Court of Criminal Appeals
May 15, 2014

Cooper v. State
No. PD-1022-12
Case Summary written by Tarryn Johnson, Online Edition Editor.

JOHNSON, J., delivered the opinion of the Court in which KELLER, P.J., and MEYERS, COCHRAN, and ALCALÁ, JJ., joined. KELLER, P.J., filed a concurring opinion in which JOHNSON, J., joined. COCHRAN, J., filed a concurring opinion in which ALCALÁ, J., joined. PRICE, J., filed a dissenting opinion in which KEASLER and HERVEY, JJ., joined. WOMACK, J., did not participate.

Cooper was convicted of five counts of aggravated robbery pursuant to an indictment that named three different complainants, with all counts arising from a single home invasion. Two counts named Andrew Chaney as the complainant, two counts named James Barker as the complainant, and one count named Paul Linden as the complainant. The jury found him guilty of all five counts in the single indictment and assessed Cooper's punishment at imprisonment for 60 years on two of the counts, 80 years on two other counts, and 65 years on the remaining count. The trial court sentenced Cooper accordingly and ordered all five sentences to be served concurrently. The court of appeals affirmed the judgments. *Cooper v. State*, 373 S.W.3d 821 (Tex. Crim. App. 2012).

Issue: Was the Double Jeopardy Clause of the United States constitution violated when Cooper was convicted of both aggravated robbery by causing bodily injury and aggravated robbery by threat to the same victim during a single robbery?

These grounds involve Cooper's convictions for two separate counts of aggravated robbery; one for each of two named complainants—Andrew Chaney and James Barker.

The Court held that Cooper's challenged convictions do violate the double jeopardy clause. The judgment of the court of appeals is reversed and remanded for further proceedings and appropriate disposition.

Keller, P.J. concurring

Presiding Judge Keller concurred with the majority, concluding that two convictions for aggravated robbery violates double jeopardy because the two convictions were for the same transaction and the same victim, rather than a lesser-included offense of aggravated assault. Cooper's convictions both arose under the same robbery statute instead of two separate statutes. The significance being that two separate statutes would tend to indicate that the legislature intended to authorize multiple prosecutions.

Presiding Judge Keller outlines the two instances that courts must ascertain the units of prosecution under a single statute. The first instances arises when the court must address whether the State can punish a defendant multiple times for the same statutorily prohibited conduct because, for example, there is more than one victim, more than one item taken, or more than one item of contraband possessed. The second instance arises when "when the same statutory section lists multiple methods of committing an offense, and [a court] is called upon to determine whether these different methods of commission are different offenses or are merely alternate means of committing the same offense."

After looking at all relevant factors in the present case, Presiding Judge Keller determined that the robbery statute and the "threat" and "bodily" injury elements of robbery are simply alternative methods of committing a robbery. Thus, the unit of prosecution in a robbery case is each individual subjected to assaultive conduct during the course of a theft. Finally, at best, the factors for either multiple prosecutions for the same prohibited conduct or multiple methods of committing the same offense counterbalance each other, and the determinative weight should be given to legislature's decision to place these different means of committing robbery in the same statutory section and hold that they are alternative methods of committing the offense.

Cochran, J. concurring

Judge Cochran, after noting the complexity of the issue at hand, analogizes the current situation to the basic distinguishing factors between assault and battery. Judge Cochran agrees with Presiding Judge Keller that "the 'threat' and 'bodily injury' elements of [assault and] robbery are simply alternative methods of committing [an assault or] a robbery." That is because the unit of prosecution for assault is either or both an "assault" (threat) or a "battery" (bodily injury) upon one person at one time and place. Therefore, the unit of prosecution for robbery is either or both an "assault" or a "battery" upon one person at one time and place during the course of a theft. Additionally, Judge Cochran explains that the unit of prosecution for aggravated robbery is either or both an "assault" with a deadly weapon or a "battery" that causes serious bodily injury upon one person at one time and place during the course of a theft.

Ultimately, because the State proved only one unit of assaultive conduct—a threat to harm with a deadly weapon immediately followed by causing serious bodily injury–against each robbery victim at one time and place, double jeopardy principles bar two convictions for Cooper robbing Mr. Barker and two convictions for Cooper robbing Mr. Chaney.

Price, J. dissenting

Judge Price explains that he would affirm the judgment of the court of

appeals because according to this Court's precedents, the number of victims should not be regarded as the only determinant in a units-of-prosecution analysis. In *Ex parte Hawkins*, 6 S.W.3d 554 (Tex. Crim. App. 1999), the Court reasoned that, "[s]ince robbery is a form of assault, the allowable unit of prosecution for robbery should be the same as that for an assault." But Judge Price points out that the Court never said that the number of victims is the *only* indicium of legislative intent with respect to allowable units of prosecution for the offense of assault.

