

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.

Cruz v. State

No. PD-0082-14

Case summary written by Justin Stevens, Staff Member.

PRESIDING JUDGE KELLER delivered the unanimous opinion of the court.

After a taco-stand operator in Austin was murdered, a fingerprint taken from a soft-drink bottle at the scene of the crime was matched to a person with multiple aliases. This person later identified to be Adelfo Cruz had an active DUI warrant from Illinois and was arrested by United States Marshals after being contacted by the detectives assigned to the murder. While being booked by local law enforcement, Cruz gave a false name and an address, but no telephone number. The detectives from Austin traveled to Illinois to question Cruz about the murder in Austin. The detectives suspected that Cruz had given several false names to Illinois authorities and asked Cruz for his name and telephone number before reading him the *Miranda* warnings. Before hearing the *Miranda* warnings from the Austin detectives, Cruz gave the detectives a number to a cell phone that was active at the time and place that the murder occurred.

At trial, Cruz filed a motion to suppress the interview between the Austin detectives and Cruz. The trial court granted Cruz's motion and the state appealed, arguing that the interview fell under the "booking" exception to the *Miranda* rule. While the court of appeals could not determine whether the interview fell under the "booking" exception, it held that the interview satisfied another exception to the *Miranda* rule involving "routine inquiries normally attendant to arrest and custody". The court of appeals found that the interview satisfied this exception because the questions asked during the interview were biographical only, did not go to an element of the murder, and because the detectives did not intend their questions to elicit an incriminating response. For these reasons, the court of appeals reversed the trial court's holding.

The court held that the interview was inadmissible because the biographical questions asked by the detectives during the interview were intended to elicit an incriminating response from Cruz. The court supported this holding by reasoning that the detectives already suspected that Cruz had given several false names to police and they thus intended to elicit an incriminating response from Cruz. Furthermore, the questions asked during the interview were held to be inadmissible because they were not asked during a booking procedure. In addition, the court concluded that responses from the interview were inadmissible because there was no administrative purpose behind those questions, since Cruz was not in custody in Texas, and because nothing in the record indicated that detectives had an administrative purpose behind their line of questioning. As a result, the “booking” and “administrative” exceptions to the *Miranda* rule did not apply.

For these reasons, the questioning by the detectives instead constituted an interrogation of Cruz before *Miranda* rights were read to him. Since the answers to questions asked during an interrogation before *Miranda* rights are read are inadmissible at trial, the court reversed the judgment of the court of appeals and affirmed the suppression order of the trial court.

Maldonado v. State

No. PD-0542-14

Case Summary written by Petrus Wassdorf, Staff Member.

JUDGE MEYERS delivered the opinion of the court.

A jury convicted Anthony Maldonado of twelve counts of aggravated sexual assault of a child and indecency with a child. He was sentenced to life in prison. On appeal, Mr. Maldonado argued double jeopardy; that two counts of indecency with a child were subsumed by the aggravated sexual assault convictions.

The court of appeals agreed with Maldonado, citing *Patterson v. State*, 152 S.W.3d 88, 92 (Tex. Crim. App. 2004). Explaining its ruling, the court of appeals found that no offense of indecency with a child was committed “separate and apart from” the aggravated sexual assault offenses. The court of appeals modified the judgment, vacating two of the convictions for indecency with a child by contact.

Two issues were brought before the Court of Criminal Appeals: (1) whether the subsumption theory of *Patterson v. State* is still valid; and (2) if it is valid, whether an offense alleging sexual contact is subsumed by an offense alleging sexual penetration, even where the evidence points to multiple separate instances of penetration any of which could have formed the basis for each offense.

The court found that the subsumption theory under *Patterson* is still valid. Explaining its decision in *Patterson*, the court found that it was a narrow holding based on the specific facts of the case. The court distinguished the single act in *Patterson* from the facts surrounding Maldonado, finding that there were many “acts of both contact and penetration” that occurred over a matter of years. The court went further in analyzing and distinguishing *Aekins v. State*, 447 S.W.3d 270 (Tex. Crim. App. 2014), explaining that that case held double jeopardy “barred multiple convictions that were based on a single continuous act.”

Upholding Maldonado’s conviction, the court found support in *Loving v. State*, 401 S.W.3d 642 (Tex. Crim. App. 2013). In *Loving*, the court found that two convictions of indecency with a child could be sustained where they occurred from separate acts. The court held that *Loving* was the controlling precedent that should have been followed by the court of appeals, not *Patterson*. The factual situation in *Patterson* was too dissimilar from the multiple indecency offenses occurring at different times from the penetration offenses. For these reasons the Court of Criminal Appeals reversed the judgment of the court of appeals and affirmed the judgment of the trial court.

PRESIDING JUDGE KELLER concurred in the opinion of the court.

Justice Keller examined an “elements” and “units” analysis of double jeopardy. Justice Keller determined that in order for a double jeopardy violation to occur, the offenses must be considered the same offense under both an elements and units analysis. In completing the analyses, Justice Keller determined that indecency with a child and aggravated sexual assault are the same under an elements scheme but different under a units analysis based on the “[d]iscrete acts that occur on separate days,” invalidating a double jeopardy claim.

In re Tyrone Allen

NOS. WR-82,265-01 & WR-82,265-02

Case Summary written by Jordan Stevens, Staff Member.

JUDGE KEASLER delivered the opinion of the court, in which JUDGES MYERS, HERVEY, RICHARDSON, and YEARY joined.

