

Court of Criminal Appeals of Texas
April 2, 2014

Ex parte Michael Dee Howard

No. AP-76, 809

Case summary by Caleb Segrest, Staff Member.

KELLER, P.J., delivered the opinion of the Court in which PRICE, WOMACK, JOHNSON, HERVEY, COCHRAN, and ALCALA, JJ., joined. KEASLER, J., filed a dissenting opinion. MEYERS, J., did not participate.

Michael Dee Howard (Howard) filed an application for a writ of habeas corpus. The habeas judge originally recommended that the Court of Criminal Appeals of Texas (Court) grant relief in the form of a new trial because Howard's counsel deficiently performed by failing to properly investigate and present a defense of insanity. Because Texas law does not recognize a defense of insanity caused by voluntary intoxication, the Court concluded that Howard was not prejudiced at the guilt phase of trial. However, the Court remanded to the habeas judge for a recommendation of whether Howard was prejudiced at the sentencing phase of trial because Texas law does allow consideration of insanity caused by voluntary intoxication for purposes of sentencing. Adopting the habeas judge's conclusion that Howard was prejudiced at the sentencing phase by his counsel's failure to present the above information, the Court granted Howard relief in the form of a new punishment hearing and remanded the case to trial for that purpose.

Dissent: KEASLER, J., filed a dissenting opinion.

Judge Keasler dissents from the Court, stating that the habeas judge's conclusion that Howard's trial counsel was ineffective was erroneous because even if Howard's counsel made some mistake, any mistake was certainly not prejudicial. Judge Keasler noted that in the face of detrimental extraneous-misconduct evidence, "it is difficult to see how the [habeas] judge could conclude, and this Court adopt, that there is a reasonable probability that the jury would have sentenced Howard to less than 20 years had the intoxication-induced insanity evidence been presented at punishment."

Holberg v. State

No. AP-77,023

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

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

Appellant was convicted of capital murder and sentenced to death after robbing, stabbing, and beating an eighty-year-old man (Towery) to death while high on crack cocaine. She was charged with committing capital murder by intentionally committing murder in the course of attempting to commit and committing robbery and burglary. During trial, the prosecution theorized that appellant formed the intent to take Towery's money prior to approaching him and took \$1,400 in cash, among other things. The court affirmed the judgment and sentence on direct appeal. In November 2012, appellate filed a motion for DNA testing of Towery's wallet, alleging that the absence of her DNA on the wallet would prove that she did not commit theft. The convicting court denied appellant's motion, concluding that, though the evidence did not contain biological material, the appellant failed to establish by preponderance of the evidence that she would not have received a conviction had exculpatory results been obtain through DNA testing.

Issues: Did Towery's wallet contain biological information enabling DNA testing? May the appellant establish by preponderance of the evidence that she would not have received a conviction had exculpatory results been obtained through DNA testing?

The court held that appellant failed to meet Article 64.03's requirement that she would have not been convicted had exculpatory results been obtained from Towery's wallet. The court began by reviewing Chapter 64 of the Texas Code of Criminal Procedure. This chapter allows a convicted person to submit a motion for DNA testing of evidence containing biological material. A court may order testing only if: (1) the evidence still exists and is in testable condition; (2) the evidence has been subjected to chain of custody that demonstrates it has not been altered materially; and (3) identity was or is an issue in the case. The movant, however, must show by a preponderance of the evidence that she "would not have been convicted if exculpatory results had been obtained through DNA testing" and that "the request for the proposed DNA testing is not made to unreasonably delay the execution of [the appellant's] sentence[.]" The court acknowledged that the only relevant issues were, first, whether the wallet contained biological material and second, whether the appellant met the preponderance burden.

