

Court of Criminal Appeals

July 01, 2015

Salinas v. State

No. PD-0419-14

Case Summary written by Allison Grayson, Online Edition Editor.

JUDGE JOHNSON delivered the opinion of the unanimous Court.

A jury convicted Orlando Salinas under Texas Penal Code § 22.04(a)(3), (f), and Texas Penal Code § 12.34(a) for injuring an elderly individual. He received a sentence of five years in prison. Thereafter, the trial court “assessed a consolidated court cost of \$133 pursuant to Texas Local Government Code section 133.102.”

In response, Salinas argued the consolidated court cost constituted a tax, making it unconstitutional. The trial court rejected Salinas’s objection, which the court of appeals affirmed.

Explaining its decision, the court of appeals held that Salinas’s claims failed because he failed to show “what the funds designated in section 133.102(e) actually do.” Furthermore, Salinas failed to address severability principles in his arguments.

Issue: Whether “[t]he Fourteenth Court of Appeals decision regarding the constitutionality of the consolidated court cost on severability grounds neither raised by the state nor briefed by either party) failed to properly address the merits of the argument.” The court further analyzed whether the Fourteenth Court of Appeals decision was “erroneous in light of clear precedent from [the Court of Criminal Appeals] in reviewing facial challenges to the constitutionality of a statute.”

The court did not decide whether the statute is unconstitutional, stating that the “determination [was] left to the court of appeals on remand, when it may apply the appropriate standard for a facial challenge to a statute and hold appellant to his proper burden.” In remanding the case back to the court of appeals, the court explained that the lower court improperly required a severability analysis as part of Salinas’s burden.

Further explaining, the court stated that “a statute requires only that a party establish that the statute in question operates unconstitutionally in all possible circumstances.” Additionally,

severability only need be addressed once a determination is made that part of the statute is invalid.

In response to the lower court's requirement that the appellant show how the statute is invalid in all applications, the court argued that "evidence of how the statute operates in actual practice is irrelevant; courts consider only how the statute is written, not how it operates in actual practice." Therefore, the court sustained this ground as it clearly went against prior precedent.

Because the court of appeals utilized an incorrect standard in its analysis of the issues of this case, the Court of Criminal Appeals reversed and remanded the case.

Peraza v. State

Nos. PD-0100-15, NO. PD-0101-15, 01-12-00690-CR

Case Summary written by Garrett Coutts, Staff Member.

PER CURIUM.

The 184th District Court of Harris County convicted Osmin Peraza upon two charges of aggravated sexual assault of a child under fourteen years of age and sentenced him to concurrently serve twenty-five years per offense. Osmin appealed the judgment contending that a \$250 DNA fee rendered for each count pursuant to Texas Code of Criminal Procedure, Article 102.020, was a violation of the separation of powers and thus unconstitutional. The First Court of Appeals reversed the District Court's judgment and found for the appellant.

The Court of Criminal Appeals reversed and reinstated the \$250 DNA record fee for both counts upon a determination that the First Court of Appeals implemented an improper standard of proof.

The linchpin of Osmin's challenge was the distribution of the \$250 fee to the criminal justice planning account and state highway fund, which he contended were not related to the adjudication of the charges against him. He compared the court's actions to tax collection and a function of the executive, not judicial, branch. While the First Court of Appeals found the fees unconstitutional, the Fourteenth Court of Appeals in Houston

found, in the similar case of *O'Bannon v. State*, 435 S.W.3d 378 (Tex.App.—Houston [14th Dist.] 2014, no pet.), in the alternative. Thus, the Court of Criminal Appeals sought to clarify the differing results. The Court of Criminal Appeals held the fees were constitutional, lawfully and statutory required, and were properly applied by the district court for two reasons.

First, the court emphasized that a law is to be read in a light favoring its constitutionality, and the First Court of Appeals failed to do so. The burden of a constitutional challenge to a statute rests with the party bringing the suit. Thus, Peraza had the burden of proving there were no possible constitutional uses of the funds collected, and until that proof was met, the law should have been considered valid.

