

Court of Criminal Appeals
December 11, 2013

Johnson v. State

No. PD-0209-12

Case Summary written by Jessica Rugeley, Online Edition Editor.

Judge Johnson delivered the opinion of the Court, joined by Judges Meyers, Price, Womack, and Cochran. Judge Alcala did not participate.

Appellant plead guilty to possession of marijuana after his motion to suppress was denied. Appellant was arrested after a complainant called 911 to report a suspicious black male who was sitting on the steps and watching cars near her apartment. A police officer responded but did not speak to the complainant. The officer saw Appellant sitting in his car, which was backed into a parking space near the apartment leasing office. Appellant matched the complainant's description only in that he is a black male and was wearing a dark shirt. He did not match in other respects, such as the color of his pants and the fact that he was not wearing anything on his head. The police officer shined his spotlight on Appellant's car, which was partially blocked in by the patrol car, and then approached the vehicle while speaking in a loud voice. He claims he smelled marijuana, which he spotted after asking Appellant to step out of the vehicle. Appellant filed a motion to suppress and the officer testified at the suppression hearing. The trial court ruled that Appellant was detained but that the officer had articulable facts that justified the detainment; thus, the motion was denied. The court of appeals considered the motion in the light most favorable to the trial court's ruling but held that Appellant was not being detained and affirmed the trial court's ruling.

Issues: (1) Whether the panel majority of the court of appeals misapplied the standard of review when it substituted the trial court's explicit findings with the majority's implicit findings and applied these substituted findings to the law to support the trial court's ruling?

(2) Whether the panel majority erred to infer from the record testimony that, notwithstanding the trial court's finding to the contrary, the evidence demonstrates of the trial court could have concluded that a reasonable person in appellant's position would have believed that he was free to ignore the officer's requests or terminate the interaction, and therefore the initial interaction between the officer and appellant was a voluntary encounter rather than a Fourth Amendment seizure?

The Court held that the determination of whether the officer detained Appellant was a question of law and should have been reviewed *de novo*. The court of appeals erred by viewing the evidence in the light most favorable to the trial court's decision. Furthermore, the Court held that a reasonable

person would not have felt free to leave under the circumstances. Thus, the Court reversed and remanded to the court of appeals to determine whether the officer had reasonable suspicion to detain Appellant.

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

Presiding Judge Keller concurred to point out her disagreements with the Court's recitation of the facts. Presiding Judge Keller states that the Court's recitation of the facts was misleading in that it implied that the police officer was lying at the suppression hearing. Presiding Judge Keller also disagrees with the majority's characterization of the police officer as evasive and argumentative during questioning by defense counsel.

Judge Price, concurring, joined by Judge Womack

Judge Price concurred to clarify why the mixed question of law and fact in this case did not turn on witness credibility, thus requiring *de novo* review. In this case, the trial court's determination that Appellant was detained did not require the trial court to believe Appellant's testimony over the officer's. Even if the trial court completely believed the officer's testimony, the trial court could determine that Appellant was detained. Thus, the trial court's decision should be reviewed *de novo* because it does not turn on witness credibility.

Hollander v. State

No. PD-1447-12

Case Summary written by Jessica Rugeley, Online Edition Editor.

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

Appellant was convicted of criminal mischief for tampering with a metering device to divert electricity to the house he lived in. An employee of the electric company noticed on several occasions that the electrical wiring at the Cisco house had been tampered with, though he had turned the electricity off multiple times. Appellant's deceased father owned the Cisco house and the electric company account was in Appellant's stepbrother's name. Appellant received a citation for an unrelated offense and listed the Cisco house as his residence. There is a statutory presumption that a person who received the "economic benefit" of the meter tampering has engaged in the prohibited conduct. The jury must find beyond a reasonable doubt that the person received that economic benefit in order to use the presumption to find the defendant guilty. The jury instructions failed to inform the jury that they must find beyond a reasonable doubt that Appellant received the economic benefit of public power supply to find him guilty. The court of appeals affirmed Appellant's conviction because it concluded that Appellant did not

establish egregious harm because the evidence supported the facts giving rise to the presumption.

Issue: Did the incomplete jury instruction cause Appellant egregious harm?

Yes, the Court held Appellant suffered egregious harm. The Court applied the *Almanza* harm test, which requires the court to consider (1) the complete jury charge, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) any other relevant factors revealed by the record as a whole. The Court found the jury charge deficient because it only provided general instructions and did not educate jurors about the level of confidence they must have in the predicate facts to rely on the presumption to convict. Neither the prosecutor nor the defense attorney ever elucidated the specific burden of proof. The Court held that the great weight of the evidence did not show that Appellant was actually residing at the Cisco house when it was using energy from the meter. Therefore, the Court reversed and remanded for a new trial.

