

**Court of Criminal Appeals**  
**September 16, 2015**

***Jaganathan v. State***

No. PD-1189-14

Case Summary written by Mariah Mauck, Staff Member.

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

State Trooper Thomas Norsworthy conducted a traffic stop after observing appellant Francheska V. Jaganathan pass a “Left Lane for Passing Only” sign and remain in the left lane with without passing. Because Trooper Norsworthy smelled marijuana during the course of the stop, the trooper searched appellant’s vehicle and found marijuana in the trunk. Thus, appellant was charged with possession of marijuana. At trial, appellant’s motion to suppress was denied and, pursuant to an agreement, she pled guilty and was placed on deferred adjudication.

On appeal, appellant claimed that Trooper Norsworthy lacked reasonable suspicion to conduct the traffic stop. The court of appeals agreed after considering a number of facts shown in the video and concluding that the record did not support a finding of reasonable suspicion.

Issue: Whether the facts surrounding the conduct of appellant combined in a way that made it unreasonable for the trooper to think she was violating the law.

The State argued that the court of appeals erred in suggesting potential justifications for appellant’s failure to immediately move out of the left lane after passing the “Left Lane for Passing Only” sign. The State did not think those potential justifications negated the existence of reasonable suspicion that an offense occurred. Furthermore, the State said such justifications might entitle appellant to an instruction on necessity if she were being tried for a traffic violation, but their significance is disputed when the issue is whether an officer had reasonable suspicion to stop appellant.

The court agreed with the State, finding three issues with the court of appeals’ decision. First, the court of appeals did not view the record in the light most favorable to the trial court’s ruling. The court

suggested possible reasons that appellant might have remained in the left lane, but an officer's suspicion is not unreasonable just because facts surrounding a suspected offense could demonstrate a defense to conduct. Second, there is a difference between what an officer sees during an ongoing event and what is seen when reviewing a video. Because of that difference, the reasonable suspicion standard "accepts the risk that officers may stop innocent people," and reasonable suspicion is not negated by the possibility that conduct is allowed by law. Lastly, the court of appeals incorrectly considered the purpose of the law against driving in the left lane without passing. The trooper was not required to consider the purpose of the law when deciding whether appellant had violated it, and law enforcement officials are free to enforce the laws and detain violators as long as an actual violation occurs.

Therefore, the court affirmed the judgment of the trial court and reversed the judgment of the court of appeals, concluding that the court of appeals erred in holding that Trooper Norsworthy lacked reasonable suspicion to conduct the traffic stop.

JUDGE MEYERS, dissenting.

Judge Meyers argued appellant's actions in this case could not constitute a crime at all because it is unclear how to comply with the "Left Lane for Passing Only" sign and when an individual's actions would become criminal activity. He posed questions such as whether a driver in the left lane must intend to pass a vehicle and how the State could ever prove that intent; whether a driver must actually pass another vehicle and if the pass must occur in a specified time; and whether a driver is required to immediately move back into the right lane after passing another vehicle, or remain in the left lane in anticipation of passing an additional vehicle. Because of the existence of these questions, Judge Meyers believes reasonable suspicion should not be based on a crime that no one understands how to or not to commit. Additionally, he argued that the presence of a sign that provides no actual notice or instruction equates to having no sign at all. Moreover, there can be no reasonable suspicion that a traffic violation occurred if there is no sign within reasonable distance of the traffic stop. Therefore, Judge Meyers would affirm the judgment of the court of appeals

because appellant should not have been pulled over and her motion to suppress the evidence found in her car should have been granted.

***Guthrie-Nail v. State***

No. PD-0125-14

Case Summary written by Andy Linn, Staff Member.

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

The appellant, Guthrie-Nail, was indicted for capital murder and conspiracy to commit capital murder. The parties agreed that the State would waive the capital-murder charge in exchange for the appellant pleading guilty to the conspiracy charge for a fifty-year prison sentence. The conspiracy count of the indictment alleged that appellant, with intent to commit capital murder, a felony, agreed with Thomas Grace and Mark Bell, that they or one of them would enter the habitation and cause the death of Craig Nail, and that Bell performed an overt act in pursuance of the agreement by entering Nail's habitation and shooting him with a firearm, causing his death. In a written confession, appellant admitted to committing the conspiracy as charged in the indictment. After questioning her about the voluntariness of her plea, the trial judge found her guilty of the conspiracy as charged in the indictment. Neither the judge nor the plea papers mentioned a deadly-weapon finding. In the original judgment, "N/A" was in the space for "Findings on Deadly Weapon." Additionally, the record contained what seemed to be a printout of docket sheet entries that included an entry notation of "Deadly Weapon Finding 42.12." Over two months after entry of the original judgment, the trial judge signed a judgment nunc pro tunc, which changed the "N/A" entry to "Yes, a Firearm." The judge also added an additional special finding that she "used or exhibited a deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited." In effect, that finding would preclude appellant's parole eligibility until she served at least twenty-five years of her sentence.

