Court of Criminal Appeals
June 25, 2014

Dobbs v. State
No. PD-0259-13
Case Summary written by Justin Nail, Staff Member.

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

Appellant, Atha Albert Dobbs, was charged with and convicted of resisting arrest with a deadly weapon. Appellant's wife, after being informed that Dobbs had been sexually abusing one of her daughters for several years, called the police to report the abuse. In this call, appellant's wife informed the police that he might attempt to resist arrest or try to hurt himself. In response, the police department sent five sheriff's deputies to apprehend Dobbs. The deputies surrounded the house, with one deputy covering the front door of the house. This officer witnessed Dobbs carrying a handgun. After the officer ordered Dobbs to drop his weapon, Dobbs instead pointed the gun at his own head and mouthed that he would kill himself. When Dobbs turned around and walked further into the house, one officer followed him in and shot him with a taser. When Dobbs again ignored a direct order to drop his weapon, the officer again shot him with the taser and removed the weapon from Dobbs' possession. The officers then arrested Dobbs. A jury convicted Dobbs of resisting arrest with a deadly weapon, and the court of appeals found that because his actions were in direct opposition to his imminent arrest.

Issue: Whether Dobbs' conduct (refusing to drop his weapon and relaying his intention to shoot himself) constituted a use of force against an officer in the officer's attempt to arrest him, as required by statute.

The court first looked to its standard of review, which required it to discern whether a rational fact-finder could have found the elements of the offense beyond a reasonable doubt. Then, the court presented the elements of the resisting-arrest statute, the relevant portion being the requirement that the person acts "by using force against the peace officer or another." TEX. PENAL CODE § 38.03(a). It then looked to the meaning of the words "force" and "against," which were not defined by the statute. The court, following precedent, decided to determine the words' plain and ordinary meaning. The court, after considering the words' dictionary definitions, decided that the language of the statute should be interpreted "as meaning violence or physical aggression, or an immediate threat thereof, in the direction of and/or into contact with, or in opposition or hostility to, a peace officer or another."

The court disagreed with the lower court's interpretation that "against" did not require "action *directed at* or *toward* an officer," but only "force exerted in opposition to the officer's efforts at making an arrest." The court found this language too broad, as it allowed the word "against" to apply to the entirety of the

arrest, as opposed to the individual officer himself. The court held that the statute required the conduct to be directed at the officer, not merely to delay or disrupt the general arrest itself.

The court held that no rational fact-finder could have, with the evidence presented in this case, convicted Dobbs of resisting arrest with a deadly weapon, because he only expressed intent to shoot himself, an act not made *against* the officer but against himself. Additionally, the court did not find the second refusal to drop the weapon as an act against the officer, simply as one to delay the arrest. The court reversed the judgment of the court of appeals and rendered a judgment of acquittal.

MEYERS, J., dissenting.

The dissent argued that a rational fact-finder could have decided that merely Dobbs' possession of a deadly weapon during the arrest "not only put pressure on the officers to delay the arrest but also gave [him] power over those officers." Judge Meyers disagreed with the majority's interpretation of the word "against" as used in the statute, finding that the threat against the officers was *implied* by his conduct, as the mere possession of the weapon implied the threat of deadly force, due to the available immediacy of deadly violence. Judge Meyers determined that the possession of the weapon (with the expressed intent to harm himself) constituted "force" "in opposition to" the arresting officers, and found that the evidence was enough to sustain Dobbs' conviction.

Kelly v. State
No. PD-0702-13
Case Summary written by Tara Parker, Staff Member.

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

The appellant was convicted for aggravated robbery and sentenced to fifty years in prison by a jury. His appointed counsel on appeal thought that any appeal would be frivolous and therefore filed an *Anders* brief to withdraw. Both the trial court and appointed counsel informed the appellant that he could file a pro se appellate brief and that he had the right to review the trial record. The appellant filed a pro se motion requesting access to the record, but did not file a response to the Anders brief. Thus, the Sixth Court of Appeals determined the appeal would be frivolous and granted appointed counsel's motion to withdraw. The appellant then filed a motion for rehearing, which was denied, alleging that he was deprived access to the appellate record; next, he filed a petition for discretionary review to the Court of Criminal Appeals, arguing that his denial of access to the appellate record violated his due process right to prepare an adequate response.

