

Court of Criminal Appeals
October 30, 2013

Ex Parte Holloway

No. WR-78,955-01

Case Summary written by Jamie Vaughan, Staff Member.

Per Curiam.

Charged with murder, defendant Holloway was convicted of manslaughter and sentenced to twenty years' imprisonment. In 2006, the Sixth Circuit affirmed his conviction. In 2006, Holloway moved for DNA testing of a knife found in his car. No DNA testing of the knife had been performed at trial. The results of the DNA test showed the DNA on Holloway's knife was not the DNA of the victim. As a result, Holloway filed an application for writ of habeas corpus, and the trial court entered findings recommending that relief be granted based on actual innocence.

Issue: Was Holloway entitled to habeas corpus relief as a result of the new DNA results?

The court held that the DNA evidence on the knife was not clearly exculpatory. The court pointed out that, to be exculpated by new evidence, a defendant would have to show that no reasonable juror would have convicted him in light of the new evidence. The court reasoned that, although the implication at trial was that the knife in Holloway's car was the knife used to kill the victim, it was found wrapped in a rag, which could have been used to wipe the knife clean. Additionally, the court pointed to other evidence introduced at trial that showed Holloway's guilt, such as client testimony that Holloway stabbed several people with a knife. The court reasoned that the DNA evidence here was simply not enough to overcome the testimony of the witnesses at trial. As such, the court denied the defendant's request for habeas corpus relief.

Turner v. State

No. AP-76,580

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

Judge Price delivered the opinion of the Court.

Turner was convicted of murdering his wife and mother-in-law, a capital offense. During trial, Turner's first appointed attorney filed a motion to have Turner evaluated for competency to stand trial. Two forensic mental-health experts, though both raised possibilities for paranoid or delusional mental illness, concluded that Turner was competent to stand trial. During pre-trial proceedings, Turner's attorney-client relationships grew untenable and new counsel was appointed. The new attorney-client relationship

deteriorated because Turner incessantly refused to cooperate and grew seemingly more paranoid. In response, defense counsel moved for a formal competency hearing, which the trial judge denied, concluding that Turner was simply insubordinate by choice (though the trial judge ordered further expert testimony). At trial, Turner's uncooperative and paranoid behavior continued, and the trial judge denied defense counsel's renewed motion for competency examination. In this automatic direct appeal resulting from the assessment of the death penalty, Turner claims he was incompetent to stand trial and merited a formal competency hearing as repeatedly requested.

Issue: Was there substantive indication that Turner lacked either a rational understanding of the proceedings or a present sufficient ability to consult with counsel with a reasonable degree of rational understanding?

Answering affirmatively, the court asserts that when a defendant's mental illness prevents him from rationally understanding the proceedings against him or engaging rationally with counsel in the pursuit of his own best interests, he cannot stand trial without violating due process. Any suggestion, i.e., any bona fide doubt as to appellant's competency (though this standard has since been rejected by amendment), of incompetency requires an informal inquiry to determine whether evidence exists to justify a formal competency trial. In this case, the trial's judge's order for further testimony constituted the necessary suggestion. In determining whether evidence exists to justify a formal competency trial, the trial court must put aside all competing indications of competency to find whether there is some evidence that rationally may lead to a conclusion of incompetency. Here, the court finds, there was some evidence to support rational finding of incompetence when Turner, as described by an expert, disregarded rational thoughts completely. The court found that the trial court's errors were two-fold: (1) it focused on evidence of competency rather than the standard of evidence of incompetency; and (2) it denied the request for formal competency because appellant failed to demonstrate any change in status from the earlier expert findings of competency, ignoring the new evidence of delusion. Lastly, the court emphasized and limited scope of its holding, applicable only to the rare instance where there is some evidence indicating that the defendant suffers from a debilitating mental illness, he obstinately refuses to cooperate with counsel, and his mental illness fuels his obstinacy.

Presiding Judge Keller, Dissenting

Keller dissented, arguing that expert evaluations, statements by appellant's attorneys, and appellant's own statements did not indicate that Turner lacked the sufficient present ability to consult with his attorneys to a reasonable degree of rational understanding.

Druery v. State

No. AP-76,833

Case Summary written by Jamie Vaughan, Staff Member.

