

Court of Criminal Appeals Criminal Procedure Topics

Duran v. State

No. PD-0429-15

Case Summary written by Julia Wisenberg, Staff Member.

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

After the victim threw something at him, Appellant broke into the victim's home and threw a DVD player at the victim. The State indicted Appellant on two counts, burglary of a habitation and aggravated assault. The jury charge instructed the jury that if they found Appellant used or exhibited a deadly weapon, they should find Appellant guilty of aggravated assault. Prior to the sentencing phase of trial, the State dropped the aggravated assault charge out of concern it would violate the Double Jeopardy Clause. The jury found Appellant guilty on both counts. Additionally, the jury found in favor of the State's enhancement allegation of a prior felony, and thus sentenced Appellant to twenty-five years in prison.

Although the State abandoned the aggravated assault charge, the trial court's judgment stated that the jury convicted Appellant of aggravated assault with a deadly weapon as well as burglary of a habitation. Upon the State's motion, the trial court entered an affirmative finding that the jury had found Appellant used or exhibited a deadly weapon in commission of the offense. The Thirteenth Court of Appeals held that rather than completely remove the aggravated assault conviction, the judgment should be modified to clarify that the State abandoned the aggravated assault charge prior to the punishment stage and therefore, the jury's sentence was assessed only on the burglary conviction. The court of appeals further held that the trial court's deadly-weapon finding was proper, explaining that the jury's conviction on the burglary charge was a sufficient basis for the court to enter a deadly-weapon finding.

Issue: Whether the court of appeals erred by (1) upholding Appellant's conviction for aggravated assault despite the State's

abandonment of the charge prior to punishment; and (2) upholding the trial court's deadly-weapon finding based upon Appellant's burglary conviction.

The Court of Criminal Appeals reversed the Thirteenth Court of Appeals. The court found that the court of appeals should have vacated the conviction for aggravated assault because of the State's unequivocal abandonment of the charge during trial. Further, the court held that the court of appeals erred by upholding the trial court's deadly-weapon finding, explaining that the court had improperly used the jury's finding in the abandoned aggravated assault charge for the deadly-weapon finding in the burglary case.

In regard to the conviction for aggravated assault, the court explained that when a defendant is charged with multiple crimes, which would require multiple punishments for the same conduct, a court should only affirm the conviction for the most serious offense and vacate all other convictions. Here, the court agreed with the argument made by both the State and the Appellant that the court of appeals should have vacated the aggravated assault conviction in order to avoid the constitutional violation of double jeopardy. Thus, the court reversed the court of appeals and vacated Appellant's conviction for the aggravated assault.

The court then addressed the court of appeals' decision to uphold the trial court's entry of a deadly-weapon finding in its judgment. Entry of a deadly-weapon finding adversely affects a defendant's eligibility for community supervision and parole. The court explained that there are numerous circumstances in which a trial court will be authorized to enter a deadly-weapon finding. The statute requires an "affirmative" finding, but does not require an "express" one. TEX. CODE CRIM. PROC. ANN., art. 42.12 § 3g (a)(2) (West 2010).

The court explained that multiple Court of Criminal Appeals cases have expanded the courts' power to determine whether the jury's deadly-weapon finding was affirmative, such that the court may enter judgment on that finding. In cases in which the trier of fact does not directly express a finding that a deadly weapon was used or exhibited in the course of the felony offense or in the immediate flight thereafter, the court may be justified in its deadly-weapon finding by examining the jury charge, charging instrument, and jury verdict. *See Polk v. State*, 693 S.W.2d 391 (Tex. Crim. App. 1985). The court listed three specific

ways in *Polk* that a court could determine that the trier of fact made an affirmative deadly-weapon finding. *Id.* at 396.

Other cases have similarly provided the court with the opportunity to list specific circumstances in which the trial court would be authorized to enter a deadly-weapon finding. *See Lafleur v. State*, 106 S.W.3d 91, 92 (Tex. Crim. App. 2003); *Crumpton v. State*, 301 S.W.3d 663, 664 (Tex. Crim. App. 2009). However, the court stated that it could not conclude under any of these cases or the Texas Code of Criminal Procedure that when the jury found Appellant guilty of burglary of a habitation, that it also made an affirmative deadly-weapon finding.

