

Court of Criminal Appeals
May 13, 2015

Tapia v. State

No. PD-0729-14

Case Summary written by Frances Tubb, Staff Member.

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

In 2002, Gilbert Tapia, Jr., the defendant, plead guilty to aggravated assault, a second-degree felony. He received deferred adjudication community supervision for 10 years. Tapia also received a 10-year prison sentence for a separate offense. The Texas Department of Criminal Justice (TDCJ) released Tapia from prison prior to the expiration date of his community supervision.

After his release, Tapia failed to satisfy all the conditions of his community supervision. The state filed a motion to revoke community supervision and adjudicate guilt on March 6, 2012 and arrested Tapia. The state alleged in its motion that Tapia failed to check in with probation, failed to inform probation of a change in address, and violated curfew. While in jail, Tapia confessed to the use of cocaine and alcohol. At the March 27, 2012 hearing, the state requested time to amend its motion to include the drug and alcohol use. Tapia's counsel objected and requested that the hearing continue. The judge suggested that the state dismiss the motion to revoke community supervision and re-file it with the new allegations, but the state chose to proceed. At that time, the judge informed Tapia that the state would likely file another motion prior to the conclusion of his probation.

During the March 27 hearing, the state asked the probation officer about Tapia's failure to report and advise the office of an address change, but the state also asked if the office was aware of any additional violations. The probation officer answered in the affirmative and stated the office planned to file an additional motion to revoke. The judge found Tapia violated the terms of his community supervision but allowed him to continue on probation if he completed twenty-one days in jail. The state filed its second motion, in which the state alleged the drug and alcohol violations, three days later. Tapia plead "true" to the

violations, and the court found he violated his probation. In response, Tapia's counsel argued that the court knew of these violations at the time of the last hearing, and the court's decision violated Tapia's due process rights. The court clarified that Tapia did not plead to these violations at the previous hearing, and the court did not consider them in ruling on the first revocation motion. The judge adjudicated guilt for the offense of aggravated assault and sentenced Tapia to five years in prison.

Issues: Must a second revocation hearing consider only evidence discovered after the previous revocation hearing and continuation or modification of probation? Does the State forfeit, through waiver or estoppel, the ability to allege a known violation by failing to include it in an initial motion to revoke?

At the Thirteenth Court of Appeals, the state argued Tapia's counsel failed to make a proper objection, waiving the ability to raise the issue on appeal. The state also argued that Tapia "invited error" because he requested to go forward with the original revocation hearing, knowing that the state would need to file a subsequent motion to revoke. The court of appeals rejected both these arguments and reversed the decision of the trial court, choosing to rely on *Rogers v. State*, 640 S.W.2d 248 (Tex. Crim. App. 1982) (op. on State's first motion for reh'g). In *Rogers*, the court continued both the revocation hearing and the defendant's probation for 60 days. When the hearing resumed, the judge revoked the defendant's probation. In this case, the state alleged no new evidence at the second hearing. This opinion discussed the need for the state to allege the probationer violated additional terms after being continued on probation. This is the language the court of appeals relied on when deciding *Tapia*. In a subsequent motion for rehearing, the Texas Court of Criminal Appeals held that Tapia's lack of objections to a violation of due process during the hearing waived his rights to raise the issue on appeal. The opinion also included dicta language similar to the opinion issued on the first motion for rehearing, discussing the need for new evidence for a revocation after the court continued probation.

At the Texas Court of Criminal Appeals, the state argued that the language the court of appeals relied on was dicta. The state also argued it did not forfeit its ability to introduce the drug and alcohol violations simply because they were not included in the first motion. Tapia acknowledged the language from *Rogers* was dicta, but he argued the

court should still follow the rule. The court noted the difference in facts between the two cases and discussed the requirements necessary to satisfy a defendant's due process rights. In order to receive due process in a revocation hearing the defendant must have (1) written notice; (2) notice of evidence; (3) ability to testify; (4) neutral fact finder; (5) statement of the evidence the fact finder used and the reasons for revocation. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973). The court concluded that both of Tapia's revocation hearings met all of these requirements. The court also highlighted the trial judge's clear statement that she did not consider the drug and alcohol violations during the first revocation hearing and that she notified Tapia there would likely be a second revocation hearing. The court held that the revocation of Tapia's community supervision did not violate his due process rights because the trial court based its ruling on the newly alleged drug and alcohol violations, and he did not plead to these violations in the first hearing. The Texas Court of Criminal Appeals reversed the Thirteenth Court of Appeals and held that the trial court did not violate Tapia's due process rights by revoking community supervision after the second revocation hearing.

JUDGE JOHNSON, concurring.

Judge Johnson concurred with the majority's decision, but he believed the state should have dismissed the motion and re-filed it, including the newly discovered evidence of drug and alcohol violations.

JUDGE MEYERS, dissenting.

Judge Meyers agreed with the court of appeals that the trial court violated the Tapia's due process rights. He argued that if the state fails to allege a known violation at the time of the first revocation hearing, then it is forfeited.

Ex Parte Kenneth Vela

No. WR-37,070-02

Case Summary written by Will Wassdorf, Staff Member.

PRESIDING JUDGE KELLER delivered the opinion of the court, in which JUDGES MEYERS, JOHNSON, KEASLER, ALCALA,

RICHARDSON, YEARY, and NEWELL joined. JUDGE HERVEY did not participate.

The appellant was convicted of aggravated robbery, with a sentence of life in prison, and possession of heroin, with a sentence of sixty years' incarceration. The trial court issued an order stacking the two sentences so that they ran consecutively. The appellant subsequently appealed the aggravated robbery conviction and the appeals court reversed and remanded for a new sentencing hearing. The appellant again received a life sentence but the trial court did not issue a new order stacking the sentence with the sixty-year sentence associated with the possession of heroin conviction. After the new sentence, the Texas Department of Criminal Justice treated the sentences for the aggravated robbery and possession of heroin convictions as if they were still stacked.

Issue: Does reversal and remand for a new sentencing hearing operate to remove the sentence from its place in a stacking order?

The court answered in the affirmative. In examining the case law, the court looked to *Alsup* and *Nickerson*. In *Alsup*, the court held that a mere appeal did not deprive the court of the power to impose consecutive sentences via a stacking order. On the other hand, in *Nickerson*, the court ruled that the granting of a new trial returned the case to its pre-trial state, meaning that no conviction existed. The court reasoned that the case at hand fell between the extremes of *Alsup* and *Nickerson* because remand for new sentencing does more than filing a notice of appeal and less than the granting of a new trial to disturb the case.

The court then looked to the statute and determined that the judgment does not "cease to operate" upon remand for a new sentencing hearing but only upon completion of the sentence or the action of the parole panel. But the court concluded that *Nickerson* correctly showed that the order of conviction for stacking purposes is disturbed when a judgment ceases to exist. Likewise, the court reasoned that the judgment included the sentence and that a remand for new sentencing results in the judgment no longer existing. The court then pointed out that if the sentences maintained their position in the stacking order, the new sentence could result in an incarceration sentence stacked on a community supervision sentence, a result contrary to statutory law.

In light of the court's statutory interpretation, case analysis, and the legislature's desire to grant maximum flexibility in the stacking of sentences, the court granted relief, ruling that a sentence reversed on appeal is removed from its place in the stacking order and, in absence of a new stacking order, the two sentences at hand run concurrently.