

Court of Criminal Appeals
October 7, 2015

Ex Parte Marascio

No. WR–80,939–01, WR–80,939–02, WR–80,939–03,
Case summary written by Justin Stevens, Staff Member.

PER CURIUM.

Marascio was convicted on three separate charges of bail jumping and failure to appear. He was sentenced to eight years' imprisonment for each charge, the sentences running concurrently. In his writ for habeas corpus, Marascio argued that the convictions violated the prohibition against double jeopardy. The court found that Marascio was not entitled to relief, and denied relief.

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

Judge Keasler reasoned that under *Ex parte Townsend*, 137 S.W.3d 79 (Tex. Crim. App. 2004), if an applicant could have brought a claim on direct appeal, then the claim's merits will not be entertained on habeas, and that a category-one right or prohibition should be the only exception to *Townsend*. Failing to exercise these rights should prove fatal to freestanding double-jeopardy claims on collateral review. Marascio's writ failed because his double-jeopardy claims could have been raised on direct appeal and did not satisfy the exception to *Townsend*.

JUDGE RICHARDSON concurred in the result, with JUDGE NEWELL joining.

For Judge Richardson, the issue was whether a double jeopardy claim that was not raised on direct appeal may nevertheless be raised in an Article 11.07 application for writ of habeas corpus. Judge Richardson believed that Marascio's claim was not cognizable because he did not believe that a double jeopardy violation was clearly apparent from the face of the record. Further, Judge Richardson concluded that Marascio's double jeopardy claim did not survive a *Townsend*-based procedural bar under the two-part *Gonzalez* test.

JUDGE MEYERS, dissenting.

Judge Meyers dissented because the per curiam opinion did not indicate on what basis the court was denying relief; thus, according to Judge Meyers, it was impossible to know what rationale or legal theory was applied in order to conclude that applicant was not entitled to relief, and because the opinion did not address any double jeopardy case law (instead it focused on the procedural aspects of the case).

JUDGE JOHNSON, dissenting.

Judge Johnson dissented, believing that it was not necessary for Marascio's counsel to "utter the magic words 'Objection, double jeopardy'" at trial to raise the issue of double jeopardy. Judge Johnson rationalized that it was apparent the trial court was on notice that Marascio was objecting to being subjected to multiple punishments for a single act. Judge Johnson also suggested that a single act of failure to appear is subject to a single punishment, regardless of how many individual charges are pending.

JUDGE ALCALA, dissenting.

Judge Alcala would have left intact the current case law that applies procedural default to double-jeopardy claims on a case-by-case basis. Judge Alcala would also have applied Gonzalez to determine whether the double-jeopardy claim was entitled to consideration on the merits. Because Marascio failed to appear at a single court setting, Judge Alcala believed that it was inappropriate to punish him for multiple charges on the same violation.

Ex parte Cooke

WR-81,360-01

Case Summary written by Jordan Stevens, Staff Member.

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

In 1999, Derrick Keith Cooke was convicted of family-violence assault in New Mexico. Cooke was then indicted for family-violence assault in Tarrant County and his New Mexico conviction was used to

enhance the Tarrant County offense to a third-degree felony. On October 31, 2002, Cooke pled guilty in that case and was placed on deferred adjudication for five years in accordance with a plea agreement. On August 1, 2007, while still on deferred adjudication, Cooke was indicted in Hood County for family-violence assault. The indictment cited the proceedings from October 31, 2002 to enhance the charged alleged in the indictment. Because Cooke committed the Hood County offense, his guilt was adjudicated in the Tarrant County case on January 3, 2008 and he received a three-year prison sentence. Cooke was convicted in the Hood County case and was sentenced to eight years in prison.

Cooke filed an application for writ of habeas corpus under Texas Code of Criminal Procedure article 11.072 in the Tarrant County case, but it was denied. Cooke then appealed his convictions from the Tarrant County and Hood county cases and appealed the denial of his article 11.072 habeas application. Cooke claimed that his New Mexico conviction could not be used for enhancement purposes because it was a deferred adjudication, which he claimed was an *ex post facto* violation. On June 11, 2011, Cooke attacked his Tarrant County conviction by filing another habeas application, this time under Texas Code of Criminal Procedure article 11.07. Cooke claimed that the Tarrant County sentence was illegal because the New Mexico conviction, being from out of state, could not be used to enhance his indictment in the Tarrant County case. Cooke also alleged that his attorney was ineffective for failing to raise this issue and that his plea was involuntary.