Judge Cochran, concurring

Judge Cochran concurred to emphasize that the harm in this case was egregious because the presumption in the jury charge appeared to be mandatory rather than permissive. The jury charge did not explain that the jury may, but need not, apply the presumption if it first found beyond a reasonable doubt that Appellant did receive the economic benefit of the electricity. Mandatory presumptions are unconstitutional.

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

Presiding Judge Keller dissented because she agreed with the court of appeals that Appellant suffered no egregious harm. Due to the language in the jury charge, Presiding Judge Keller stated that the jury found Appellant guilty of actually tampering with the meter, not just receiving an economic benefit. Therefore, even if the burden was misstated as to the presumption, the harm was not egregious.

Moreno v. State

No. PD-1731-12

Case Summary written by Jessica Rugeley, Online Edition Editor.

Judge Hervey delivered the opinion of the unanimous Court.

Appellant plead guilty to possession with intent to deliver a controlled substance in an amount of four or more grams but less than 200 grams and was sentenced to fifteen years of incarceration. Lubbock Police initially suspected Appellant of drug dealing after receiving a tip from the Clovis, New Mexico Police Department. Lubbock Police utilized a confidential informant

(CI) to purchase drugs from Appellant. The CI was known to be reliable and was searched prior to and after the purchase. The CI contacted an unknown participant to purchase the drugs. The unknown participant met with the CI, went to Appellant's house, and returned to the CI with the narcotics. The Lubbock Police kept constant surveillance on the unknown participant. On these facts, a magistrate issued a warrant to search Appellant's residence for crack cocaine. Appellant filed a motion to suppress, arguing that the warrant was not based upon probable cause because the credibility of the unknown individual was not verified. The trial court denied the motion to suppress and the court of appeals affirmed.

Issue: Does probable cause exist when police kept constant surveillance on an unknown participant, though that person's identity and credibility were never verified?

The Court held that the magistrate had probable cause to issue the search warrant. The magistrate could reasonably infer that the unknown person obtained the crack cocaine from Appellant's residence. The police kept constant surveillance of the person. Furthermore, the unknown person was unaware of the police investigation and had no motive to mislead the police. The Court noted that the affidavit was not based on the unknown person's statements but only independent observation. Even if the credibility of the unknown person was necessary to the probable cause determination, the person's statements may be deemed reliable because they were against the person's interest.

Judge Cochran, concurring

Judge Cochran concurred to point out that the unknowing participant was Appellant's agent—his employee who sells on the street corner.

Carrizales v. State

No. PD-0320-12

Case Summary written by Jessica Rugeley, Online Edition Editor.

Judge Cochran delivered the opinion of the unanimous Court.

Appellant was convicted of criminal mischief for placing screws and nails into the road, which caused flat tires. Appellant lives on a country road and his only neighbor is his cousin, Ramona Gomez. Appellant and Mrs. Gomez did not get along because Appellant believed she and her husband drove too fast on the country road. Mrs. Gomez and her husband got multiple flat tires from the same type of metal roofing screw on the road. The police officer that came out to talk to Mrs. Gomez also got a flat tire from a metal roofing screw. Appellant denied placing the screws in the road but the trial court found him guilty and sentenced him to thirty days in jail, suspended for

one year. Appellant appealed, claiming that the evidence was insufficient to prove that anyone placed the screws in the road intentionally. The court of appeals affirmed, holding that “the evidence established both (1) the *corpus delicti* of the offense . . . and (2) Appellant’s identity as the person who committed the crime.”

Issue: Can a conviction for a crime involving property damage stand when there is no evidence whatsoever that the damage was caused by a person’s intentional act?

The Court held that *corpus delicti* rule does not apply when there is no confession. The *corpus delicti* doctrine is meant to ensure that a person is not convicted based upon his or her confession alone when there is no corroborating evidence. In all other criminal cases, the *Jackson v. Virginia* sufficiency of the evidence standard applies. Under this standard, circumstantial evidence is as probative as direct evidence. In this case, the trial judge could reasonably have based the conviction upon the following evidence: Appellant admitted he had a conflict with his neighbor over her alleged speeding past his house, Appellant admitted he previously placed logs in the road to slow his neighbor down but it did not work, Mrs. Gomez stated that she never had a flat tire problem on the country road before the dispute with Appellant arose, and the patrol officer who took the initial report ended up with a flat tire caused by the same type of screw. Therefore, the trial court had sufficient evidence to convict and the Court of Criminal Appeals affirmed.

Blackman v. State

No. PD-1575-12

Case Summary written by Jessica Rugeley, Online Edition Editor.

Judge Price delivered the opinion of the Court, joined by Presiding Judge Keller and Judges Meyers, Womack, Johnson, Keasler, Hervey, Cochran. Judge Alcala did not participate.