Appellant appealed, arguing the judgment nunc pro tunc was erroneous in that (1) it corrected judicial error rather than clerical; (2) there was no support to conclude that she used or exhibited a deadly

weapon; and (3) it violated her right to due process because the judge added the deadly-weapon finding, almost three months later, without notice. The appellate court upheld the judgment “because the indictment alleged the use of a deadly weapon, because appellant pled guilty to and judicially confessed her guilt to the conspiracy offense as set forth in Count II of the indictment, and because the trial judge orally found appellant guilty ‘as set forth in the indictment in this matter.’”

Issues: (1) Whether the judge had discretion to decline making a deadly-weapon finding, even though use of a deadly weapon, in this case, was a necessary element of the offense, and (2) whether the trial judge, at the time of trial, actually made such a finding.

First, the court explained that it was beyond dispute that appellant was entitled to notice and hearing before issuance of a nunc pro tunc judgment, and that that right was violated. To answer the first issue, the court looked to *Hooks v. State*, 860 S.W.2d 110 (Tex. Crim. App. 1993). In that case, the judge found defendant guilty as charged in the indictment (that charge being aggravated assault with a firearm, a deadly weapon), and placed the defendant on probation. The court of appeals then held that the judge “made a de facto affirmative [deadly-weapon] finding,” and because probation was improper if a deadly-weapon finding was made, pursuant to the probation statute, it concluded the imposition of probation was void. The Court of Criminal Appeals reversed, holding that the trial judge did not enter a deadly-weapon finding; therefore, the probation statute did not bar imposition of probation on the defendant. By necessary implication based on the *Hooks* analysis, here, the court determined that a trial judge in a bench trial has discretion to decline to make a deadly-weapon finding even after finding the defendant guilty, although it is a necessary element of the offense.

Second, the trial judge in this case orally pronounced that the defendant was guilty of the conspiracy to commit capital murder as charged in the indictment. But the judge thereafter entered “N/A” in the original written judgment under the “Findings of a Deadly Weapon” section. To the court, this seemed to indicate the trial judge explicitly declined making a deadly-weapon finding, and was more explicit than the oral pronouncement of guilty “as set forth in the indictment.” Through a hearing, the parties could clear up why the trial judge

entered the “N/A” notation, and why the docket sheet entry was made. Because the appellant had a right to notice and a hearing before issuance of the nunc pro tunc judgment, and because the record did not inconclusively show that the failure to enter a deadly-weapon finding was merely clerical, the court reversed the appellate court’s judgment and remanded to the trial court.

JUDGE RICHARDSON, concurring.

Judge Richardson agreed that the judgment nunc pro tunc was likely improper and that the case should have been remanded to the trial court for a hearing because the record did not clearly show whether the nunc pro tunc judgment was corrected to reflect what should have been done, or to reflect what was done. The latter of the two is the proper purpose of a nunc pro tunc judgment. Due to lack of clarity in the record as to the trial court judge’s intentions, Judge Richardson believed it was proper to remand the case for a hearing in order to allow appellant to be heard on the issue, and for the judge to explain why he made no mention of a deadly-weapon finding at the time of appellant’s plea.

JUDGE MEYERS, dissenting.

Judge Meyers dissented, stating that the majority’s holding “carved out an exception to the nunc pro tunc law, which has traditionally been used only to correct a clerical error.” Judge Meyers further reasoned that the majority’s holding sets precedent that deadly-weapon findings can be entered for conspiracy, which is an inchoate crime. According to Judge Meyers, the problem is that conspiracy is not a crime that necessarily involves a deadly weapon, and although “a judge may enter a deadly-weapon finding based upon a guilty plea for a crime which, by necessity, employs a deadly weapon, conspiracy is not such a crime, and the point is moot.” Here, the appellant only pled guilty to the conspiracy, not the capital murder, so a deadly-weapon finding was unwarranted. The judgment nunc pro tunc was improper because the actual judgment rendered was correct without the deadly-weapon finding, as such finding is not allowed in this type of conspiracy case.

JUDGE KEASLER, dissenting.

