

Court of Criminal Appeals
January 27, 2016

Buntion v. State

NO. AP-76,769

Case Summary written by Keirsten Hamilton, Staff Member.

JUDGE BROWN delivered the unanimous opinion of the court. JUDGE HERVEY filed a concurring opinion in which JUDGE KEASLER and JUDGE NEWELL joined. JUDGE ALCALA filed a separate concurring opinion.

In June 1990, James Irby, a motorcycle police officer, stopped a vehicle in which the appellant was a passenger. Officer Irby spoke with the driver outside the vehicle. At some point while the two individuals stood next to the vehicle, the appellant exited the vehicle, and shot Officer Irby in the head. The appellant subsequently shot Officer Irby two additional times. The appellant then fled the scene on foot and proceeded to commit multiple acts of violence in an effort to evade responding police officers.

In January 1991, a jury convicted the appellant, Carl Wayne Buntion, of capital murder for the June 1990 offense. The jury found the appellant guilty based on special issues addressed in Texas Code of Criminal Procedure Article 37.071, §§ 2(b), 2(e). Based upon the jury's findings, the trial judge sentenced the appellant to death. On direct appeal, the appellate court affirmed the appellant's conviction and sentence. The appellant petitioned for habeas relief; the initial petition was denied, but the court granted his subsequent petition, and remanded the case for a new punishment hearing.

In February 2012, at the trial court's new punishment hearing, the trial judge sentenced the appellant to death. Per Texas Code of Criminal Procedure, Art. 37.0711, §3(j), the appellant was afforded automatic direct appeal to the Court of Criminal Appeals. On appeal, the appellant raised twenty-seven points of error; the court reviewed each point in turn, and determined all points to be without merit. Thus, the court affirmed the appellant's sentence of death.

The court addressed the appellant's points of error in the following seven categories: sufficiency of the evidence; juror disability; district attorney's conduct and police presence; introduction of matters outside

the record; voir dire—denied challenges for cause; motion to include life without parole; and future dangerousness special issue. Upon its review, the court found each point of error to be without merit.

Sufficiency of the evidence

The appellant claimed that insufficient evidence existed to “sustain the jury's affirmative answer to the future dangerousness special issue.” The appellant claimed that no evidence existed to show that he would be a future danger and that the only relevant society that should be considered would be prison society. The court did not find the argument to be convincing, and denied his points of error regarding the sufficiency of the evidence.

Juror Disability

The appellant claimed in his first three points of error that the trial court should have removed, disqualified, or excused juror Kristi Kotsatos. The appellant claimed that because Kostastos was “psychologically crippled by the prospect of serving on a jury,” according to her own testimony, that the trial court abused its discretion. The court determined, however, that because the appellant failed to object to Kotsatos’s jury service during the initial trial, that the appellant did not preserve this point of error.

District Attorney's Conduct and Police Presence

The appellant claimed that, among other things, pretrial publicity along with the trial court's rulings, as well as the police presence denied him a fair trial. The court determined that the appellant did not prove error on any of the claims separately, and thus did not have a convincing argument that the “harms” together created a “cumulative harm.”

Introduction of matters outside the record

The appellant claimed that the prosecutor interjected “impermissible evidence and argument into the trial court proceedings.” The court determined that because the appellant did not “provide[] specific record references to the relevant argument, evidence, and rulings from the trial proceedings.” Ultimately, the court determined that appellant did not show that the State “interjected information

outside the record” and denied appellant's points of error regarding this issue.

Voir dire

After reviewing the appellant’s fourteen points of error regarding voir dire, the court noted that “to demonstrate reversible error, appellant must show that the trial court erroneously denied his challenges for cause to at least three of the eleven prospective jurors at issue.” The court reasoned that appellant failed to show that the trial court erred in denying his challenges for cause in such a manner that would satisfy his burden.

Motion to include life without parole

The appellant complained that his rights under the “Sixth, Eighth, and Fourteenth Amendments” were violated by the trial court. The appellant argued that the trial court should not have denied his motion to waive his right to parole as a sentencing option. The appellant argued that he should have been allowed to waive his right to parole under the previous punishment scheme, and to have the benefit of trial under Article 37.0711, and the jury instruction as to the resulting life without parole sentence. The appellant claimed that he needed the instruction because individuals expressed concerns to “local media that appellant could be released on parole if he received a life sentence.” Upon consideration, the court reasoned that the current punishment scheme did not “by its own terms . . . apply to an offense” that occurred in 1990. Ultimately, the court found that the trial court was correct in refusing to apply the current punishment scheme to the appellant’s offense.