Appellant was convicted of possession with intent to deliver cocaine in an amount over 400 grams. On appeal Appellant argued that the trial court erred when overruling his *Batson* challenge during voir dire. The State peremptorily struck an African-American juror and, when challenged, the prosecutor stated that he did so because he felt that she was connecting more with the defense counsel and because she described the defendant in a previous trial in which she was a juror as the “accused,” implying that she believed the defendant was wrongly accused. The prosecutor also explained that he struck several white jurors for similar reasons. The court of appeals sustained Appellant’s *Batson* challenge, finding the following: (1) it found no support for the prosecutor’s claim that the juror stated the prior jury on

which she served did not reach a verdict and that reasoning was pretextual because the prosecutor failed to strike non-African-Americans who stated the same thing; (2) the trial court failed to make specific findings of fact in regard to the prosecutor's claims about the juror's demeanor; and (3) the juror's use of the word "accused" was unremarkable. Thus, relying on *Snyder*, the court of appeals held that the prosecutor's reasoning was pretextual. In the dissenting opinion, Justice Keyes argued that the majority inappropriately stood in the place of the trial court in making its determinations.

Issue: Did the court of appeals correctly find the prosecutor's reasoning to be pretextual?

The Court frequently notes that a reviewing court should not overturn a trial court's resolution of a *Batson* challenge unless the trial court's ruling was clearly erroneous. The Court held that *Snyder* does not apply because a trial judge may accept a prosecutor's explanation about the demeanor of a juror even if the judge has no personal recollection about the juror's demeanor and a demeanor challenge may be considered proved on the record if the prosecutor makes his observation on the record and defense counsel fails to rebut the observation. The Court finds three errors in the court of appeals' reasoning: (1) the prosecutor never offered as an explanation for his preemptory strike that the previous jury that the juror in question served on never reached a verdict, (2) the trial court did make a ruling as to the prosecutor's demeanor-based explanations because the only explanations the prosecutor offered were demeanor-based, and (3) the court of appeals erred in shifting the burden of proof to the state because it erred in finding the prosecutor's explanations to be pretextual. The trial court's ruling was not clearly erroneous because the prosecutor offered reasons as to why he believed the juror would be unduly sympathetic toward the defendant. These explanations do not turn on the juror's race.

Wehrenberg v. State

Nos. PD-1702-12, PD-1703-12

Case Summary written by Jessica Rugeley, Online Edition Editor.

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

Appellant plead guilty to narcotics charges and received five years of confinement. The Parker County anti-narcotics unit had been conducting surveillance of Appellant's residence for approximately thirty days when police officers received a call from a confidential informant (CI). The CI told the officers that Appellant was preparing to manufacture methamphetamine that night. The officers initially entered the residence without a warrant and without consent but only performed a protective sweep and handcuffed the

individuals inside the residence. The officers then secured a search warrant with only the information provided by the CI and did not mention the previous entry or anything seen inside the home. Appellant moved to suppress the evidence. The trial court granted in part and denied in part Appellant's motion to suppress, finding that the initial entry by the police was illegal but the search warrant was untainted by the previous entry and detention because it stemmed from independent facts. The court of appeals reversed holding that the independent source doctrine does not apply in Texas.

Issue: Is the federal independent source doctrine, which excepts from the exclusionary rule evidence initially observed during an unlawful search but later obtained lawfully through independent means, applicable in Texas?

Yes, the independent source doctrine applies in Texas because it does not conflict with the Texas exclusionary rule. The Texas exclusionary rule excludes evidence obtained in violation of the law. However, "evidence obtained pursuant to an independent source, much live evidence for which a prior taint has been attenuated, is not "obtained" in violation of the law and is thus not subject to suppression." Appellant argued that the independent source doctrine is the functional equivalent of the inevitable discovery doctrine and thus should be disavowed like the inevitable discovery doctrine has been in Texas. The Court distinguished the independent source doctrine from inevitable discovery because the inevitable discovery doctrine applied when evidence has actually been unlawfully seized. The independent source doctrine, however, requires a break in the chain. The Court held that the Texas exclusion law is consistent with the independent source doctrine and thus the Court reversed and remanded to the court of appeals for further consideration.

Judge Price, concurring

Judge Price concurred to suggest discontinuing the use of terms like "independent source doctrine" and "inevitable discovery" because of the difference between the federal application and the Texas exclusionary statute. Judge Price suggests that courts ask in every case, "was the evidence "obtained" by virtue of the primary illegality?" If the answer is "no," then there is no causal connection between the illegal act and the evidence.

Judge Meyers, dissenting

Judge Meyers dissented because he believes that the warrant was obtained based upon the police officers' initial unlawful entry into the residence. The CI gave the police tip three to four hours before the initial entry, making the investigator's claim that the police initially entered to prevent the destruction of evidence implausible. Furthermore, if the police had entered and merely found the occupants "only baking cupcakes," the officers would not have proceeded to obtain the search warrant. They

obtained the warrant only after entering and finding suspicious activity. Finally, even if the warrant were based solely on information from the CI, it would still not be valid because the tip predicted a future crime. “Probable cause for a search warrant cannot be based on anticipation of a prospective crime.” TEX. CODE CRIM. PROC. arts. 18.01, 18.02.