April 12, 2011 SDR

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[2]TCDLA
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Please do not rely solely on the summaries below. Each case name links to the full text of the opinion, which we recommend you read in addition to these brief synopses. The SDR is sent to current TCDLA members.

Editors: [3]Tim Crooks, [4]Kathleen Nacozy, Chris Cheatham

FIFTH CIRCUIT

[5]Hunter v. Tamez, 622 F.3d 427 (5th Cir. 2010). District court did not err in denying defendant's habeas petition, filed pursuant to 28 U.S.C. § 2241, challenging the Federal Bureau of Prisons' (BOP's) failure to grant him (by means of a *nuncprotunc* designation) credit against his federal sentence for time spent in Texas state custody for unrelated state convictions; although defendant argued that the BOP's failure to give effect to the state court's direction that the state sentence run concurrently with the federal sentence, violated principles of federalism and comity, that argument was foreclosed by *Leal v. Tombone*, 341 F.3d 427, 428-30 & nn.13 & 19 (5th Cir. 2003). Nor were there separation of powers problems; in the absence of specific direction from the federal sentencing judge, the federal sentence was presumed to be consecutive; the request for a *nuncprotunc* designation, so as to make the federal sentence effectively concurrent, was thus equivalent to a request for clemency or commutation of sentence, which are traditionally prerogatives of the Executive Branch. Finally, the Fifth Circuit denied relief on defendant's claim that the frustration of the parties' understanding about his sentences running concurrently rendered his state plea involuntary; while possibly true, that claim was not cognizable here, because defendant was no longer "in custody" on the state conviction.

[6]United States v. Flores-Gallo, 625 F.3d 819 (5th Cir. 2010). District court did not err in applying a 16-level "crime of violence" enhancement under USSG § 2L1.2(b)(1)(A)(ii); defendant's prior Kansas state conviction for aggravated battery, in violation of Kan. Stat. Ann. § 21-3414(a)(1)(B), was one for a qualifying "crime of violence," because the offense has as an element at least the threatened use of physical force.

[7]United States v. Jefferson, 623 F.3d 227 (5th Cir. 2010).

(1) COA had jurisdiction, pursuant to 18 U.S.C. § 3731, over the government's interlocutory appeal of the district court's order ruling inadmissible proof of defendant's prior convictions for bribery and obstruction of justice; the district court erred in concluding that § 3731 permits an interlocutory appeal only

when the excluded evidence relates to an element of the charged offense; § 3731 contains no such limitation and instructs courts to liberally construe the statute to effectuate its purpose; moreover, the statute itself limits such appeals to evidence that is "substantial proof of a fact material in the proceeding," not evidentiary rulings concerning matters that involve elements of the charged offense; finally, under the statute, this evaluation is to be made ***by the United States Attorney***, not by the district court; indeed, once the government files a timely appeal under § 3731 and the United States Attorney makes the required certification, COA cannot evaluate the materiality of the excluded evidence to decide whether or not to hear the appeal; because COA did acquire jurisdiction upon filing of the government's notice of appeal, the district court was divested of jurisdiction to take further action in the case; accordingly, the Fifth Circuit vacated all orders issued by the district court following the filing of the notice of appeal.

(2) On the merits, district court erred, in RICO conspiracy trial, in excluding evidence of defendant's prior convictions for bribery and obstruction of justice for purposes of impeaching the defendant's testimony; these offenses were ones involving dishonesty or false statement, and thus were proper fodder for impeachment pursuant to Fed. R. Evid. 609(a)(2). Moreover, the court had no discretion to exclude these convictions because Rule 609(a)(2) required their admission. Accordingly, the Fifth Circuit vacated the district court's order prohibiting impeachment with these convictions.