Judge Keasler determined the issue was whether the trial judge had discretion to withhold a deadly-weapon finding after accepting the guilty plea and finding appellant guilty of the conspiracy as charged, which expressly alleged the use of a deadly weapon. Judge Keasler further determined that the majority incorrectly approached the nunc pro tunc judgment as a fact issue, and that the majority also incorrectly concluded that trial judges have such discretion. According to Judge Keasler, a challenge to a nunc pro tunc judgment involves a question of law, not fact. Such a judgment was originally designed to be a way to fix clerical errors, and the majority's holding converted it into a method for post-conviction litigation. Moreover, the trial judge did use the nunc pro tunc to correct a clerical error as the record "supports the conclusion that the judge made an affirmative deadly-weapon finding."

JUDGE YEARY, dissenting

Judge Yeary dissented, reasoning that remand at this point in the case would be a "useless task" as the State argued. Judge Yeary agreed with Judge Keasler in that the question in this case was one of law not fact, and that the trial judge actually did make an affirmative deadly-weapon finding. Moreover, the trial judge did not have discretion to find the defendant guilty and then decline to make a deadly-weapon finding.

***Ex parte Moore***

NO. WR-13,374-05

Case Summary written by Pedro Leyva, Staff Member.

JUDGE JOHNSON delivered the opinion of the court, in which PRESIDING JUDGEs KELLER, MEYERS, KEASLER, HERVEY and RICHARDSON joined. JUDGE NEWELL did not participate.

In 1980, applicant was convicted of capital murder and sentenced to death for fatally shooting a seventy-year-old grocery clerk, in Houston, while committing or attempting to commit robbery. The Court of Criminal Appeals affirmed the conviction and sentence in the same year. Federal habeas corpus relief was granted and the trial court held a new punishment hearing in February 2001. Once again, appellant received a death sentence. On direct appeal, the Court of Criminal Appeals, once again, affirmed the trial court's judgment.

The applicant, in his initial writ application challenging his 2001 punishment retrial and death sentence, raised forty-eight claims for relief. In January 2014, the habeas judge held a two-day evidentiary hearing on applicant's first claim for relief, where appellant alleged that he was intellectually disabled and therefore exempt from execution under the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Following the evidentiary hearing, the habeas court signed the applicant's proposed Addendum Findings, which applied the definition of intellectual disability presently used by the American Association on Intellectual and Developmental Disabilities (AAIDD), concluded that appellant was intellectually disabled under that definition, and recommended that the Court of Criminal Appeals grant relief on his *Atkins* claim. The Addendum Findings also concluded that the appellant had established by a preponderance of the evidence that he was intellectually disabled as prescribed under the fourth and fifth editions of the American Psychiatric Association's (APA's) Diagnostic and Statistical Manual of Mental Disorders (DSM), i.e., the DSM-IV and DSM-V.

The SCOTUS decision in *Atkins* determined that the death penalty cannot be given to intellectually disabled individuals because it violates the Eighth Amendment, but the court left it to the states to develop appropriate ways to enforce the constitutional restriction. In 2009, in the absence of state legislation, the Court of Criminal Appeals adopted the definition of intellectual disability stated in the ninth edition of the American Association of Mental Retardation (AAMR) manual published in 1992, and the similar definition of intellectual disability contained in § 591.003(13) of the Texas Health and Safety Code.

The habeas judge applied a different standard. The habeas judge concluded that since the AAIDD's and APA's positions regarding diagnosis of intellectual disability have changed, then the most current position should be used. The Court of Criminal Appeals held that the habeas judge erred by disregarding the Court of Criminal Appeal's case law and employing the definition of intellectual disability presently used by the AAIDD, a definition which notably omits the requirement that an individual's adaptive behavior deficits, if any, must be "related to" significantly sub-average general intellectual functioning.

Since there is still no legislation regarding this matter, the court continued using the previously adopted rule. Thus, to demonstrate that he is intellectually disabled for Eighth Amendment purposes, and therefore exempt from execution, an applicant must prove by a preponderance of the evidence that:

- (1) he suffers from significantly sub-average general intellectual functioning, generally shown by an intelligence quotient (IQ) of 70 or less;
- (2) his significantly sub-average general intellectual functioning is accompanied by related and significant limitations in adaptive functioning; and
- (3) the onset of the above two characteristics occurred before the age of eighteen.

When determining the first element, the Court of Criminal Appeals stated that it is not sufficient for an applicant to establish by a preponderance of the evidence that he has significantly sub-average general intellectual functioning and significant limitations in adaptive functioning. The applicant must also demonstrate by a preponderance of the evidence that his adaptive behavior deficits are related to significantly sub-average general intellectual functioning rather than some other cause. In making the relatedness determination, the factfinder may consider the seven evidentiary factors developed in *Briseno*:

- Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was [intellectually disabled] at that time, and, if so, act in accordance with that determination?
- Has the person formulated plans and carried them through or is his conduct impulsive?
- Does his conduct show leadership or does it show that he is led around by others?
- Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
- Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
- Can the person hide facts or lie effectively in his own or others' interests?

- Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Between the time of his first trial and applicant's initial writ application, several family members testified that the applicant was beaten as a child by his father, had a difficult time learning in school, was kicked out of his house as a teenager, and that he was a changed person having spent so much time on death row. Family members also testified that as a child, applicant worked small jobs in order to help feed his family. Conflicting evidence was introduced about the applicant's IQ. The court found the applicant to have an IQ ranging from 73-83, which meant that he was not intellectually disabled. The applicant also wrote several motions while incarcerated asking to represent himself *pro se* at times and pointing out his lawyers' mistakes on previous matters.

Ultimately, the Court of Criminal Appeals looked at the *Briseno* factors and held that the evidence did not weigh in the applicant's favor. The Court of Criminal Appeals found that people who knew him as a child did not seem to think he was intellectually disabled; the applicant was capable of forming and carrying out plans; applicant had demonstrated leadership while in prison; during applicant's testimony at various points, he responded coherently, rationally, and on point to oral and written questions; the record showed that he had lied during his first trial demonstrating that he can hide facts or lie effectively to protect his own interest; and the offense required forethought, planning, and moderately complex execution.

The Court of Criminal Appeals denied relief on applicant's first claim and the second and third claims as well. In his second claim, applicant contended that he was denied due process because Texas's death penalty statute does not prohibit the execution of an intellectually disabled individual. In his third claim, applicant argued that his death sentence violated the Sixth Amendment because the jury's verdict did not include that he is not intellectually disabled. The Court of Criminal Appeals held that his second claim was inadequate because applicant failed to plead and prove facts that would entitle him to relief, and the third claim was previously rejected by the court. As to the applicant's remaining claims, the court found that the record supported the habeas

court's findings of fact, conclusions of law, and recommendation, which were denied by the habeas judge.

JUDGE ALCALA, dissenting.

The dissent argued that the application of the *Briseno* standard does not conform to the requirements of the federal Constitution. The dissent called for the court, in the absence of the action by the legislature, to develop a new standard taking into account the consensus of the medical community regarding what constitutes intellectual disability. Judge Alcala would have remanded the case to the habeas court after creating the new standard.

***Blasdell v. State***

No.PD-0162-14

Case Summary written by Eric Matthews, Staff Member.

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

The trial court convicted Blasdell of aggravated robbery. At trial, the sole issue was the identity of the assailant. The court allowed a forensic psychologist, Dr. Steven Rubenzer, to testify regarding several potential problems with identification. However, the court excluded as irrelevant his testimony regarding the potential impact of the weapon-focus effect. The weapon-focus effect involves the potential for deterioration of the accuracy of an eyewitness's identification when that eyewitness sees an assailant use a weapon.

In the first appeal, the Ninth Court of Appeals affirmed the trial court's ruling and agreed that the testimony was irrelevant. The Court of Criminal Appeals determined that the testimony was relevant, reversed the judgment, and remanded the case. On remand, the appellate court again affirmed the exclusion of the testimony. Instead of ruling that the testimony was irrelevant, the court determined that the scientific principles of the weapon-focus effect were not reliable by clear and convincing evidence. Blasdell again appealed the court's judgment.

Blasdell argued that the trial court erred (1) by requiring Blasdell to prove the reliability of the weapon-focus aspect of Rubenzer's testimony but not the others, and (2) by excluding the testimony

because its reliability was then excluded in favor on the qualifications of Rubenzer and the reliability of his other testimony. The State contended that Blasdell, not the trial court, had the burden to prove the sufficiency of the testimony and failed to do so.

The court determined that Blasdell was required to prove by clear and convincing evidence that the testimony was reliable. Psychology evidence, which includes the weapon-focus effect, is considered “soft” science evidence. A proponent of such evidence must prove that the subject matter of the testimony is within and relies upon principles of a legitimate field of expertise. Although Rubenzer showed an extensive background in eyewitness identification, he failed to establish that he had any specific expertise on the weapon-focus effect or whether the effect is a generally accepted theory. Because Rubenzer failed to prove the reliability of the theory or how any its principles applied to the case, the court affirmed the judgment.

JUDGE MEYERS, dissenting.

Judge Meyers argued that the trial court never questioned the reliability of the weapon-focus effect; therefore, Blasdell was not required to present evidence supporting the theory. Meyers believed that “it [wa]s totally wrong and unfair” to hold Blasdell at fault for an issue that was never addressed by the trial court.