Court of Criminal Appeals
May 7, 2014

Ex parte Chance
No. WR-81, 136-01
Case Summary written by Jessica Rugeley, Online Edition Editor.

PER CURIAM. COCHRAN, J., filed a concurring opinion in which JOHNSON and ALCALA, JJ., joined. KELLER, P.J., filed a dissenting opinion in which KEASLER and HERVEY, JJ., joined.

Chance was convicted of two counts of online solicitation of a minor. The online solicitation of a minor statute under which Chance was convicted was held unconstitutional in *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013). Thus, the Court set aside Appellant's convictions

Cochran, J., Concurring

Judge Cochran concurred to note that any conviction under an unconstitutional statute is void, regardless of whether the defendant challenged the constitutionality of the statute before it had been declared unconstitutional in another case. Anyone convicted under a statute declared unconstitutional is "innocent" and may obtain acquittal, either in the trial court, on appeal, or in a habeas proceeding.

Keller, P.J., Dissenting

Presiding Judge Keller dissented to state that the Court should have considered the State's argument that Chase cannot raise the constitutionality issue for the first time in a habeas proceeding when he failed to raise it on direct appeal. The online solicitation statute was held unconstitutional because it prohibited a wide range of constitutionally protected speech but it is unclear if the conduct for which Chase was convicted fell within the constitutionally protected range. Furthermore, the cases cited by the concurrence to show that convictions based on unconstitutional statutes are automatically void could be distinguished. Because the Court failed to explain why the convictions were overturned, Presiding Judge Keller dissented.

Whitson v. State
No. PD-0514-13
Case Summary written by Jessica Rugeley, Online Edition Editor.

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

Appellant pled guilty to burglary of a habitation and the trial court

deferred adjudication and placed her on community supervision for five years. Her supervision was set to end on April 4, 2007, barring extension of early termination. The State filed two motions to adjudicate and the trial court twice extended Appellant's community supervision. The second order listed the end-date as October 6, 2009, but listed conflicting durations for the extension: "Defendant's conditions of supervision should be amended and extended for a period of 18 months, with said community supervision to henceforth terminate on the 6th day of October 2009…. Defendant's community supervision be, and the same is hereby extended for a period of 1 year, with said period of community supervision to henceforth terminate on the 6th day of October 2009." The State filed a third motion to adjudicate on October 5, 2009, and the trial court adjudicated Appellant guilty and sentenced her to eight years of confinement. Appellant challenged the trial court's jurisdiction and argued that her deferred adjudication ended on October 4, 2009, one day before the State filed its motion to adjudicate, pursuant to *Nesbit v. State*, 227 S.W.3d 64 (Tex. Crim. App. 2007). The trial court denied Appellant's motion. The court of appeals affirmed.

Issue: (1) "Whether the trial court lacked jurisdiction to revoke appellant's community supervision because the motion to proceed to adjudicate was filed one day after the seven and one half year period of probation ended."

(2) "When the trial court pronounces the period of community supervision as being so many years and/or so many months and then the date is not correctly calculated so that the amount of years and/or months and the ending calendar date are [not] the same, which prevails, the announcement of the year and/or months or the calendar date, the longer period regardless of the conflict, the court's intent, or some other method of resolving the conflict?"

The Court held that the trial court lacked jurisdiction because the motion to adjudicate was filed too late and that the determination of the end-date of community supervision must be calculated according to *Nesbit v. State*. In *Nesbit*, the Court held that a ten-year community supervision beginning on April 29, 1994, should end on April 28, 2004, not April 29, 2004; otherwise, the period would be ten years and one day. Though *Nesbit* did not require the Court to decide between a standard calculation and an end-date specified by the trial court, the Court chose to follow its reasoning in this case and hold that the *Nesbit* calculation controls in all determinations of community supervision. Thus, "should a trial court elect to provide a specific end-date in addition to the standard term of years and months, this date must be correctly computed pursuant to *Nesbit*." Appellant's deferred adjudication ended on October 4, 2009, and the trial court did not have jurisdiction to grant the State's motion to adjudicate. The court was appeals was reversed and the case was remanded to the trial court for further proceedings.

Keller, P.J., Concurring

Presiding Judge Keller concurred because she would hold that the trial court was not authorized to extend Appellant's community supervision beyond one year and eighteen months. Appellant agreed to one year for the first extension and eighteen months for the second extension and in doing so waived her right to a hearing. Thus, the trial court was not authorized to extend the community supervision further than was agreed to and the State's motion to adjudicate was filed too late.

Whitfield v. State
No. PD-0865-13
Case Summary written by Jessica Rugeley, Online Edition Editor.