Issue: "Who should bear the ultimate responsibility for assuring that the indigent appellant is allowed access to the appellate record in order to implement this right?"

The Court of Criminal Appeals granted the petition and asked the various appellate courts for information regarding each court's process to ensure that a pro se appellant is granted access to appellate records. The Court adopted a policy based on a recommendation from the Sixth Court, requiring appellate counsel to "take concrete measures to initiate and facilitate the process of actuating his client's right to review the appellate record." This adds to the previous list of requirements for a lawyer who files an *Anders* brief. The withdrawing attorney must now assist the appellant in accessing the appellate record by including a form motion in the notice to withdraw, with only the appellant's signature and date lacking. Further, the withdrawing attorney should give the appellant the address of the relevant court of appeals and tell the appellant the deadline for filing.

The Court then set out the responsibility of the appellate courts after the appellant has filed his pro se request for access to the appellate record. The Court did not hold that a specific procedure must be followed in each case to ensure appellant's access to the record. Rather, the Court held that each court of appeals must make a written order to specify the procedure and must send that order to all interested parties so that everyone is on the same page. The Court specified that the appellate courts should not make a ruling on the Anders brief until the appellant has had access to the appellate record and a sufficient amount of time to prepare a response. Ultimately, the Court held that it is the responsibility of the appellate courts to ensure the appellant is given access to the appellate record.

Judge Alcala filed a concurring opinion.

Judge Alcala agrees with the reversal of the Kelly case, but disagrees with the Court's new requirements put on the courts of appeals. Judge Alcala thinks the Court is micromanaging the courts of appeals, and that the ultimate responsibility of helping the appellant belongs to his attorney. Judge Alcala reached this conclusion by using the appellate-court clerk's duties set out in Rule 12 of the Texas Rules of Appellate Procedure, and by noting the ethical obligations of each attorney to zealously represent his client. Because of these two long understood principles, Judge Alcala believes the majority's opinion is too broad and unnecessary.

Presiding Judge Keller filed a concurring opinion.

Presiding Judge Keller files a concurring opinion because he believes that any problems with allowing an appellant access to the appellate record is something best left to the courts of appeals.

Lundgen v. State
No. PD-1322-13
Case Summary written by Nirav Patel, Staff Member.

Judge Hervey delivered the opinion of the unanimous Court.

The appellant pled guilty to driving while intoxicated, pursuant to a plea-bargain agreement in which he waived his right to appeal. He was placed on community supervision for 18 months. One week after he pled guilty, appellant was again arrested for driving while intoxicated. Appellant then filed a timely notice of appeal in addition to a motion for new trial, both relating to his first case. In response, the state filed a motion to revoke appellant's community supervision from his first offense due to his arrest for a second offense. Appellant's appeal was dismissed and his motion for a new trial was overruled. Appellant also filed a motion to quash the state's motion to revoke his community supervision. In his motion, appellant claimed he did not violate the terms of his community supervision because he filed a timely motion for new trial and notice of appeal in his first case, which retroactively stayed the commencement of his community supervision until the motion and appeal were resolved. The trial court revoked appellant's community supervision and the court of appeals upheld the trial court's ruling.

Issue: Whether appellant's notice of appeal and motion for new trial tolled the commencement of his community supervision.

