

## **Court of Criminal Appeals Criminal Procedure Topics Part 2**

### ***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. Alcala 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 Alcala 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.

***Metts v. State***

No. PD-1054-15

Case Summary written by Caroline McLeod, Staff Member.

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

Facts: In 2004, appellant Anthony Metts pled guilty to two instances of sexual assault of a child in exchange for a recommendation of deferred adjudication community supervision for each offense. Before Metts entered his plea, he met with Robin Darr, the prosecutor representing the State, at a status hearing to waive his right to a jury trial. The status hearing was approximately three minutes long, and consisted of Robin Darr supplying a waiver for Metts to sign in order to waive his right to a jury trial. Robin Darr had not previously represented the State in relation to any of Metts's cases, nor did she appear as a prosecutor in any of his cases thereafter. Robin Darr subsequently became a district court judge and, in 2013, adjudicated Metts guilty and sentenced him to ten years in prison for each offense.

On appeal, Metts contended that the judgments were void because Judge Darr was statutorily and constitutionally disqualified from presiding over cases in which she had previously acted as counsel for the State. The State countered that Judge Darr's conduct as a prosecutor failed to rise to the level of active participation that Metts needed to demonstrate in order to disqualify a trial judge.

Issue: Whether Robin Darr's involvement as a prosecutor in Metts's case amounted to active participation, thus disqualifying her from adjudicating Metts's guilt?

The Texas Constitution and the Texas Code of Criminal Procedure both require the disqualification of a judge who has previously

participated as counsel for the State in a pending matter. However, the Court has recognized that not every action taken by a prosecutor who later becomes a judge necessitates disqualification. To trigger the disqualification provision, the judge's involvement as a prosecutor must amount to a level of active participation in the case. By contrast, the Court has held that a mere "perfunctory act" by a prosecutor who later becomes a judge will not merit disqualification.

In this case, the Court found that Judge Darr's involvement in Metts's status hearing amounted to active participation. Although her involvement in Metts's case was limited, the Court reasoned that the brief status hearing in which Judge Darr acted as counsel for the State was an integral step toward Metts's deferred adjudication community supervision. Further, the Court found that Judge Darr's signature and presence at Metts's status hearing as the sole attorney for the State demonstrated that Judge Darr exercised discretion on behalf of the State. The Court concluded that, by executing the State's written consent and approval to Metts's waiver of a jury trial, Judge Darr actively participated in Metts's case. Judge Darr was therefore disqualified from presiding over Metts's adjudication hearing. The Court vacated the judgment of the court of appeals and remanded the case for consistent proceedings.

### ***Henry v. State***

No. PD-0511-15

Case Summary written by Camille Youngblood, Staff Member.

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

Alvin Henry, appellant, was convicted of evading arrest with a motor vehicle—which was considered a deadly weapon. At the punishment phase of trial, the state offered evidence linking Henry to two prior convictions, which enhanced his sentence to sixty years. Henry appealed the sentence, arguing that the State failed to offer legally sufficient evidence linking him to the prior convictions.

At trial, the State offered evidence of the prior convictions through stipulations by both the State and the defendant, Henry. Further, the State elicited testimony from Henry, his cousin, and a doctor who all

confirmed that Henry had two prior convictions of aggravated assault and aggravated robbery. Henry's testimony, however, was vague and did not specify details of the convictions and he merely stated he was convicted of assault and robbery. The testimony of his cousin was more direct, and contained the years of his cousin's incarceration for the convictions, which provided a more sufficient base to support the enhancement of the sentence.

On appeal, Henry argued that the State failed to meet its burden or beyond a reasonable doubt the defendant was in fact the person who was convicted of the prior offenses. Henry contended the state failed to facially show he was the person convicted of the prior convictions because the name that appeared on the final judgments did not match his name. The convictions reflected the name, "Alvin Peter Henry," and the appellant's name was "Alvin Peter Henry, Jr.," which are different only by the additional "Jr." that the appellant's name retains, which the convictions leave off.

ISSUE: Did the state meet its burden when proving the prior convictions which resulted in an enhanced sentence?

The court reiterated that to establish that a defendant has been previously convicted of an offense, the State must prove beyond a reasonable doubt the defendant was in fact convicted of the that offense. However, the state is not required to prove this by express documents, such as a final judgment. Instead, acceptable evidence includes admissions or stipulations by the defendant, testimony by someone with personal knowledge of the conviction, or documents proving the conviction. Further, the trier of fact must look to the totality of the evidence when deciding whether there is sufficient evidence to prove the defendant's prior convictions.

