

Court of Criminal Appeals
January 15, 2014

Ex Parte Coty

No. WR-79, 318-03

Case Summary written by Leonardo De La Garza, Staff Member.

Hervey, J., delivered the opinion of the unanimous Court.

Jonathan Salvador, a laboratory technician working for the Houston Police Department, resigned from his position after the Texas Forensic Science Commission (TFSC) discovered professional misconduct on his part. Specifically, TFSC found that Salvador had used engaged in “dry labbing”, i.e., producing results by guesswork or using evidence or results from another analysis. The investigation and subsequent retesting resulted in various habeas corpus applications from cases involving Salvador’s work. The court in those cases consistently found a presumptive due-process violation.

Coty, the habeas applicant of concern, was pulled over on suspicion of possessing narcotics and subsequently arrested after cocaine was discovered in a cereal box. Though the evidence was initially subject to Salvador’s testing, a laboratory technician later charged with retesting concluded that Salvador followed proper procedures and correctly positively identified cocaine. After receiving a sentence of 10 years confinement, Coty filed an application for writ of habeas corpus, alleging that he was entitled to relief because of Salvador’s misconduct. The habeas court agreed. The Court of Criminal Appeals had previously granted Coty’s application based on the presumptive violation of due process, but withdrew the motion to address the issue presented.

Issue: Under what circumstances, if any, should the court presume a due-process violation in a case handled by a forensic scientist found to have been committed misconduct in another case?

The court held that presuming evidence in every case involving a forensic scientist previously found to have committed misconduct was inappropriate and established another test. This test allows an applicant to shift the burden of falsity to the state if certain conditions are met, but the applicant must still prove the materiality of inferred false evidence. The Court first outlined the state and applicant’s arguments as follows: the state argued that this type of rebuttable presumption should apply only when the misconduct is so persistent and pervasive that it shocks the conscience. Moreover, the state proposed a two-prong test, accepted by other jurisdictions, involving misconduct egregiousness and demonstrable prejudice. In response, Coty argued, among other things that because he was convicted based on Salvador’s test results, false evidence was essentially used against him. Thus, the court should abide by the per se rule, which presumed the falsity of evidence and that the error was material to the applicant’s

conviction. However, the court declined to presume both, instead implementing a shifting burden inquiry for falsity and placing the burden of persuasion on the applicant for materiality.

First, the court requires the applicant demonstrate the following factors to infer that the evidence in question is false: (1) the technician in question is a state actor, (2) the technician has committed multiple instances of intentional misconduct in another case or cases, (3) the technician is the same technician that worked on the applicant's case, (4) the misconduct is the type of misconduct that would have affected the evidence in the applicant's case, and (5) the technician handled and processed the evidence in the applicant's case within roughly the same period of time as the other misconduct. If the applicant demonstrates all of the above, the burden shifts to the state to prove that the laboratory technician committed no such intentional misconduct. Though the Court recognized that such factors place a heavy burden on the state, it also recognized that the materiality element provides its own high hurdle for the defendant. Finally, the court remanded the cause to the habeas court to apply the principles set forth in the opinion.

Price, J., filed a concurring opinion.

Judge Price agreed that the Court's initial categorical approach did not take into account whether the technician misconduct materially affected the outcome of the case. He added a message of caution, i.e., that the convicting court and parties should not mix the issues of falseness and materiality. In separating the analysis, courts should only inquire as to whether the state can offer specific evidence to prove that the state's agent did not falsify his report in the instant case. A further inquiry treads on the materiality analysis.

Ex Parte Walton

No. WR-75,599-03

Case Summary written by Matt McKee, Staff Member.

Keller, P.J., delivered the unanimous opinion of the Court.

After finding him guilty of aggravated sexual assault, the trial court sentenced Walton to forty years in prison. The court of appeals subsequently affirmed this ruling with the Court of Criminal Appeals denying review. Walton raised eight issues in his application for Habeas Corpus, using an 11.07 form from the district court where he filed the application. Noting the form contained no maximum length for the application, Walton submitted a 328-page memorandum to supplement his application.

Finding Walton's application to be excessive in length, the Court of Criminal Appeals cited the 4,868 writ applications it disposed of in 2013, noting the importance of giving prisoners the opportunity to apply for Habeas Corpus while also promoting judicial efficiency. Citing states like California and Florida that have enacted fifty-page limits for post conviction applications, and Ohio, which limits such applications to three pages per issue, the Court revised the Texas Rules of Appellate Procedure to limit Habeas Corpus petition pleadings' length.

Accordingly, Rule 73.1(d) now limits each ground for relief's length to the two pages provided on the 11.07 form, additionally allowing a memorandum not exceeding 15,000 computer generated words, or fifty pages if non-computer generated. Tex. R. App. P. 73.1(d). Rule 73.1(d)'s amendment, does not, however, apply to "appendices, exhibits, cover page[s], table of contents, table of authorities, [or] certificate of compliance" to the fifty-page limit. Tex. R. App. P. 73.1(d). An applicant's failure to comply with the new limits can result in their application's dismissal. Tex. R. App. P. 73.1(d). In addition to the 73.1(d) requirements, Rule 73.1 requires an applicant to note each issue their memorandum addresses in the 11.07 form. Tex. R. App. P. 73.1. Finally, the Court amended Rule 73.2 to provide the Court of Criminal Appeals with authority to dismiss applications that do not comply with the aforementioned rules. Tex. R. App. P. 73.2.

