

**Court of Criminal Appeals**  
**June 17, 2015**

***Ex Parte Roberto Gonzalez De La Cruz***

No. WR-76,781-01

Case Summary written by Luke Luttrell, Staff Member.

JUDGE ALCALA issued the opinion for the unanimous court.

Upon application for a post-conviction writ of habeas corpus, the court considered (1) whether a claim that the use of false testimony in a criminal trial violated the applicant's due-process rights, and (2) whether the claim was subject to procedural default for failure to raise it earlier in the proceedings.

During trial for the murder of Jorge Pena, evidence suggested that (A) applicant shot Pena once, transported his body to a Baytown nature center and dumped it there, and (B) that Pena was shot at the nature center. The theory that Pena was shot and transported to the nature center was based on the eyewitness testimony of Torres. The theory that Pena was shot at the nature center was also based on the forensics testimony of Medical Examiner Dr. Paul Shrode. The jury found the applicant guilty of murder and the applicant's conviction was affirmed on appeal.

The applicant applied for a writ of habeas corpus claiming post-conviction false-evidence. In support of his claim, the applicant presented an amended autopsy report from Deputy Chief Medical Examiner Dr. Wolf. The report established that two gunshot wounds to the head caused Pena's death, and that he was probably shot at the nature center. The habeas court concluded that the state's entire case against the applicant was based on false testimony by Torres. The existence of a second bullet wound established that the testimony was false, and therefore, the applicant was denied due process. The habeas court recommended a new trial.

The Court of Criminal Appeals first concluded that the applicant's habeas claim was not procedurally barred because the grunt of his complaint was premised on new factual and legal bases that were not reasonably available during his trial or appeal.

The court next concluded that the applicant did not meet his burden of proving his false-evidence claim. An applicant must prove that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict. The court first found that the applicant failed to show that Torres's claim was false. The court was not persuaded that the new evidence showing Pena was shot twice demonstrated Torres testimony was false. The court believed an alternative finding would improperly bypass the jury's role in assessing the credibility of witness testimony and in resolving inconsistencies in evidence at trial. The court finally concluded that even if Torres's testimony was false, the applicant failed to show that the false testimony was material. The jury was aware of inconsistencies with Torres's testimony at trial and nonetheless chose to convict the applicant. Thus, the court found that any false evidence in Torres's testimony did not tip the scales in the state's favor.

Accordingly, the court held that the applicant's due process rights were not violated and denied relief.

***Ex Parte Alberto Rodriguez***

NO. WR-58,474-02

Case Summary written by Eric Clinton, Staff Member.

JUDGE KELLER delivered the opinion of the court in which JUDGES MEYERS, KEASLER, HERVEY, RICHARDSON, YEARY, and NEWELL joined. JUDGE JOHNSON concurred. JUDGE ALCALA did not participate.

On March 15, 1995, Alberto Rodriguez, then 16 years old, shot and killed Alexander Lopez. One month later, on April 26th, the state moved to certify Rodriguez as an adult and waive the jurisdiction of the juvenile court. The juvenile court later scheduled a transfer hearing for July 27.

On July 27 the prosecution and defense both appeared and announced, "ready." The witnesses and parties were sworn in and forced to return on August 1 at 10:00 a.m. for trial. When the parties appeared on August 1, the court again reset the hearing for August 4. Rodriguez was served with summons that stated that the hearing would begin on August 1 at 9:30 a.m. The return

on the summons, however, stated that he was not served until 11:45 that day, two hours after the hearing was scheduled to begin. Rodriguez did not receive another summons for the August 4th hearing.

The juvenile court granted the state's petition to certify Rodriguez as an adult during the August 4 transfer hearing. While Rodriguez had the right to appeal this decision immediately, he did not do so. The court records of the proceedings held on August 1 and 4 were unavailable during this appeal, but handwritten notes on the docket entries stated "[a]ny further notice waived by Resp." He was later sentenced to life in prison for murder. His appeal of the conviction was then upheld and Rodriguez did not seek discretionary review.

On May 18, 2011 Rodriguez filed a habeas application, claiming that the trial court lacked jurisdiction due to the juvenile court's failure to provide proper summons. The habeas judge found that Rodriguez was entitled to relief because "the record d[id] not show positively or affirmatively that a valid, or timely summons was ever served upon any party. . . ." pursuant to the prevailing mandatory notice requirements.