Despite finding that a timely and effective notice of appeal stays the commencement of a community supervision term until the appeal has been resolved, the court held that appellant's notice of appeal did not toll his community supervision because the notice was ineffective. The appellant's notice was not effective because he waived his right to appeal in his plea agreement. The court did, however, hold that a waiver of the right to appeal does also waive a defendant's right to file a motion for new trial. In so holding, the court found that a motion for new trial is sufficiently different than a notice of appeal that a waiver of appeal does not waive a defendant's right to seek a new trial. Because the appellant filed a timely and effective motion for new trial, his community supervision was tolled until the motion was overruled. The court held that the court of appeals erred because appellant's community supervision term did not commence until after his second offense.

Keller, P.J., Concurring

Presiding Judge Keller writes separately to inform that the state had two alternatives it could have pursued to avoid its predicament. First, the state could have agreed to appellant's motion for new trial. This would have ensured the state an opportunity to seek incarceration. Second, the state could have included a waiver of the right to file a motion for new trial in addition to a waiver of appeal.

Canida v. State
No. PD-0003-13
Case Summary written by Regan Pearson, Staff Member.

Judge Meyers delivered the unanimous opinion of the Court.

Canida's name appeared in a database search of pseudoephedrine purchases made within Lamar County and a police narcotics investigator obtained a search warrant and searched Canida's residence. After the investigator found several items used in the manufacture and use of methamphetamine, Canida was arrested for manufacturing more than one but less than four grams of methamphetamine.

At trial, an expert for the State testified that a person could make one to two grams of methamphetamine with the materials found in Canida's residence and the jury convicted him of manufacturing methamphetamine in an amount of more than one gram but less than four grams, in violation of Texas Health and Safety Code Section 481.112(b).

Canida appealed and the court of appeals reversed, noting that the State was required to prove Canida produced between one and four grams of methamphetamine. Because some of the materials needed to manufacture methamphetamine were not found during the search of Canida's residence and only an unknown quantity of the drug was detected on a container found in the home, the court concluded that the evidence was insufficient to affirm the conviction and entered an acquittal.

The State filed a petition for discretionary review and argued that the court of appeals erred in its judgment by failing to reform the judgment to a conviction of the lesser-included offense of attempted manufacture of methamphetamine. The State based its decision on the Court of Criminal Appeals' decision in *Bowen v. State*, where the Court concluded that a reformation of a conviction, as opposed to an acquittal, was proper. *Bowen v. State*, 374 S.W.3d 427, 428-29 (Tex. Crim. App. 2012).

The Court of Criminal Appeals noted that it had since clarified the holding of *Bowen*, stating that a court must answer two questions when deciding whether reformation of the conviction or acquittal is necessary: 1) can the defendant be found to have necessarily committed every element necessary to convict the defendant of the lesser-included offense; and 2) is there sufficient evidence to support a conviction of the lesser-included offense. *Thornton v. State*, 425 S.W.3d 289, 299-300 (Tex. Crim. App. 2014). If the answers to both questions are yes, than the court should reform the conviction; however, if the answers to both or one of the questions is no, the court should enter an acquittal. Because *Thorton* was such a recent decision, the Court remanded the case to the court of appeals to consider it in regard to *Thorton*.

Gonzales v. State
No. PD-1313-13
Case Summary written by Nicholas Pilcher, Staff Member.

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

The State appeals the dismissal of Gonzales's indictment for injury to a child and indecency with a child pursuant to Gonzales's speedy-trial motion. The incident from which the charges arose allegedly occurred on November 27, 2002. Accordingly, Gonzales was indicted on March 17, 2004. However, he was not arrested until April 21, 2010. After his arrest, Gonzales filed a pretrial motion to dismiss for lack of a speedy trial. Gonzales's motion was denied by the trial court and he timely appealed, but the court of appeals affirmed its dismissal. *See Gonzales v. State*, No. 04-11-00405-CR, 2012 WL 1364981 (Tex. App.—San Antonio Apr. 18, 2012) (mem. op.) (not designated for publication). Gonzales then filed for discretionary review by the Court of Criminal Appeals, which reversed the court of appeals and remanded the case for analysis of the speedy-trial claim under the correct prejudice standard. *See Gonzales v. State*, No PD-0724-12, 2013 WL 765575, at *1 (Tex. Crim. App. Feb. 27, 2013). It is from the court's subsequent dismissal of Gonzales's indictment that the State has appealed.

