Court of Criminal Appeals
February 26, 2014

Cardenas v. State
No. PD-0733-13
Case Summary written by Leonardo De La Garza, Staff Member.

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

Cardenas was convicted of aggravated robbery with a deadly weapon. The court ordered him to pay court costs totaling $294. Cardenas filed a motion to correct costs, alleging that the court of appeals mischaracterized the record and fabricated facts to justify the imposition of court costs.

Issue: Did the court of appeals err when it held that the record supported the assessment of $294 in court costs and construing to allow a convicted defendant to file a motion to correct costs?

The court held that *Johnson v. State* controlled with respect to the basis of assessed costs and that the bill of costs provided sufficient basis to sustain the court costs. In *Johnson*, the court held that record did not require a bill of costs to support assessed court costs and that an appellate court could order a trial-court clerk to prepare a bill of costs to be included as a supplemental clerk's record. In this case, the bill of costs in the supplemental record supported the court costs. In response to the claim that the court of appeals fabricated facts, the court held that Cardenas's right to due process was satisfied with respect to notice and an opportunity to be heard. While Cardenas also raised claims requiring construal of Texas Code of Criminal Procedure Article 103.008, the court declined to reach the merits of those grounds because Cardenas never filed a motion under that Article, nor did the court of appeals construe that provision. Thus, the court affirmed the court of appeals.

State v. Granville
No. PD-1095-12
Case Summary written by Jamie Vaughan, Staff Member.

Judge Cochran delivered the opinion of the Court, in which Presiding Judge Keller and Judge Meyers, Price, Womack, Johnson, Hervey, and Alcala, joined. Judge Keller concurred, joined by Judge Price, and Judge Keasler dissented.

Teenager Anthony Granville was arrested for causing a disturbance on his school bus, at which time his property was seized, including his cell phone. While he was being detained, an officer got word that Granville had taken an inappropriate photograph of a fellow student. That officer went to

the jail, got Granville's cell phone, turned it on, and searched its contents until he found the photo, at which time he printed a copy of the photo. He also kept the phone for evidence. At trial, Granville filed a motion to suppress the evidence, and the trial court granted the motion. The SPA (State Prosecuting Attorney) tried to argue that they did not need a warrant to search the contents of the cell phone because prisoners have no expectation of privacy to their cell phones stored in the jail property room after their arrest. The trial court held that people do have a reasonable expectation of privacy regarding the information on their cell phones that are being held by a jail, such that, without a search warrant or exigent circumstances, they cannot be searched. The appellate court affirmed, finding an expectation of privacy due to the invasiveness of the potential search, the defendant's status as a pretrial detainee, the short duration of his detainment, and the fact that Granville's arrest had nothing to do with his cell phone.

Issue: Is a detainee entitled to an expectation of privacy in the information stored on his electronic devices that are seized at the time of his arrest and stored in a jail property room?

The court held that people do have reasonable expectations of privacy regarding the information stored on their cell phones that are seized at the time of their arrest and placed in jail property rooms. The court begins by stating that the Fourth Amendment referenced "papers and effects" but applies to electronically stored information as well. The court pointed out that some of people's most private information is now stored on electronic devices such as cell phones, and the same policy about preventing unlawful searches applies even though the medium is more technologically advanced now. The court then held that Granville had standing because he had a subjective and reasonable expectation of privacy in his cell phone because he owned his cell phone and it had an ability to store large amounts of information. Next, the court pointed out that, although an expectation of privacy can be lost, such as in cases of abandonment, lending property out, or consenting, Granville did none of those things here and there was no reason for him to think that his expectation of privacy had been lost. The court determined that the SPA was wrong in arguing that a prisoner's right to an expectation of privacy regarding his belongings stored at the jail does not disappear. Rejecting the SPA's argument, the court affirmed the judgment of the court of appeals and held in favor of Granville.

Keller, J., concurring.

Judge Keller agreed with the majority but wrote separately to further discuss Granville's subjective expectation of privacy. Judge Keller believes that Granville had a subjective right to privacy based only on his right to the possession and the actual possession of the cell phone. This is because the information to which Granville had an expectation of privacy was not on public display. It was clear that it was not on public display because the

police that took it from Granville did not even know about it. Additionally, Keller argued that Granville did not lose his expectation of privacy because he did not voluntarily relinquish possession of his cell phone. His expectation may have been frustrated as to the physical aspects of his phone; however, he did not lose all rights to his expectation of privacy to the information on the phone.

Keasler, J., dissenting.