Additionally, with respect to the related question of whether a jury must be unanimous with respect to its verdict in an assault prosecution, the Court concluded in *Landrian v. State*, 268 S.W.3d 532, 541 (Tex. Crim. App. 2008) that the Legislature intended that alternative statutory methods of committing assault should be regarded as discrete offenses, requiring jury unanimity with respect to each one separately. Judge Price believes there is no reason why the Court would not say the same thing with respect to the assault statute when it comes to a double jeopardy units-of-prosecution analysis—that robbery by causing bodily injury and robbery by threatening or placing the victim in fear of bodily injury or death are discretely actionable offenses.

Judge Price believes the Court recently *did* say this in *Ex parte Denton*, 399 S.W.3d 540, 546 (Tex. Crim. App. 2013). Since the allowable units of prosecution for robbery "should be the same as that for an assault," it is more than plausible to conclude, as the court of appeals did in this case, that Cooper may constitutionally be punished for as many statutorily alternative ways that he robbed both Chaney and Barker as the evidence will support.

Ex parte Harleston
No. WR-79,196-01
Case Summary written by Tarryn Johnson, Online Edition Editor.

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

Applicant, Robert Harleston, Jr., is currently serving a twenty-five-year sentence for the aggravated sexual assault of a child. In this application for a writ of habeas corpus, Applicant claims that he is actually innocent based on the victim's alleged recantations. After conducting a live evidentiary hearing, the habeas court adopted findings of fact that the victim's recantations were credible and recommended that this Court grant relief.

Harleston was accused of sexually assaulting a child when in 2007, the victim, Kenya Davis, told a school counselor that Harleston had sexual

intercourse with her two times in 2004, both events occurring on the night of Thanksgiving. At this time, Kenya Davis was twelve years old. Kenya Davis then revealed that there was a third instance of intercourse on an unspecified day in Harleston's vehicle. Harleston was convicted by a jury and sentenced to twenty-five years' imprisonment after pleading true to an enhancement allegation.

Applicant then filed a petition for discretionary review, which this Court refused on January 12, 2011. Just over a month after Applicant's petition for discretionary review was refused, Kenya hand wrote a nine-page affidavit allegedly recanting, for the first time, all of her allegations against Applicant. Applicant then filed an application for a writ of habeas corpus arguing that Kenya's recantation proves by clear and convincing evidence that he is actually innocent of the aggravated sexual assault of Kenya. The habeas judge, who was the same judge that presided over Applicant's trial, held a live evidentiary hearing at which two witnesses testified: Kenya and Kenya's mother (Sheila). The victim's testimony was highly inconsistent because she recanted her allegations and repudiated those recantations multiple times. The habeas court made findings of facts that certain exhibits and portions of Kenya's testimony in which she recanted her trial testimony were credible and then recommended that we grant Applicant relief because Kenya's credible recantation proves by clear and convincing evidence that Applicant is actually innocent of the crime for which he was convicted.

Issue: Did the victim's recantations of the sexual assault and the evidentiary findings at the habeas corpus hearing establish Harleston's innocence by clear and convincing evidence?

After independently reviewing the record, we reject the habeas court's findings that the victim's recantations were credible because those findings are not supported by the record, and we hold that Applicant has failed to present clear and convincing evidence that unquestionably establishes his innocence. Although the Court of Criminal Appeals will typically defer to the habeas court's findings of fact and conclusions of law, the Court's "deference is not a rubber stamp, and [the Court] can invoke [] authority as the ultimate fact finder to make contrary or alternative findings and conclusions '[w]hen our independent review of the record reveals that the trial judge's findings and conclusions are not supported by the record . . . .'"

The evidence presented at the habeas hearing was newly discovered, but lacked credibility. Significant objective evidence from the habeas record supports a finding that Sheila testified untruthfully at the evidentiary hearing and that Kenya's recantations and stories explaining why she recanted were internally inconsistent, implausible, and portions of them factually impossible. The stories that she told in various forms throughout the post-conviction proceedings were also contradicted by the testimony adduced at Applicant's trial.

Additionally, the applicant failed to prove his actual innocence by clear

and convincing evidence because "[t]he sheer number of 'back and forth,' inconsistent stories" leads to the conclusion that Harleston cannot meet the minimum quantum of proof necessary to satisfy his burden to unquestionably establish his actual innocence by clear and convincing evidence. Newly discovered evidence that merely "muddies the waters" and only casts doubt on an applicant's conviction, such as the multiple recantations and repudiations in this case, is insufficient to prevail in a free-standing actual-innocence claim because that evidence does not affirmatively establish an applicant's factual innocence by clear and convincing evidence. *See Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

Although Harleston presented newly discovered evidence that, if true, would have possibly established his actual innocence, because he has did not show that his newly discovered evidence is credible, and because of the multiple recantations and repudiations, he cannot prove by clear and convincing evidence that no rational jury would have convicted him in light of the newly discovered evidence. Therefore, relief was denied.