The court explained that the indictment did not include any specific language as to Appellant's use of a deadly weapon. The DVD player Appellant threw at the victim is not deadly by design, or in other words, a deadly weapon *per se*. Additionally, the jury was never asked to make a deadly-weapon finding as a special issue, even though that is how the trial court referred to the finding in the judgment. Thus, the trial court had no basis for entering a deadly-weapon finding against Appellant. Although it may be hard to conceptualize, the court explained, "it is at least theoretically possible" that an individual could commit aggravated assault without utilizing a deadly weapon. The jury therefore did not necessarily make an affirmative deadly-weapon finding when it convicted Appellant for burglary of a habitation.

The court vacated the aggravated assault conviction. The court affirmed Appellant's burglary of a habitation conviction but deleted the deadly-weapon finding.

JUDGE RICHARDSON filed a concurring opinion, in which JUDGE JOHNSON joined.

Judge Richardson agreed with the majority opinion but added additional comments to clarify why both the deadly-weapon finding and the aggravated assault conviction should have been deleted from the judgment. Judge Richardson argued that the court of appeals erred by modifying the judgment to reflect that punishment was assessed only on the burglary of a habitation conviction instead of deleting the deadly-weapon finding and aggravated assault conviction entirely. He argued that their decision was not supported by case law.

JUDGE YEARY filed an opinion concurring in part and dissenting in part, in which JUDGE KEASLER joined.

Judge Yeary agreed with the majority in regard to vacating the aggravated assault conviction and its finding that the deadly-weapon finding was improper. However, Judge Yeary disagreed with the court's interpretation and use of case law in support of its conclusions. He would have remanded the case to the court of appeals because the cases relied upon do not provide adequate authority for the court to make a ruling that is not perfunctory. He noted that the court might need to address these issues in the future.

Elizondo v. State

PD-1039-14

Case Summary written by Shane Puckett, Staff Member.

JUDGE RICHARDSON delivered the opinion of the Court, in which JUDGE MEYERS, JUDGE JOHNSON, JUDGE ALCALA, and JUDGE NEWELL joined. JUDGE KEASLER dissented.

Elizondo, a U.S. Customs and Border Protection Agent, was charged with the murder of Fermin Simon Sr., after shooting and killing him, while off duty. The jury convicted Elizondo of murder and he was sentenced to twenty-five years in prison.

Issue: Whether the trial court erred in including a provocation instruction in the jury charge and whether the jury charge was erroneous and harmful.

The Texas Court of Criminal Appeals held that the trial court erred in including a provocation instruction and that the jury charge was both erroneous and harmful, thereby reversing the judgement of the Thirteenth Court of Appeals and remanding the case for a new trial.

The Court of Criminal Appeals concluded that the appellate court failed to adequately analyze all three elements set forth in *Smith v. State*. *Smith* set forth three elements for determining whether a charge on provocation is required:

- (1) that the defendant did some act or used some words that provoked the attack on him;
- (2) that such act or words were reasonably calculated to provoke the attack;
- and (3) that the act was done or the words were used for the purpose and with the intent that the

defendant would have a pretext for inflicting harm upon the other.

The court noted that although the appellate court adequately considered the first two elements set forth in *Smith*, the court failed to properly analyze the third element when it affirmed the decision of the trial court. In order to support the giving of a provocation instruction, the court reasoned that there had to be evidence raised from which a jury could have found that Elizondo possessed the requisite intent to provoke the altercation between himself and the deceased as a pretext for inflicting harm. If this evidence had been properly raised, then Elizondo's self-defense assertion would have been properly rejected. However, the court stated that that the appellate court incorrectly focused on Elizondo's abandonment of the altercation, rather than whether there was sufficient evidence from which a rational jury could find that Elizondo used provocation as a pretext for murder. Due to the lower court's failure to adequately assess all three elements of *Smith* and whether an instruction on provocation was required, the trial court erred in including an instruction on provocation in the jury charge.

Lastly, the Court of Criminal Appeals concluded that Elizondo suffered harm as a result of the provocation instruction because it affected the jury's assessment of Elizondo's self-defense argument. The court reasoned that the presence of the instruction alone suggested that there was some evidence to support every element set forth in *Smith* regarding provocation, when there was not. As a result, this inappropriately undermined Elizondo's self-defense assertion. Furthermore, the court noted that the jury instructions were erroneously worded because it stated that if the jury had found provocation, then they should have found Elizondo guilty of murder. Rather, as the court concluded, the instruction should have stated that if the jury had found provocation, then self-defense should have been rejected. Regardless, since the court found that the provocation instruction should not have been included in the first place, Elizondo was harmed as a result of its inclusion.

JUDGE YEARY filed a dissenting opinion, in which JUDGE KELLER and JUDGE HERVEY joined.