The court held that when looking at the totality of the evidence, it must view the evidence in the light most favorable to the trial court's finding. The court found that when looked at individually, the judgments with the incorrect names, and the vague testimonies were insufficient to support the sentence enhancement. However, when the court took in the totality of the evidence in the light most favorable to the trial court's ruling, it found that the evidence taken together was sufficient to support the enhancement.

***State v. Cortez***

No. PD-1652-15

Case Summary Written by Nicole Amos, Staff Member.

JUSTICE KELLER delivered the opinion of the Court.

A state trooper spotted appellee's minivan driving on Interstate 40 and began to suspect that the vehicle was connected to criminal activity. Subsequently, the state trooper stopped the vehicle for unlawfully driving on the shoulder of the highway. The shoulder was an improved shoulder. The state trooper acted on the basis that the vehicle had twice crossed onto the "fog line" of the highway (the solid white line on the outer edge of the driving lane).

The trial court granted a motion to suppress after watching video showing that the vehicle's "right rear tire (or its shadow) . . . to come in the proximity to and possibly touch the inside portion or more of the white line delineating the roadway from the improved shoulder .

. . . but not to extend past the . . . outermost edge of the fog line." The trial court found that appellee's vehicle did not cross the outer edge of the fog line and concluded that crossing over the fog line nearest the center of the roadway or crossing upon the fog line does not violate Texas law.

The State appealed on the point of error that "the trial court abused its discretion in finding that the trooper lacked a reasonable suspicion to conduct a traffic stop." Relying on *Heien*, the State discussed why the case should be resolved in the State's favor. Ultimately, the State asserted that the trooper acted in reasonable reliance on his understanding of the statute and, under *Heien*, an officer's mistake of law is reasonable if the statute contains at least some ambiguity that has not been previously addressed by a State's appellate courts.

The court of appeals held that a person does not drive on the improved shoulder if the vehicle is on, but does not cross, the fog line, because the line is not part of the improved shoulder. The court of appeals accepted the trial court's conclusion that appellee's vehicle did not cross beyond the fog line and affirmed the judgment granting the motion to suppress. The court of appeals concluded that "a reasonable

mistake of law could not serve as a proper basis for a stop,” relying on *Robinson v. State* and *Abney v. State*.

In its petition, the State raised two grounds: first, that “the court of appeals was incorrect in holding that the fog line was not part of the improved shoulder;” and second, “that there was an objectively reasonable basis for the stop under *Heien*. The State contended that, under Rule of Appellate Procedure 47.1, “the court of appeals rendered an opinion that does not address every issue raised and necessary to final disposition.”

Because *Heien* “was a prominent part of the argument under the State’s second point of error in its brief before the court of appeals,” the Court of Criminal Appeals held that the court of appeals should have addressed *Heien* and vacated the judgment and remanded the case for reconsideration in light of *Heien*.

### ***Ex parte White***

NO. WR-48, 152-08

Case Summary written by Shane Puckett, Staff Member.

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

White was indicted for capital murder and sentenced to death in July 1996. This decision was affirmed on appeal in June 1998. White filed four applications for writ of habeas corpus from 1998-2009, all of which were denied. In 2013, the Texas Legislation revised its habeas corpus procedures, recognizing a grant of relief based on scientific evidence that (1) contradicts the state’s evidence at trial or (2) that was not available to be offered at trial. White filed a fifth application for writ of habeas corpus, asserting that newly discovered scientific evidence, if it had been available at trial, would have mitigated his sentence.

Issue: Whether newly discovered scientific evidence, which would have only affected the punishment phase of trial, entitles an applicant to habeas corpus relief under Article 11.073 of the Texas Code of Criminal Procedure?



The court of Criminal Appeals concluded that evidence which would have only changed the punishment phase of trial does not satisfy the requirements under Article 11.073. Accordingly, the court dismissed the application for writ of habeas corpus.

Relief under Article 11.073 requires an individual to prove that if newly discovered scientific evidence had been presented at trial, then the individual would not have been convicted. Furthermore, an individual must satisfy this requirement by a preponderance of the evidence.

The court concluded that Article 11.073, on its face, requires an individual to prove that they would not have been convicted. If an individual fails to satisfy this requirement, then no relief is available under the statute. Therefore, based on statute's plain language, scientific evidence would have only affected the punishment phase, would have no bearing on guilt determination, and would be unable to undermine the verdict. The court elaborated that even if an individual could prove that they would have received a lesser punishment because of newly discovered scientific evidence, doing so would not satisfy the conviction requirement.