After affirming its *de novo* scope of review (and limiting the record to trial evidence) the court looked to Article 64.01 to resolve the first issue. The court has held that this section requires the appellant to prove biological material exists, not that it is merely probable. The court reviewed the appellant's affidavits from experts. The state argued that the appellant's evidence was insufficient to satisfy Article 64.01 because some of the experts merely posed probabilities. The court

refused to adjudge the first issue because appellant failed under the second issue anyways. Specifically, the appellant was required to show that, more likely than not, she would not have been convicted had the jury been able to weigh evidence that she did not deposit biological material on the wallet against the balance of trial evidence. Contrary to the appellant's assertion that the exculpatory result would have sufficiently undermined the State's reliance on the capital-murder-aggravating theory of robbery, the court concluded that the jury could reasonably have found that the appellant committed the capital-murder aggravator of robbery even if it also believed that the appellant did not leave Tower's apartment with the \$1,400 cash. This was because robbery requires only that the person be in the course of committing theft (though theft requires acquisition). Thus, the court concluded that the jury could reasonably have found that the appellant committed robbery even if it also believed that the appellant did not rifle through victim's wallet. Alternatively, the jury could reasonably have found that appellant committed robbery by taking prescription medication independent of the \$1,400 cash. Ultimately, the court affirmed the convicting court's order, denying the Chapter 64 motion for post-conviction DNA testing.

Freeman v. State

No. PD-1579-13

Case Summary written by Jamie Vaughan, Staff Member.

Per Curiam.

Appellant Freeman was convicted under Section 33.021 of the Texas Penal Code for online solicitation of a minor, and the appellate court affirmed the conviction. Freeman filed a petition for discretionary review in the Court of Criminal Appeals, arguing that the appellate court erroneously upheld the statute's constitutionality.

Issue: Is Section 33.021 of the Texas Penal Code constitutional?

The court granted Freeman's petition for discretionary review, stating that it had already held the statute to be facially unconstitutional in *Ex parte Lo*, a recent decision of which the lower courts were unaware at the time they rendered their decisions. The court therefore vacated the appellate court's judgment and remanded the case.

Jourdan v. State

No. PD-0446-13

Case Summary written by Matt McKee, Staff Member.

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

While she was leaving her job as a custodian at a public library, Crystal Kemp discovered she locked her keys in her car. While she was on the phone with a relative, Appellant approached her and offered his assistance. After asking her to get him paper towels, Appellant allegedly followed Kemp into the library's bathroom, where he allegedly sexually assaulted her. Appellant claimed that when he approached Kemp her relative convinced her to offer \$50 and oral sex in exchange for his help retrieving the keys. Appellant further contended he entered an adjacent storage facility where he ejaculated on Kemp's shirt before she could perform the agreed upon conduct. Believing Kemp did not intend to pay him the \$50, Appellant claimed he became angry, following Kemp into the library bathroom and beating her. Though Appellant claimed he only ejaculated on Kemp's shirt in the storage facility, a medical expert claimed he discovered Appellant's seminal fluid on Kemp's groin region. At trial, during his closing argument, the prosecutor put particular emphasis on Appellant's statements that he ejaculated on Kemp's shirt, which contradicted medical testimony that the fluids were found around her groin.

Appellant was charged with three counts of aggravated sexual assault. The charges respectively alleged Appellant (1) caused Crystal "Kemp's female sexual organ to contact his own sexual organ . . . (2) caus[ed] penetration of Kemp's female sexual organ with his own sexual organ . . . ; and (3) caus[ed] penetration of Kemp's female sexual organ with the appellant's finger. . . ." Rather than outlining separate applications—one for contact or penetration with the finger, and one for contact or penetration with Appellant's sexual organ—as the prosecutor outlined during voir dire, the court presented the jury with one application paragraph, instructing the jury that if they found that Appellant caused contact or penetration with his finger or his sexual organ, the jury should find him guilty of aggravated sexual assault. "This application paragraph [did] not expressly require the jury, as a predicate to convicting the appellant, to reach agreement with respect to whether he: (1) contacted Kemp's sexual organ with his own sexual organ . . . ; (2) penetrated Kemp's sexual organ with his own sexual organ . . . ; or (3) penetrated Kemp's sexual organ with his finger. . . ."

On appeal, Appellant argued the jury instruction was improper because, rather than alleging alternative means of committing the same offense, it alleged two separate offenses: contact or penetration with his sexual organ and contact or penetration with his finger. Holding for Appellant, the court of appeals found "that the indictment alleged two separate statutorily defined offenses, and held that the jury should have been required to achieve unanimity with respect to at least one of those offenses before convicting," which caused Appellant egregious harm.