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

Defendant Druery was convicted of capital murder and sentenced to execution. At a hearing in February 2012, the trial court set the execution date for August 1, 2012. The defendant filed a motion for competency hearing within sixty days. There were also motions to withdraw and motions for discovery. In a series of hearings, the trial court continually expressed frustration with defense counsel, saying defense counsel only needed to show a threshold for a competency hearing and that it should not have taken much as the defendant would merely have to show some evidence of incompetency. At one hearing, the defendant spoke up against the advice of counsel and expressed his desire that his counsel should have done something that they could not legally do. The defendant also discussed nonexistent evidence at this time. After some extensions, the defendant filed a motion for competency hearing on July 11, 2012, and filed supplemental documents twelve days later. The court held a hearing on July 24, finding that, although the defendant had shown that he had a mental illness, he had not made a substantial showing of incompetence for execution. Defendant appealed.

Issue: Did the defendant make a substantial showing of incompetence such that he was entitled to further proceedings to determine whether he was incompetent for execution?

The court examined the procedural statute regarding competency for execution and found that the defendant had made a substantial showing of incompetence and was therefore entitled to further proceedings and a stay of execution. First the court pointed out that, because this was a question of law, the standard of review was *de novo*. The court next looked to what constituted a substantial showing under Article 46. Taking into account federal constitutional considerations, analogous threshold determination, the language and structure of Article 46, and holdings in other jurisdictions, the court determined that a substantial showing consists of more than some evidence but less than a preponderance of the evidence. Because the evidence in this case showed that the defendant was aware that he had been convicted of capital murder and sometimes believed that he was going to be executed but other times believed he had not committed the crime and was not going to be executed, the defendant had made a substantial showing of incompetency because he had shown that he was somewhat out of touch with reality. For these reasons, the court stayed the defendant's execution and reversed and remanded to the trial court for further factual determinations.

Werner v. State

Nos. PD-0326-13 & PD-0327-13

Case Summary written by Megan Kateff, Staff Member.

Judge Cochran delivered the unanimous opinion of the Court.

In this case, the appellant was indicted and charged with two separate counts of stalking his former girlfriend. The first resulted from the appellant stalking his ex-girlfriend between the months of March and April of 2010. After these incidents, a magistrate judge issued an emergency restraining order against the appellant. After the expiration of the restraining order, the behavior continued, and the appellant was indicted again for three charges of stalking in July of 2010. Prior to the trial, the two offenses were consolidated, and the appellant subsequently filed a motion to sever. The trial court denied the appellant's motion to sever and sentenced him to two ten-year confinement terms to run concurrently. The court of appeals found that the appellant had the absolute right under § 3.04 of the Texas Penal Code to sever his claims. Because the court of appeals also found that the evidence for the two offenses were separate and unrelated, it held that the trial court's error in failing to allow the severance of the offenses was harmful. The conviction was reversed and the case was then remanded for a new trial.

Issue: Did the trial court's failure to grant the motion to sever result in harmful or harmless error to the appellant?

The Court of Criminal Appeals agreed with the appellate court that the trial court committed error. Under §3.04 of the Texas Penal Code, unlike the federal rule of discretionary severance, the trial judge does not have the discretion to deny a motion to sever, other than when certain offenses, not at issue in this case, are present. The Texas rule is fashioned for the defendant's benefit, taking into consideration that in a consolidated trial, a jury might be inclined to convict a defendant based on his prior or subsequent offenses, not because he is necessarily guilty of the crime charged. If a trial judge erroneously denies a motion to sever, the court must determine whether that error was harmful or harmless, disregarding the error unless it affected the substantial rights of the defendant.

The Court focused on an analysis of the two "book-end" cases *Llamas v. State* and *Scott v. State*. In *Llamas*, the court held that when there is no overlap of evidence between two charges, a failure to grant severance of the charges would be harmful. Conversely, in *Scott*, the court held when there is a substantial overlap of evidence between two charges, a failure to grant severance of the charges would be harmless. The Court disagreed with the appellate court's rejection of the *Scott* rationale, reasoning that the elements of a stalking offense are unique, one of which is proof of a pattern of conduct, and that the determinative factor is the admissibility of evidence in the separate cases. Because the evidence of the appellant's conduct in April would have been necessary to admit at a separate trial for the July events to

prove the “pattern of conduct” element, the court held that there was a substantial overlap of evidence between the April and July offenses, such that the present case was closer to the facts of *Scott* than to those of *Llamas*. Therefore, the court held that the trial court’s denial of the motion to sever was harmless error, and that the appellant’s substantial rights were not affected by the denial. The judgment of the court of appeals was reversed and remanded for further proceedings.

State v. Esparza

No. PD-1873-11

Case Summary written by Jessica Rugeley, Online Edition Editor.