[8]Arriaza Gonzalez v. Thaler, 623 F.3d 222 (5th Cir. 2010). The Supreme Court's decision in *Lawrence v. Florida*, 549 U.S. 327 (2007), did not overrule *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003); thus, defendant's Texas state conviction became "final" for AEDPA purposes when the time for seeking discretionary review from CCA expired (August 11, 2006), not when the Texas appellate court issued its mandate (September 26, 2006). Accordingly, defendant's federal habeas petition was untimely under the AEDPA. **The Fifth Circuit noted, but rejected as unpersuasive, the contrary decision of the Eighth Circuit in*Riddle v. Kemna*, 523 F.3d 850, 855-56 (8th Cir. 2008) (en banc).**

[9]United States v. Schmidt, 623 F.3d 257 (5th Cir. 2010). Defendant's prior federal conviction for theft of a firearm from a licensed gun dealer, in violation of 18 U.S.C. § 922(u), was one for a "violent felony" within the meaning of 18 U.S.C. § 924(e)(2)(B) of the Armed Career Criminal Act ("ACCA"); therefore, district court did not err in enhancing defendant's sentence under the ACCA.

[10]United States v. Gomez, 623 F.3d 265 (5th Cir. 2010). District court did not err in denying defendant's motion to suppress because the decision to stop defendant's vehicle was supported by reasonable suspicion. Even if the tip on which the stop decision was based (that the defendant had a pistol) is considered an "anonymous" tip (which, the Fifth Circuit said, was doubtful under the circumstances), the officers still had reasonable suspicion under the 4-factor test set in *United States v. Martinez*, 486 F.3d 855 (5th Cir. 2007).

COURT OF CRIMINAL APPEALS

State's PDR from Bexar County

[11]State v. Rodriguez, __S.W.3d__ (Tex.Crim.App. No. 04-07-00436-CR, 4/6/11)

Affirmed: Cochran (8-0); [12]Price concurred w/Keller

Roman Rodriguez was charged with recklessly discharging a firearm. CCA granted the State's petition to review whether COA correctly held that the information was defective because it failed to apprise defendant of "the circumstances that indicate [Rodriguez] pulled the trigger of a loaded firearm in a reckless manner." The issue is not "how" did defendant discharge a firearm (by pulling the trigger), but how did he act "recklessly" in discharging the firearm. When it is alleged that the accused acted recklessly, Tex. Code Crim. Proc. art. 21.15 requires additional language in the charging instrument. This language must set out "the act or acts relied upon to constitute recklessness[.]" But, as CCA noted in its unanimous decision in *Smith v. State*

, 309 S.W.3d 10 (Tex.Crim.App. 2010), there is some conceptual difficulty about the specific terms used in Article 21.15.

The language of Article 21.15 assumes that the culpable mental state of recklessness can be "constituted" by some "act." However, the definition of "act," added in 1974, made this a "conceptual impossibility." In *Smith*, CCA explained that, because of the "conceptual impossibility, "the "act or acts constituting recklessness" under Article 21.15 are really those "circumstances" surrounding the criminal act from which the trier of fact may infer that the accused acted with the required recklessness. Therefore, CCA agrees that the State failed to allege with reasonable certainty the act or circumstance which indicated Rodriguez discharged the firearm in a reckless manner.

State's PDR from Lubbock County

[13]Hereford v. State, __S.W.3d__ (Tex.Crim.App. No. PD-0144-10, 4/6/11)

Affirmed: Womack (7-1)

Appellant was arrested for misdemeanor traffic warrants. After officers placed appellant in the back of the police car, they noticed he was hiding something in his mouth that they assumed was cocaine, which they were able to remove after repeated use of Tasers on his groin area and with the assistance of medical personnel. Appellant was charged with and convicted of possession of a controlled substance with intent to deliver: cocaine. Appellant filed a motion to suppress the evidence based on his claims that the officers lacked probable cause to arrest him and used unreasonable force to recover the drugs.

