

Court of Criminal Appeals
October 8, 2014

Ex Parte Alberto Giron Perez

NO. AP-76,800

Case Summary written by Kevin Smith, Staff Member.

JUDGE Alcala delivered the opinion of the Court, in which PRESIDING JUDGE KELLER, JUDGE PRICE, JUDGE WOMACK, JUDGE JOHNSON, JUDGE KEASLER, JUDGE HERVEY and JUDGE COCHRAN joined. JUDGE MEYERS GUZMAN filed a dissenting opinion.

Alberto Giron Perez, applicant for a writ of habeas corpus, claimed ineffective assistance of appellate counsel and sought petition for discretionary review in order to appeal his 1991 murder conviction. The application was filed twenty years after conviction, which initially resulted in the Court of Criminal Appeals revising the laches doctrine related to applications for post-conviction writs of habeas corpus. This opinion followed a second remand after the trial court considered the application under the revised laches standard.

On the first remand, the court considered affidavits from Perez's appellate counsel and the district attorney that handled his case. The affidavits supported that counsel had offered assistance to Perez in filing a writ of habeas corpus, and the district attorney alleged that approval of a delayed writ would prejudice the State. On the second remand, the trial court made several findings of fact that included: Perez was notified of counsel's willingness to assist in filing a writ of habeas corpus within a year of conviction; Perez was aware of his ability to procure a copy of the appellate transcripts, but instead decided to pursue the transcripts from counsel in an effort to avoid paying for them; four years post-conviction, counsel was required to produce Perez's file and transcript; Perez did not file an out-of-time petition writ of habeas corpus until September, 2011; and Perez's various interim pro se filings evidenced his ability to file legal documents along with his familiarity with the legal system. The trial court ultimately recommended denial of relief.

Issue: Did the trial court err in denying Perez's post-conviction, long-delayed application for a writ of habeas corpus by inappropriately applying the revised doctrine of laches?

After review of the trial court's findings and conclusions, the Court of Criminal Appeals adopted them. Applying the totality-of-the-circumstances approach outlined in *Ex parte Perez*, No. AP-76,800, 2012 WL 1882234 (Tex. Crim. App. May 16, 2012), the court considered whether there was unreasonable delay by the opposing party and if the state was prejudiced as a result from the delay, or if there were other compelling reasons to apply the doctrine of laches. The court concluded that Perez's reasoning was not that he lacked access to his record, but rather that he lacked awareness of his ability to secure further review. The evidence, however, suggested that Perez was in fact aware of his ability to appeal

his case. The court also concluded that even if accepted as true, Perez's reasoning was insufficient to justify inaction for more than fifteen years during which he could have made inquiries or educated himself about seeking additional review.

Ultimately, the court held that Perez's ignorance was not adequate to excuse the lengthy delay in filing the writ, and that the State had been prejudiced as a result. The court also noted that a relevant factor considered by the trial court included the State's and society's interest in finality of the conviction. Subsequently, the court held that there are no other equitable considerations in Perez's favor and the application for a writ of habeas corpus was barred by the doctrine of laches.

Meyers, J., Dissenting

In his dissenting opinion, Judge Meyers argues that when the state files an indictment several years after an alleged crime occurred, the court has not based any form of relief on the defendant's purported ability, or inability, to defend against prosecution. He argues that although the state has a statute of limitations, applicants for a writ of habeas corpus must file within the period of their confinement. By the majority's reasoning in this case, applicants must now file as soon as possible so as not to prejudice the state. Essentially, they run the risk of forfeiting their right by delay. Additionally, the court is usurping the legislature by applying an equitable analysis. Judge Meyers cites the Texas Code of Criminal Procedure to support that no mention is made of a time bar to writs filed due to new or previously unavailable claims. If the legislature had intended to place a time bar, it was able to but chose not to do so.

State v. Redus

No. PD-0067-14

Case Summary written by Carter Bowers, Staff Member.

Judge Cochran delivered the opinion of the Court.

The Court of Criminal Appeals consolidated two cases in this opinion. In the first, *State v. Redus*, Redus faced intoxication manslaughter charges. The second, *State v. Zermeno*, involved third-time DWI charges against Zermeno. The trial judge for both cases ruled that nonconsensual blood tests made without a warrant were unconstitutional. He therefore suppressed any blood-alcohol evidence that had been obtained without consent or a warrant.