Future Dangerousness

On the issue of future dangerousness, the court determined that the appellant’s claim as to whether the jury should have received the benefit of research suggesting “how prison society actually functions,” and that appellant statistically is “almost no threat at all” to be unconvincing. The court did not find the appellant’s argument that “capital juries cannot accurately predict a defendant's future dangerousness” to be persuasive. Furthermore, the court noted that no evidence existed to show that the appellant had raised these claims at

the trial court; thus, the court found his claim to be inadequately briefed, and overruled his point of error regarding the future dangerousness special issue.

JUDGE ALCALA, concurring.

Judge Alcala wrote separately to address the possibility of the legislature adopting a provision to address the inequity of the current punishment and sentencing scheme when compared to the punishment of defendants convicted under the Tex. Code. Crim. Proc. art. 37.0711. Judge Alcala agreed with the appellant that defendants sentenced under the current provision set forth in Tex. Code. Crim. Proc. art 37.071 received the benefit of a jury instruction as to the current scheme's death or life with no possibility of parole options, as well as the actual benefits that might occur as to the jury feeling less confined by the sentencing options. Appellant argued that the jury might feel that its "only alternative to a death sentence was a life sentence with the possibility of parole," which might make it more likely that the jury would answer the question affirmatively as to the death sentence. Although Judge Alcala agreed that an inequity existed, because the sentencing scheme applicable to the appellant did not provide for this option, Judge Alcala agreed with the majority, but urged the legislature to consider adopting a "legislative enactment applicable to a defendant convicted of capital murder for an offense occurring before September 1, 1991, who intentionally, knowingly, and voluntarily waives his right to the possibility of a sentence of life with parole," that would include a jury instruction similar to the instruction under art. 37.071.

JUDGE HERVEY, joined by JUDGE KEASLER and JUDGE NEWELL, concurring.

Judge Hervey wrote separately to address Judge Alcala's suggestion for the legislature to include a provision allowing the possibility of life without parole. Judge Hervey noted that Judge Alcala's suggestion "ignore[d] the fact that equity includes the right of the State of Texas to decide to seek the death penalty in the first place, and the right of the jurors to make an ultimate decision based on all the facts and their right to perform their duties based on the law provided by the Legislature at the time they carry out that heavy burden."

Furthermore, Judge Hervey noted that such a provision would potentially violate ex post facto laws.

Griffin v. State

NO. 10-05176-CRF-361

Case Summary written by Frederick C. Hutterer, Staff Member.

JUDGE JOHNSON delivered the opinion of the court, in which JUDGE KEASLER, JUDGE HERVEY, JUDGE ALCALA, JUDGE RICHARDSON, AND JUDGE NEWELL joined. JUDGE YEARY filed a dissenting opinion, in which PRESIDING JUDGE KELLER and JUDGE MEYERS joined.

Griffin was charged with intentionally causing the death of Jennifer Hailey while attempting to kidnap her son on September 19, 2010. In June of 2012, a jury convicted Griffin of the capital murder of Hailey. The trial judge sentenced him to death.

Griffin argued that the evidence was not sufficient to establish that he murdered Hailey in order to facilitate a kidnapping. Griffin also asserted that he murdered Hailey before he did anything to her son, who he harmed to prevent the discovery of Hailey's murder.

Issue: Whether the evidence was sufficient to establish that Griffin murdered Hailey in the course of kidnapping her son.

The Texas Court of Criminal Appeals held that the evidence did not support the trial court's finding that Griffin was guilty of capital murder, remanding the case for a reformation of judgment pursuant to a murder conviction and for a new punishment trial.

The court reasoned that Griffin did not physically restrain Hailey's son during the commission of the murder. It was not until the murder was completed that Griffin restricted the boy's movements without consent while substantially interfering with his freedom of movement. Furthermore, Griffin did not exhibit an intent to confine the boy, but rather an intent to kill him in order to eliminate a witness. The record did not reflect an intent to kidnap Hailey's son, and that during the attempt, Griffin murdered her. The court stated that Griffin did not know the boy was in the apartment until after the murder. The court found that the child was assaulted, but not kidnapped because he freely

approached Griffin after the murder, and was not restrained until Griffin commenced his assault.

The Court concluded that because Griffin committed the murder prior to his attack on Hailey's son, and because Griffin did not restrain the boy until his assault, capital murder did not occur. The court asserted that because the evidence was sufficient to find that Griffin murdered Hailey, reformation of the judgment was appropriate.

JUDGE YEARY, in which PRESIDING JUDGE KELLER and JUDGE MEYERS joined, dissenting.