On May 1, 2014, after acknowledging that Cooke was facing collateral consequences as a result of his Tarrant county conviction but that Cooke was scheduled to discharge his sentence in the Tarrant County Case on March 11, 2013, the habeas court recommended denying relief. The Texas Court of Criminal Appeals then remanded the case for further investigation and supplemental findings. The habeas court concluded that Cooke's New Mexico conviction could not be used to enhance the Tarrant County offense and, therefore, the Tarrant County sentence was illegal and recommended vacating Cooke's conviction. The habeas court also held that Cooke's ineffective assistance of counsel claim was without merit. The Texas Court of Criminal Appeals then set the application in this case for submission to

determine whether Cooke was suffering collateral consequences because if the Tarrant County offense had not been elevated to a third-degree felony, it could not have been used to enhance the charge in the Hood County case.

Issue: Was Cooke suffering collateral consequences as a result of the Tarrant County conviction?

The Texas Court of Criminal Appeals began by discussing article 11.07 and noted that an applicant must be in “confinement” as result of conviction to be entitled to post-conviction relief. “Confinement” is defined by the Texas Code of Criminal Procedure as “confinement for any offense or any collateral consequence resulting from the conviction that is the basis of the instant habeas corpus.” Because Cooke had discharged his sentence in the Tarrant County case, the court held that he would only be entitled to relief under article 11.07 if he were suffering collateral consequences as a result of the conviction that is the basis of the instant habeas corpus. The court turned its attention to the enhancement of the Hood County offense because that was the only collateral consequence the parties alleged.

At the time of Cooke’s Texas offenses and today, the repeated-offender scheme for family violence assault is a two-strikes system. The first offense is treated as an ordinary Class A misdemeanor, but the second offense can be punished as a third-degree felony. Deferred adjudication can be used to enhance a subsequent offense. This was part of the statute when Cooke pled guilty to the Tarrant County offense so it could be used to enhance the Hood County offense. Therefore, the prohibition against *ex post facto* laws would not have been violated even if the deferred adjudication in the Tarrant County Offense had been successfully completed. The court noted that the definition of “previously convicted” in § 22.01(b)(2) of the Texas Penal Code was different than the definition of “conviction” found in the habeas statute, which does not include any kind of deferred adjudication or probation.

The court concluded that Cooke was correct in stating that the New Mexico conviction could not be used to enhance the Tarrant County offense because of the “under this section” language in the statute. However, the court did not agree with Cooke that the enhancement of the Hood County case was a collateral consequence of the Tarrant County *conviction*. This was because it was clear from the

Hood County indictment that the prior conviction used for enhancement was the deferred adjudication, which is not the conviction Cooke was challenging in the habeas proceeding. Furthermore, even if Cooke had successfully completed his period of deferred adjudication and had never been adjudicated, Cooke's Tarrant County deferred adjudication would still have been available to enhance the Hood County offense. If that had been the case, Cooke would not have been entitled to relief under article 11.07 because he would not have a final conviction. The court dismissed Cooke's habeas application because the Hood County enhancement was not a collateral consequence of the Tarrant County conviction, which Cooke was challenging. The court also acknowledged, but did not discuss, the "substantial argument" that could be made that Cooke's acceptance of the benefits of the Tarrant County adjudication would estop him from challenging its use in enhancing the Hood County offense.

State v. Johnson

12-12-00425-CR

Case Summary Written by Kathryn Almond, Staff Member.

PRESIDING JUDGE KELLER delivered the opinion of the Court in which JUDGES JOHNSON, KEASLER, HERVEY, ALCALA, and RICHARDSON joined.

While appellee was walking down the street, he jumped up and grabbed a flag and its staff off of a building. He then threw the flag into the street. Appellee was arrested for violation of the Texas flag-destruction statute—Texas Penal Code § 42.11. He explained to police that he had thrown the flag into the street because he was mad. The information alleged appellee did "[i]ntentionally or knowingly damage, deface, or mutilate a flag of the United States by throwing the flag onto the ground/roadway of Highway 19." Appellee filed a motion to dismiss, claiming that the flag-destruction statute was unconstitutional. The trial court granted the motion reasoning that, under *Texas v. Johnson* and *United States v. Eichman*, a statute that criminalizes behavior against a flag is unconstitutional because of the limitations it places on freedom of speech. The judge stated that if acts such as burning a flag are speech then acts such as throwing a flag onto the ground could be speech as well. The State appealed and the court of appeals held that

appellee's conduct was not conduct that implicated the First Amendment; however, the court ruled that the statute was overbroad and, therefore, unconstitutional. The State appealed again.