Tyrone Allen was indicted twice for capital murder and faced the possibility of being sentenced to death if found guilty of either charge. In a pretrial motion, Allen sought a pretrial hearing to determine whether he was intellectually disabled and, as a result, ineligible to receive the death penalty. Upon Allen's request, the trial judge held a hearing and granted his motion. In response, the state petitioned the Texas Court of Criminal Appeals for mandamus relief, but was denied. The state then looked to the Dallas Court of Appeals for mandamus relief.

The appellate court first directed its analysis at Texas Court of Criminal Appeals precedent and determined that a finding of intellectual disability is an issue of fact. Next, the appellate court looked to the Texas Code of Criminal Procedure and focused its analysis on three specific statutes: (1) Article 37.071, § 2, "stating that once a jury finds a capital defendant guilty, the court must conduct a sentencing proceeding 'before the jury trial'"; (2) Articles 1.13(a) and 1.14(a), "providing that a defendant facing the death penalty may not waive a jury trial on punishment"; and (3) Article 36.13, "mandating that '[u]nless otherwise provided in this Code, the jury is the exclusive judge of the facts.'" The appellate court granted the state mandamus relief because it concluded that, when read together, the three aforementioned statutes dictate that the question of whether or not a defendant is intellectually disabled must be answered by the same jury that determines the guilt or innocence of a defendant. The Texas Court of Criminal Appeals then granted Allen's motion for leave to obtain mandamus relief and challenge the court of appeals' judgment.

Issue: How and when should it be determined whether or not a defendant is intellectually disabled?

The Texas Court of Criminal Appeals began by reviewing the two pronged test used to determine whether mandamus relief is appropriate. The court stated that a relator must establish that (1) the relator has no adequate remedy at law to redress the harm he alleges, and (2) that

what he seeks to compel is a ministerial act as opposed to a discretionary or judicial decision. The court concluded that the second prong was dispositive in Allen's case because it requires the relator to show the law invoked is "definite, unambiguous, and unquestionably applies to the indisputable facts of the case."

The court then reviewed and rejected the appellate court's interpretation of the Texas Code of Criminal Procedure. The court held that Article 37.07, § 2, was not on point because that statute only applies when the state seeks the death penalty and there is no way to know whether the state is still seeking the death penalty when a jury finds a defendant guilty of capital murder. The court concluded that Articles 1.13(a) and 1.14(a) are irrelevant because Allen's pretrial motion did not operate as a jury-trial waiver. Finally, the court dispensed with Article 36.13 by noting that none of the court's precedents have ever invoked this particular article when addressing the issue of which factfinder should determine whether a defendant is intellectually disabled.

The court then turned its analysis to its precedent regarding intellectually disabled criminals and the death penalty. The court began by acknowledging that the "stop-gap" definition of intellectual disability created in *Ex parte Briseno* is still good law. The court then discussed *Hunter v. State*, which it found to be the most informative authority on the issue before the court. In *Hunter*, a factually similar case, the Texas Court of Criminal Appeals held that "because there is no legislation or constitutional requirement directing when or by whom an intellectual disability determination is to be made," the trial judge did not err in denying Hunter's request for a pretrial intellectual-disability determination. Finally, the court addressed the suggestion that *State ex. Rel. Lykos v. Fine* and *State ex rel. Watkins v. Cruzot* require the court to issue mandamus. The court noted the differences between this case and those cases and concluded that a denial of Allen's motion was not "positively commanded and so plainly prescribed under the law as to be free from doubt." The court also considered whether Allen's motion was ripe for review and determined that it was because of the immediate and substantial effect the state's notice in seeking the death penalty has on the case.

The court concluded that the law surrounding the judge's action was not clear enough for mandamus relief to be appropriate. The court

lamented the fact that, like all other mandamus cases, this case had to be decided based solely upon the existing law and, as such, the court was not in a position to interpret statutes, clarify Texas Court of Criminal Appeals precedent, or create new law. The court then responded to Judge Alcalá's dissent by noting that it was not bound by Texas Rule of Appellate Procedure 7.2(b). The court finished by calling for legislation prescribing a procedure for determining whether or not a defendant is intellectually-disabled.

JUDGE YEARY, concurring.

Judge Yeary wrote separately to highlight the problems created by the United States Supreme Court's decision to make intellectually-disabled defendants immune from the death penalty, and to call for a legislative fix. He summarized the United States Supreme Court's holding in *Atkins v. Virginia* and reviewed the Texas Court of Criminal Appeals' response. He pointed out the many problems with the current definition of intellectually-disabled used by courts and called for legislative guidance in this area. He concluded by issuing a warning that many more problems are likely to arise if legislative guidance is not provided soon.

JUDGE ALCALA, dissenting.

Judge Alcalá dissented because she believes that the trial judge's decision to deny Allen's pretrial motion should be abated so that the new judge could have the opportunity to reconsider his predecessor's ruling. Judge Alcalá supported this proposition by surveying the law governing abatement and concluded that mandamus relief was inappropriate because there was not a live controversy between the parties. Judge Alcalá argued that, even if the original judge's decision should not be abated, the relator's request for mandamus relief should be denied. She argued this was so because "a trial court lacks jurisdiction to conduct a pretrial hearing on intellectual disability because that issue is not ripe until the punishment phase of trial." In support of this position, she cited numerous statutes and Texas Court of Criminal Appeals cases which she believes to be dispositive in this case.

JUDGE NEWELL, joined by PRESIDING JUDGE KELLER, and JUDGE ALCALA, dissenting.

Judge Newell believed that this issue was not ripe for review and that the majority essentially empowered trial courts to issue an advisory opinion. He believed that *Fine* and *Creuzot* are not distinguishable from the present case as the majority suggested and, as such, their reasoning is dispositive in this case. Therefore, whether or not a defendant is intellectually-disabled is a sentencing issue which is not ripe for review until after a finding of guilt.