Judges Yeary, Keller, and Hervey agreed with most of what was stated in the majority opinion. However, the judges asserted that the

case should have been remanded to the court of appeals for an analysis on whether Elizondo was harmed as a result of the inclusion of the jury instruction, instead of the case being remanded for a new trial.

Ex parte Pointer

Nos. WR-84, 786-01 & WR-84, 786-02

Case summary written by James Tuck, Staff Member.

PER CURIAM.

Jeffery Shawn Pointer was convicted of manslaughter and aggravated assault and sentenced to twenty-five years imprisonment on each count. Pointer did not appeal his convictions. In his writ of habeas corpus, Pointer contends that his trial counsel failed to investigate whether his prior convictions from Arkansas, alleged in the indictments, could enhance his sentences. The court concluded that Pointer had alleged facts that, if true, might entitle him to relief. Then the court stated that the trial court was the appropriate forum for finding of facts because the circumstances dictated that additional facts were needed. Included in the order, were instructions for the trial court to order Pointer's trial counsel to respond to his claim. Also, the court stated that if the trial court elects to hold a hearing and determines that Pointer is indigent then the trial court should appoint an attorney for him if he desires one. The court went on to state that the trial court shall make findings of fact and conclusions of law as to whether (1) the Arkansas convictions alleged in the indictments were proper punishment enhancements; (2) Pointer had other prior felony convictions that could have properly enhanced his punishment; (3) trial counsel was deficient for failing to investigate whether the Arkansas convictions could enhance Pointer's punishment; and (4) if, but for counsel's alleged deficient conduct, Pointer would have pleaded not guilty and insisted on a trial. In conclusion, the court decided to hold Pointer's applications in abeyance until the trial court resolved the fact issues.

JUDGE ALCALA filed a concurring opinion, in which JUDGE JOHNSON joined.

Judge Alcala concurred in the result, but wrote separately to express her disagreement with the court's order because it failed to

track the statutory language in the Code of Criminal Procedure. Specifically, she stated that the order improperly limits an indigent habeas applicant's entitlement to the assistance of appointed counsel to situations involving a live hearing on remand. Judge Alcalá stated that the court should require a habeas court to appoint counsel to an indigent habeas applicant in a wide range of circumstances, not just in the event of a live hearing on remand. She points to the specific language of Article 1.051 of the Code of Criminal Procedure which requires an eligible indigent defendant to have an attorney appointed to him when the trial court holds a hearing or when it is in the interest of justice to require representation. In her view, because Pointer has filed a pro se habeas application that gives rise to a colorable ineffective-assistance of counsel claim, he should receive appointed counsel in the interest of justice based on the statutory authority in Article 1.051(d)(3). Judge Alcalá goes on to point out the importance of the right to effective assistance of counsel and the unlikelihood that a pro se, incarcerated habeas applicant, like Pointer, will properly presenting such a claim. She believes that in Pointer's case and cases like it, the criminal justice system will be improved by ensuring that pro se litigants receive effective counsel at trial so that the number of wrongfully convicted people will be reduced.

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

Judge Yeary began by noting that the court has a history of requiring convicting courts to appoint counsel to indigent applicants for post-conviction habeas corpus relief, whenever the court has remanded the writ application for a formal evidentiary hearing without citing any particular authority except for the statute that sets out the procedure for appointing counsel for criminal trials and appeals. Judge Yeary believes that the complaint that the court only authorizes counsel for formal evidentiary hearings is misleading because it implies that an indigent applicant is not entitled to counsel under any other circumstance. Furthermore, Judge Yeary pointed out that indigent post-conviction applicants for habeas corpus relief are not constitutionally entitled to assistance of counsel.

The investigation and preparation phase of the post-conviction application process, which is often times being the most important part,

Article 1.051(d)(3) does not seem to contemplate appointment of counsel at this stage. Judge Yeary went on to say that if an applicant alleges facts that may entitle him to relief and further factual development is required to make the final determination, then there are many means available to the court, such as affidavits, depositions, interrogatories, additional forensic testing, and hearings, as well as personal recollection, to meet that end. For example, the application may require an affidavit or a simple forensic test to sufficiently fill in the factual record. The court should not presume that every indigent application that gives rise to a colorable claim requires the appointment of counsel.

Furthermore, the court order was that the convicting court should appoint an attorney if it makes the determination to undertake factual development through use of an evidentiary hearing. The order is not meant to prohibit the convicting court from appoint counsel in the interest of justice in accordance with Article 1.05(d)(3).