The Court of Criminal Appeals reviewed the holding of the court of appeals to determine whether Gonzales was subjected to sufficient presumptive prejudice in order for the court of appeals to proceed with its *Barker* analysis, whether Gonzales acquiesced to such prejudice, and whether the State had persuasively rebutted the presumption of prejudice.

The Court affirmed dismissal of the indictment holding that Gonzales's defense was prejudiced by the State's six year delay in prosecution, Gonzales did not acquiesce to the delay in his prosecution because "he asserted his rights once he was aware of the indictment against him," and the State had failed to meet its burden to rebut the presumption of prejudice. *Gonzales*, 2013 WL 4500656, at *6. The Court ultimately concluded that "because of the State's negligence in failing to pursue [Gonzales] with diligence for six years . . . [his] right to a speedy trial was violated," and affirmed the judgment of the court of appeals.

Keller, P.J. Dissenting

In Presiding Judge Keller's dissenting opinion, she addressed what she viewed as one the primary purposes of the speedy-trial guarantee: protecting the defendant against "tolling abuse," which is the use of a sham indictment as a strategy to toll the running of the applicable statute of limitations when it would otherwise expire and foreclose prosecution. Because Gonzales was arrested within the limitations period applicable to the underlying charge, tolling abuse did not occur. Accordingly, Gonzales was not deprived of his Sixth Amendment right to a speedy trial.

Price v. State
No. PD-1460-13
Case Summary written by Jake Rutherford, Staff Member.

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

Jimmy Don Price was convicted of four sexually related offenses as a result of a period of repeated sexual contact with his ten-year-old stepdaughter. At trial, the complainant testified that the encounters—which were extremely graphic in nature—took place from approximately March 2009 to January 2010. The only two charges at issue on appeal were the convictions for continuous sexual contact and attempted aggravated sexual assault of a child. On appeal, the appellant argued TEXAS PENAL CODE 21.01 (b), (c), (e) is not intended to allow for punishment for both of those offenses.

Issue: Whether a defendant may be charged with continuous sexual abuse of a child and criminal attempt to commit one of the predicate offenses under the same statute.

The Court of Appeals looked to the language of the statute and concluded that, although the statute does not explicitly address attempt crimes, the Legislature did not intend to permit both the convictions in question and to allow both convictions to stand would violate double jeopardy. The court based their reasoning on the explicit statutory language that prohibits conviction of both the predicate offenses and continuous sexual abuse. The Court of Criminal Appeals agreed and expanded on the lower court's reasoning and found further justifications for overturning the appellant's attempted aggravated sexual assault conviction.

First, the Court held that the statute's language is ambiguous. A statute is ambiguous when it can be understood to mean two different things by two different, reasonable people. The Court held that it is clear that the Legislature did not intend to allow conviction of continuous sexual abuse and the underlying sexual acts that satisfy the elements of the crime. When it comes to attempted predicate acts that are excluded at completion, it is less clear. Therefore, the Legislature's silence can be construed to either allow or disallow conviction for attempted sexual assault and continuous sexual abuse of a child.

Next, the Court examined the statutes legislative history and determined that the statute was designed to remedy a common scenario where the systematically and continuous abused child-victim lacks the cognitive ability to give accurate quantitative or temporal testimony as to when or how often the encounters occurred. The Court held this statute to be an alternative—not additional—route to conviction for sexual abuse. The prosecutor is able to charge for the entire sequence of events, rather than the offense specific approach previously required.

Once the Court determined that the Legislature did not intend for the statute to allow conviction of both of the offenses in questions, they held that to do so would violated the defendant's rights against double jeopardy. The Court reasoned that attempted aggravated sexual assault is a lesser-included offense of continuous sexual abuse. Therefore, without a clear intent by the Legislature to allow separate punishments for both crimes, the crimes are the same for double jeopardy purposes. The Court of Criminal Appeals affirms the judgment of the Court of Appeals vacating the conviction for attempted aggravated sexual assault.