The State filed an appeal in both cases pursuant to Tex. Code Crim. Proc. 44.01(a)(5), whereby the State is able to appeal a trial court's order if the order "grants a motion to suppress evidence . . . and if the prosecuting attorney certifies to the trial court that the appeal is not taken for the purpose of delay and that the evidence, confession, or admission is of substantial importance in the case." The elected county and district attorney signed the notices. The court of appeals held that this recitation of the statute and a signature by the district attorney did not constitute an appropriate certification. The State appealed to the Court of Criminal Appeals, arguing that the court of appeals' decisions were too narrow and

“hypertechnical,” and the court had construed the statute to be a barrier that violated United States Supreme Court precedent.

Issue: Whether the court of appeals’ interpretation of the certification requirements of Tex. Code Crim. Proc. 44.01(a) misconstrued the statute and created an impediment for the State’s ability to appeal trial court orders.

Under the statute, the State may only make an interlocutory appeal if the following requirements are met: (1) the appealed trial court ruling was made prior to jeopardy being attached; and (2) the prosecuting attorney provides personal certification that (a) the purpose of the appeal is not to delay, and (b) the suppressed evidence is substantially important to the case. The prosecutor’s certification gives proper jurisdiction to the appellate court. If the certification is improper, then the State’s appeal must be dismissed for want of jurisdiction.

In the two underlying cases, the elected district attorney’s certification stated neither that it was not for the purpose of delay nor that the evidence at issue was of substantial importance to the case. Instead, the two notices of appeal merely quoted the statute, and then were signed by the district attorney. The court noted that the purpose of certification was to assert the validity of facts. Here in both instances, the district attorney failed to assert any facts. Therefore, there was no certification as required by the statute.

The Court refused to overrule prior case law and reaffirmed the notion that strict compliance with statutory provisions was required in order to confer jurisdiction on the court of appeals. The Court also noted that United States constitutional challenges to the appellate court’s decision fell short because both state and federal precedent assert that certifications are assertions of fact. Thus, the Court affirmed the court of appeals and dismissed the State’s appeals for lack of jurisdiction.

State v. Redus and Zermeno

Nos. PD-0067-14 & PD-0069-14

Case Summary written by C.J. Baker, Staff Member.

Judge Cochran delivered the opinion of the unanimous Court.

In separate cases later consolidated for appeal, the trial judge suppressed blood evidence the prosecution acquired under the recently enacted provisions in Chapter 724 of the Texas Transportation Code. The new provisions allow for unconsented blood draws without a warrant but the trial judge held this was unconstitutional. The State sought appellate review but failed to properly certify that the appeal was (1) not taken to delay the trial, and (2) the suppressed evidence was of substantial importance to the case. Instead, the prosecutor simply recited article 44.01(a)(5) of the Texas Code of Criminal Procedure, which affords the State a right to appeal under on those two conditions. The court of appeals held the appeal was not proper because without a timely executed certification, the appeals court lacked jurisdiction to hear the case.

The issue before the Court of Criminal Appeals was not the constitutionality of the unconsented blood draw, but whether the lower court's construction of the procedural rule was too "hypertechnical" and, as a result, led to an absurd consequence in the case. Essentially, the prosecutor argued that where the substance of the appellate certification was proper, the formal deficiency should be overlooked.

In light of the legislative history around article 44.01(a)(5) of the Texas Code of Criminal Procedure, which grants the State the right to appeal a pretrial ruling, the prosecutor's certification is a necessary prerequisite to jurisdiction, not a formality. Prior to 1987, the State could not appeal pretrial rulings and there was concern that allowing it to do so would advantage the State because defendants must wait until the disposition of the case to appeal. The primary check on this potential imbalance of power is the limitation of appeals to cases where the pretrial ruling essentially destroys the State's case. The prosecutor's certification places the reputation and integrity of the prosecutor on the line in order to ensure that this check is not ignored. Therefore, the appeals courts lack jurisdiction where the prosecutor fails to make the required certification and refusing to hear the case is not an absurd consequence. The Court of Criminal Appeals affirmed.

Cameron v. State

No. PD-1427-13

Case Summary written by Linda Castillo, Staff Member.

Womack J., delivered the opinion of the Court, in which Price, Johnson, Cochran, and Alcalá, JJ., joined. Keasler, J. concurred in the judgment.