Emphasizing that neither this opinion, nor that of COA should be construed to imply that the use of a Taser is per se unreasonable, CCA holds that the circumstances presented by this case show an excessive use of force that violated the Fourth Amendment prohibition against unreasonable seizures. Officer Arp deliberately chose to administer numerous electrical shocks to an area of appellant's body chosen by him because of its exceptional sensitivity, long after the initial arrest was made, when there admittedly was no ongoing attempt by appellant to destroy the evidence, little concern about a drug overdose, and while appellant was restrained in handcuffs behind his back. The unreasonableness of this behavior is shown by comparison with the decisions made by his fellow officers, who stopped using the Taser when its use failed to effect compliance. While those officers could have chosen to continue to shock appellant in order to recover the crack, they chose to pursue other methods. Officer Arp should have done the same.

State's PDR from El Paso County

[14]State v. Elias, __S.W.3d__ (Tex.Crim.App. No. PD-0735-10, 4/6/11)

Vacated, remanded: Womack (6-2); [15]Keller concurred

In this felony prosecution for possession of marijuana, the State appealed from the trial court's grant of appellee's motion to suppress evidence that appellee contended was obtained as a result of an illegal traffic stop. COA affirmed the court's ruling in an unpublished opinion, holding that appellee's initial detention was not justified by specific articulable facts to show that a traffic violation occurred, and that the search could not be otherwise justified by the fact that, after the initial stop, appellee was found to have an outstanding arrest warrant that might give rise to a valid search incident to arrest because by the time the search of the vehicle was conducted, appellee had been secured in the back of a squad car. CCA granted the State's PDR to examine both holdings.

CCA holds that COA erred in two respects in its disposition of the State's appeal. First, it erred to affirm the trial court's grant of appellee's suppression motion on the basis that the initial detention was illegal

without first remanding the cause to the trial court for specific findings of fact with respect to whether the appellee failed to signal his intention to turn within a hundred feet of the intersection. Second, it also erred to affirm the trial court's grant of appellee's suppression motion without first addressing the State's alternative argument that the arrest warrants attenuated the taint of any initial illegality, and that the K-9 sniff provided probable cause to justify the warrantless search of the van under the automobile exception. In the event that COA, on remand, rules in the State's favor with respect to the second issue, it should reverse the trial court's ruling on the suppression motion and remand the cause for trial. But if COA rules in appellee's favor with respect to the second issue, it should then remand the cause to the trial court for specific findings of fact and a ruling of law as to the first issue, *viz*: whether the initial detention was justified by at least a reasonable suspicion that appellee failed to signal his intention of turning within a hundred feet of the intersection.

Appellee's PDR from Wichita County

[16]State v. Woodard, __S.W.3d__ (Tex.Crim.App. No. PD-0828-10, 4/6/11)

Affirmed: Keasler (6-2); [17]Keller dissented w/Meyers

Appellee drove his car off the road into a ditch and then abandoned it by walking away. Appellee filed a pretrial motion to suppress, claiming that his warrantless arrest for DWI, about a quarter of a mile from the accident, was unlawful. COA correctly held that the initial interaction on the sidewalk between appellee and officer, which began with officer asking appellee if he had been involved in a reported accident, was a consensual encounter. Further, CCA concludes that the encounter, which eventually escalated into appellee's arrest for DWI, was supported by probable cause.

Application for Writ of Habeas Corpus from Jackson County

Ex parte Ramey__S.W.3d__ (Tex.Crim.App. No. WR-74,986-01, 4/6/11)

Filed & set: (5-3); [18]Keasler dissented w/Keller, Hervey

CCA votes to file and set this case to decide how or whether CCA's opinion in *Coble v. State*, 330 S.W.3d 253 (2010), impacts Ramey's claim that the trial judge erred to admit an expert witness' future-dangerousness testimony because it violated the federal Eighth Amendment and Due Process Clause. Dissent argues that Ramey's claim was rejected in *Barefoot v. Estelle*, 463 U.S. 880 (1983), and the law has not since changed.

Appellant's PDR Granted from Taylor County

10-1356 ? Jeffrey Dee Steadman ? Aggravated Sexual Assault; Indecency w/Child

COA erred when it held that the trial court's findings were sufficient to meet the Walker test.

PDRs Granted from Upshur County

11-0119 ? Katherine Clinton ? Debit Card Abuse

State's: Are the terms "present and "use" mutually exclusive, barring any overlap in meaning in the debit card abuse statute?

