Court of Criminal Appeals
November 27, 2013

Anderson v. State
No. PD-0408-12
Case Summary written by Jessica Rugeley, Online Edition Editor.

Judge Meyers delivered the opinion for a unanimous Court.

Appellant was convicted of possession of methamphetamine with intent to deliver, over four grams but less than 200 grams, and aggravated assault of a public servant. Appellant and Timothy Sherber sold methamphetamine to Jeffery Harmon, a paid confidential informant, on multiple occasions. Sherber drove with Appellant to sell Harmon drugs in a parking lot. The police moved in to arrest them and Sherber, in an attempt to flee, hit two unmarked patrol cars and a marked patrol car, injuring a police officer. Appellant was tried by a jury and sentenced to forty years of imprisonment for the possession charge and life in prison for aggravated assault. The court of appeals affirmed, holding that a rational jury could have found Appellant guilty under the conspiracy theory of the law of parties because he should have anticipated that, under the circumstances, police officers would face injury.

Issue: whether it was rational for the jury to infer that Appellant should have anticipated the second offense.

To convict a person as a party to a secondary offense, the jury must find that the second felony was committed in furtherance of the unlawful purpose and was one that the co-conspirator *should* have anticipated as a result of carrying out the conspiracy. The Court adopted the federal approach delineated in *Pinkerton v. United States*, 328 U.S. 640 (1946), to determine co-conspirator liability. The Court considered the totality of the circumstances to determine whether the offense committed by the co-conspirator was "reasonably foreseeable." Appellant and Sherber worked together to sell moderate amounts of methamphetamine, Appellant possessed $3,500 in cash at the time of his arrest, and the two travelled across several counties to sell to Harmon. These facts suggest that Appellant and Sherber were more than small-time dealers and thus Appellant should have anticipated that he and Sherber might be targeted by a police investigation and that violence might be used in an attempted escape. Therefore, the Court affirmed the court of appeals and held that a rational jury could find beyond a reasonable doubt that Appellant should have anticipated that his co-conspirator would commit aggravated assault of a public servant as a result of carrying out their conspiracy to deliver methamphetamine.

State v. Meru
No. PD-1635-12
Case Summary written by Jessica Rugeley, Online Edition Editor.

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

Appellee was convicted of burglary of a habitation and sentenced to twenty-five years in prison. Andrew Trevino, the victim, testified that Appellee knocked on his door multiple times and walked in front of his apartment when Trevino did not answer the door. A few moments later, Trevino's apartment door was busted open and he saw Appellee walking away from his apartment. Appellee told the police he kicked the door to scare away a person he saw looking in Trevino's patio. At trial, Appellee requested a jury instruction on criminal trespass, but the court did not specifically rule on the request and no instruction was included. After the jury convicted him, Appell filed a motion for new trial, which the trial court granted based on the failure to instruct the jury on the lesser-included offense of criminal trespass. The court of appeals affirmed, holding that, based upon *Goad v. State*, 354 S.W.3d 443 (Tex. Crim. App. 2011), criminal trespass is a lesser-included offense of burglary.

Issue: Whether the indictment charging Appellee with burglary of a habitation alleges either all of the elements of criminal trespass, or elements and facts from which all of the elements of criminal trespass may be deduced.

The Court uses a two-step analysis to determine whether a lesser-included-offense instruction should be given: (1) Are the elements of the lesser-included offense included within the proof necessary to establish the elements of the charged offense? (2) Is there evidence in the record that could allow a jury to find the defendant guilty of only the lesser-included offense? The first step is a question of law that compares the elements of the offense as alleged in the indictment with the elements of the lesser offense. The elements of the lesser-included offense do not have to be pleaded in the indictment if they can be deduced from facts alleged in the indictment. A person commits criminal trespass if he "enters or remains on the property of another…without effective consent." Entry is defined in the statute as an "intrusion of the entire body." However, entry for purposes of burglary is defined as an intrusion of "any part of the body." Therefore, criminal trespass will generally not be a lesser-included offense of burglary unless the indictment alleges that the perpetrator entered with his entire body. The Court recognizes that failing to find criminal trespass is a lesser-included offense of burglary but states that it must abide by the language of the statutes. Because Appellee failed to meet the first prong of the analysis, the Court did not go on to the second. The Court held that the trial court erred by granting a new trial and reversed the court of appeals.