Judge Yeary argued that the statutory language of the Texas Penal Code does not necessarily require that the murder facilitate the predicated offense. Judge Yeary further stated that he would have held that murders do not need to facilitate a predicate offense to be committed in the course of the predicate crime. Lastly, Judge Yeary asserted that there was sufficient evidence for a jury to find that Griffin kidnapped Hailey's son because he restrained him with the intent to abduct while still engaging in the conduct that caused Hailey's death.

In a point of error, Griffin claimed that the trial court violated his Fifth Amendment rights by allowing the prosecutor to introduce his failure to testify into evidence through Griffin's expert witness, who stated that Griffin refused to speak to him about the offense. Judge Yeary asserted that Griffin constructively waived his Fifth Amendment rights by speaking to his expert witness and introducing testimony based upon the interview at trial, permitting the state to offer rebuttal testimony.

Griffin also argued that the jury's finding that he was not mentally retarded was against the great weight of the evidence and manifestly unjust. Judge Yeary stated that because there was significant evidence on both sides of the issue, the court must defer to the fact-finder, which found that Griffin was not mentally retarded.

In another point of error, Griffin claimed that the lower court erred by instructing the jury to consider the circumstances surrounding the offense, which may have militated for or against capital punishment. Griffin argued that this instruction would permit the jury to consider his low mental capacity as militating in favor of the death penalty in violation of his Eighth and Fourteenth Amendment rights. Griffin did not object to this instruction. Judge Yeary concluded that

even if the jury instruction was erroneous, Griffin was not egregiously harmed. The State did not claim that Griffin's low intelligence was an aggravating factor. Judge Yeary found that Griffin was not egregiously harmed by the jury instruction because did not permit the jury to find this special issue in the negative while finding that Griffin was mentally retarded but also believing that his mental retardation militated in favor of capital punishment.

Ex Parte Cox

WR-42,794-05

Case Summary written by Katherine Mendiola, Staff Member.

JUDGE JOHNSON delivered the opinion of the court.

This case dealt with the third review of a defendant's plea bargain in which he pled guilty to one count of possession of a controlled substance and no contest to the second count of possession with intent to manufacture a controlled substance. The defendant was found guilty on both counts and subsequently appealed. Initially, the court remanded the case for a determination of the validity of the second count, intent to manufacture, which was found invalid. However, on second remand, the trial court held that the plea bargain was not a package, therefore, the conviction should stand. The question before the court was to determine if the plea bargain was in fact a package deal and as such, if one part of the plea bargain is not fulfilled, the entire plea bargain is unenforceable.

The court acknowledged that multiple counts can be brought under a single plea bargain, but in accordance with contract laws and as such if a plea bargain is based on a false premise, then the promise is not kept, and the plea is considered involuntary and "the parties must be returned to their original positions." The court held in the instant case that because "the negotiated consideration by the state was the waiver by applicant of a constitutional right in one count for the reduction of the sentence by the state in a different, invalid count, we hold the plea agreement to be a 'package deal'; a reduced punishment range for Count II was the consideration offered by the state to induce the promise of applicant to waive his right to a jury trial in Count I." Therefore, he did not knowingly and intelligently waive his rights and

the conviction could not stand. The case was remanded to the trial court for resentencing.

JUDGE KELLER, concurring.

Judge Keller agreed that the defendant's plea was a package deal but wrote separately to address the possible remedies that should occur as a result of an invalidated plea bargain. First, if the plea was involuntary, the entire plea should be set aside. Second, if the plea was voluntary but one part of the plea bargain was held invalid, the State is then entitled to undo the plea bargain. Although he agreed the plea was involuntary, he differed on the reason as to why it was involuntary.

Reeder v. State

No. PD-0601-14

Case Summary written by Pedro Leyva, Staff Member.

JUDGE HERVEY delivered the opinion of the unanimous court.

The appellant, Reeder, over his objection, was required to submit a blood specimen after hitting a tree pursuant to §724.012(b)(3)(B) of the Texas Transportation Code. The appellant was charged with a felony DWI because he had twice previously been convicted of DWI. The appellant filed a motion to suppress, which was denied by the trial judge.

The appellant appealed, arguing that his conviction should be reversed given the U.S. Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). The court of appeals ultimately found §724.012(b) was unconstitutional as applied to the appellant. The State Prosecuting Attorney then filed a petition for discretionary review arguing that the blood-draw in this case did not violate the Fourth Amendment regardless of the Supreme Court's ruling in *McNeely*.

The Court of Criminal Appeals following its decision in *State v. Villarreal*, No. PD-0306-14, 2014 WL 6734178 (Tex. Crim. App. Nov. 26, 2014), resolved the issue against the State, thereby affirming the judgment of the court of appeals.