The Court of Criminal Appeals granted discretionary review to address two grounds, upon which, the State claimed the court of appeals erred: that the indictment did not allege separate statutorily defined offenses, and that the court erred in placing such great emphasis on prosecutor's closing argument.

The Court first noted the core principle of jury unanimity, noting however, that it is not improper to present a jury with alternative methods or means of committing an offense. Reviewing the case, the Court identified three potential jury unanimity problems wherein the jury could have convicted Appellant without determining whether (1) he "contacted Kemp's sexual organ with his own sexual organ versus penetrated her sexual organ with his own;" (2) he "penetrated Kemp's sexual organ with his own sexual organ versus penetrated her sexual organ with his finger;" or (3) he "contacted Kemp's sexual organ with his own sexual organ versus penetrated her sexual organ with his finger." Because Appellant only raised the second situation on appeal, the Court addressed that issue first.

In applying the "eighth-grade grammar" test to Tex. Penal Code § 22.021(a)(1)(A)(i), the Court found that the statute does not differentiate which type of object a defendant uses to cause penetration, rather, the statute addresses "penetration" perpetrated "by any means." Thus, whether Appellant caused penetration with his finger or penis simply provides alternative means of violating the same statute. Finding the statute does not indicate a legislative intent to focus on a particular means of penetration, the Court held that the jury did not have to achieve uniformity in determining the means by which Appellant penetrated Kemp's sexual organ.

The court next addressed the distinction between contact and penetration. Though there is a distinct statutory difference in contact and penetration, even if Appellant had raised the issue before the court of appeals, the Court found that in order to have penetration, there must first be contact. Thus, there is no lack of jury uniformity because the jury found that Appellant *at least* contacted Kemp's sexual organ. Similarly, regarding the distinction between penile and digital penetration, the Court noted that even if Appellant had raised the issue on appeal, the error in distinction was an egregious error.

Accordingly, the Court reversed the court of appeals' judgment, affirming the trial court's conviction.

Thornton v. State

No. PD-0669-13

Case Summary written by Megan Kateff, Staff Member.

Judge Price delivered the opinion of the Court in which Presiding Judge Keller and Judges Womack, Keasler, and Hervey joined.

Two Lubbock police officers were in plain clothes, driving an unmarked car in a residential neighbor on burglary patrol. The officers saw the appellant and another person walking in the middle of the street, not on the sidewalks lining both sides of the road. The officers pulled over to the curb intending to cite the appellant with a violation of the “Use of Sidewalk” provision of the Texas Transportation Code. The appellant and his companion then stepped onto the sidewalk and continued walking. The officers exited their vehicle, stepped on to the sidewalk, and eventually identified themselves to the appellant and the other person as police officers. The appellant turned around, and when he realized the police officers were approaching him, he dropped an object from his pocket, which shattered when it hit the sidewalk. One officer, Roberts, directed the other, Meil, to inspect the broken object. Meil confirmed that the object was a crack pipe. The appellant was then arrested for possession of drug paraphernalia and later charged with tampering with evidence by concealment.

At trial, Roberts testified that he had never lost sight of the pipe. The appellant, based on this testimony, asked the trial court to instruct the jury as to the lesser-included offense of attempted tampering with evidence. The trial court rejected this argument, the jury returned a guilty verdict on the charge of tampering with evidence by concealment, and the appellant was sentenced to a forty-five year term of confinement. The appellant then appealed the judgment.

On his initial appeal, the appellant argued that the evidence on which the jury relied to convict him was insufficient to establish the “concealment” element. The State responded that the appellant did in fact conceal the weapon by “palming” it before he dropped it. The State also argued that despite Robert’s testimony that he had a clear view of the pipe during the entire exchange, the fact the Meil did not was sufficient to support the appellant’s conviction. The court of appeals disagreed with the State on both grounds, disputing the State’s claim that the pipe was ever out of Robert’s view, and reasoning that because one officer (Roberts) was aware of the presence of the allegedly concealed item, that knowledge was imputed to the other officer. The court of appeals reversed the judgment of the trial court and acquitted the appellant as to the tampering charge. Before the court of appeals issued its opinion on the above judgment, however, the Court of Criminal Appeals decided the case of *Bowen v. State*, which held that upon finding that a conviction was supported by legally insufficient evidence, a court of appeals is not limited to acquittal, but may instead reform the judgment to a lesser-included offense, even if there was no instruction given as to that offense at trial.