Judge Price delivered the opinion of the court, joined by Judges Womack, Johnson, Cochran, and Alcalá.

Appellee was arrested for DWI and filed a motion to suppress, alleging that the arrest was illegal and the breath test was illegally obtained. The State’s only witness at the suppression hearing was the arresting officer, who arrested Appellee without a warrant. The officer testified that he arrested Appellee because he rear-ended another vehicle and failed the field sobriety tests. The trial court found that the officer had probable cause to arrest but also found that the State failed to present evidence regarding the breath test and suppressed those results. The court of appeals reversed, finding that the trial court abused its discretion. The court of appeals also rejected appellee’s new theory, raised for the first time on appeal, that the State failed to establish scientific reliability for the breath test. In his petition for discretionary review appellee argued that the court of appeals erred in requiring him to raise his alternative argument at the suppression hearing.

Issue: Did the court of appeals improperly utilize principles of procedural default to determine whether the alternate legal theory, even though identified for the first time on appeal, should nevertheless be regarded as law applicable to the case?

The Court of Criminal Appeals held that “because the State...was never confronted with the necessity of meeting its burden to establish scientific reliability of its breath-test results at the hearing on the appellee’s pretrial motion to suppress, and for that reason the record was undeveloped with respect to admissibility as a function of scientific reliability, inadmissibility of that evidence under Rule 702 was not ‘a theory of law applicable to the case’ that is available to justify the trial court’s otherwise erroneous ruling on the appellee’s motion to suppress.” Under *Calloway v. State*, 743 S.W.2d 645 (Tex. Crim. App. 1988), the appellee does not have an obligation to raise a theory in the trial court to preserve it for consideration on appeal. However, at trial, the proponent of scientific evidence is not required to establish reliability unless the opponent raises an objection under

Rule 702. Appellee did not raise such an objection at the suppression hearing. The trial court did not exclude the evidence based on Rule 702 but did so simply because the State failed to present testimony regarding the breath test. This Court has resisted implementing the *Calloway* rule when it would work an injustice to the appellant. Thus, the Court affirmed the court of appeals.

Presiding Judge Keller, Concurring, joined by Judges Keasler and Hervey

Judge Keller noted that the *Calloway* rule applies when the defendant is appealing a conviction, a final judgment. A trial court's ruling on a motion to suppress is not a final judgment, thus the *Calloway* rule does not apply.

Judge Hervey, concurring, joined by Presiding Judge Keller and Judge Keasler

Judge Hervey noted that the trial court must conduct hearings concerning scientific evidence. Before scientific evidence can be admitted, the trial judge must conduct a hearing. Judge Hervey believes that the majority implied that a trial court may be incapable of sua sponte inquiring into the admissibility of scientific evidence in its role as gatekeeper. If a trial court cannot inquire into the admissibility of scientific evidence, junk science could influence the jury.

Judge Meyers, Dissenting

Judge Meyers argues that appellee was not required to cite the rules of evidence in order for the judge to review the breath-test results. The appellee asked the judge to review the reliability and admissibility of the evidence. Because the State presented no evidence, the trial judge was within his discretion to suppress the evidence.

Wortham v. State

No. PD-0765-12

Case Summary written by Mayra Varela, Staff Member.

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

Appellant was convicted of a first degree felony—injury to a child. The jury was provided with instructions to charge Appellant with the offense of intentionally and knowingly causing serious bodily harm to a child. Opposed to the jury instruction, Appellant requested that the lesser-included offenses of reckless and criminally negligent conduct towards a child be submitted to the jury. However, the trial court denied Appellant's request and the court of appeals affirmed. The Court of Criminal Appeals of Texas granted Appellant's petition for discretionary review.

The Court addressed “whether the court of appeals erred when it upheld the judge’s denial of Wortham’s requested lesser-included offenses charge.”

Based on the two-prong analysis under *Hall v. State*, the Court held that the court of appeals erred in affirming the trial court’s decision in denying Appellant his requested jury instruction. *Hall v. State* sets out the law “when determining whether a requested charge constitutes a lesser-included offense.” The first prong requires a court to compare, as a matter of law, the elements of the charged offense against an individual to the elements of the defendant’s requested lesser-included offense. If the elements of the charged offense include the same elements of the requested lesser-included offense, then the requested lesser-included offense is, statutorily, a lesser-included offense of the charged offense. The Court determined that the offense of intentionally and knowingly causing injury to a child, compared to the offense of reckless and criminally negligent injury to a child by act, requires the same elements. Thus, Appellant’s requested lesser-included charge satisfies the first prong.

