

**Court of Criminal Appeals**  
**October 9, 2013**

***Boston v. State***

No. PD-1023-12

Case Summary written by Mayra Varela, Staff Member.

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

Appellant was charged and convicted of aggravated robbery after he and another individual, Hemphill, robbed a convenient store. During the incident, Hemphill approached the counter for the store attendant to ring him up. After handing money to the store attendant, Hemphill pulled a firearm out of his pocket but dropped the weapon on the floor. Hemphill picked up the firearm and placed it on the counter. The store attendant, however, did not see the firearm. As the store attendant opened the cash register, Hemphill reached over the counter and grabbed the money. Appellant and Hemphill ran away after the store attendant attempted to stop Hemphill from taking the money. The store attendant testified that she never saw the firearm until she viewed the surveillance video.

On appeal, Appellant argued that his conviction was unsupported because the store attendant never saw the firearm, and therefore, no evidence existed to show that Appellant threatened the store attendant or placed her in fear of imminent bodily harm. The court of appeals affirmed the trial court's decision, holding that Appellant's engagement in threatening conduct and the act of Hemphill placing the firearm on the counter was sufficient to establish the aggravated element.

The issue before the Court of Criminal Appeals was whether the court of appeals erred in holding that a store attendant "was threatened or placed in fear of imminent bodily injury or death when the evidence showed that no threat was perceived by the" store attendant.

The Court of Criminal Appeals held that a jury could have inferred from Hemphill's actions that the store attendant was threatened and placed in fear. The Court stated that the question at issue incorrectly assumed that the store attendant did not perceive a threat. The Court reasoned that Hemphill's act of reaching over the counter was enough for the store attendant to perceive a threat and enough to place the store attendant in fear of imminent bodily harm. Further, the Court reasoned that even though Hemphill's act of placing the firearm on the counter did not place the store attendant in fear, the act was an implicit threat. Thus, the Court affirmed the judgment of the court of appeals.

***Plummer v. State***

No. PD-1269-12

Case Summary written by Megan Kateff, Staff Member.

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

In this case, the appellant was charged with both unlawful possession of a firearm and unlawful possession of body armor by a felon. He was approached by a peace officer while on duty as a security guard at a wellness clinic. The officer noticed that he was wearing a bulletproof vest and was carrying a gun in his holster that was much smaller than a normal “duty weapon” would be. The officer ran the appellant’s identification and discovered that he had a prior felony conviction and was not a licensed peace officer, but that he was employed as a security guard. This previous felony conviction disallowed the appellant from being able to lawfully possess both the firearm and the bulletproof vest.

Issue: To support a finding of “use and exhibition of a deadly weapon during the commission of a felony,” must the ‘exhibition’ of a deadly weapon facilitate the associated felony offense, or is it sufficient for the exhibition of the deadly weapon to occur simultaneously with a felony and unrelated to that felony’s commission?

The court looked to the legislative history of the statutory offense and found that the purpose of the statute was to both discourage felons from carrying firearms and to deter persons involved in seriously violent felonies from bringing their firearms with them. The court concluded, though, that an overly broad interpretation of the word “exhibit” could lead to absurd results. It ultimately held that the statute does not cover the mere possession of a deadly weapon during a felony offense, and while the appellant was exhibiting the deadly weapon, that weapon was not being used in the commission of the offense. The court reasoned that the silence of the legislature as to mere possession triggering this offense was indicative of its intent to enact a narrower policy. Therefore, the court held that a deadly weapon exhibited during the commission of a felony offense must facilitate the commission of the felony to support a deadly weapon finding, and that the facts of this case did not present such a scenario.

***Sturdivant v. State***

No. PD-0759-13

Case Summary written by Jamie Vaughan, Staff Member.

Per curiam.

A jury convicted Sturdivant of murder and attempted capital murder. Sturdivant appealed the judgment, alleging the trial court erred in including in court costs money paid to the State's attorneys pro tem, investigators, and experts. The First Court of Appeals affirmed the trial court's holding because Sturdivant did not raise the issue with the trial court or file any post-judgment motions.

Issue: Did the trial court err by including in its costs assessed against Sturdivant money paid to attorneys pro tem, investigators, and experts?

The Court vacated and remanded, instructing the First Circuit to reconsider the issue taking into account the Court's recent decision in *Landers v. State*, 402 S.W.3d 252 (Tex. Crim. App. 2013).

***Ex Parte Erick Alberto Oranday-Garcia***

No. WR-71,844-02

Case Summary written by Matt McKee, Staff Member.

Price, J., delivered the opinion for a unanimous court.

