

Court of Criminal Appeals
February 5, 2014

State v. Swearingen

No. AP-77,020

Case summary by Caleb Segrest, Staff Member.

Womack, J., delivered the opinion of the Court, in which Keller, P.J., Meyers, Price, Keasler, Hervey, Cochran, and Alcala, JJ. joined. Johnson, J., concurred.

The appellee, Larry Ray Swearingen, was convicted in 2000 of the capital murder of Melissa Trotter and sentenced to death. In the trial, a “mountain of evidence” was presented of the appellee’s guilt. This following evidence was introduced at trial: the victim and the appellee were seen together on the day of the victim’s disappearance; hair and fiber indicated that the victim was in the appellee’s house and vehicle; the appellee utilized a cell tower from a phone call showing that his location when he made the call was consistent with the theory that he drove to Sam Houston National Forest to dispose of the victim’s body; the body was found at the Sam Houston National Forest; the appellee was familiar with the area where the body was found from previous visits; the ligature found around the victim’s neck matched the remains of a pair of pantyhose found in the appellees house; etc. The Court affirmed the judgment and sentence. Here, the State appeals the trial court’s decision to grant the appellee’s fourth Article 64 motion for DNA testing.

Chapter 64 of the Code of Criminal Procedure allows a convicted person to “submit to the convicting court a motion for forensic DNA testing of evidence containing biological material.” Among several preliminary requirements that the movant must meet is the requirement that the movant show, with a preponderance of the evidence, that he would not have been convicted if the exculpatory results were available at trial.

The appellee made several previous Article 64 motions for DNA testing before the relevant motion at issue, including a motion in 2010. The 2010 motion, denied by the trial court, was also denied on appeal to the Court of Criminal Appeals of Texas. The 2010 motion was for the DNA testing of the victim’s fingernail scrapings, the ligature, and the victim’s clothes. Another previous motion requested DNA testing for the cigarette butts found near the victim’s body. The fourth Article 64 motion was made by the appellee after two significant legislative amendments were made to Article 64. The first change defined “biological material” and made fingernail scrapings, per se, biological material. The second change, irrelevant to the present case, eliminated a requirement that the lack of previous testing had not been the convicted person’s fault. The State argued that the “law of the case” doctrine—providing that an appellate court’s resolution of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue—was dispositive of the appellee’s motion.

Issue: Did the trial court err in granting the appellee’s fourth Article 64 motion for DNA testing?

The Court found that due to the legislative changes, the appellee was no longer required to show proof that the fingernail scraping contained biological material. However, regarding the ligature, clothing, and cigarette butts, the appellee still failed to meet his burden of proof to show biological material. A defendant must prove biological material exists and not that it is merely probable. The Court held that Since the legislature's amendment did not alter the Court's result except in the case of the fingernail scrapings, the trial court erred under the law of the case doctrine when it disregarded the Court's previous holding denying the appellee's motion.

Further, even though the fingernail scrapings were biological material, the appellee still failed to prove, with a preponderance of the evidence, that he would not have been convicted if the exculpatory results were available at trial. The jury was already aware that another man's DNA was found under the victim's fingernails, and chose that this evidence was insufficient to overcome the other evidence in favor of the appellee's guilt.

The appellee finally argues that because the legislature's amendment requires DNA results to be run through CODIS—a DNA database for repeat offenders—the Court should now construe an “exculpatory result” to mean DNA results that are not from the convicted person and which generate a CODIS hit. The Court rejects this argument, stating that had the legislature meant to so drastically lower the barrier for Chapter 64 testing, they would have said so explicitly. The court held that the statute requires only that the results be run through CODIS. It does not set a standard for exculpatory results.

REVERSED and REMANDED.

Taylor v. Texas

No. PD-0180-13

Case Summary written by Megan Kateff, Staff Member.

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

In this case, the *pro se* appellant was charged with evading arrest with a motor vehicle. Years after this charge, the trial court revoked the appellant's previous receipt of deferred adjudication and sentenced him to two years' confinement. The appellant attempted to appeal this decision on the grounds of ineffective assistance of counsel. His attempt to appeal, though, is what was at issue before the court of appeals. Per the Texas Rules of Appellate Procedure, the appellant's notice of appeal was due in the convicting court within thirty days, which fell on December 20. On December 21, the court of appeals, not the trial court, received the appellant's notice. The notice was forwarded to the correct court—the trial court—and stamped as filed on December 27. While December 27 fell outside the allotted thirty-day window, it did fall within the additional ten-day period permitted by the “Mailbox Rule.” On appeal, the State argued that the court

of appeals lacked jurisdiction because the notice was not timely filed—particularly that the method by which the notice was sent was unknown, and when given an opportunity to demonstrate the method used, the appellant failed to provide any adequate evidence to that end. The appellant filed a motion for rehearing, asserting that his notice was timely filed under the “Prisoner Mailbox Rule.” In response to court order, the appellant filed a written declaration stating that he placed his notice of appeal in an envelope and then in a mail slot at the prison. The court of appeals again held that it lacked jurisdiction, as the appellant failed to indicate whether the envelope was properly addressed. If the envelope was not properly addressed, then the Mailbox Rule was inapplicable. The appeal was ultimately dismissed.