Issue: Whether the Texas flag-destruction statute is unconstitutionally overbroad.

The Court of Criminal Appeals held that the Texas-flag destruction statute was facially unconstitutional due to its overbreadth and violation of the First Amendment. The court held that a statute could be overbroad even though there is some legitimate application and if the party before the court was not engaged in activity protected by the First Amendment. The court began by stating that Judge Yeary's dissent incorrectly applied *Jaynes v. Commonwealth* because that case only allows states to limit or expand standing to challenge the statute rather than applying less stringent standards in overbreadth challenges. Further, the court reasoned here there could be no standing issues because the appellee was charged by the State with a criminal violation and was therefore able to defend himself by claiming that the statute he was charged with violating was unconstitutional.

The court began to address the issue by looking at the text of the statute. The State argued that the statute should be narrowly construed to apply only to conduct that amounts to criminal mischief. The court rejected this construction, reasoning that the language of the statute was too broad to allow such a narrow construction. Moreover, the court reasoned that a statute could be narrowly construed only if the statute is readily susceptible to a narrow construction. Here, the court reasoned that because the statute is unambiguous, a narrow construction could not be employed.

Next, the court addressed whether applications of the statute that implicate and violate the First Amendment were so substantial that the statute must be held invalid on its face. Using the Supreme Court's decisions in *Texas v. Johnson* and *United States v. Eichman*, the court reasoned that the content-based restriction could not be upheld where the First Amendment is implicated and the government is attempting to restrict that conduct merely because society would find that type of conduct offensive or disagreeable. Because of its similarity in wording to the statute in *Eichman*, the court reasoned that this statute was also an impermissible content-based restriction of speech—even though it was not limited to expressive conduct—because the statute was impermissible

when applied to expressive conduct. The State also argued that lawful applications of the statute outweighed the potential for unlawful applications; however, the court rejected this idea because most conduct that falls under the statute would constitute protected expressions. By looking at past judicial decisions, the court found that it was uncommon for flag-destruction statutes to be used to prosecute non-expressive conduct, and therefore the risk was substantial that the statute would be applied to expressive conduct.

The State also argued that the flag-destruction statute only applied to criminal mischief, but the court disagreed. The court reasoned that the plain language of the statute allowed its application even when someone damaged his own flag and the State could potentially prosecute defendants under both criminal mischief and the flag-destruction statute.

Finally, the State argued that the flag-destruction statute would not be unconstitutionally applied because it is rarely enforced. The court rejected the contention that the State would properly apply the statute because the decision of constitutionality rests with the courts. Thus, the court found that the statute was facially unconstitutional.

JUDGE ALCALA, concurring.

In a concurring opinion, Judge Alcala mentioned three additional points. First, she pointed out that those who love the flag should agree with the ruling in this case, because this is the only way to honor the constitutional principles that the flag represents. Second, she noted that most homeowners likely have violated this statute at some point. Because the statute criminalizes the improper disposal of any flag, she noted even throwing away a small dollar store flag would be improper disposal under the statute. Finally, Judge Alcala noted that this holding was in accordance with the Supreme Court precedence, and therefore was the only correct decision.

JUDGE MEYERS, dissenting.

Judge Meyers filed a dissenting opinion where he stated that the statute was not overbroad, but rather a way to keep people from destroying a national symbol. He noted that in this case, the person was not attempting to express anything, and therefore was not protected by

the First Amendment—which he stated is conduct that should be outlawed by statute.

JUDGE YEARY, dissenting.

Judge Yeary also filed a dissenting opinion, in which he stated that he did not agree that the Court even had the proper standing to hear the case. Judge Yeary reasoned that the court did not have the authority to decide this case because the State had the discretion to restrict standing in overbreadth cases, pursuant to *Virginia v. Hicks*. He argued that the case should have never been heard because the appellee in this case was not engaged in constitutionally protected behavior and Texas law, unlike federal law, requires the powers of the three branches to be completely separated. Therefore, he reasoned that the Court assumed it has the same powers of the United States Supreme Court in considering any constitutional challenge—even where the complaining party’s rights have not been violated—and may have overstepped its boundaries in this case by entering into an area that has been legislated. Judge Yeary also argued that the court misapplied the overbreadth standard by applying it to hypothetical situations rather than merely looking at the text of the statute. Thus he concluded that he could not agree with the court’s holding.