Judge Keasler argued that the majority ignored precedent and ignored the requirement for a subjective expectation of privacy. Keasler said that Granville did not show an actual expectation of privacy through his own affirmative actions or the fact that society is able to say the expectation is reasonable. According to Keasler, although a fear of abuse by law enforcement is a well-founded one, the majority ignored requirements and precedent.

Garfias v. State
No. PD-1544-12
Case summary by Caleb Segrest, Staff Member.

KEASLER, J., delivered the opinion of the Court, in which KELLER, P.J., MEYERS, PRICE, and HERVEY, JJ., joined. COCHRAN, J., filed a concurring opinion, in which WOMACK, JOHNSON, and ALCALA, JJ., joined.

In the early morning of March 1, 2006, Christopher Garfias entered a convenience store and pointed a gun at the clerk, Shahid Shahid (the victim). After the victim asked Garfias not to shoot, Garfias shot the victim four times at close range. Garfias was charged with both aggravated robbery by threat and aggravated assault causing bodily injury. Garfias was convicted by a jury of both crimes and sentenced to life plus sixty years. On appeal, and for the first time, Garfias raised an argument that the aggravated robbery charge violated the Double Jeopardy Clause. The court of appeals agreed and reversed Garfias's conviction for the aggravated robbery.

Issue: Was the Double Jeopardy Clause violated by Garfias's conviction of both aggravated robbery by threat and aggravated assault causing bodily injury?

Despite the fact that Garfias failed to raise his double-jeopardy claim to the trial court, the claim can be raised for the first time on appeal if the undisputed facts show the double jeopardy violation is clearly apparent from the facts of the record.

There are three types of double jeopardy claims: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same

offense. Garfias argued that the third type was violated in this case. The intent of the Legislature is pivotal in determining whether the state may concurrently charge two crimes without violating the Double Jeopardy Clause. When the offenses in question come from different sections, which is the case with the two crimes at present, an "elements" analysis is proper to determine legislative intent. This elements analysis is composed of the *Blockberger* test and the *Ervin* factors. The *Blockberger* test states that when two crimes have at least one element that the other does not, this fact weighs toward probable legislative intent that prosecution for both crimes would not violate the Double Jeopardy Clause. The *Ervin* factors facilitate in ascertaining legislative intent by considering the "focus" and "gravamen" of penal provisions when determining whether the Legislature intended two crimes to be charged together.

Since each crime at present does contain at least one element that the other does not, the *Blockberger* test weighs against Garfias's argument. However, the *Blockberger* test is not dispositive and is only a factor in determining legislative intent. Garfias argues that under the *Ervin* factors, both crimes have an assaultive nature, so the Legislature likely did not intend for the two crimes to be brought against a defendant simultaneously.

The Court disagreed. The Court reasoned that the aggravated robbery by threat charge is an assaultive offense by threat, which amounts to a "conduct-oriented" offense involving violating another's personal security. Unlike this crime, the aggravated assault causing bodily injury charge is a "result-oriented" offense involving inflicting actual harm on another. The differing gravamen of the two offenses, the Court reasoned, means that the Legislature intended to allow the two crimes to be brought together against a defendant without violating the Double Jeopardy Clause.

Other *Ervin* factors that weighed against Garfias included the different punishment ranges of the two crimes and the fact that the two crimes came from different statutory sections. Ultimately, the Court held that "[b]ecause double-jeopardy principles were not involved in this case, no double-jeopardy violation is clearly apparent from the face of the record." The judgment of the court of appeals is REVERSED and Garfias's robbery conviction is REINSTATED.

COCHRAN, J., filed a concurring opinion in which WOMACK, JOHNSON, and ALCALA, JJ., joined.

The concurring opinion emphasized that a "hard-and-fast" rule that the aforementioned crimes may always be brought together is inappropriate. The facts of the present case clearly show two distinct events: (1) a failed robbery attempt and (2) a separate assault in which Garfias shot the victim. The concurrence states that these clearly separate incidents may not always be the case and the problem should be approached on a case-by-case basis.

Johnson v. Texas
No. PD-0193-13
Case Summary written by Megan Kateff, Staff Member.

Judge Hervey delivered the unanimous opinion of the Court.

In this case, the appellant was charged with and convicted of aggravated robbery with a deadly weapon. The judgment ordered the appellant to pay all fines and court costs. After an assessment at trial, the amount of $234 in court costs was written on the judgment. The appellant appealed that assessment, arguing that there was insufficient evidence to support the amount. Specifically, the appellant argued that the record contained no bill of costs to substantiate the $234 figure. On appeal, the appellate court ordered the district clerk to supplement the record with a bill of costs, if it existed, or an affidavit confirming that a bill of costs did not exist. The district court clerk filed an affidavit stating that a bill of costs was not in the record, but later supplemented the record with what appeared to be a bill of costs. The court of appeals held that the supplemental document was not a bill of costs because it was not brought to the attention of the trial judge, and that the trial court erred in entering the $234 amount because there was insufficient evidence to support that assessment.