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

Appellant was convicted of rape in 1981 and sentenced to fifteen years of imprisonment. In 2007, Appellant was granted post-conviction DNA testing. After receiving the results in 2009, the trial court found no reasonable probability that Appellant would not have been found guilty if the results had been available at trial. The court of appeals held that Chapter 64 of the Code of Criminal Procedure does not permit an appeal of unfavorable findings after post-conviction DNA testing is completing and dismissed the appeal for lack of jurisdiction.

Issue: "[W]hether the courts of appeals have jurisdiction to consider a convicted person's appeal of unfavorable findings from a hearing on DNA testing."

The Constitution of the State of Texas states that a statute must expressly give the courts of appeals jurisdiction. The Court begins with the plain language of the statute. The only reference to Chapter 64 reads: "An appeal under this chapter is to a court of appeals in the same manner as an appeal of any other criminal matter, except that if the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the court of criminal appeals." Article 64.05 only describes the procedure to appeal, not the substance that may be appealed. Thus, the Court looked beyond the text to the legislative history. "The bill analysis provided by the House Committee on Criminal Jurisprudence at the time of the 2003 amendments said, '[This bill] makes it clear that both the request for a test (based on legal or factual determinations) and the findings by the trial court

are appealable.'" The legislature, thus, did intend to permit the courts of appeals to consider the sufficiency of the evidence and other grounds of appeal from these DNA hearings. The Court held in *State v. Holloway*, 360 S.W.3d 480 (Tex. Crim. App. 2012, that a trial court's findings after a DNA hearing was advisory in nature and thus the courts of appeals lacked jurisdiction. The Court overruled *Holloway* and reversed the court of appeals and remanded for further consideration.

Price, J., Concurring

Judge Price concurred to point out that the Court was correct in holding in *Holloway* that a trial court's favorable finding under Article 64.04 is "advisory in nature," but the Court was wrong in holding that the advisory nature meant that the court of appeals lacked jurisdiction.

Alcala, J., Concurring

Judge Alcala concurred because she does not find that "the legislative intent to permit an appeal is necessarily dispositive of the question whether an opinion by an appellate court reviewing such a finding would nevertheless be advisory." Judge Alcala concluded that "regardless of whether the appellant is the convicted person or the State, an opinion by a court of appeals reviewing a trial court's finding that DNA results are either favorable or unfavorable to a convicted person does not constitute an impermissible advisory opinion because (1) appellate review of the trial court's Chapter 64 finding in no way infringes upon this Court's exclusive habeas-corpus jurisdiction, and (2) any resulting opinion from a court of appeals is not advisory-only in that it is final and binding on the parties."

Acosta v. State
No. PD.-1211-13
Case Summary written by Jessica Rugeley, Online Edition Editor.

Judge Cochran delivered the opinion of the unanimous Court.

Appellant, a freightliner truck driver, was stopped with a defective light. The police officer became suspicious when he noticed that Appellant's passenger, Gus, whom Appellant claimed was learning to be a truck driver, did not have a driver's license. There were also five cellphones between the two of them. Appellant gave the officer permission to search the truck and he found over $500,000 hidden behind a speaker. Another officer placed the money in two duffle bags and placed those bags amongst empty ones for a K-9 to sniff. The dog alerted for drugs on the bags with the money. Both Appellant and Gus were indicted for money laundering. Gus was found guilty and Appellant argued that he was a "blind mule" and did not know Gus was transporting the money. In rebuttal, the local sheriff testified that, while serving as a bailiff in an earlier proceeding, he witnessed Appellant and Gus

having an amicable conversation. The State used this testimony to show that Appellant was not a blind mule because he would have been angry at Gus if he hadn't known about the money. Appellant was convicted of money laundering and sentenced to eight years' confinement. On appeal, Appellant argued that the evidence was insufficient to demonstrate that the money came from delivering drugs. The court of appeals affirmed.

Issues: (1) Did the court of appeals err by relying on the dog alert as evidence that the money was proceeds of delivery of a controlled substance?

(2) Was the evidence otherwise insufficient to prove the nexus?

The Court held that the evidence was sufficient. Evidence of money laundering may include the following: "a denial of knowledge of the money, a narcotics-dog alert on the money, the amount of money, the packaging of the money, the secret storage of the money, the presence of illegal drugs, and the presence of records of drug transactions." Courts look to the totality of the circumstances and come to a common sense conclusion. Appellant argued that the court of appeals erred because this Court held that "scent lineups" alone are insufficient to support a conviction in *Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010). Scent lineups, however, may be used as circumstantial evidence. The court of appeals also found that Appellant did not know his passenger's last name, broke eye contact when he was asked about money, his log book showed travel on a known drug route, Appellant did not act surprised when the cash was found, there was a substantial amount of cash, there were five cellphones, and Appellant and Gus remained amicable. Considering the totality of the circumstances, the court of appeals could have reasonably concluded that the money was proceeds from the delivery of a controlled substance. Thus, the Court affirmed.