Ex Parte Heriberto Saenz

No. WR-80,945-01

Case Summary written by Christian Nisttáhuiz, Staff Member.

JUDGE ALCALA delivered the opinion for a unanimous Court.

The State of Texas convicted Applicant Heriberto Saenz for the murder of an individual and aggravated assault of three others after a jury found him guilty of a drive-by shooting outside a Corpus Christi house in 2009. The Thirteenth Court of Appeals affirmed. Saenz initially applied for habeas corpus in 2012, and about a year later amended his application, claiming ineffective assistance of counsel at the trial level. Specifically, he argued that he was prejudiced due to the counsel's failure to impeach a key State witness with a prior inconsistent statement about Saenz's identification. The witness and victim, Jerry Gonzalez, allegedly first told the police that he would not recognize the shooter if he saw him again. At trial, though, he identified Saenz as the shooter.

The habeas court found that Saenz's trial counsel was not ineffective, and even if he was, his deficient performance did not prejudice Saenz. In the alternative, the court found that it could not consider Saenz's application under the laches doctrine because it surprised both the State and trial counsel.

Issues: 1) Whether the court could consider Saenz's amended application under Article 11.07 of the Texas Code of Criminal Procedure; 2) whether the doctrine of laches precluded the court from considering the application; and 3) whether Saenz established his claim alleging ineffective assistance of counsel based on the counsel's failure to impeach the State's witness.

As a threshold matter, the court considered the jurisdiction and laches issues. The court first addressed the State's contention that it should consider Saenz's amended application in a separate proceeding because under Article 11.07 § 4, each new filing constitutes a separate application. The court rejected this argument, concluding that additional filings do not trigger § 4 requirements until "after final disposition of an initial application" under the plain language of the statute. See TEX. CODE CRIM. PROC. art. 11.07 § 4. The court explained that the limit was meant to give an applicant *one* "full bite at the apple" and gave examples of cases where it has considered supplemental claims after the filing of an initial application. See *Ex Parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997); *Ex Parte Robbins*, 360 S.W.3d 446 (Tex. Crim. App. 2011); *Ex Parte Jimenez*, 364 S.W.3d 866 (Tex. Crim. App. 2012). Thus, the court held it could consider Saenz's amended application.

As a second threshold issue, the court considered the State's equitable defense of laches. The State argued that Saenz's delay in filing the amended application would prejudice it because it would have to repeat the same time-consuming process it had spent on the initial application, citing *Ex Parte Perez* in support. 398 S.W.3d 206 (Tex. Crim. App. 2013). Though the court recognized the State's potential for prejudice and its interest in orderly adjudication of Article 11.07 applications, it held that under the facts of this case, the State was not prejudiced because the meaning of prejudice is not so broad as to include amended applications under Article 11.07.

In its final issue, the court considered the merits of the case. The court began its analysis by citing *Strickland v. Washington*, which states that the applicant has to prove by a preponderance of the evidence that counsel's performance did not meet an objective reasonableness standard and did not result from "reasonable professional judgment," and that but for that deficient performance, it

was reasonably probable that the proceeding would have had a different result. 466 U.S. 668, 688–94 (1984). Ultimately, *Strickland* explains that the focus of the inquiry should be on the reliability and “fundamental fairness of the proceeding.” *Id.* at 696.

Under this applicable law, the court first pointed out that Gonzalez’s statement to the police was inconsistent with the one in court. The trial counsel knew about it and conceded that failing to impeach Gonzalez would be a mistake, which he oversaw, yet he could not explain why he failed. The court concluded that counsel’s failure to impeach Gonzalez was not objectively reasonable. Considering the record was developed, counsel lacked strategic motivation behind his decision. Further, Gonzalez’s statement was critical to Saenz’s case. Thus, the court held that counsel’s failure to impeach the key witness signaled deficient conduct.

The court further concluded that Saenz was prejudiced by this deficiency because the evidence identifying Saenz as the shooter was weak and rested primarily on the credibility of Gonzalez’s identification testimony. Gonzalez was the only witness who testified that Saenz was the shooter. Moreover, the court questioned the credibility of other witnesses, including testimony from Saenz’s friend and testimony from the murder victim’s cousin who had a criminal record and a motive to lie. The court also questioned the evidence presented by the State that put Saenz at a location near the shooting before and after it occurred because of its indefiniteness. Finally, though the State theorized that Saenz shot at the victims in retaliation for a gang-related matter, the court concluded that the evidence to support that theory was insubstantial because the evidence of motive was weak. Because the evidence presented was relatively weak overall, the court held that it was reasonably probable that the result of Saenz’s proceeding would have been different but for the trial counsel’s failure to impeach Gonzalez. The court granted relief. It set aside the judgment and remanded the case.