Second, the court found that the appellate court improperly relied upon *Ex parte Carson*, 143 Tex. Crim. 498, 159 S.W.2d 126 (1942), in finding the fees were neither “necessary” nor “incidental” to a criminal trial. The court specifically stated that the 65% of the fee allocated to the criminal justice planning account could be used as reimbursement funds for the Department of Public Safety in fulfilling its requirement to collect DNA samples from persons charged for particular offenses, including aggravated sexual assault of a child under fourteen years of age. Thus, that allocation was valid. The court also found the remaining 35% allocation to the state highway fund valid because those funds could be used for the Department of Public Safety’s DNA collection efforts and the laboratories that store and test those DNA samples. Thus, both allocations of the fee had possible, constitutional uses and were thus valid.

In essence, the court adopted a general standard for validating fees assessed by court order. If the fees are “for legitimate criminal justice purposes” as provided by the applicable statute, then they are valid and constitutional. The court defined a “criminal justice purpose” as “one that relates to the administration of our criminal justice system.” The court reversed the decision of the First Court of Appeals and reinstated both \$250 DNA fees.

Speights v. State

PD-0543-14

Case Summary written by Jack Fulgham, Staff Member.

JUDGE YEARY delivered the opinion for a unanimous court.

Billy Wayne Speights was charged with three counts of aggravated sexual assault of a child, indecency with a child by sexual contact, and indecency with a child for engaging in sexual acts with a child under seventeen. The record and testimony from the victim, the victim's guardian, and the victim's assault counselor indicate that Speights took the child into a bathroom, exposed himself, began masturbating, and then made the child touch his penis. The jury found Speights guilty of both indecency with a child by sexual contact and indecency with a child by exposure; Speights received twenty and ten year sentences respectively. On appeal, Speights contended that punishment for both the indecency by exposure and contact charges amounted to double jeopardy, because the exposure was in essence a consequence of the sexual contact. Although Speights never raised this issue at trial, the court of appeals heard his claim on the merits noting that "a double-jeopardy violation . . . can be raised for the first time on appeal." The court of appeals ultimately agreed with Speights and held that "punishment for both indecency by exposure and indecency by contact was constitutionally intolerable." The court subsequently acquitted Speights on the charge of indecency by exposure. The state prosecuting attorney petitioned for discretionary review on the grounds that the court of appeal's holding conflicted with recent precedent.

Issue: Does receiving punishments for indecency by exposure and indecency by contact resulting from the same incident amount to double jeopardy?

The Court of Criminal Appeals of Texas determined that in the context of double jeopardy this case was a matter of whether or not the defendant received multiple punishments for the same offense, and if the legislature intended multiple offenses to result from the same act. To answer these questions, the court applied a "units of prosecution" analysis derived from the recent decision in

Ex parte Benson. The first part of the test is determining what the “allowable units of prosecution” are under the statute. The statute at issue in this case was § 21.11 of the Texas Penal Code subsections (a)(1) and (a)(2)(A). The court relied upon *Loving v. State* in determining that the legislature did intend to allow for a defendant to be charged with both indecency by contact and exposure even when stemming from the same incident and “the exposure precedes the contact.”

The court noted that the fact that exposure and contact are separated in the Indecency with a Child Statute further suggests that the legislature intended for them to be charged as separate offenses. The court analogized the separation of exposure and contact indecency offenses to the separation of sexual contact involving different parts of the body “i.e., anus, breasts, or genitals.” The court further rejected the court of appeals decision in holding that indecency by exposure is not necessarily subsumed by indecency by contact, again relying on *Loving* as the basis of its holding. Part two of the units of prosecution analysis asks how many units of prosecution have been shown, or in other words, how many separate offenses resulting from the same act can the accused be charged with. Noting that the defendant plainly committed both indecencies by exposure and contact, and that the legislature intended both indecencies to be separate offenses, the court concluded that more than one unit of prosecution existed in this case. Therefore, the defendant’s double jeopardy right had not been offended. The Court of Criminal Appeals of Texas reversed the court of appeals decision to acquit Speights of the indecency with a child by exposure conviction.