The court rejected all arguments in favor of construing the statute broadly on the basis that Article 11.073 is unambiguous. Therefore, the court refused to ascertain any additional legislative intent behind the statute. Furthermore, the court upheld the constitutionality of the statute and held that it did not violate the Separation of Powers Clause of the Texas Constitution. The court reasoned that prior to the enactment of Article 11.073, no such remedy based on newly discovered scientific evidence was available. Therefore, when the legislature created a remedy on this ground, it was well within its power to place limitations on the scope of the remedy—restricting the scope to the guilt determination phase rather than the punishment phase. Accordingly, the court dismissed the application for writ of habeas corpus.

**JUDGE RICHARDSON concurred, joined by JUDGES HERVEY AND NEWELL.**

The concurring judges all agreed with the majority's plain language interpretation of Article 11.073 and that its scope is restricted to the guilt determination phase of trial. However, the concurring judges took issue with the fact that the majority's position lead to a

harsh result. Therefore, Article 11.073 should extend to the punishment phase, at least in death penalty cases.

JUDGE ALCALA dissented, joined by JUDGES MEYERS AND JOHNSON.

The dissenting judges disagreed with the majority's restriction of Article 11.073 to the guilt determination phase of trial. Additionally, the dissent asserted that Article 11.073 should extend to the punishment phase because the statutory language is ambiguous and the legislature intended for this result.

***In Re Jeremie Glen Tennison***

No. WR-85,771-01

Case Summary written by Danny Barber, Staff Member.

JUDGE RICHARDSON filed a concurring opinion in which JUDGE MEYERS and JUDGE JOHNSON joined.

Jeremie Glen Tennison followed his counsel's advice and waived a jury trial on an evading arrest charge. Subsequently, Tennison changed counsel, and new counsel filed a motion to withdraw the jury-trial waiver. The trial court told counsel that it would not rule on the motion until the date of the bench trial. To halt the bench trial, Tennison filed an emergency stay with the Twelfth Court of Appeals, and the court denied it. Tennison filed another emergency stay and a mandamus with the Texas Court of Criminal Appeals to hold a hearing regarding the jury trial waiver.

The court posited that a defendant may waive a jury trial pursuant to Article 1.13 of the Texas Code of Criminal Procedure, but nothing in the code addresses the withdrawal of a jury trial waiver. However, the Texas Court of Criminal Appeals previously held that a defendant does not have an absolute right to withdraw a jury trial waiver, but it is within the trial court's discretion. Furthermore, a defendant should be allowed to withdraw the waiver if it is filed in good faith and demonstrates that no adverse consequences would follow. But, the defendant bears the burden of showing that granting the request will not (1) interfere with business and administration of the court, (2) result in delay or inconvenience to witnesses, or (3) prejudice the state.

In this case, Tennison filed the motion to withdraw thirty-six days before the bench trial. The court also noted that forty-one witnesses could possibly testify. But based on the motion's timely submission, the Texas Court of Criminal Appeals concluded that Tennison's motion to withdraw the jury-trial waiver should be granted.

***Texas v. Copeland***

No. PD-1549-15

Case Summary written by Davinder Jassal, Staff Member.

JUDGE HERVEY delivered the opinion of the Court.

Shirley Copeland was charged with possessing a dangerous drug after the police conducted a search of the car she was in. At trial, Copeland filed a motion to suppress, arguing that the police did not have her consent to search the car and that the length of her detention was unreasonable. The trial court granted the motion and issued factual findings and legal conclusions. The State appealed to the Court of Criminal Appeals, arguing that the driver of the car consented to the search. In holding that consent was present, the court remanded the case to the court of appeals to determine whether an alternative theory of law applicable to the case existed to uphold the trial court's ruling. On remand, the court of appeals did find such a theory—the length-of-detention issue—and upheld the trial court's ruling. Notably, the court of appeals held that the State procedurally defaulted on the length-of-detention argument on appeal. The court reasoned that the issue was a theory of law because the State argued at trial the detention was reasonable. Therefore, the State had an obligation to raise that issue on appeal or risk forfeiture through inaction. The State, however, argued that the length-of-detention was not a theory of law because the trial court did not address the issue in its findings and conclusions.

**Issue:** Did the State procedurally default on the length-of-detention issue by not raising the argument on appeal when the trial court did not address it in the court's findings and conclusions?