The court was faced with two issues in this case. First, the Court of Criminal Appeals questioned whether Rodriguez, who was personally served with a defective summons for his juvenile transfer hearing, had the ability to waive any defects in the summons. The court then inquired as to whether Rodriguez did in fact waive the defects in summons.

Section 53.06(e) of the Family Code unambiguously prevents juveniles from waiving the right to service. However, the court noted that Rodriguez did in fact receive actual notice, but that the service was defective. The notice of summons in this case was found insufficient under the Family Code for one of two reasons. The summons was either served upon defendant too late for the August 1 hearing date, in violation of § 53.07(a) of the Family Code, or it contained the incorrect time and date for the August 4 hearing—violating § 53.06(b) of the Family Code.

In finding that a juvenile could waive defects in service, the court relied upon § 51.09 of the Family Code. This provision allows a juvenile to waive, in writing or in the record, any right provided

to him by the Family Code “[u]nless contrary intent clearly appears elsewhere.” The court found that while “contrary intent clearly appears” with respect to a juvenile’s ability to waive service of the summons, a juvenile’s right to waive a defect in summons is not clearly restricted by the code. Thus, juvenile defendants may waive a defect in the service of the summons.

Next, the court was forced to decide whether or not Rodriguez did in fact waive the defects in his summons. In deciding this issue, the court noted the distinction between the standard for reviewing a direct attack on the court’s jurisdiction verses a collateral attack. In Dicta, the court stated that upon a direct attack there must be “an affirmative showing of service of summons in the record,” for the juvenile court’s jurisdiction to be affirmed. Upon a collateral attack, however, the record must affirmatively reflect a lack of jurisdiction. In this context, a finding that the juvenile court lacked jurisdiction to transfer the case would require that the record reflect a lack of waiver. This stricter standard is in place to improve the finality of judgments when jurisdictional issues are not immediately appealed.

As stated above, the court would typically look to the record to determine whether it reflects a lack of waiver or proper service. Here, however, the juvenile court reporter’s record was unavailable. Because of this, it could not be determined whether or not this record contained a waiver of the service defects. As a result, the court held that Rodriguez failed to prove that the juvenile court lacked jurisdiction to transfer the case.

***Cortez v. State***

No. PD-0501-14

Case Summary written by Andy Linn, Staff Member.

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

Appellant, Damien Hernandez Cortez, appealed for discretionary review contending that the court of appeals erred in determining that the application paragraphs of the trial court’s

jury instructions comported with the statutory language for the offense of fraudulent use or possession of identifying information. Specifically, appellant asserted that the jury instructions were erroneous because they failed to instruct the jury that the term “item of identifying information” required grouping of the information, such as on a check, bank statement, or credit card, and the instruction permitted the jury to find that he possessed more items of identifying information than he actually possessed, thereby subjecting him to a higher punishment range.

At trial, the application paragraph of the jury charge permitted the jury to find appellant guilty of fraudulent possession of identifying information in amounts that would constitute either a second-degree felony, third-degree felony, or a state-jail felony. The jury found appellant guilty of possessing five or more, but less than ten items of identifying information. After finding that appellant had been previously convicted of two felony offenses, the jury sentenced him to fifty years’ imprisonment.

On direct appeal, the appellant asserted that the trial court erroneously used the phrase “identifying information” instead of “item of identifying information” in the application paragraph of the jury charge. He contended the jury should have been limited to finding that a grouping of information found on a particular document should count as only one item, rather than counting each piece of identifying information on a document as a separate “item of identifying information,” and that this instruction egregiously harmed him by subjecting him to a higher range of punishment.

The appellate court examined the statute and determined the plain meaning of the phrase “item of identifying information” is any bit of information falling within one of the categories of material enumerated in the statute’s definition of “identifying information.” The court rejected appellant’s complaint, reasoning that because the Legislature included a list of things it deemed to be “identifying information” in the statute, an “item” within that list would be a distinct part thereof. Further, the court noted that nowhere in its language did the statute refer to a physical object or document containing identifying information. The court of

appeals therefore held that the trial court did not err in its instructions to the jury.

In his petition for discretionary review, appellant asked whether an item of identifying information is a grouping of identifying information or if it is each piece of identifying information that meets the statutory term, thereby resulting in multiple items appearing on a single document or object, such as a check or a credit card. He asserted that the court of appeals' adoption of the phrase "item of identifying information" as meaning each piece of identifying information appearing on a document misinterpreted the statute and lead to the erroneous conclusion that there was no error in the trial court's instructions.