Ex parte Robbins

No. WR-73,484-02

Case Summary written by Andy Linn, Staff Member.

PER CURIAM.

In 1999, a jury found Neal Hampton Robbins guilty of capital murder of his girlfriend's seventeen-month-old daughter. He was convicted and sentenced to life in prison. Robbins moved for a new trial, contending that the evidence was factually and legally insufficient to establish that the child's death was a homicide, but the trial court denied his motion. On direct appeal, the court affirmed as to both the judgment and sentence.

At trial, the State's expert witness, Dr. Patricia Moore, who performed the autopsy of the child, testified that the child's cause of death was homicide. But, in May 2007, Dr. Moore changed her opinion as to the cause of death. In a letter to the District Attorney, she stated that since the time of trial, she had gained more experience, and that upon review of her autopsy report and the case file, she felt that the cause and manner of death was undetermined, rather than homicide.

In 2011, Robbins filed his initial writ of habeas corpus, alleging actual innocence based on new scientific evidence not available at the time of trial and due process claims for the use of false testimony. The court denied Robbins's application.

In 2013, Robbins filed a second application for habeas relief on the same grounds. The only difference in the two applications was the enactment of article 11.073 of the Texas Code of Criminal Procedure. Based on enactment of this article, Robbins argued that he was entitled to relief because scientific evidence not available at the time of trial contradicted the scientific evidence relied on by the State at trial. The trial court recommended that relief be granted, and this court ordered that the application be filed and set for submission.

Article 11.073 provides a basis for habeas relief if the applicant can show by a preponderance of the evidence that he would not have been convicted if the newly available scientific evidence had been presented at trial. Robbins showed that Moore's opinion after re-evaluation contradicted her testimony at trial that the cause of the child's death was a homicide. The State repeatedly emphasized Moore's

testimony at trial that this was a homicide. Therefore, the court held that article 11.073 applied to this evidence.

The method used by Moore on which the scientific evidence was based had not changed between the time of trial and Robbins's second application, which article 11.073 requires the court to consider. But, the article also required the court to consider whether the scientific knowledge had changed. Thus, the court considered whether "scientific knowledge" applies to the knowledge of an individual. Citing *Daubert*, the court found that Moore's opinion at trial "was admissible scientific evidence, based on inferences derived from the scientific method," although another expert opined that the autopsy did not support her original conclusion. The court also stated that Moore's new opinion on the cause of death was "also an inference or assertion supported by appropriate validation based on the scientific evidence." Moore's new opinion thus satisfied the requirements to be called "scientific knowledge," and fell within the language of article 11.073. Moore's opinion, that the cause of death was undetermined, was not available at trial because her scientific knowledge changed since that time.

Moore's trial testimony was the only evidence that conclusively stated that the child's cause of death was a homicide. The State repeatedly emphasized this testimony when arguing that the cause of death was a homicide. Thus, the court found on the preponderance of the evidence that, if the new scientific evidence had been presented at trial, Robbins would not have been convicted. For these reasons, the court granted Robbins's request for habeas relief.

Subsequently, the State filed a motion for rehearing. The court granted that motion in May 2015. But, after considering the merits, the court concluded that the motion was improvidently granted. Thus, in January 2016, the court denied the motion for rehearing, thereby affirming the original majority opinion. The court ruled that no further motions be entertained.

JUDGE ALCALA, concurring.

Judge Alcala joined in the court's order because it granted relief to Robbins, which she believed to be long overdue and that the conviction was wrongful as there was no competent evidence that a murder even occurred. Additionally, Judge Alcala wrote to emphasize the difficulty that some must encounter in order to obtain relief from wrongful

convictions; and, to express disapproval and concern with the court's "judicial mistakes" in this case.

JUDGE RICHARDSON, concurring.

Judge Richardson agreed that Robbins deserved a new trial due to Dr. Moore's change of opinion on the cause of death. But he did not agree that resurrecting the majority opinion of 2014 was the best way to do so. Rather, Judge Richardson believed Robbins was entitled to relief based on the 2015 amendment to article 11.073. Further, he did not agree that rehearing was improvidently granted. Nor did he agree that "scientific knowledge or method on which the relevant scientific evidence is based" refers to a testifying expert's particular knowledge or method, but that it refers to general science.

JUDGE NEWELL, concurring.

Judge Newell agreed that the applicant was entitled to a new trial and wrote his concurring opinion to explain his reasoning for voting against granting rehearing.

JUDGE MEYERS, dissenting.

Judge Meyers disagreed that the State's motion for rehearing was improvidently granted. He believed that analysis of writs of habeas corpus must be based on constitutional criteria, and that article 11.073 does not provide for relief based on any such constitutional criteria.