Ex parte McCuin

Nos. WR-82,096-10, WR-82,096-02 and WR-82,096-03

Case Summary written by Camille Youngblood, Staff Member.

PER CURIAM.

Kentrail McCuin was found guilty for evading arrest, possessing a firearm as a felon, and possessing cocaine with the intent to deliver in a school zone, which has been designated as a drug free zone. McCuin was sentenced to prison for two, five, and twenty years for his convictions. McCuin appealed to the Fifth Court of Appeals, which affirmed his convictions.

McCuin appealed to the Court of Criminal Appeals claiming that his *pro se* representation constituted ineffective assistance of trial counsel. His allegations were based on a failure to object to an improper cumulation order.

Issue: The issue before court was whether McCuin had the right to habeas corpus relief based upon his ineffective assistance of counsel claim.

The court held that there were no findings to support a writ of habeas corpus relief because, in fact, counsel had objected to the improper cumulation order. Further, there were no findings that proved counsel was ineffective, leaving no support for McCuin's allegations. The court denied relief on McCuin's habeas allegations.

JUDGE YEARY, concurring.

Judge Yeary concurred with the holding of the case, but maintains his views conveyed in a previous concurring opinion. *Ex parte Pointer*, ___ S.W.3d ___, Nos. WR-84,786-01 & WR-84,786-02 (Tex. Crim. App. June 8, 2016).

JUDGE ALCALA, dissenting.

Judge Alcala dissented based on McCuin's legitimate claim of ineffective assistance of appellate counsel, rather than the unpersuasive claim of ineffective assistance of trial counsel. Judge Alcala stated that McCuin had a colorable claim because appellate counsel failed to, on a direct appeal, challenge the order for improper cumulation.

Judge Alcala, after reviewing the pleadings for substantive merit and legitimate claims, believed that McCuin, an indigent *pro se* applicant, deserved remand to a trial court for the appointment of post-conviction counsel. The appointment of post-conviction counsel would be in the interest of justice, to give McCuin an opportunity to have counsel advocate for him in order to get a meaningful representation.

State v. Drummond

NO. PD-1238-15

Case Summary written by James Tuck, Staff Member.

JUDGE HERVEY delivered the opinion of the unanimous Court.

On Sept. 2, 2013, a complaint was filed with the Civil Rights Division of the Harris County District Attorney's Office that alleged Drummond, a sergeant in the Harris County Constable's Office, arrested five individuals with excessive force, which constituted official oppression. A deputy's dash-mounted camera recorded the incident. The state's filing stated that the video showed that the complainant was held face down by two deputies and that Drummond kicked him five times in the chest and the used the complainant's shoulder to wipe the underside of one of his shoes. The charging instrument further detailed that the complainant was still "squirming" while on the ground and still in handcuffs when Drummond "dropp[ed] his knee forcefully on the back of the complainant's head or neck" and then forcibly pulled back the complainant's head. The complainant's medical records show that the complainant "suffered a 'nondisplaced, simple fracture of the right seventh rib.'" Photographs after the incident also show that the complainant had scratches and contusions all over various parts of his body.

One day before the expiration of the statute of limitations, a magistrate authorized the issuance of a capias based upon a probable-cause affidavit. That same day, Drummond was charged with official oppression by an assistant district attorney. A grand jury returned an indictment three months later, "but the indictment did not include tolling language." Because of the lack of that language, Drummond filed a motion to quash. The grand jury included tolling language in a second indictment that they returned before the judge could rule on the motion. The trial court agreed with Drummond that both indictments had been quashed. The court of appeals "reasoned that the instrument filed by the State could not toll the statute of limitations because the State filed only a complaint, even though it was required to charge Drummond by information or indictment."

Issue: Whether,

[t]he court of appeals erred in holding that the running of the statute of limitations was not tolled by the filing of the initial complaint against [Drummond] when the clear language of the controlling statute states that the filing of a complaint tolls the running of the statute of limitations.

The standard of review for a ruling of a trial court that quashed an indictment is de novo. The state must “present an information or an indictment within two years of the commission of the offense” to prosecute a Class A misdemeanor. The pertinent context of a complaint for this case, per the Code of Criminal Procedure, is that it is a prerequisite to an information. “An information is ‘a written statement filed and presented in behalf of the state by the district . . . attorney, charging the defendant with an offense which may by law be so prosecuted.’” There are several requirements listed in the Texas Code of Criminal Procedure article 21.21 that an information must meet in order to be sufficient.