Price, J., concurring

Judge Price wrote separately to advance two main points: (1) That as the court of return in this situation, the Court of Criminal Appeals is not bound by the convicting court's findings of fact; and (2) In post-conviction proceedings under *Elizondo*, it does not ultimately matter whether the convicting court or even this Court happens to believe the complaining witness's recantations.

First, because Judge Price does not believe that the Court of Criminal Appeals is bound by the convicting court's findings of fact, and does not agree with the majority that the convicting court's recommended findings have no support in the record. Instead, Judge Price believes that the record before the Court presents a compelling case for the complaining witness's recantations to be rejected outright, and therefore Judge Price would simply do so. Second, under the *Elizondo* standard, Judge Price contends that the Court must make a judgment with respect to what a reasonable juror would have believed about the credibility or reliability or truth of the newly discovered evidence; *not* whether the new evidence of innocence is found by the Court to be credible, reliable, or true. Judge Price agrees that under *Elizondo*, the Applicant in this case is not entitled to relief.

Perez v. State
No. PD-1380-13
Case Summary written by Tarryn Johnson, Online Edition Editor.

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

joined. KEASLER, J., concurred in the judgment.

The appellant was originally charged in an eleven-count indictment with four counts of indecency with a child and seven counts of aggravated sexual assault. The day before trial, the State filed a motion asking the trial court to amend the indictment by replacing the existing eleven counts with the five counts in an attached exhibit. The motion also stated that the appellant agreed to the amendment and waived the ten-day notice to prepare for trial. The trial court held a hearing on this motion. The State explained that it was abandoning several counts and reorganizing those remaining so they would be in order of severity. The appellant's trial counsel stated that he had no objections to the amendments and that they were waiving the statutorily permitted extra time. The Court swore in the defendant and asked him whether he understood the amendments, whether he consented to them, and whether he waived the extra time to prepare for trial. The defendant affirmatively answered each question.

The method of amending the indictment was then discussed on record. The Court explained that under these circumstances, the Court would normally interlineate the changes on the face of the document by writing the changes, but because the amendments to this indictment would include the entire page, the Court left it up to the parties to agree. The State offered to physically copy, cut, and paste the changes to the indictment, but neither the Court nor the defense counsel saw that to be necessary. All parties agreed at the time that the replacement indictment would be read to the jury and the unaltered eleven-count indictment would speak for itself in the file. Defendant was convicted of all five counts under the amended indictment and on appeal, he argues that the indictment was not properly amended because there was no physical alteration (interlineation) to the actual face of the indictment.

Issues: (1) whether the indictment was properly amended from its original eleven counts to five (of which he was convicted).

(2) whether the trial court committed reversible error by not granting the appellant a hearing on his motion for new trial.

Applying the rules of *Ward v. State* and *Riney v. State*, the Court held that the indictment was properly amended. In *Ward*, the Court of Criminal Appeals addressed how an indictment should be amended in order to accomplish judicial efficiency without undermining a defendant's rights. *Ward* explained that only physical alteration is consistent with the accused's right to be informed of the nature of the charges against them from the face of the indictment. Later, in *Riney*, the Court abrogated *Ward*. The facts in *Riney* closely resemble the facts in this case, but the Court cautioned that "resolutely clinging to the notion that an amendment can be accomplished *only* by the physical interlineation of the original indictment provides a defendant with the opportunity to subvert a process of which he was fully aware and had affirmatively acknowledged." Thus, *Ward* was overruled to

the extent that it required physical interlineation to be the only method of amending an indictment, and that an amended photocopy of the indictment was also an acceptable method of amendment.

Ultimately, the Court reasoned that none of the dangers *Ward* sought to prevent were present in this case. Furthermore, "[t]he appellant was given actual notice of the proposed amendments and very clearly stated that he had no objections. These changes did not add any new charges or alter the language of the old charges. Instead, they eliminated six counts [] and reorganized those remaining." Although it is the purpose of a grand jury to vote on charges in an indictment, the duties and purposes of the grand jury were not frustrated or bypassed in this case because they originally returned a true bill for all original counts, and therefore the amended indictment with five counts had still been returned as true from the beginning. On the issue of whether the trial court committed reversible error by denying the appellant a hearing on his motion for a new trial, the Court held that the appellant had not preserved an error and the second ground for review was overruled.