Issue: Did the court of appeals err in ordering the deletion of the $234 assessment in court costs from the trial court judgment?

When a court cost is written in a judgment, an appellate court errs in deleting the amount if there is a basis for the cost. Therefore, the Court of Criminal Appeals granted review to determine whether there was a basis for the $234 cost.

First, the court looked at the state's argument that the appellant failed to preserve his complaint for review. Relying on its own decision in *Mayer v. State*—another case that brought claims challenging the imposition of costs—the court held that the appellant did not need to object at trial to raise a claim challenging the bases of assessed costs on appeal. The court noted that there was no evidence in the present case that the appellant even had the opportunity to object at trial. While a defendant is typically sentenced in open court, the actual judgment is prepared at a later date on which the defendant will not likely be able to object.

The state's next argument was that the appellant's claim was not ripe for review because the state had not yet attempted to collect the assessed court costs from the appellant. Distinguishing the present case from *Harrell v. State*, the Supreme Court of Texas case that the state relied on, the court overruled this ground for review. The court noted that in *Harrell*, the appellant's claim contested the collection of assessed court costs, whereas the

present case challenged the bases of imposed court costs—a claim ripe for review.

The court then looked to the state's third argument, that because there is no affirmative duty for clerks to include a bill of costs in an appellate record, the appellate court was not authorized to order the supplementation of the record. The court responded by noting that the Texas Rules of Appellate Procedure list only the items that *must* be included in the record, but are silent as to whether items not required to be included can properly be included on appeal. Further, the court noted that the Rules allow an appellate court to direct the trial court clerk to supplement the record with a relevant item that was omitted from the original record. While a bill of costs requires preparation, it is an item documenting costs already accrued in connection with the case. The court held that a bill of costs is a relevant item that can be prepared and added to the original record by a supplemental clerk's record.

After addressing the state's arguments and concluding that an appellate court may order a trial clerk to supplement the record with a bill of costs, the court went on to address the appellant's arguments. The appellant first argued that the bill of costs was not a "true" bill of costs because it was not properly signed. The Texas Code of Criminal Procedure states that a bill of costs must contain the items of cost, must be signed by either the officer who charged the cost or the officer entitled to receive payment for the cost, and must be certified. The court found that bill of costs in the present case contained the items of cost, was signed by the Harris County District Clerk—an officer entitled to receive payment for the cost, and was certified by an officer of the court. Therefore, the court held that the bill of costs in the supplemental record was a true bill of costs per the Texas Code of Criminal Procedure.

The appellant argued that even if the supplemental bill of costs was a true bill of costs, the appellate court properly refused to consider it on the basis that it was never brought to the attention of the trial court. The appellate court relied on the Court of Criminal Appeals's decisions in *Chambers v. State* and *Lamb v. State*. The court ultimately distinguished the present case from both of those cases. In *Chambers*, the appellant collaterally attacked her conviction on the grounds that the charging instrument was void, and in *Lamb*, the state was attempting to supplement the record on appeal with a fingerprint card to prove the appellant's citizenship at the time he pled guilty. In the present case, however, the appellant's conviction was not being challenged. The appellant challenged a statutorily mandated court cost. The court held not only that because the imposition of court costs has no bearing on the appellant's guilt or innocence that it need not be brought to the attention of the trial court, but also that the court of appeals erred when it failed to consider the bill of costs from the supplemented record.

Finally, the court addressed the appellant's argument that the Texas Code of Criminal Procedure creates an evidentiary-sufficiency requirement that a bill of costs must be in the appellate record to support a specific amount of court costs, or else the amount must be stricken from the judgment. The court disagreed, relying on the language the Texas Code of Criminal Procedure. The court found that the language of the Code evidences the fact that the legislature did not intend for a bill of costs to be included in every record on appeal, because it included an alternative statutory remedy to "correct costs." The court ultimately held that a specific amount of court costs does not need to be supported by a bill of costs in the appellate record for a reviewing court to conclude that the assessed court costs are supported by facts in the record.

The Court of Criminal Appeals held that the appellate court erred in deleting the $234 from the judgment, modified the judgment to reinstate the $234, and affirmed the judgment as modified.

Judge Cochran, concurring

Judge Cochran's concurrence suggests that a defendant's concerns regarding the imposition of court costs are best and most efficiently addressed on direct appeal. If the record does not contain a bill of costs, an attorney on direct appeal would ask for its preparation and inclusion in the appellate record and easily be able to review the record for accuracy.