During oral arguments, Drummond agreed that an information and a supporting complaint could be a single document. In addition, he conceded that the document in question meet all the requirements to be both an information and complaint. However, he argued that a complaint and information must be two separate documents. The court agreed with Drummond that the information and complaint should be two separate documents but pointed out that the Code does not prohibit them being in a single document. The court went on to “hold that a single document can serve as an information and the complaint supporting that information so long as the statutory requirements for both are met, and the accuser is not the same person as the prosecutor who brought the charges. Because those requirements were met in this case, [the court held] that [the] document filed by the State [in this case] is both an information and a complaint.”

Article 12.05(b) of the Texas Code of Criminal Procedure states that “a previously filed charging instrument will toll the statute of limitations for a subsequently filed charging instrument so long as both allege the same act, conduct, or transaction.” The information in this case was presented to the 208th Judicial District Court of Harris County which vested that court with jurisdiction “over the offense and Drummond, making it a court of competent jurisdiction for purpose of

Article 12.05(c).” As a result, the court held “that the filing of the information-complaint in this case tolled the statute of limitations.”

“Because [the court] conclude[d] that the document filed by the State . . . constituted a complaint and an information, and the statute of limitations for the charged offense was tolled, [the court] sustain[ed] the State’s ground for review, reverse[d] the judgment of the court of appeals, set aside the trial court’s order granting the motion to quash, and remand[ed] this cause for further proceeding.”

Furr v. State

No. PD-0212-15

Case Summary written by Jesus Cano, Staff Member.

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

Officer Alvarez responded to an anonymous tip that two white males in certain clothing were using drugs on a street corner. Alvarez drove by the street corner and noticed two individuals that matched the description given in the anonymous tip. He drove by them but noticed in his rearview mirror that both watched him drive past. He approached the two individuals who were later identified as Collier and Furr. As he approached, Furr avoided Alvarez and quickly walked into a shelter. As Furr walked away, Alvarez noticed that Furr was looking over his shoulder repeatedly at Alvarez. Alvarez later described Furr as walking away “furtive[ly], like he was trying to get away.” When Officer Ayala arrived, both he and Alvarez approached Furr inside the shelter. During their conversation with him, Ayala testified that Furr was “kind of out of it” and “looked like he was under the influence of a drug.” Ayala frisked Furr for weapons to protect himself and others and found drug paraphernalia in Furr’s pocket, including a glass crack pipe and two syringes. After removing Furr’s wallet with permission, Ayala found two small balloons of what he believed to be heroin. Furr was charged with possession of a controlled substance. He subsequently motioned to suppress the drugs and paraphernalia but was denied. The Court of Appeals affirmed the denial.

Issue: Is an anonymous tip that an unidentified individual was doing drugs, without more, sufficient to justify a stop and frisk?

Furr argued on appeal that the drugs and paraphernalia should have been suppressed because they were found during an unjustified stop and frisk. He further argued that an anonymous tip, without more, does not justify a stop and frisk. The court identified three different police-citizen interactions: (1) consensual encounters that do not implicate the Fourth Amendment; (2) investigative detentions that must be supported by reasonable suspicion of criminal activity; and (3) arrests that require probable cause. Specifically, the court addressed the question of whether a consensual police-citizen encounter had advanced into detention. The court concluded that courts must examine the totality of the circumstances to determine whether a reasonable person would feel free to ignore the officer or terminate the encounter. This test is an objective one and should not be based on the belief of the officer or detainee.

Reasonable suspicion to detain a person depends on whether the officer has specific, articulable facts that reasonably lead the officer to conclude that the detainee is, has been, or will be engaged in criminal activity. The test to determine whether reasonable suspicion exists depends on the totality of the circumstances, including the cumulative information known to cooperating officers at the time of detention. The court further stated that an officer is justified in engaging a stop and frisk if there is a reasonable suspicion that the detainee is armed and dangerous at the time of detention.

Using this foundation, in accord with *Florida v. J.L.*, the court concluded that the anonymous tip alone was not enough to justify a stop and frisk. However, the totality of the circumstances, in this case, was sufficient to provide the officers with reasonable suspicion to temporarily detain and stop and frisk the detainee. The court considered a variety of factors including the officers' observations of Furr's behavior and the reputation of the area as one of a "high drug, high crime" area. Importantly, the court concluded that Furr's detention did not occur until Officer Ayala began the frisk, allowing Furr's behavior within the shelter to provide the basis for reasonable suspicion. On this basis, the court affirmed the Court of Appeals' ruling.