PRICE, J., Concurring:

Judge Price would rely solely on the *Blockburger* test for double jeopardy without clear legislative intent to the contrary. Under *Blockburger*, an offense is the "same" offense for double jeopardy purposes if it contains the same elements, including lesser-included offenses. Since the Legislature did not intend to allow convictions for the ongoing offense and aggravated sexual assault, and attempted aggravated sexual assault is a lesser-included offense of aggravated sexual assault, it is the same for double jeopardy purposes.

Rabb v. State
No. PD-1643-12
Case Summary written by Austin Smith, Staff Member.

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

Appellant was convicted of tampering with physical evidence and sentenced to six years of confinement. Appellant was shopping in a Wal-Mart with his step-brother, James Reynolds. During that time, Reynolds was observed shoplifting by a Wal-Mart asset protection coordinator who contacted the police to come to the store. Once Reynolds exited with check-out area, he was detained by store employees. During that time, Appellant was unaware that Reynolds had been detained for shoplifting and continued shopping. After Appellant paid for his items and was exiting the store, he was approached by a police officer who responded to the call. The officer explained to Appellant that Reynolds was in custody for shoplifting and asked if Appellant had taken anything from the store without paying. Appellant responded that he had not taken anything he did not pay for and immediately consented to a pat-down search by the officer.

An employee standing nearby noticed the corner of a plastic baggie in Appellant's hand and notified the officer. When the officer went to retrieve the baggie, Appellant put the baggie in his mouth and swallowed the baggie and its contents. An ambulance was called and medical report shows that Appellant told the medic that the baggie contained pills that were not prescribed to him. No one

made any attempt to retrieve the items that Appellant swallowed. The State charged Appellant with violating Section 37.09 of the Penal Code by "knowing that an investigation was in progress, . . . intentionally or knowingly destroy[ing] a plastic baggie with intent to impair is availability as evidence in the investigation."

On appeal, Appellant argued that the evidence was insufficient to establish that he destroyed the baggie or that he knew an investigation was in progress. "Section 37.09(a)(1) of the Texas Penal Code defines the offense of tampering with physical evidence with three elements: (1) Knowing that an investigation or official proceeding is pending or in progress; (2) a person alters, destroys, or conceals any record, document, or thing; (3) with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding." The Appellant's indictment alleged only that he had "destroyed" the evidence and did not allege either of the statutory alternatives.

The court of appeals first addressed the definitions of "conceal" and "destroy" within the statute and decided the two definitions should not so closely overlap as to be interchangeable in this case. The court of appeals looked to the Court's analysis in *Williams v. State* for the definition of "destroy," in which the Court held that a glass crack pipe that had been stepped on and had been broken into pieces was destroyed for the purposes of this statute. 270 S.W.3d 140 (Tex. Crim. App. 2008). In that case, the Court held that because Legislature chose to use the three different words in the statute, "'destroys' must have an effect distinct from 'alters' and 'conceals' and determined that evidence is "destroyed" when "ruined or rendered useless," rather than when its evidentiary value is lost or diminished. The court of appeals concluded that, because the evidence showed only the baggie's location and nothing about the condition of the baggie, or pills, the acts of Appellant constituted concealment rather than destruction. Based on that finding, the court of appeals reversed the trial court, holding that no rational trier of fact could have found that Appellant destroyed the baggie within the meaning of the law and rendered a judgment of acquittal.

Issue: "(1) whether the court of appeals erred in failing to find overlap in the terms 'conceals' and destroys,' (2) whether the court of appeals erred in not permitting the fact finder to infer the evidence was destroyed, and (3) whether the court of appeals was required to reform the judgment after a conviction on a lesser-included offense rather than acquit."