The Court of Criminal Appeals disagreed with the court of appeals' reasoning and determined the phrase "item of identifying information" in the statute is ambiguous as to whether it refers to each document that may contain multiple pieces of identifying information, or whether it refers to each piece of information that alone or in conjunction identifies a person. The fact that the word "item" was not statutorily defined left it reasonably susceptible to more than one meaning. Because the court found the meaning of the literal text of the statute ambiguous, it conducted extra-textual analysis to determine the legislature's intent in enacting the statute.

The legislative history of the statute showed the legislature's intent to treat each part of the enumerated list in the statute as an individual "item of identifying information." The original fraudulent use or possession of identifying information statute made it a state-jail felony to obtain, possess, transfer, or use the identifying information of another person without that person's consent with the intent to harm or defraud another. Regardless of the type or quantity of information possessed, the statute punished the offense as a state-jail felony. The legislature amended this statute in 2007 in order to "fill the gap" in the law that wasn't covered by traditional fraud or theft law. The court determined the legislature's focus at the time of the statute's enactment was on preventing identity theft by targeting fraudulent use or possession of identifying information, not just use or possession of particular documents, especially in

consideration of the nature of identity theft in a digital age. The legislature added the phrase “item of identifying information” in 2007 to create different offense levels. Therefore, the court determined the legislature’s intent when enacting the statute was for the phrase “item of identifying information” to refer to any single bit of personal, identifying information enumerated in the definition of “identifying information” that alone or in conjunction with other information identifies a person.

Furthermore, the court explained that this interpretation of the statute renders it effective and makes it feasible of execution, whereas the appellant’s interpretation did not. The appellant’s proposed interpretation would subject a defendant to minimal criminal responsibility if in possession of multiple pieces of identifying information, merely because those pieces of information were on one document rather than multiple documents. For example, a defendant possessing five pieces of identifying information on one piece of paper would be subjected to a lower degree of criminal liability than a defendant who possessed five pieces of identifying information on five different pieces of paper. Moreover, appellant’s proposed interpretation would require a tangible object containing identifying information, thus rendering parts of the statute ineffective.

The court also disagreed with appellant’s argument that it would be illogical to allow prosecution for each piece of information that alone or in conjunction identifies a person because it would result in greater punishment for possessing a check than passing a forged check. The check appellant possessed, in this case, contained a complainant’s name, driver’s license number, address, phone number, bank-account number, and bank-routing number. Pursuant to the statutory definition of “identifying information,” the court explained that complainant’s name and driver’s license number would have to be combined for a single “item” of identifying information—name alone is insufficient. The complainant’s account and routing number would be combined into one “item” because only “in conjunction” would the two numbers become information that identifies her. Thus, possession of a check would count as two “items” and result in

punishment as a state-jail felony, which is the same offense level that applies to check forgery that is also a state-jail felony.

For the reasons explained above, the Court of Criminal Appeals held that the phrase item of “identifying information” means any bit of identifying information within the list enumerated in the statute that alone or in conjunction with other information identifies a person. The court therefore agreed with the court of appeals’ determination that the trial court was correct not to limit the jury’s consideration to each tangible document containing multiple pieces of identifying information. And because appellant limited his complaint to the meaning of the phrase “item of identifying information,” the Court of Criminal Appeals affirmed the judgment of the court of appeals.

JUDGE RICHARDSON, joined by PRESIDING JUDGE KELLER, and JUDGES JOHNSON and HERVEY, concurring.

Judge Richardson agreed with the majority’s analysis and opinion affirming the court of appeals’ judgment. He believed, however, that under a different set of facts, certain errors in the jury charge could have resulted in egregious harm to the appellant. The jury charge omitted the phrase “an item of” from the statutory definition of the offense, and defined “identifying information” in sentence form rather than in a list as in the statute. The application paragraph of the jury charge tracked the language of the amended indictment for fraudulent possession of ten or more but less than fifty items of identifying information. The charge also included the lesser-included offense of possessing five or more but less than ten items. Thus, it appeared the appellate court followed the jury charge’s definition of “identifying information” and counted the complainant’s name as an item of identifying information. If the jury convicted appellant of possessing a greater number of items in a higher range of punishment, the error could have caused egregious harm to the appellant. Although the charge error in this case did not deprive the defendant of a valuable right, affect the basis of the case, or affect appellant’s defense, it illustrated why the jury charge must define terms exactly as they are set out in the statute. The difference in the jury charge’s definition and the statute’s definition of “identifying information”



left room for misinterpretation, which could have resulted in a higher range of punishment for appellant under a different set of facts.