JUDGE MEYERS filed a dissenting opinion.

The dissent agrees with the majority's totality of the circumstances test for objectively determining reasonable suspicion. However, Judge Meyers's opinion adds a requirement to determine whether the officer reasonably believed that the detainee was armed before the officer can conduct a stop and frisk. The dissent did not reach the "reasonable belief that the detainee is armed" prong. Judge Meyers, based on Officer Ayala's testimony, concluded that Furr's detention began when Ayala first approached him in the shelter. As such, the circumstances and information the officers had before entering the shelter needed to provide reasonable suspicion for the investigative detention. The dissent concluded that the anonymous tip, the Appellant's looking over his shoulder, and the location alone or in combination did not provide an objective basis for the reasonable suspicion required by an investigative detention. The lack of reasonable suspicion rendered the stop and frisk unlawful and should have led to the exclusion of the drugs and paraphernalia. The dissent would have reversed the court of appeals.

State v. Hill

No. PD-0019-15

Case Summary written by Gregory Cotton, Staff Member.

JUDGE RICHARDSON delivered the opinion for a unanimous court.

Appellee Albert Hill and his wife, Erin Hill, were indicted in 2011 for mortgage fraud when they allegedly took out a \$500,000 home-equity loan. However, Hill claimed that the prosecution was only brought against him and his wife because of separate federal trust litigation that Hill was involved in against his father, Albert G. Hill, Jr. Hill alleged that his father and another party to the trust litigation (Lisa Blue Baron) improperly influenced the Dallas District Attorney's Office into bringing the mortgage fraud charges against Hill, and that therefore, the prosecution was vindictive and meritless. Within six months, the State dismissed the charges against Erin Hill and soon after, Hill filed a motion to quash and dismiss his own indictments.

The trial court held an evidentiary hearing on the matter and ultimately granted Hill's motion to dismiss with prejudice. The State then appealed and the Fifth Court of Appeals resolved two issues in

favor of the State, holding that the trial court had erred in conducting an evidentiary hearing in this case.

ISSUE: The issue before the court was whether the trial court erred in holding a pretrial hearing on Hill's motion to quash and dismiss his indictment.

The court began its analysis by curtly pointing out that, though neither party had made the argument, Article 28.01 of the Texas Code of Criminal Procedure gives a trial court discretion to hold pre-trial hearings for preliminary matters. Therefore, the plain language of the Code allowed for the trial judge in this case to hold a preliminary hearing on the motion to dismiss.

The State also tried to urge the court to follow federal case law that requires a defendant to show "some evidence" of selective prosecution before an evidentiary hearing may be held. However, the court did not find the federal case law to be controlling or persuasive.

In conclusion, the court held that Article 28.01 was controlling in this case. Therefore, it was within the trial court's discretion to hold an evidentiary hearing on Hill's motion to quash and dismiss and there were no threshold evidentiary requirements that limited this discretion. The court reversed the judgment of the court of appeals on this issue but, because the Fifth Court of Appeals did not reach the State's two remaining issues on the first appeal, the case was also remanded to address the State's remaining challenges.

Ex Parte McDonald

No. WR-82,533-03

Case Summary written by Hillary Hunter, Staff Member.

PER CURIAM.

Applicant Richard McDonald pled guilty as part of a packaged plea agreement to the charges of assault and forgery. In exchange for his guilty plea, in both cases he received ten years deferred adjudication. The State moved to revoke his community supervision and adjudicate nine months later. Pleading true to the violations, McDonald was convicted and sentenced to ten years and twelve years, respectively, for the charges of forgery and assault. In 2015, the Court of Criminal Appeals of Texas granted relief to McDonald in regard to the assault charge because his original plea was involuntary. The involuntary

finding stemmed from a critical term of the plea agreement that included he be convicted of a crime that does not exist under Texas law, and therefore, could not be performed. McDonald was then remanded to the custody of the Sheriff of Bowie County to answer to the charges in the indictment of that case.

ISSUE: Was the plea for the forgery charge involuntary because it was packaged with the invalidated assault charge?

The court determined that as the forgery plea was part of the same plea agreement that contained the invalidated assault charge, relief should be granted. McDonald established that he would not have made the same decision regarding his plea if he knew that the assault charge was invalid. The court remanded McDonald to respond to the allegations in the motion to proceed with adjudication in the custody of the Sheriff of Bowie County.