On its initial petition to the Court of Criminal Appeals for discretionary review, the State asked the court to vacate the judgment of the court of appeals and remand it for further consideration of *Bowen*'s effect on its previous reasoning and analysis. The Court of Criminal Appeals granted the State's request. On remand, the court of appeals held that to reform their previous judgment to a lesser-included offense was inappropriate for this case. The court first reasoned that the State waived any error regarding the trial court's initial failure to submit a lesser-included offense when it "stood idly by" as the request for such a submission was denied. The court then reasoned that the *Bowen* opinion proposed that appellate courts should reform judgments to lesser-included offenses only in situations where the State failed to prove an "aggravating element" of the charged offense, but met its burden of proof as to the essential elements of the lesser-included offense. The court ultimately found *Bowen* not relevant to the present case, because concealment is not an aggravating element of tampering with evidence. Finally, the court reasoned that even if *Bowen* were on point, the evidence was not legally sufficient to support a conviction of attempted tampering with evidence.

After the remand to the court of appeals, the State submitted a second petition for discretionary review to the Court of Criminal Appeals, asking for a review of each of the court of appeals's justifications for its refusal to reform the previous judgment to the lesser-included offense of attempted tampering with evidence.

Issues: Did the court of appeals err in holding that the State failed to preserve the issue of reformation at the trial level? Did the court of appeals err in its interpretation of the *Bowen* opinion? Finally, did the court of appeals err in concluding that there was insufficient evidence to support a conviction of attempted tampering with evidence?

I. Did the court of appeals err in holding that the State failed to preserve the issue of reformation at the trial level?

The Court of Criminal Appeals first addressed the court of appeals's contention that by failing to timely request or object to the omission of a lesser-included offense in the jury charge, the State waived its right to later request a reformation of judgment on appeal. The court looked to two previous decisions upon which the court of appeals based its decision. The first is *Collier v. State*, which discussed the trial strategy by the state of not requesting instructions on a lesser-included offense with the expectation that a jury is more likely to convict than let the accused go "scot-free." With this strategy in mind, *Collier* held that an appellate court may reform a judgment to reflect a lesser-included offense only if either the jury was instructed on that lesser-included offense or if one of the parties requested such an instruction but was denied. The second is *Haynes v. State*, which bolstered the notion that reformation is not appropriate by the appellate court when the State "overreaches" by failing to ensure that a lesser-included instruction is given at trial.

What cases like *Collier* resulted in was the understanding that pre-*Bowen*, appellate courts did not have the authority to intervene on behalf of "overreaching"

parties. In *Bowen*, however, the Court of Criminal Appeals found that the *Collier* rationale failed to consider aspects such as the defense's strategic interest in not requesting a lesser-included offense instruction, and its effective prevention of judgment reformation in circumstances in which the State requested a lesser-included offense, but where the trial court did not submit the instruction. Finding *Collier's* holding to be unjust and unworkable, the Court of Criminal Appeals found in *Bowen* that appellate courts may no longer base their decision whether to reform a judgment of conviction on either of the *Collier* considerations (whether the jury was instructed on a lesser-included offense or whether one of the parties requested such an instruction but was denied). The post-*Bowen* focus is now on the evidence presented and the lesser conviction sought, rather than the parties' respective strategies in failing or deciding whether to seek an instruction at trial. On this issue, the court thus held that the State's "standing idly by" at trial had no impact on the authority of the court of appeals to reform the judgment. In other words, the preservation of this issue at trial was irrelevant.