Judge Price, concurring

Judge Price concurs to further define the cognate pleadings analysis under the first prong of the lesser-included offense test. The descriptive-averment language from the indictment charging the greater offense must be the "functional equivalent" to the statutory elements defining the lesser offense. Judge Price argues that this means the "language of the indictment must explicitly operate to commit the State to prove the greater offense in such a way that it will also *necessarily* prove" the elements of the lesser offense. In this case, the indictment would have to commit the State to proving that Appellee entered the premises with his entire body, which the indictment did not.

Judge Price also takes issue with Judge Alcala's finding of a lack of evidence to support that Appellee entered anything more than a portion of his body. Judge Price believes there is more than enough evidence based upon the doorframe and the victim's testimony to support a finding that Appellee's entire body intruded into the apartment.

Judge Alcala, concurring, joined by Judges Cochran and Womack

Judge Alcala concurs because she believes Appellee meets the first prong but fails the second prong of the lesser-included offense test. She states that "[t]he offenses of criminal trespass and burglary are two peas in a pod" because they both criminalize the act of entering on the property of another without consent. She notes that the Court of Criminal Appeals has historically considered trespass a lesser-included offense of burglary. Though entry has a slightly different definition in trespass as in burglary, the elements in both statutes are functionally equivalent by targeting a person's unauthorized entry onto property. Under the majority opinion, trespass could only be a lesser-included offense if the State alleged in the indictment that Appellee entered with his entire body. It is unrealistic to expect that prosecutors will do so. Judge Alcala concludes that "under the indictment in this case that generally pleads entry without further defining that term, criminal trespass is, as a matter of law, a lesser-included offense of burglary." Judge Alcala goes on to explain that Appellee failed to show any evidence that he entered with his entire body, which is required to establish trespass. Therefore, the trial court correctly refused to give the lesser-included jury instruction.

Delafuente v. State
No. PD-0066-13
Case Summary written by Jessica Rugeley, Online Edition Editor.

Judge Johnson delivered the opinion of the Court, joined by Presiding Judge Keller and Judges Meyers, Price, Keasler, Hervey, and Cochran. Judge Womack's concurrence was not filed.

Appellant was convicted of misdemeanor possession of marijuana and sentenced to three days of confinement and a fine. Appellant was the passenger in a vehicle travelling on Interstate 10. A police officer noticed traffic congestion in the inside lane and found Appellant's vehicle travelling 13 miles per hour below the speed limit. The officer pulled the vehicle over and smelled marijuana. Appellant told the officer that marijuana was in the trunk and was subsequently arrested. Appellant filed a motion to suppress, arguing that the officer did not have reasonable suspicion to stop the vehicle. At the suppression hearing, the State stipulated that there was no warrant and the police report was the only evidence submitted. The trial court accepted the officer's statement that the vehicle was impeding traffic as credible and entered findings of fact and conclusions of law that the officer had probable cause to stop because the vehicle was impeding traffic. On appeal, Appellant argued that the arresting officer did not have reasonable suspicion to stop the vehicle and the trial court erred in denying his motion. The court of appeals reversed, holding that the officer did not have probable cause. The Court of Criminal Appeals vacated the court of appeals' judgment and remanded for the court to determine the effect of *State v. Mendoza*, 365 S.W.3d 666 (Tex. Crim. App. 2012), on its decision.

Issues: (1) Did the Court of Appeals' determination that the traffic stop was illegal ignore relevant facts and rational inferences, require the state to rebut innocent explanations, and misconstrue *Ford v. State*, 158 S.W.3d 488 (Tex. Crim. App. 2005)?

(2) Did the Court of Appeals err by refusing to remand to the trial court for additional findings of fact and conclusions of law?

The officer's bare statement that the vehicle was impeding traffic is a legal conclusion, not a factual finding. However, the trial court's finding that the offense report was credible precludes the need for additional findings. The officer provided more than an unsubstantiated subjective assertion because he provided facts, such as observations of traffic congestion and the vehicle's speed. There was no evidence to contradict the officer's report. The officer had reasonable suspicion to stop the vehicle was impeding the normal and reasonable movement of traffic. The Court held that the court of appeals read the police report too narrowly and disregarded reasonable inferences from the facts. Therefore, the court reversed and reinstated the trial court's denial of the motion to suppress.