Issue: Did the court of appeals err in finding a lack of jurisdiction, where the appellant’s notice of appeal was mailed to the court of appeals on or before the filing deadline, forwarded by that court to the proper trial court clerk, and received in the trial court within the ten days permitted under the Mailbox Rule?

The Court of Criminal Appeals granted review to determine whether the appellant (1) sent his notice to the proper clerk, and (2) accurately addressed the envelope containing the notice. Before directly reaching either question, the court looked to portions of the Texas Rules of Appellate Procedure, which state that “[i]f [a] notice of appeal is received in the court of appeals, the clerk . . . shall immediately record on the notice the date that it was received and send the notice to the trial court clerk.” The court also looked to the language of the Mailbox Rule, which provides that if a document is received within ten days after the filing deadline, it is considered as timely filed if it was properly addressed and sent to the correct clerk. The Prisoner Mailbox Rule provides that a *pro se* inmate’s pleading is deemed filed at the time the prison authorities duly receive the document to be mailed.

As to the first question, the court found that, per the Rules, the court of appeals clerk was required to date the notice on the day it was received, before forwarding it to the trial court clerk. The court highlighted that this type of mistake must have been so common as to necessitate the creation of a rule of appellate procedure to address it. It also looks to the case of *Moore v. State*, which held that an envelope generally addressed to the incorrect clerk, but to the correct floor of the correct building, was adequate to comply with the Mailbox Rule. Finding support in both the rules of appellate procedure and the *Moore* case, the court ultimately held that the appellant timely filed his notice of appeal under the Mailbox Rule, because the address to which the appellant sent his notice was “sufficiently specific” for the document to be received in the proper place at the proper time.

As to the second question, the court held that in light of the fact that the court of appeals clerk received the notice, it was reasonable to infer that the notice was addressed to the court of appeals clerk. The court finally noted that the appellant, as an inmate, had limited control over the document’s filing and should not be penalized for his inability to provide evidence substantiating his claims as to the above questions.

Presiding Judge Keller, dissenting, joined by Judge Keasler

Judge Keller's dissent argued that the holding of court of appeals required the assumption that the appellant's notice was actually mailed to the court of appeals. It argued that jurisdiction may not be so inferred in the absence of direct evidence that the appellant addressed his envelope to the court of appeals clerk. The court of appeals gave the appellant multiple opportunities to plead anything that would confer jurisdiction upon the court, which he failed to do. This failure, argued Judge Keller, required a finding of a lack of jurisdiction.

The dissent also contended that the majority improperly attributed the inadequacy in the record (as to the envelope's address) to the court clerk, rather than to the appellant. Looking to the State's argument, the inference that the appellant's failure to indicate where the envelope was directed may have been misplaced, in that it assumed this failure was inadvertent—not the result of a calculated choice when making a statement under penalty of perjury. It also required the speculation that the envelope was lost, rather than actually sent to a third party. Judge Keller further argued that the Mailbox Rules requires documents to be addressed to the proper clerk, and because the appellant failed to provide any indication that this requirement was complied with, even generally, the court of appeals lacked jurisdiction.

Judge Keller disagreed with the majority's interpretation of the rules, stating that the rule requiring an appellate court clerk to forward a notice of appeal to the trial court clerk does *not* say that such a notice is deemed to have been filed in the trial court on the day the appellate court receives it. Lastly, the dissent distinguishes between *Moore* and the present case, noting that in *Moore*, there was evidence that the envelope was actually address to a clerk on the correct floor and building, whereas in the present case, there is no evidence of an address whatsoever. The timely receipt of notice in an appellate court before the deadline does not automatically establish jurisdiction in court of appeals per the rules of appellate procedure.

Ragston v. State

No. PD-0824-13

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

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

This case centers on jurisdiction of the courts of appeals in reviewing interlocutory orders regarding excessive or the denial of bail. In August of 2012, appellant was indicated for capital murder, murder, and aggravated robbery. For the capital murder charge, appellant was jailed and held without bond. For the murder and aggravated robbery charge, bond was set at \$500,000. Appellant filed a motion for bond reduction, but the trial court ordered that appellant would continue to be held without bond on the murder charges and reduced the bond on the robbery

charge to \$250,000. In response, the appellant filed an interlocutory appeal of the trial court's order, but the Court of Appeals granted the State's motion to dismiss for want of jurisdiction.

Issues: Do the courts of appeals of Texas hold jurisdiction to hear an interlocutory appeal of a pretrial motion for bond reduction?

The Court answered negatively. The Court recognized that some courts have found requisite jurisdiction from Rule of Appellate Procedure 31 and a footnote in the Court's *Primrose* decision. The *Primrose* footnote, argued the appellant, suggested that courts of appeals had jurisdiction over bail proceedings.

Courts of appeals have jurisdiction to review interlocutory orders only if the law has expressly granted jurisdiction through statute or constitution. While some courts of appeals have cited Rule 31 and the *Primrose* footnote, the Court noted that Rules of Appellate Procedure do not establish jurisdiction and the footnote constituted dictum. Furthermore, the Court's rules cannot enlarge the rights of litigants beyond those provided in the constitution or statute. Because there is no constitutional or statutory authority granting the courts of appeals jurisdiction to hear interlocutory appeals regarding excessive bail or the denial of bail, the Court affirmed.