II. Did the court of appeals err in its interpretation of the *Bowen* opinion?

The court of appeals interpreted the *Bowen* opinion to mean that an appellate court may consider reformation only if the State fails to prove an aggravating element of the offense, but proves all the essential elements of the offense. Because concealment is not an "aggravating element" of the offense of tampering with evidence, the court of appeals held it was not bound to consider whether to reform the judgment. The Court of Criminal Appeals noted that while the court of appeals correctly interpreted the facts of *Bowen*, it failed to correctly discern the reasoning. *Bowen* directed appellate courts to focus on what the jury found in the course of convicting the appellant of the greater offense. If the jury convicts the appellant of the greater offense, it necessarily found every element necessary to convict him for the lesser offense, and an acquittal in this situation would allow the appellant to enjoy an "unjust windfall." In considering whether to reform judgment, though, two questions must be answered in the affirmative: (1) in the course of convicting the appellant of the greater offense, did the jury necessarily find every element necessary to convict on the lesser offense; and (2) was the evidence the jury found at trial sufficient to support a conviction of the lesser offense? Essentially, an appellate court should not assume that a conviction of a greater offense automatically satisfies the elements for the lesser offense, and a review of the sufficiency of the evidence is necessary.

Applying this two-prong reformation analysis, the Court of Criminal Appeals next determined whether the jury, in the course of finding the appellant guilty of actual tampering with evidence, also found all of the elements of attempted tampering with evidence. As to the first prong, the court held that the jury necessarily found all elements of attempted tampering. Thus, as to the State's second point, the Court of Criminal Appeals found that the court of appeals erred in its holding of *Bowen* as inapplicable to the present case.

III. Did the court of appeals err in concluding that there was insufficient evidence to support a conviction of attempted tampering with evidence?

Issue II above discusses the Court of Criminal Appeals's finding that the jury's guilty verdict as to tampering necessarily constituted a finding of every element necessary to convict the appellant of attempted tampering. The court next addressed the second prong of the reformation analysis—whether the evidence that the jury found for the tampering offense was sufficient to support a conviction for an attempted tampering offense. The court held that it was, noting that, viewed in the light most favorable to the prosecution/verdict, the evidence reasonably supported a finding that the defendant harbored the specific intent to conceal the crack pipe and thereby impair its later availability as evidence beyond a reasonable doubt. Specifically, it was reasonable for the jury to infer that the appellant believed the pipe was concealable, and that it was possible for him to conceal that pipe from the police, both based on the pipe's small, translucent nature and the fact that the sun was coming up when the exchange occurred. Additionally, testimony regarding the appellant's "stealthy demeanor" as he attempted to dispose of the pipe and the fact that he "palmed" the pipe as he removed it from his pocket constituted probative evidence of the appellant's intent to conceal. Finding the second prong of the reformation analysis satisfied, and thus sustaining the State's third and final point of error, the Court of Criminal Appeals reversed the judgment of the court of appeals and remanded to the trial court, with instructions to reform the judgment to a conviction of attempted tampering with evidence and to hold a punishment hearing attendant to the post-reformation conviction.

Presiding Judge Keller, concurring.

Presiding Judge Keller, expanding on the majority's evidentiary-sufficiency analysis, defined "conceal" to mean removal from sight, and that removal from sight occurs when a person's line of sight to the object in question is blocked. She noted that under this definition of concealment, the evidence presented was sufficient to show that the appellant intended to block the officer's line of sight to the pipe. Even though Officer Roberts testified that the crack pipe never left his sight, he also testified that he could not see the pipe while it was concealed in the appellant's hand. Presiding Judge Keller also pointed to a portion of the defense's examination of Officer Roberts as further evidence of the appellant's intent to block the Officer's view. In the examination, Officer Roberts testified that the appellant moved towards him in an attempt to further conceal the pipe, and that he believed the appellant's intent was to hide the pipe. Lastly, in argument to the jury, one of the prosecutors stated that Officer Roberts's previous demonstration of how the crack pipe was dropped showed that the appellant dropped it on the ground, behind his leg. Presiding Judge Keller noted that without definitive evidence to the contrary, the assumption must be made that the Officer's demonstration could rationally support a conclusion that the appellant dropped the crack pipe behind his body.

Judge Cochran, dissenting, joined by Judges Meyers and Johnson

Judge Cochran dissented from the majority with respect to both the tampering and attempted tampering convictions. Evidence of the appellant throwing down contraband during the exchange between him and the police was not sufficient, by itself, to constitute either concealment or attempted concealment under the tampering statutes. Rather, Judge Cochran urged that the appellant was guilty of no more than the Class C misdemeanor of possessing drug paraphernalia.