Before the *voir dire* began in the appellant's trial the bailiff removed all spectators from the courtroom. Once the *voir dire* began the appellant's counsel objected to the exclusion of the public spectators based on the appellant's right to a public trial. The judge recognized the appellant's right to a public trial, but he did not know where they would seat the spectators due to the jury panel size and the lack of extra seating. The judge repeatedly stated that no one was excluded from the courtroom, but refused to make a ruling on the objection. There was no showing that any spectators were allowed into the courtroom after the objection. In the middle of the State's *voir dire* the trial court turned to the *Waller* analysis, it considered the size and configuration of the courtroom, safety concerns, and whether the jurors would feel uncomfortable. The judge once again stated that spectators would be allowed and that the court would try and accommodate them.

The jury found the appellant guilty of murder. The Fourth Court of Appeals reversed her conviction and this Court granted review. The appellant appealed claiming her constitutional right to a public trial was violated when the trial court excluded the public from the *voir dire* of her trial.

Issues: (1) Whether the appellant's trial was in fact closed, and if so, (2) whether the closure was justified.

First, the State argued that the record was silent, but the Court found it was not. The appellant's counsel objected to the removal of the public on the record and there was no dispute as to the fact that all spectators were removed from the courtroom. The court further reasoned that had the proceedings been open the trial judge would not have needed to cite space limitations and safety concerns as reasons as to why the public needed to be kept out. Moreover, the Court reasoned that that judge's consideration of the *Waller* analysis would not have been necessary if the proceedings were in fact open.

Second, the Court applied the *Waller* test to determine whether the closure was justified. A closure is justified only if the closure is necessary to protect an overriding interest and it is narrowly tailored to protect that interest. The court must also consider reasonable alternatives. The Court found that space and overcrowding; vague safety concerns; and juror's possible discomfort did not outweigh the appellant's Sixth Amendment rights. The Court also found that there were available alternatives to remedy the spacing issues. The Court affirmed the Court of Appeals decision.

Keller, P.J., filed a dissenting opinion in which Hervey, J. joined. Meyers, J. dissented.

The dissent argued that the fact that spectators were not allowed back inside the courtroom was a disputed fact. The Court accepts as true factual assertions made by counsel that are not disputed by opposing counsel, but the dissent pointed to evidence that no one was excluded from the courtroom with the intention of not being allowed back in. Therefore, the appellant failed to satisfy her burden of showing that the *voir dire* was not open to the public.

Whatley v. State

No. PD-1627-13

Case Summary written by Brittany Dumas, Staff Member.

Justice Johnson delivered the opinion with Presiding Justice Keller and Justices Price, Womack, Keasler, Hervey, Cochran, and Alcalá joining. Justice Meyers dissented.

The trial court found Whatley guilty of aggravated sexual assault of a child by touching and therefore sentenced him to fifty years. Appellant's stepdaughter accused the appellant of inappropriate touching on three different occasions. The appellant argued that the evidence did not support the conviction because the prosecution did not offer evidence to dispute his claim that he involuntarily touched her because he was asleep at the time of the assault. The court of appeals reversed and acquitted the appellant. The Supreme Court of Texas reversed the court of appeal's decision and remanded.

Issue: Whether the jury could reasonably have inferred that the appellant voluntarily touched the appellant's stepdaughter?

Under § 6.01(a) of the Texas Penal Code, a voluntary act is required in order to hold a defendant culpable of an offense. Voluntary under § 6.01(a) does not refer to the mens rea element of a crime, instead, it only refers to physical body movements. In order to show involuntariness under the statute, the act must be the product of someone else's act, set in action by non-human force, caused by physical reflex or convulsion, or is the product of some other involuntary action. In order for the court to review the jury's decision that the action was voluntary, the court must consider all of the evidence in light most favorable to the verdict and determine if a reasonable fact-finder could have found the defendant guilty beyond a reasonable doubt.

The Supreme Court of Texas reviewed the trial transcript that the jury relied on to make their decision. The appellant's actions were voluntary because the complainant was not convinced that the appellant was sleeping and she did not tell her mother about the abuse due to fear. The complainant, at one point, stated that the appellant may have mistaken her for her mother; however, the mother stated that the appellant had reached for her one time in five years and never penetrated her. For these reasons the Supreme Court found that there is support for a guilty verdict and the appellant's actions were voluntary under § 6.01(a).