Cornwell v. State

No. PD-1501-14

Case Summary written by Ben Agee, Staff Member.

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

Facts: Appellant Robert Cornwell was convicted of impersonating a public servant after he was caught portraying himself to be a Dallas County assistant district attorney.

In May of 2012, Robert Cornwell learned that an arrest warrant had been issued for a friend of his, Michelle Salas, in Montgomery County. Upon learning of the arrest warrant, Cornwell called the Montgomery County District Attorney’s Office, and identified himself as an assistant district attorney for Dallas County. In conversations with

Montgomery County Assistant District Attorney Kourtney Teaff, Cornwell mentioned several things intended to bolster his alias as a Dallas County ADA. For instance, Cornwell told Teaff that he had investigated Michelle Salas's file, examined her medical records, and at one point in his pretend career, prosecuted his own nephew.

Teaff became suspicious during Cornwell's recounting of his pretend accolades, and eventually began recording their conversations. Multiple times, Cornwell asked Teaff if she could do him a "personal favor" and treat Salas leniently. At no point did Cornwell assert that he had authority over Teaff, and Cornwell always used his real name.

Eventually, Cornwell was indicted under Texas Penal Code § 37.11(a)(1) for impersonating a public servant. The trial court convicted him, and the appellate court affirmed. On his appeal to the Court of Criminal Appeals, Cornwell alleged that the evidence presented at trial was insufficient to establish the necessary intent under § 37.11(a)(1) to "induce another to submit to his pretended official authority." Cornwell asserted that §37.11(a)(1) mandates that for a conviction, a person must not only impersonate a public servant, but must also commit an overt act as such.

Issue: Whether Texas Penal Code § 37.11(a)(1) requires that an overt act be committed to render a conviction.

Analysis: The court looked to the legislative history of § 37.11 for guidance in determining whether an overt act is required for conviction. The Practice Commentary of the statute noted that there was no specific requirement of an overt act, but that normally the State would have to prove an act to achieve the required intent. The court interpreted this to mean that there is not a requirement for an overt act to be committed.

In applying this analysis, the court noted that the only reason Cornwell would go to such lengths to trick Teaff into believing he was a Dallas County ADA was to give himself credibility in asking for a "personal favor." The court noted that the Penal Code considers speech an act in its definitions, so that alone may have been enough of an overt act anyhow.

Furthermore, the court noted that while Cornwell was simply asking Teaff for a "personal favor," he was in fact asking for a personal favor to a pretend person—the nonexistent Dallas ADA he was pretending to be.

Overall, the court found that the only reason Cornwall would call and portray himself as a Dallas County ADA was to increase his credibility before asking for a personal favor to treat his friend with leniency.

Holding: The Court of Criminal Appeals affirmed the judgments of both the trial and appellate courts and upheld Cornwell's conviction.

Vidales v. State

No. PD-0705-15

Case Summary written by Eric Clinton, Staff Member.

PER CURIUM.

Appellant, Sammy Vidales, was convicted and sentenced to sixty-two years in confinement for evading arrest with a vehicle. On May 15, 2015, the court of appeals affirmed in part and reversed in part, causing the State to file a petition for discretionary review with the Court of Criminal Appeals on June 12, 2015. On July 7, 2015, the court of appeals withdrew the original opinion and issued a new opinion.

Issue: Did the court of appeals have jurisdiction to issue a second opinion after a petition for discretionary review has been filed in the Court of Criminal Appeals?

Rule 19 of the Texas Rules of Appellate Procedure grants the court of appeals plenary jurisdiction that continues after a petition of review is filed in the Supreme Court of Texas. Rule 50 of the Texas Rules of Criminal Procedure would have given the court of appeals plenary jurisdiction upon a petition for discretionary review to the Court of Criminal Appeals; however, this rule was abolished in 2011. Since the second opinion was issued after the State filed a petition for discretionary review in the Court of Criminal Appeals, the court of appeals did not have jurisdiction to enter the opinion under the Texas Rules of Appellate Procedure. Therefore, the court of appeals opinion issued on July 7, 2015 was withdrawn.