With respect to the tampering conviction, § 37.09 of the Texas Penal Code is based on the corresponding § 241.7 of the Model Penal Code (MPC). Judge Cochran, borrowing language from the Supreme Court of Tennessee, noted that most, if not all, jurisdictions utilizing versions of § 241.7 of the MPC have recognized that the statute is not violated by a mere abandonment of physical evidence of a street crime while running from police or fleeing the scene of the crime. Further, most states addressing this issue have concluded that dropping, abandoning, or throwing down drugs in the presence and view of police will not constitute concealment. As the Supreme Court of New Hampshire explained, the intent of a defendant should not be confused with his physical actions, for the tampering statute uses the term “conceal” to define the *actus reus* of the offense. Though the statute also requires proof of a culpable mental state, the intent of a defendant to make it more difficult for an officer to discover contraband does not mean that a defendant concealed the contraband by abandoning it.

Judge Cochran noted that, with respect to attempted tampering, courts have held similarly that the act of discarding contraband in the presence of police will not suffice to establish this lesser offense. The rationale for these holdings are that discarding of contraband in police view and presence is an act of abandonment, not concealment; unsuccessful attempts to rid oneself of contraband do not always impair the contraband’s availability as evidence; and the legislature could not have intended for the act of discarding a misdemeanor amount of drugs—a felony offense if categorized as tampering with evidence—to be punished more severely than being in possession of that misdemeanor amount of drugs. In these cases, the evidence tends not to show that the defendant intended to conceal evidence with the intent to impair its usefulness at trial, but rather that the defendant merely tried to distance himself from the evidence. Oftentimes the abandonment of contraband actually exposes, rather than conceals, the contraband, as in the present case. To hold that the evidence in this case supported a finding of the appellant’s specific intent to conceal, rather than abandon, the pipe, calls for total speculation. The dissent also reasoned that the tampering statute should only apply to completed crimes in which the evidence is permanently destroyed, altered, or concealed. Judge Cochran ultimately agreed with the court of appeals’s holding that the evidence was insufficient to support the element of concealment, for either a tampering or an attempted tampering conviction.

Judge Alcala, dissenting, joined by Judges Meyers, Johnson, and Cochran

Judge Alcala's dissent argued that the judgment in this case should not have been reformed from tampering with evidence to attempted tampering with evidence, and the appropriate outcome was outright acquittal or a remand for a separate trial on the criminal attempt. Attempted tampering is unlike other lesser-included offenses because it includes an additional element not found in the greater offense of tampering with evidence: the specific intent to commit evidence tampering.

Judge Alcala reasoned that it was neither clear that the jury found, nor that the State proved, all the elements of criminal attempt to commit evidence tampering beyond a reasonable doubt. Nor does *Bowen's* holding support a reformation of the judgment to criminal attempt, because unlike the present case, the judgment in *Bowen* was reformed only when it was abundantly clear from the jury's verdict that the jury necessarily found the defendant guilty of the lesser-included offense beyond a reasonable doubt and the evidence was sufficient to establish the elements of that offense. The present case thus posed the question whether the evidence was sufficient to find that the appellant attempted to conceal the pipe. This dissent argued that the jury made no determination as to the specific intent element. Thus because the jury did not implicitly find all the elements of criminal attempt in rendering its verdict on the tampering charge, reformation was not required, nor appropriate. Though the majority suggested that a finding that the appellant intended to "impair the availability of the glass" sufficed as evidence that he was acting with the "specific intent to conceal the evidence," Judge Alcala disagreed, reasoning that the two elements pose different factual questions. He went on to suggest that judgments should almost never be reformed to reflect criminal attempt, because in rendering a guilty verdict on a greater offense, the jury has not found the elements necessary to constitute a guilty verdict for criminal attempt (despite criminal attempt's classification as a lesser-included offense in the Texas Code of Criminal Procedure).

Judge Alcala proposed guidelines for reformation, which find support in the approach of the federal courts of appeals. The federal approach generally limits reviewing courts' authority to reform judgment to those situations in which the lesser offense is unaffected by the error that led to the reversal of the greater offense, recognizing that appellate courts are not well suited to make factual determinations based on the record, especially with respect to questions that the jury did not expressly answer.