Judge Alcala, dissenting

Judge Alcala would reverse and remand this case to the court of appeals with instructions to abate to the trial court for additional findings. Judge Alcala notes that the record is too sparse and only presents a legal conclusion—that the vehicle was impeding traffic. "The trial court's adoption of that legal conclusion as a finding of fact does not transform it into something it is not; it remains a conclusion of law." A trial court that adopts an officer's legal conclusion as its sole relevant fact finding does not provide an appellate court an adequate basis upon which to review a suppression ruling. Driving under the speed limit is not enough to establish that a vehicle was impeding traffic. Judge Alcala reasons that the majority incorrectly concluded that the officer intended to say that Appellee's slow-moving car caused a backed up line of cars behind it. However, the report does not state this and the court cannot infer it. As such, Judge Alcala concludes that the trial court's finding of fact that the vehicle was impeding traffic was unsubstantiated.

State v. Bennett
No. PD-0354-12
Case Summary written by Jessica Rugeley, Online Edition Editor.

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

On December 1, 2009, Bennett was found guilty of aggravated assault alleged to have occurred on June 5, 2007. He filed a motion for new trial, alleging ineffective assistance of counsel. Bennett argued that his counsel failed to challenge the indictment because the statute of limitations for aggravated assault is two years. Bennett's counsel submitted an affidavit stating that he believed the statute of limitations was three years. The trial court granted the motion for new trial because Bennett's counsel failed to preserve the statute of limitations issue for appeal. The court of appeals found that the law regarding the statute of limitations for aggravated assault is unsettled and thus Bennett's counsel could not be found ineffective for not asserting the statute-of-limitations challenge.

Issue: Is the statute-of-limitations question unsettled?

The Court noted that it has consistently refused to find counsel ineffective for failing to take action on an unsettled issue. Previous opinions from the Court of Criminal Appeals have come to different conclusions concerning the aggravated assault statute of limitations. The Court affirmed the court of appeals and held that Bennett's ineffective assistance claim failed. The Court did not resolve the statute-of-limitations question.

Presiding Judge Keller, concurring, joined by Judge Price as to part I

Presiding Judge Keller concurred to explain why the statute of limitations for aggravated assault is two years. The problem in determining the statute of limitations stems from the fact that both statutes that might apply, Article 12.01 and Article 12.03, each except from its scope any offenses controlled by the other statute. Prior opinions from this Court only considered the issue in dicta and carry no precedential value. Looking at the plain language of the statute, Presiding Judge Keller determined that prior to the 1997 amendment, aggravated assault appeared to fall under Article 12.03, rather than Article 12.01, because aggravated assault is an "aggravated" offense under Article 12.03(d).

Judge Johnson, concurring

Judge Johnson concurred to explain why the statute of limitations for aggravated assault is three years. Looking at the plain meaning of the statute, Judge Johnson stated that the legislature did not intend for a violent felony to have the same statute of limitations as a misdemeanor. Thus, as assault becomes a felony when it is aggravated, the statute of limitations is three years, as those of other felonies.

Judge Cochran, concurring

Judge Cochran noted that the Texas Legislature can resolve the statute-of-limitations problem by changing the title of aggravated assault and aggravated perjury to felony assault and felony perjury. "The rule of Article 12.03 would appear to be simple: categorize the charged offense as a felony or a misdemeanor. If the charged offense is a felony look under the various provisions of Article 12.01 to see if there is a special statute of limitations. If not, then the residual or "catch-all" provision of three years applies to all unspecified felonies. If the charged offense is a misdemeanor, then the statute of limitations is two years. If the charged offense falls in one of the "special circumstances" categories, the regular limitations period for the offense applies." "The Legislature could make its intention clear by either (1) changing the name of these two offenses, or (2) amending article 12.03(d) to explicitly note its application to these two felony offenses."

Judge Meyers, dissenting

Judge Meyers dissented because he would hold that the court of appeals erred in reversing the trial court's order granting a new trial. Judge Meyers disagrees that it was an abuse of discretion for the trial court to grant a new trial because of uncertainty in the law.

Judge Price, dissenting

Judge Price dissented because he would hold that the statute of limitations period is two years and that Bennett's trial counsel was ineffective. Judge Price states that Bennett's trial counsel should have

argued the statute of limitations in the manner most favorable to his client. Trial counsel had nothing to lose by doing so and everything to gain. Therefore, Judge Price would find trial counsel ineffective.