecting the State's claim, as the State could not raise the open field doctrine issue for the first time on appeal. The Court held that the Appellee's warrantless arrest was unlawful because the officers lacked probable cause. Although the officers received an anonymous tip, the Court stated that additional facts and circumstances were necessary and that the call was not sufficient to constitute a basis for probable cause. Therefore, because the trial court did not err in finding that the Appellee's arrest was unlawful, it did not err in concluding that evidence obtained as a result of that arrest was inadmissible. The State argued, in the alternative, that the Court should remand the case because the court of appeals had not considered whether seizing the checks was lawful pursuant to Kuykendall's arrest. The Court held that remand was inappropriate because the court of appeals' statement that the alternative argument was "unconvincing" sufficiently disposed of the issue, since the State's alternative argument was contrary to the evidence. Thus, the court held that neither the trial court nor the court of appeals erred in its decisions.

P.J. Keller, joined by J. Price, dissenting:

Presiding Judge Keller stated that the State's failure to raise the open field doctrine did not dispose of the issue because the Court had previously held that a State-appellant may raise an issue of standing for the first time on appeal. *State v. Mercado*, 972 S.W.2d 75, 77-78 (Tex. Crim. App. 1998); *State v. Klima*, 934 S.W.2d 109 (Tex. Crim. App. 1996). Further, Keller stated that the open field doctrine did not apply because the record did not indicate that the Appellee had any possessory interest over the field. Furthermore, even if the State bore the burden of discussing

the doctrine, it did not bear the burden of proving that the deputies were not trespassers. Keller also disagreed with the majority's opinion regarding probable cause, stating that because the marijuana was in plain sight, the deputy had authority to search the vehicle under the automobile exception. *Texas v. Brown*, 460 U.S. 730, 739-44 (1983); *United States v. Ross*, 456 U.S. 798, 825 (1982); *Keehn v. State*, 279 S.W.3d 330, 331 335-36 (Tex. Crim. App. 2009).

State v. Grado

No. PD-1057-13

Case Summary written by John Garza, Staff Member.

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

Michael Grado was sentenced to ten years of community supervision and assessed a \$10,000 fine after he pled guilty to the possession of 400 grams or more of amphetamine. Grado's community supervision was later revoked, and both the State and Defense counsel mistakenly informed the judge that the minimum punishment for the possession of 400 grams or more of amphetamine was ten years. The punishment range is based on the group that a substance falls into. Amphetamine falls into Penalty Group 2, and the possession of 400 grams or more of amphetamine carries a minimum punishment of five years rather than ten. The judge, operating on the misinformation, sentenced Grado to ten year's confinement and Grado did not contemporaneously object to this sentence.

Grado later challenged his sentence and conviction, "asserting that (1) the judge arbitrarily refused to consider the correct range of punishment, and (2) he was constructively denied effective assistance of counsel when counsel agreed with the State's representation of the minimum punishment." Based on the *Marin* analysis, the court of appeals held that Grado's first assertion could be raised for the first time on appeal. The Court of Criminal Appeals affirmed the judgment of the court of appeals.

The general rule is that a contemporaneous objection must be made in order to preserve an issue on appeal, however, *Marin v. State* carved out some exceptions to this rule. The Court of Appeals separated defendants' rights into three categories in *Marvin*. The first category of rights is considered so fundamental that they cannot be forfeited by inaction. The second category of rights cannot be forfeited by mere inaction, but can be waived "if the waiver is affirmatively, plainly, freely, and intelligently made." The third category of rights is not considered as important, and is forfeitable if not requested by the defendant.

The court of appeals held that Grado's right to be sentenced by a judge who had considered the appropriate range of punishment fell within the second category of rights and the Court of Criminal Appeals agreed. The Court was unwilling to place this right in the first category because the judge's actions were not intentional or

deliberate. The right to be sentenced within the appropriate range is important enough to *not* be forfeited by mere inaction, though, and because Grado did not affirmative, plainly, freely, or intelligently waive the right it could be raised for the first time on appeal.

Keller, P.J., Dissenting

Judge Keller pointed out that Grado's sentence was neither illegal nor void. Although his sentence was greater than the minimum five years, it was still within the acceptable range of punishment between five years and a term of lifetime confinement not to exceed 99 years. Keller also pointed to the Court's holding in *Ex parte Brown*, in which it was decided that "an unobjected-to claim that a trial judge failed to consider the full range of punishment may not be raised on direct appeal but it may (at least sometimes) be raised post-conviction by application for a writ of habeas corpus." The rights denominated in *Marin* as second category rights were assistance of counsel and the right to a jury trial, both of which are Sixth Amendment rights. Keller argued that the right at issue in this case is not of the same kind as Sixth Amendment rights, and therefore not a second category right.