Appellant's: 1. Does COA have the authority to reform a trial court's judgment to reflect a conviction for a lesser included offense when the trial court's jury charge did not include an instruction for the lesser included offense and the request by appellant for the inclusion of the lesser included offense instruction was

not properly preserved?

2. Should COA have authority to reform a judgment to reflect a conviction for a lesser included offense when the instruction was not included in the trial court's jury charge under any circumstances?

For a list of issues pending before the court, click [19]here.

COURT OF APPEALS

Summaries are by Chris Cheatham of Cheatham Law Firm, Dallas, Texas.

[20]Thomas v. State, No. 01-08-00902-CR, 2010 WL 4925846 (Tex.App.-Houston [1 Dist] Nov. 30, 2010). Officer's statement to D during traffic stop, to the effect that officer was going to take D's refusal to answer as a refusal to consent to breath test, did not render D's consent to breath test involuntary. Officer, after repeatedly asking D whether he was willing to consent to a breath test and failing to get a clear answer, stated to D that he was going to take D's refusal to answer as a refusal to consent. Said statement did not impose the level of psychological pressure necessary to render D's consent involuntary.

[21]Overshown v. State, 329 S.W.3d 201 (Tex.App.-Houston [14 Dist] Dec. 2, 2010). "[A] traffic stop made for the purpose of issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."

[22]Flores v. State, No. 13-09-00413-CR, 2010 WL 4901408 (Tex.App.-Corpus Christi Dec. 2, 2010). Even though D sustained head lacerations in car accident, D's post-accident behavior (e.g., unsteady gait) was attributed to intoxication so as to provide sufficient evidence that D was intoxicated at the time of the accident. "Each officer testified that he believed [D] was intoxicated. Each based his opinion on one or more of the following: (1) the smell of alcohol on [D's] breath; (2) the smell of alcohol emanating from his vehicle; (3) [D's] non-compliance, his red, bloodshot eyes, his slurred, loud speech, and his unsteady gait and balance; (4) the results of his field sobriety tests; and (5) the results of the portable breath test?. When [officer] and [D] arrived at the Cameron County Jail, the medic advised [officer] that, because of the lacerations, the bleeding, and the dried blood, the jail personnel would not accept [D] until he received a medical clearance. According to [officer], this decision had nothing to do with a head injury."

[23]Alford v. State, No. 02-09-00246-CR, 2010 WL 4924991 (Tex.App.-Fort Worth Dec. 2, 2010). Although D was in custody when officer held up a flash-drive and asked D what it was and if it belonged to D, the question was deemed an administrative booking question rather than a custodial interrogation. The court likened the flash-drive inquiry to cases holding that officer's asking arrestee for his name, address, name of spouse, and like information, deemed "routine booking questions."

[24]Woodruff v. State, No. 06-09-00086-CR, 2010 WL 4909597 (Tex.App.-Texarkana Dec. 3, 2010). A defendant's age and whether or not he engages in arguments with investigators deemed relevant factors in determining whether a non-custodial or post-Miranda statement is made voluntarily. Here, D "was a nineteen-year-old college student and did not appear to be unduly intimidated during the interview. In fact, [D] argued with the investigators on a number of occasions."

Prosecutors, by instructing sheriff's office to record D's phone communications with his attorneys and provide prosecutors with copies of recordings, did not prejudice D in manner as to require dismissal of indictment; recordings supposedly did not provide State with useful information and district attorney's office recused itself, letting State's Attorney General's Office prosecute. "The State does not challenge the trial court's conclusion that [D's] Sixth Amendment right to counsel was violated?. In our review of the record, we have reviewed the telephone calls recorded by the Hunt County Sheriff's Office at the request of the Hunt County District Attorney's Office?. Approximately fifty-four of the calls were made to [D's] defense counsel

or his office staff?. Our review failed to discover any privileged information of even the most marginal value to the State. Although not for lack of trying, the Hunt County District Attorney's Office failed to discover anything of value when it violated [D's] constitutional rights."

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