Thurston v. State

No. PD-1316-14

Case Summary written by Jeryn Crabb, Staff Member.

PER CURIUM.

During trial, Thurston admitted to shooting the victim in self-defense, failing to call authorities for a one-day period, wrapping the body in a sleeping bag and a blue tarp, and ultimately dumping the body near some railroad tracks. The jury

acquitted Thurston of murder but convicted him of tampering with evidence.

Thurston appealed his conviction to determine the definition of “pending” in the tampering with evidence statute, Texas Penal Code § 37.09(a)(1). After examining the record, the Court decided its decision to grant review was improvident and Thurston’s petition for discretionary review was dismissed.

JUDGE KELLER joined by JUDGE JOHNSON and JUDGE RICHARDSON, concurring.

The Court’s granting of Thurston’s petition for review was improvident because resolving the definition of “pending” in the tampering with evidence statute could not lead to relief on Thurston’s sufficiency claim. This is because an alternate theory of committing tampering was submitted to the jury and that theory was supported by sufficient evidence.

The indictment for the tampering charge contained two methods of evidence of tampering: 1) knowing that a murder had been committed, the defendant destroyed, concealed, or altered a human corpse with the intent to damage its ability to be identified or used as evidence in an investigation or proceeding and 2) knowing that an investigation or official proceeding was “pending or in progress” the defendant destroyed, concealed, or altered a human corpse. The jury charge contained both of these theories of liability and the jury delivered a general verdict with respect to the tampering offense.

Thurston argued he could not be convicted of tampering under the first theory of liability because he had been acquitted of murder, but under *Jackson v. Virginia*, 443 U.S. 307 (1979), the evidence of Thurston shooting the victim and failing to notify authorities was sufficient to support the allegation of murder that was included in the tampering indictment. Also, Thurston’s disposal of the body suggested his consciousness of guilt. Because the state’s first theory of liability was supported by sufficient evidence and the jury delivered a general verdict, meaning that the verdict is considered to be supported by evidence if it supports one of the theories submitted, Thurston’s argument for not being liable for tampering with evidence because the definition of

“pending” is not correct does not matter. Thurston did not raise a jury-charge claim regarding the sufficiency of evidence used to prove his criminal liability before the court of appeals, and because of this, his argument about the meaning of “pending” relates to no claim upon which he can obtain relief.

State v. Jackson

No. PD-0823-14

Case Summary written by Jonae Chavez, Staff Member.

JUDGE YEARY, delivered the opinion of the court in which PRESIDING JUDGE KELLER and JUDGES KEASLER, HERVEY, ALCALA, RICHARDSON and NEWELL joined.

Initially, law enforcement officers suspected that John Jackson was trafficking drugs. They sought a court order to place a GPS tracking device on his vehicle to determine when and where he was getting his supply. Once the GPS was installed, the police officer, Sides, programmed the device to alert him when Mr. Jackson moved the vehicle. The police officer watched the vehicle move toward the Dallas/Fort Worth area where he had been told was the location of the source of the methamphetamine.

During this time, Sides was able to tell from the GPS device that Mr. Jackson was speeding. Sides had contacted another police officer that had been involved in the narcotics investigation and asked him to pull Mr. Jackson over for speeding. Mr. Jackson allowed the police officer to search his car and the police officer discovered methamphetamine. Mr. Jackson confessed that it was his and was taken to the police station. At the police station, Mr. Jackson admitted that he consented to the search of the vehicle and that he had purchased the methamphetamine in Dallas for resale.

