

Supreme Court of Texas
March 18

Kachel v. State

No. PD-1649-13

Case Summary written by Carter Bowers, Staff Member.

Judge Keasler delivered the Court's opinion, joined by Presiding Judge Keller and Judges Meyers, Hervey, Alcala, and Yeary. Judge Richardson filed an opinion concurring in part and dissenting in part, joined by Judge Johnson. Judge Newell concurred.

Donnie Kachel was arrested for indecency with a child by exposure. On the evening of his arrest, a mother and daughter returned to their home. As they entered the house, the daughter noticed a nude man in the street and pointed it out to her mother. The mother observed that the man's behavior was strange, as if he were on drugs. She called a relative and 911 for help, but was still afraid of the man outside. The mother testified that when she looked through the blinds to see where he was, he thrust his pelvis and fondled himself. The relative arrived and the man left the scene.

A police officer noticed a car at a nearby truck stop that matched the description of the offender's truck. As the officer approached, he witnessed Kachel in the driver's seat attempting to clothe himself. Kachel initially told the officer that he had stopped behind the truck stop to change clothes after work and that he had not been near the scene of the crime. He then changed his story to say that he actually was going to go to a friend's apartment on the same street as the one where the crime took place. Kachel subsequently changed his story again, saying that he decided to change out of his work clothes on the street in question—unaware of better nearby locations.

After he was arrested, Kachel admitted to drinking alcohol and smoking methamphetamine before heading to his friend's apartment. He also claimed that while he was changing in the street, he saw a woman arrive at a house, and he decided to flee because he was wearing only thong underwear. He denied seeing anyone other than the woman, and also denied being fully naked, thrusting, or fondling himself.

At trial, Kachel did not offer any evidence, but did seek an instruction to the jury for the lesser-included offense of indecent exposure. The trial judge denied this request on the basis of no evidence because Kachel had initially denied any exposure had occurred. The jury convicted Kachel for indecency with a child by exposure, and he received sixty years imprisonment because of two prior felony convictions. The court of appeals affirmed.

Issue: Whether the trial court erred by denying Kachel's request for a jury instruction on the lesser-included offense of indecent exposure at his trial for indecency with a child by exposure.

The Court applied a two-step test to determine whether Kachel was entitled

to a lesser-included offense instruction: (1) Whether the offense in the requested instruction is actually a lesser-included offense of the charged crime, and (2) if so, whether the admitted evidence supports the instruction. The Court affirmatively answered the first prong of the analysis because the only difference between the charged crime and the crime requested for instruction was the element of knowledge of a child's presence. Thus, indecent exposure certainly is a lesser-included offense of indecency with a child by exposure.

To answer the second prong, the Court must find at least some evidence—anything more than a scintilla—put forward by the defendant in order to substantiate the requested lesser-included offense instruction. In denying the requested instruction, the trial court ruled that Kachel had not put forth any evidence in support of the lesser-included offense, relying primarily on his initial denial of even being near the scene of the crime. The State argued in favor of upholding the trial and appellate courts by citing case law, which stood for the proposition that a defendant who flatly denies involvement in a crime cannot later seek a lesser-included offense instruction. The Court of Criminal Appeals distinguished this case law because, although Kachel initially denied any possible involvement, he later proffered multiple accounts, which did place him at the scene of the crime and even suggested that he had *only* seen an adult woman at the scene while he was there. Thus, Kachel had supported his requested lesser-included offense with some evidence, a reasonable jury could have reached multiple conclusions about the charged offense based on this evidence, and the trial court erred in denying Kachel's requested instruction. The Court remanded the case to the appellate court to conduct a harm analysis.

Judge Richardson, concurring in part and dissenting in part, joined by Judge Johnson

Judge Richardson concurred in the Court's decision that Kachel was entitled to a lesser-included offense instruction, but dissented with regard to the Court's decision to remand the case to the court of appeals for a harmful error analysis. While the failure to submit a lesser-included offense instruction is not *per se* harmful, there is a strong presumption of harm when the defendant is entitled to such an instruction and the trial court's denial of the request gives the jury only the choices of convicting of a greater offense or acquitting the defendant (as was the situation in this case). According to Judge Richardson, implicit in the Court's holding is that the trial court's error *was* harmful to Kachel, and the remand was simply a waste of judicial efficiency and resources.

State v. Heilman

No. PD-1591-13

Case Summary written by C.J. Baker, Staff Member

Justice Keasler delivered the opinion of the Court, in which Presiding Justice Keller and Justices Hervey, Richardson, Yeary, and Newell joined. Justice Newell filed a

concurring opinion in which Justices Keller and Hervey joined. Justices Meyers, Johnson, and Justice Alacala each filed dissenting opinions.

Background: In October 2008, Eric Heilman, while working as a police officer in Beaumont, participated in a failed drug investigation. Significant cash and drugs were seized but Heilman's reporting of the incident was later called into question. A grand jury investigation of Heilman began which resulted in a plea agreement. Heilman pleaded guilty to a misdemeanor offense and the government agreed not to pursue certain felony charges or oppose early termination of Heilman's deferred adjudication. Because the statute of limitations had passed for the misdemeanor offense, a condition of the agreement was that Heilman would waive his statute of limitations defense. The plea was accepted and the prosecutor did not oppose the early termination of Heilman's sentence. However, when Heilman's conviction prevented him from procuring a peace officer's license, he brought a habeas challenge to his conviction asserting that his "pure-law" limitations defense is an absolute right that cannot be waived.

Issue: Can a "pure-law" statute-of-limitations defense be waived as part of a plea agreement?

Holding: Under *Marin v. State*, there are three types of litigant rights: (1) absolute rights, (2) rights that can be expressly waived, and (3) rights that must be demanded by the defendant. Previously, in *Phillips v. State*, the Court of Criminal Appeals held that "pure-law" limitations defenses—those limitations defenses that appear on the face of the charge—are category one rights. *Phillips* concluded that entering conviction on a time-barred offense would violate the *Ex Post Facto* Clause because it essentially allows the government to reverse course after the defendant can fairly say that he is free from the possibility of prosecution. But *Phillips* rested on the assumption that the *Ex Post Facto* Clause applies to actions by the judicial—rather than legislative—action. Intervening United States Supreme Court decisions made clear that the relaxing a statute of limitations only violates the *Ex Post Facto* Clause when the government can choose to pursue the time-barred offense "at will." Because that is not the case in the plea agreement context, the statute-of-limitations defense is not absolute. Additionally, the *Ex Post Facto* Clause is directed at the legislative branch. While the courts must be careful not to unlawfully enlarge a statute's application, that restriction is rooted in the due process requirement of adequate notice and is not applicable to this context. The Court of Criminal Appeals accordingly overruled *Phillips v. State*.