JUDGE RICHARDSON joined by JUDGE JOHNSON and JUDGE ALCALA, concurring in part and dissenting in part.

Judge Richardson concurred with the court's decision to grant relief to McDonald. Instead of remanding to respond to the allegations in the motion to proceed to adjudication, McDonald should be remanded to answer the information charging forgery. Because the assault charge influenced the parties, the entire outcome of the plea bargain cannot be trusted. As such, the State should return the applicant to his original position of answering to the charge, as he was in the assault case, not the position of answering the motion to adjudicate.

Ex Parte Mario Gamez

No. WR-85,368-01

Case Summary written by Logan Smith, Staff Member.

PER CURIUM.

Before the Court of Criminal Appeals was an application for a writ of habeas corpus for an applicant convicted of capital murder and sentenced to life imprisonment. The Third Court of Appeals affirmed his conviction. Applicant alleged his trial counsel rendered ineffective assistance because he did not investigate or contest the legality of applicant's arrest, failed to investigate and examine evidence, failed to investigate and interview witnesses, failed to suppress hearsay

statements by witnesses at trial, failed to adequately communicate the facts of his case to Applicant, lied and mislead Applicant regarding the facts of his case, failed to present favorable evidence to make an adequate closing argument, failed to impeach the testimony of the State's witnesses, and failed to file various motions for the defense.

Issue: Whether Applicant's trial counsel rendered ineffective assistance sufficient to warrant the granting of his application for a writ of habeas corpus?

Applicant alleged sufficient facts that may entitle him to relief, although additional facts were needed. The trial court, established as the appropriate forum for findings of fact, should order Applicant's trial counsel to respond to his claim of ineffective assistance of counsel pursuant to any means set out in Tex. Code Crim. Proc. Art. 11.07, § 3(d). The trial court may also rely on its personal recollection. If the trial court elects to hold a hearing, then it shall determine whether Applicant is indigent, and if so, shall appoint an attorney to represent Applicant during the hearing if the Applicant so wishes. The Court of Criminal appeals ordered the trial court to make findings of fact and conclusions of law to determine whether the performance of Applicant's trial counsel was deficient, and if so, whether counsel's deficient performance prejudiced Applicant. The trial court was also ordered to determine the disposition of Applicant's claim for habeas corpus relief. Issues were ordered to be resolved within 90 days.

JUDGE ALCALA filed a concurring and dissenting opinion in which JUDGE JOHNSON joined.

Judge Alcala concurred in the court's order remanding this case for further factual development in the habeas court due to the limited means in state court for indigent inmates sentenced to life without parole to challenge the ineffectiveness of their court-appointed trial attorney.

However, Judge Alcala dissented from the court's order to the extent it refused to require the habeas court to appoint counsel for applicant, who is serving a life-without-parole sentence and who asserted in his *pro se* habeas application that his trial counsel rendered ineffective assistance of counsel. This court took the position that only the habeas court—and not this court—could require the appointment of counsel for an indigent *pro se* habeas applicant to assist him in

presenting and litigating his claims of ineffective assistance of counsel. The limited view of this court's authority to order the appointment of habeas counsel was highly unusual, given this court always orders such for an indigent applicant when a live hearing was also ordered. The applicable statute compels the appointment of habeas counsel for an indigent habeas applicant when the court determines the interests of justice require representation, yet this court refused to consider whether the interests of justice might require representation and further refused to instruct the habeas court to appoint habeas counsel for a *pro se* applicant, even though it was apparent the appointment of habeas counsel was necessary in the interests of justice. Alcalá noted, because of the court's refusal to require such appointment of habeas counsel, an inmate who has been wrongfully convicted due to ineffective trial counsel runs the risk of forever being denied relief, even if a subsequent application for habeas relief could reasonably show trial counsel was ineffective. The habeas corpus statute limits applicants to "one bite at the apple," even if a *pro se* applicant's one bite was taken without knowledge on how to present such a claim. *See Ex parte Saenz*, 491 S.W.3d 819, 824 (Tex. Crim. App. 2016) (citing *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997)); *see also* Tex. Code Crim. Proc. art. 11.07, § 4.

To afford Applicant his one full bite at the apple in this initial habeas proceeding, and to ensure Applicant was fully afforded his Sixth Amendment rights, Judge Alcalá would remand this case to the habeas court for the appointment of post-conviction counsel, and would permit counsel to amend the instant pleadings before ordering further proceedings as to applicant's ineffectiveness claims.