Mr. Jackson filed a motion to suppress, arguing that the warrantless search was unconstitutional. The state argued that any taint from the illegal use of the GPS tracking device was attenuated by the officers’ verification that Mr. Jackson was speeding before pulling him over. However, the trial court suppressed all evidence gathered by the police officers.

On appeal, the state argued that Mr. Jackson’s consent to

search the vehicle and the verification of him speeding were intervening causes for an attenuation-of-taint analysis. However, the court of appeals affirmed the trial court's holding. The court found no intervening cause and used the "temporal proximity factor from the *Brown v. Illinois* attenuation-of-taint analysis to prove that the discovery of methamphetamine and [Mr. Jackson's] statements were not attenuated from the input of the GPS." Moreover, the search violated the Fourth Amendment for two reasons: (1) it occurred in the absence of a warrant and (2) it was based on a finding of reasonable suspicion rather than probable cause.

The state challenged the court of appeals' decision, arguing that the court of appeals should have focused on the third attenuation-of-taint factor which is whether the "conduct of the officers was purposeful or in flagrant disregard of the law." There is no disagreement that the police officers did not intend to conduct an illegal search.

The Court of Criminal Appeals stated that the police officers would not have found the methamphetamine but for the initial illegal installation of the GPS. However, neither the Fourth Amendment exclusionary rule nor the state's statutory exclusionary rule requires suppression of evidence "that was not obtained as a result of illegality." Therefore, the issue becomes "whether the verification by police of Mr. Jackson's speeding through 'pacing' and radar constituted a 'means' of obtaining the contraband that was 'sufficiently distinguishable' from the installation of the GPS to be purged of the primary taint."

The court of criminal appeals applied the following three factors from *Brown* to determine the attenuation of taint: (1) the temporal proximity of the arrest and confession, (2) the purpose and flagrancy of the official misconduct, and (3) the presence of intervening circumstances. The Court of Criminal Appeals has previously held that an arrest warrant could not alone attenuate the taint of the illegal initial detention, and it stood by this holding here. Therefore, the Court of Criminal Appeals analyzed the remaining two factors.

First, the Court agreed with the court of appeals that the police did not purposefully and flagrantly disregard Mr. Jackson's

Fourth Amendment rights. When Sides received the court order to install the GPS, the Supreme Court had not decided that it would constitute a search under the Fourth Amendment. Although Sides purposely installed the GPS to obtain evidence, there was no evidence that Sides intended the search to violate Mr. Jackson's rights.

Second, this court determined whether the officers' verification of Mr. Jackson's speeding was an intervening circumstance or the tainted product of the primary illegality. If the verification of Mr. Jackson's speeding was an intervening cause, then the second *Brown* factor weighed in favor of attenuation. However, if the latter was decided, then the court of appeal's holding was correct.

Here, the court found that the independent verification of Mr. Jackson's speeding was an "intervening circumstance," even though the illegal installation and tracking of the GPS took place at the same time. As long as the circumstance intervenes sometime between the *inception* of the illegal conduct and the discovery of evidence, the circumstance can be regarded as the "intervening circumstance" factor from *Brown*.

Therefore, once Mr. Jackson was stopped, he voluntarily consented and confessed. These actions did not result from any illegality besides the initial non-flagrant installation of the GPS. Moreover, the analysis of the facts under the remaining two *Brown* factors reveal that by the time Mr. Jackson consented to the search and confessed that the methamphetamine was his, the taint of the installation of the GPS had dissipated.

The judgment of the court of appeals was reversed and remanded to trial for further proceedings.

JUDGE HERVEY filed a concurring opinion in which JUDGES KEASLER, RICHARDSON, and NEWELL joined.

Judge Hervey agreed with the court but wrote separately to emphasize that the exclusionary rule mainly serves an underlying policy. Judge Hervey added that the purpose of the exclusionary rule is to deter police misconduct and should only be used as a last resort. In this case, Judge Hervey agreed that Mr. Jackson's speeding was an intervening circumstance and if the evidence

against Mr. Jackson were to have been suppressed, it would not have deterred future police misconduct since the police believed they were acting lawfully.