Regarding the first issue, the Court concluded that while the words chosen by Legislature in defining this offense each have a distinct purpose, they are not mutually exclusive and does not preclude overlap among those meanings. The Court found that the court of appeals simply declined to extend the definition of "destroy" put forth in *Williams* to the situation in this case in which Appellant's "action so clearly constitute[ed] a concealment" and thus, its decision did not conflict with the Court's conclusion.

As to the second issue, the Court agreed with the State's assertion that fact finders are permitted to draw reasonable inferences if supported by the evidence, however, the fact find is prohibited from drawing conclusions based on speculation

or mere theorizing about the possible meaning of facts. The Court concluded that even if a fact finder could reasonably infer from the evidence that the baggie and pills were destroyed by their passage into Appellant's body, the State did not present any evidence on the condition of the baggie and its contents after Appellant swallowed them, nor any evidence that demonstrated that the items had been ruined or rendered useless. Additionally, there was no evidence of an attempt by officers or doctors to retrieve the baggie or demonstrate if its recovery was possible. The Court stated that "while it is possible that the baggie was destroyed, it is just as possible that it was not," using the comparable situation of drug smugglers common technique of swallowing items filled with drugs, which clearly does not cause the destruction of drugs. The Court held that without evidence on the status of the baggie, a determination on whether it was destroyed after passing through Appellant's stomach would be based purely on speculation. Because the State chose to allege only that Appellant destroyed the evidence and failed to include either of the statutory alternatives, in addition to presenting no evidence that the baggie and its contents were destroyed, the Court concluded there was no evidence that a fact finder could base a reasonable inference that they had been destroyed and affirmed the court of appeals decision.

Finally, the State argues the court of appeals should have reformed its conviction to the lesser-included offense, attempted tampering with evidence, rather than entering a judgment of acquittal. Because neither the State nor the court of appeals had the benefit of the Court's recent decision in *Thorton v. State*, 425 S.W.3d 289 (Tex. Crim. App. 2014), which the Court used a two-prong analysis for deciding whether to reform the judgment to reflect a conviction for a lesser-included offense when there is insufficient evidence to support a conviction for a greater-inclusive offense, the Court remanded the case for the court of appeals to consider whether reformation of the judgment is required.

Judge Cochran Concurring

Judge Cochran writes separately to simply point out that the State lost this conviction because it did not pay sufficient attention to its pleading and suggests the prosecution should have alleged all three criminal acts—"concealing," "altering," and "destroying"—in its indictment. He agrees that Appellant concealed the baggie when he swallowed it, but sustains that there is no evidence to support a finding that the baggie was "destroyed" when swallowed.

Judge Alcala, Dissenting, joined by Presiding Judge Keller

Judge Alcala disagrees with the Court's reasoning and argues that, in deference to the fact finder's common sense, the evidence is sufficient to support a conviction of Appellant for tampering with physical evidence. The fact finder was rational in determining that the pills and baggie were ruined or rendered useless by Appellant's act of swallowing them.

He also argues that a rational trier of fact could have found the baggie and pills were rendered useless for their intended purpose and therefore, destroyed. He

suggests the pills and baggie could have been destroyed by the Appellant's act of swallowing them, "either because (1) they were digested in that process, or (2) they were expelled in an unsanitary condition in appellant's excrement after passing through his intestinal tract." He also asserts that the State does not need to prove that the altered, destroyed, or concealed item could not be used as evidence at the defendant's trial. It only needs to prove that a defendant acted with intent to impair the verity, legibility, or availability of evidence in an investigation.

Lastly, he argues that the existence of a reasonable alternative, specifically the analogy to drug smuggling, does not make evidence insufficient so that the fact finder engages in impermissible speculation. He concludes that a rational fact finder could have determined that the baggie and pills were rendered useless or ruined by the appellant's act of swallowing them and hold the evidence is legally sufficient to sustain appellant's conviction for tampering with physical evidence.