The second prong determines whether the requested lesser-included offense instruction is supported by evidence presented at trial. If the defendant presents “[a]nything more than a scintilla of evidence,” then the defendant is entitled to the lesser charge. Because Appellant presented testimony from the detective at the scene, the Court determined that this evidence, whether credible or not, was sufficient to satisfy the second prong. Thus, the court of appeals erred because Appellant was entitled to the requested jury instruction of the lesser-included offenses by satisfying the two-prong analysis of *Hall v. State*. The Court reversed and remanded judgment.

Keller, P.J., filed a concurring opinion.

Presiding Judge Keller argues that the result of Appellant’s conduct determines whether or not the lesser-included offense should be submitted as part of the jury instruction. Ultimately, the injury determines the jury instruction, not what caused the injury. In this case, whether or not Appellant engaged in “severe shaking,” as argued by the State, or “shaking to revive the victim,” as argued by Appellant, does not matter in regards to the lesser-included offense. Because both “severe shaking” and “shaking to revive the victim” result in serious bodily injury to a child, both acts lead to the same offense. Therefore, the Court should view the evidence in the light most favorable to the defendant and choose the lesser-included offense to be submitted to the jury.

Ex Parte John Christopher Lo

No. PD-1560-12

Case Summary written by Matt McKee, Staff Member.

Judge Cochran delivered the unanimous opinion of the court.

Appellant filed a pretrial habeas corpus application claiming his felony online solicitation of a minor charge was unconstitutional because the statute he was charged under is overbroad, vague, and violates the Dormant Commerce Clause. Section 33.021 of the Texas Penal Code, or the Texas Online Solicitation of Minors statute, acts as a means to punish illegal transactions wherein an actor attempts to solicit a minor by meeting that person, intending that the minor will engage in sexual behavior. Almost every state has enacted legislation to restrict sexual solicitation of minors; however, in addition to restricting solicitation, Texas' statute places additional restrictions on sexually explicit communications.

Section 33.021(c) prohibits "sexually explicit" communications with a minor. The statute defines sexually explicit as "any communication, language, or material, including a photographic or video image, that relates to or describes sexual conduct."

In reviewing Appellant's motion, the trial judge denied relief. On appeal, the First Court of Appeals evaluated the statute using a standard of review that presumed the statute's constitutionality, affirming the trial court.

Reviewing the court of appeals' holding, the Criminal Court of Appeals first noted that when a statute's constitutionality is questioned, courts adopt the presumption that the statute is constitutional. When such a statute imposes "content based" regulations, however, the burden to prove the statute's constitutionality shifts to the government. Such content based regulations are subject to the "most exacting scrutiny."

The court found that, in addition to barring obscene and pornographic material, the statute's definition of sexually explicit also encompasses many modern movies, shows, and books—citing materials ranging from *Fifty Shades of Grey*, to Janet Jackson's infamous "wardrobe malfunction," and even noting Miley Cyrus' groundbreaking innovations relating to the phenomenon known as "twerking." *See generally* E.L. JAMES, *FIFTY SHADES OF GREY* (2011) (portraying in depth exhibits of explicitly erotic scenes involving elements of "bondage/discipline, dominance/submission, and sadism/masochism (BDSM)"

(quoting WIKIPEDIA, http://en.wikipedia.org/wiki/Fifty_Shades_of_Grey (last visited Nov. 5, 2013)).

Though the statute was enacted to impose sanctions upon those who engage in internet conversations with minors with an intent for physical contact to take place, the statute's sexually explicit communication provision contains no requirement that an actor ever possess the intent to meet the child. Noting the State cannot suppress lawful speech in order to suppress

unlawful speech, the court cited *Ashcroft v. Free Speech Coalition's* differentiation between "virtual" child pornography and unprotected child pornography, refusing to uphold the statute on the basis that it violated the First Amendment's Overbreadth Doctrine. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). The court went further, explaining that the state may only regulate speech in order to protect a compelling interest, and may only do so using the "least restrictive means" necessary to further the interest.

Finding the statute is not narrowly drawn, the court noted that § 33.021(c) does not restrict any speech that is either not addressed by other statutes, or is not protected. Moreover, the court found the statute does not define obscenity and does not require intent to commit sexual act. Accordingly, the court reversed the court of appeals and remanded the case for the trial court to dismiss the indictment.