Noting Walton's application did not comply with the newly amended Rules of Appellate Procedure, the Court found Walton filed his petition before the court revised the rules. Reviewing the application on its merits, the Court denied Walton relief.

Gilley v. Texas

No. PD-1581-12

Case Summary written by Megan Kateff, Staff Member.

Judge Price delivered the opinion of the Court, joined by Presiding Judge Keller, and Judges Meyers, Womack, and Cochran.

In this case, the appellant was convicted of aggravated sexual assault of a child. The appellant made a pretrial motion for a hearing to determine the child's competence to testify. The trial judge conducted the competency examination *in camera*, in the absence of both the appellant and his attorney, and found the child to be competent to testify. On appeal, the appellant asserted that by excluding him and his attorney from the hearing, the trial court had violated certain rights afforded by the Sixth Amendment. The court of appeals rejected the appellant's constitutional assertions.

Issue: Was the appellant's Sixth Amendment right to assistance of counsel at a critical stage of the trial proceeding violated when the trial judge conducted a competency examination of the child-witness in the absence of both the appellant and his attorney?

The Court of Criminal Appeals granted the appellant's petition for discretionary review after the court of appeals rejected his constitutional claims. Of the points of error raised on appeal, the Sixth Amendment right to counsel at a critical stage of the trial proceeding was the only issue not reached by the court of appeals. The Court of Criminal Appeals decided to grant review of the issue, even though it was not directly addressed by the court of appeals, because the appellant "seemed to also be challenging the court of appeals' resolution of some of the other, non-right-to-counsel issues that were raised." After the initial grant of the petition, though, the appellant's brief insisted that his argument was limited to a violation of his Sixth Amendment right to assistance of counsel. Additionally, the appellant argued—for the first time—that the court of appeals incorrectly categorized the pretrial hearing as *not* being a critical stage of the adversarial proceeding.

The Court of Criminal Appeals first addressed whether to reach the merits of the appellant's argument. It found that this particular scenario qualified as an exception to the court's practice of only reviewing actual *decisions* of the court of appeals. It explained this decision by noting that a remand would burden the court of appeals with having to address a number of ancillary issues.

After the court's decision to reach the merits of the argument, it ultimately held that the pretrial competency hearing did not constitute a critical stage of the adversarial proceeding, in which either the appellant or his attorney was entitled to be present. The court noted that the language of Rule 601(a)(2) gives the trial court the *discretion* to permit a party's participation in the hearing, but does not *require* that permission. Although the result of the hearing could lead to adverse consequences for the appellant, the court found that the ability of the appellant's counsel to later challenge the child's testimonial deficiency during the trial itself through cross-examination—in an effort to avoid or ameliorate such adverse consequences—rendered the hearing a non-critical stage of the proceeding. The court also highlighted that the appellant's counsel had further opportunities to expose the child-witness's deficiencies by being allowed to submit questions for the trial judge to ask during the hearing, and by being afforded the opportunity to review a transcript of the examination after-the-fact. Quoting *United States v. Ash*, the court stated that "the opportunity to cure defects at trial causes [a] confrontation to cease to be 'critical.'" Finally, the court discussed the appellant's inaccurate reliance on the case of *Kentucky v. Stincer*, stating that the case's language does not indicate the Supreme Court would regard the hearing at issue as a critical stage for purposes of the Sixth Amendment.

Judge Keasler, dissenting, joined by Judges Hervey and Alcala

Judge Keasler's dissent argues that because the court of appeals never directly addressed the right-to-counsel issue, it was improperly reached by the Court of Criminal Appeals and should be dismissed, or at the very least remanded for further review. It argues that the Court of Criminal Appeals improperly employed the "judicial economy" exception to the case, because the resolution of the outstanding issue was not clear enough to fall under this exception. The court of appeals had the opportunity to address the right-to-counsel claim, but its silence on the matter was indicative of that court's conclusion that it was not an appropriate issue to reach. Finally, the dissent contends that because the issue is not clear, it is worthy of a thorough review by the court of appeals—on remand—but not the Criminal Court of Appeals.

Judge Johnson, dissenting

Judge Johnson's dissent argues that the competency hearing was a critical stage of the trial proceeding, and that we cannot constitutionally use, as a standard, a task that cannot be performed. It argues that the remedies purportedly available to the appellant's counsel during and post-competency examination, in reality, were not possible for the appellant to utilize. Because the party seeking to exclude a witness from testifying has the burden of establishing incompetency, that party should have the opportunity to question, or at least observe the questioning of, the witness. Additionally, the appellant could not know what supplemental questions to provide to the trial judge if it did not know what the initial questions were. Further, body language, tone, and inflection are important factors to consider in deciding how to question a witness, and the appellant was denied the opportunity to observe such factors. The dissent notes that to the extent the majority indicated that the appellant could have reviewed a transcript of the hearing, at that stage of the trial, a transcript was likely unavailable—nor can one observe body language, tone, or inflection from a transcript alone. Finally, the dissent argues that the majority's interpretation of *Kentucky v. Stincer* was misplaced, because in that case, unlike the case at bar, the defendant's attorney was present during the competency hearing—only the defendant was excluded.