Applicant filed his original application for habeas corpus in 2009, alleging his guilty plea for cocaine possession was involuntary because his trial counsel informed him his conviction would not result in deportation. After being deported following his conviction, the convicting court recommended Applicant be denied relief based on his trial counsel's affidavit refuting the claims; accordingly, the Texas Court of Criminal Appeals accepted the trial courts recommendation, denying relief.

Applicant filed this second habeas corpus application alleging no new facts, but instead, a new legal basis, citing the United States Supreme Court's *Padilla v. Kentucky* opinion, holding "when a defendant's immigration consequences are clear, trial counsel has a duty to inform his client of those consequences." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482-84 (2010).

Citing its holding in *Ex parte Brooks*, the Texas Court of Criminal Appeals first noted "the applicant must make a *prima facie* showing that he is actually innocent," which Applicant has failed to do. *Ex parte Brooks*, 219 S.W.3d 396, 400--01 (Tex. Crim. App. 2007). Additionally finding that *Padilla* does not apply retroactively, the Court dismissed the application.

***Britain v. State***

No.. PD-0175-13

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

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

A jury convicted Britain of manslaughter and injury to a child for recklessly causing the death of her stepdaughter, basing its decision on the premise that Britain's failure to take her stepdaughter, suffering from acute appendicitis, to the doctor led to the child's death. The Fourth Court of Appeals reversed the conviction and entered a judgment of acquittal on both counts after finding insufficient evidence to prove recklessness.

Issue: Should the court of appeals have reformed the verdict to the lesser-included offense of criminally negligent homicide rather than rendering a verdict of acquittal?

The Court answered the issue in the negative, holding that the court of appeals did not err in rendering a judgment of acquittal. The Court first established the standard for determining sufficiency of evidence, i.e., viewing the evidence in light most favorable to the prosecution; any rational jury could have found the essential elements of the crime beyond a reasonable doubt. After reminding the reader of the requirements for manslaughter and criminally negligent homicide, the Court, citing *Bowen v. State* and Rule of Appellate Procedure 43.2(c), reaffirmed that a court of appeals may reform a judgment to a lesser-included offense, but is not required to do so when the evidence fails to prove both the greater and lesser offense. Concerning the greater offense, the jury erred in finding recklessness; concerning the lesser offense, the lack of evidence and the conflicting expert testimony led the court to conclude that the State failed to prove that Britain acted negligently beyond a reasonable doubt.

***Farmer v. State***

No. PD-1620-12

Case Summary written by Jessica Rugeley, Online Edition Editor.

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

Farmer was convicted of driving while intoxicated and received one year of community supervision. Appellant suffered from chronic back pain and was prescribed painkillers and muscle relaxers. He had taken these medications for ten years. Four days prior to his arrest, he was prescribed a sleep aid, Ambien. Appellant's wife normally put his medications out for him to take. She admits she put the Ambien out for him and that he may have accidentally taken it in the morning, instead of his normal painkiller. Appellant didn't remember taking any medication; however, the lab report

showed that he had Ambien in his system. At trial, he requested three jury charge instructions: (1) involuntary intoxication, (2) accident, and (3) involuntary act. The trial judge refused to implement any of these instructions. The court of appeals reversed and remanded because some evidence presented at trial raised the issue of voluntariness. The Court of Criminal Appeals reversed.

Issue: “Whether there was sufficient evidence adduced at trial to entitle Appellant to a jury-charge instruction on voluntariness.”

The Court noted a person must have voluntarily engaged in an act to be convicted of driving while intoxicated. The voluntary act requirement only refers a voluntary physical act. Thus, because Appellant admits that he voluntarily picked up and ingested Ambien, though he didn’t mean to, he acted voluntarily. “[T]his is a case of knowingly taking pharmaceutical medication but *mistakenly* taking the wrong one.” Thus, the Court held that because Appellant voluntarily took Ambien, which he knew had intoxicating effects, the trial court correctly denied Appellant’s jury-charge request.

Cochran, J., Concurring, joined by Judge Johnson

Judge Cochran argues that the trial court erred by excluding Appellant’s involuntary intoxication instruction but concurs because he failed to preserve error on the specific involuntary intoxication charge. The Court defined the test for involuntariness as the “absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant.” Involuntary intoxication occurs when a person voluntarily takes a substance but is unaware of its intoxicating effects. She notes that Texas courts have recognized this “unwitting” prong of involuntary intoxication. As Farmer offered evidence of involuntary intoxication, the trial judge should have allowed a jury instruction on involuntary intoxication. However, as appellant did not raise any issue on appeal about that particular jury charge, he forfeited that claim.