At the outset, the Court of Criminal Appeals reasoned that the trial court did have an obligation to address all essential findings and conclusions, and erred by not addressing the potentially case-dispositive issue of length-of-detention. Nevertheless, the court concluded that the trial court's error did not lead to the conclusion that the issue was not a

theory of law applicable to the case. For a theory of law to be applicable, the only relevant question is whether the theory of law was actually litigated at trial. The court noted that both parties argued the length-of-detention issue at the suppression hearing, which resulted in the issue becoming a theory of law applicable to the case. Further, the court disagreed with the State's argument that it was not fair to require the State to raise the argument on appeal when it appeared that the trial court did not treat the issue as dispositive. The State knew, however, that one critical issue was not addressed by the trial court, yet failed to object to its findings and conclusions. Additionally, the State knew or should have known that it needed to raise the length-of-detention issue on appeal to preserve error. Therefore, the court held that the State procedurally defaulted the length-of-detention issue because the issue was a theory of law applicable to the case and the State failed to raise it on appeal. Accordingly, the court affirmed the judgment of the court of appeals.

PRESIDING JUDGE KELLER filed a dissenting opinion.

Judge Keller reasoned that the State is not always responsible for raising an issue on appeal concerning the appellee's alternative ground for granting a motion to suppress. This situation only arises, according to Judge Keller, when the trial court either makes no findings at all or when the court makes a finding on an appellee's ground in the appellee's favor. If, however, the findings do not consider a particular basis for relief argued by the appellee, a court should not presume that the trial court resolved an unaddressed basis in favor of the prevailing party. Instead, after the court rejected the lack-of-consent claim, the court of appeals was obligated to resolve the length-of-detention claim regardless of whether it was discussed in the trial court's findings. Therefore, Judge Keller concluded that the court applied the wrong legal standard, and respectfully dissented.

***State v. Schunior***

No. PD-0526-15

Case Summary written by Jessica Robertson, Staff Member.

JUDGE MEYERS delivered the opinion of the Court in which PRESIDING JUDGE KELLER and JUDGE JOHNSON, JUDGE

KEASLER, JUDGE HERVEY, JUDGE ALCALA, JUDGE RICHARDSON, and JUDGE YEARY joined.

This opinion stems from the State's petition for discretionary review following the dismissal of Victor Manuel Schunior, Jr.'s indictment for an incident that occurred more than two years prior. Appellee was indicted on four counts of aggravated assault with a deadly weapon arising out of an incident on or about February 19, 2011, where Appellee shot a firearm into a vehicle with one passenger inside the vehicle and two exiting the vehicle, and subsequently hit another individual in the head with the firearm. Both the trial court and the San Antonio Court of Appeals found that the relevant statute of limitations was two years and granted Schunior's motion to dismiss and pre-trial application for habeas corpus; dismissing the indictment with prejudice. On petition in the Court of Criminal Appeals, the State asks the following two questions:

1. Is the limitation period for aggravated assault governed by Article 12.01(7) rather than Article 12.03(d) of the Code of Criminal Procedure?
2. If the limitation period for aggravated assault is governed by Article 12.03(d), does the lesser-included offense with the greater limitation period control when the lesser-included offenses of the aggravated assault include both misdemeanor assault and a felony?

The court held that aggravated assault is governed by Article 12.03(d), as opposed to 12.01(7), and that the lesser-included offense does not control the requisite statute of limitations.

The State asserted three arguments to support its interpretation of the Code of Criminal Procedure that the statute of limitation period is three years. First, the statute's plain language provides that Article 12.01(7) addresses aggravated assault. Second, the legislature is deemed to have ratified the three-year limitation period for aggravated assault based on the multiple judicial opinions that have applied the period following amendments of the perhaps ambiguous statutory language. Finally, the State argued that, even if Article 12.03(d) controls, the legislature could not have intended to make a two-year limitation period for aggravated assault when a lesser-included offense—felony deadly conduct—has a period of three years. None of the State's arguments persuaded the court of appeals which held that there

was no ambiguity in the statute, meaning that Article 12.01(7) is subject to Article 12.03(d).

The Court of Criminal Appeals also failed to find the State's arguments persuasive. Although the court acknowledged that extraneous evidence may be considered because the language of the statute concerning the limitation period for aggravated assault was ambiguous, the court ultimately concluded that 12.03(d) governs the statute of limitations for aggravated assault with a deadly weapon and a longer period for a lesser-included offense will not control. Therefore, the requisite statute of limitations is two years and the judgment of the court of appeals was affirmed.