JUDGE MEYERS, dissenting.

Judge Meyer's dissent argued that the search of Mr. Jackson's vehicle was a direct result of the unconstitutional installation of the GPS. Judge Meyers stated that there was no other reason for the police officer to search the vehicle besides the use of the GPS. The fact that Mr. Jackson was speeding was not enough to constitute an "intervening circumstance." Judge Meyers would have affirmed the court of appeals decision.

Stairhime v. State

No. PD-1071-14

JUSTICE YEARY delivered the opinion for a unanimous Court.

Ryan Stairhime was indicted for murder. During voir dire, the trial court sustained three of the state's objections to the manner in which Stairhime's counsel phrased a question to the venire. At the close of voir dire, the trial court asked, "whether either party ha[d] 'an objection to the panel or as to the jury as selected.'" Both Stairhime and the state answered, "No, Your Honor." Ultimately, the jury convicted Stairhime and sentenced him to forty-three years in prison.

On appeal, Stairhime raised four points of error. His fourth point of error noted the trial court erred "by refusing to allow him to propound a specific question in a specific way to the venire." The First Court of Appeals dismissed each of his claims. Specifically, the court of appeals relied upon its own opinion in *Harrison v. State*, 333 S.W.3d 810 (Tex. App.—Houston [1st Dist. 2010, pet. ref'd) to conclude Stairhime "waived any error he might have earlier preserved" when he did not object at the close of voir dire. As a result, Stairhime filed a petition for discretionary review with the Court of Criminal Appeals.

Issue: Whether "the [First Court of Appeals] correctly regarded [Stairhime's] answer to constitute waiver of his appellate

complaint that he [was] denied the opportunity to pose a proper question.”

The Court of Criminal Appeals applied its rationale from *Thomas v. State*, 408 S.W.3d 877 (Tex. Crim. App. 2013) to clarify the use of the “no objection” waiver rule. The court held the “no objection” waiver rule is “context-dependent.”

Traditionally under the “no objection” waiver rule, one may affirmatively waive previously preserved error through a “clear and unequivocal statement on the record.” If the record shows that counsel did not affirmatively intend to waive previously preserved error, then the appellate court should resolve the claim on the merits. If the record is unclear, however, then the appellate court should “resolve the ambiguity in favor of a finding of waiver.” Any determination must be based on the context of the question.

Here, the Court of Criminal Appeals held Stairhime’s response to the trial court’s question, in context, did not amount to waiver. Justice Brown of the First Court of Appeals noted in his concurring opinion that “at [that] moment in the trial . . . the attorneys are focused on examining their strike sheets . . . evaluating the other party’s strikes, and analyzing the resulting composition of the jury.” This court adopted Justice Brown’s rationale. It is at that moment when the trial court asked if either party had an objection to the “seating of the jury,” or “to the panel,” or “to the jury as selected.” The trial court’s inquiry did not invoke or reference an objection to previous aspect of voir dire; rather it focused on the composition of the jury.

In that context, the court concluded Stairhime did not intend to waive any previously preserved error and the trial court likely did not believe he intended to do so either. The possibility that Stairhime intended to waive previously preserved error was so remote that it did not create enough ambiguity that would require the court to resolve “in favor of a finding of waiver.”

As a result, the court held that “a reply of ‘No’ or ‘No, your Honor’ to the question of whether there is an objection to ‘the seating of the jury,’ or ‘to the panel,’ or ‘to the jury as selected at the conclusion of the jury selection does not constitute waiver.” The Court also overruled *Harrison v. States*, 333 S.W.3d 810 (Tex.

App.—Houston [1st Dist. 2010, pet. ref'd) to the extent that its rationale conflicted with that of this court.

Because the First Court of Appeals dismissed Stairhime's fourth point of error based on an incorrect analysis of the issues in this case, the Court of Criminal Appeals reversed and remanded the case.