November 2011 SDR - Voice for the Defense Vol. 40, No. 9

[1]SDR
[2]TCDLA
Tuesday, November 22nd, 2011

Voice for the Defense Volume 40, No. 9 Edition

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

Supreme Court

***Bullcoming v. New Mexico*,131 S. Ct. 2705 (U.S. 2011); Reversed, remanded (5?4)**

Bullcoming was sentenced to two years in prison for felony aggravated DWI/DUI. The State introduced a blood draw taken from him under a search warrant issued following his refusal of the breath alcohol test. Bullcoming argued that the laboratory report of his blood draw results was testimonial evidence subject to the Confrontation Clause. COA affirmed the conviction and upheld the trial court?s ruling that the forensic report was a business record. The court ruled that a blood alcohol report is admissible as a public record and that it presented no issue under the Confrontation Clause because the report was non-testimonial. While the case was pending in the New Mexico Supreme Court, *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (U.S. 2009), clarified that forensic laboratory reports are testimonial and therefore the Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits. In applying *Melendez-Diaz*, the New Mexico Supreme Court held that the blood alcohol report was testimonial evidence but that was admissible even though the forensic analyst who performed the test did not testify.

HELD: A blood-alcohol test admitted without the testimony of the person who prepared the results can violate a criminal defendant?s Sixth Amendment rights under the Confrontation Clause. ?The Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported[.]?

***Bond v. United States*,131 S. Ct. 2355 (U.S. 2011); Reversed, remanded (9?0)**

Bond was found guilty of trying to poison her husband?s mistress, Haynes, with toxic chemicals at least 24 times. A grand jury charged Bond with two counts of possessing and using a chemical weapon, in violation of a criminal statute implementing the treaty obligations of the United States under the 1993 Chemical Weapons Convention. Bond?s attorneys argue that the statute was intended to deal with rogue states and terrorists, and that their client should have been prosecuted under state law instead. Bond, a laboratory technician, stole the chemicals from the company where she worked. Haynes was not injured.

Haynes had contacted police and postal authorities after finding the chemicals at her home. The Third Circuit held that Bond lacked standing to challenge the constitutionality of the statute under the Tenth Amendment to the U.S. Constitution.

HELD: A defendant who has been convicted under a federal statute has standing to challenge the conviction on grounds that the statute is beyond the federal government?s enumerated powers and inconsistent with the Tenth Amendment. ?Bond has standing to challenge the federal statute on grounds that the measure interferes with the powers reserved to States.?

***Davis v. United States,*131 S. Ct. 2419 (U.S. 2011); Affirmed (6?2)**

While conducting a routine vehicle stop, police arrested petitioner Davis, a passenger, for giving a false name. After handcuffing Davis and securing the scene, officers searched the vehicle and found a gun in his jacket. He was charged and convicted for possession of an illegal weapon. Following a jury trial, Davis was convicted and sentenced to 220 months in prison. But the Eleventh Circuit found that while the search was illegal under *Arizona v. Gant,* 556 U.S. 332 (2009), the evidence found in the vehicle was still admissible.

HELD: The good-faith exception to the exclusionary rule applies to a search that was authorized by precedent at the time of the search but is subsequently ruled unconstitutional. ?Searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.? Justice Breyer dissented: ?The Court finds a new ?good faith? exception which prevents application of the normal remedy for a Fourth Amendment violation, namely, suppression of the illegally seized evidence. . . . A new ?good faith? exception and this Court?s retroactivity decisions are incompatible.?

Fifth Circuit

***United States v. Hernandez,*633 F.3d 370 (5th Cir. 2011)**

Defendant?s 97-month sentence?an upward departure from the Guideline range of 51 to 63 months?did not violate the Sixth Amendment as applied. Justice Scalia has continually recognized the possibility that even under an advisory Guideline scheme, a sentence could violate the Sixth Amendment if it could only be upheld as reasonable based on judge-found facts; that argument is, however, foreclosed by Fifth Circuit precedent. Moreover, the Fifth Circuit has repeatedly held that the sentencing court is entitled to find by a preponderance of the evidence all facts relevant to the determination of a sentence below the statutory maximum.

***United States v. Doggins,*633 F.3d 379 (5th Cir. 2011)**

The Fair Sentencing Act of 2010, which lowered the statutory penalties for many crack cocaine offenses, does not apply retroactively to persons sentenced before its enactment date (August 3, 2010), notwithstanding the fact that their cases are still on direct appeal.

***United States v. Caulfield,*634 F.3d 281 (5th Cir. 2011)**

District court did not err in ruling on defendant?s motion to reduce sentence under 18 U.S.C. §?3582(c)(2); particularly, defendant was not entitled to have the court consider only Amendment 706 to the Guidelines, without also considering Amendments 715 and 716, which were designed to correct anomalies in Amendment 706. Even though Amendment 706 was the only amendment in place at the time defendant brought his motion, there was no ex post facto violation in also applying Amendments 715 and 716, because these did not increase the possible punishment from those available at the time the offense was committed. That defendant might have been eligible for a greater discretionary reduction under Amendment 706 standing alone does not give rise to an ex post facto violation.

***United States v. Burrell,*634 F.3d 284 (5th Cir. 2011)**

District court reversibly erred in denying defendant?s motion to dismiss under the Speedy Trial Act (STA), because defendant was not brought to trial within 70 days; particularly, the delay attributable to the alleged unavailability of a witness (a sheriff getting recertified) was not excludable under either 18 U.S.C. §?3161(h)(3) (dealing with the absence or unavailability of an essential witness) or 18 U.S.C. §?3161(h)(7) (the catch-all ?ends of justice? exclusion) because the government failed to present any evidence to explain why the witness? presence could not be obtained through reasonable efforts (for example, by working around the certification or by seeking rescheduling of the certification). The Fifth Circuit reversed defendant?s conviction and sentence and remanded to the district court for dismissal of the indictment with or without prejudice.

***United States v. Jasso,*634 F.3d 305 (5th Cir. 2011)**

Where defendant was subject to a 10-year (120-month) statutory minimum sentence, district court reversibly erred in imposing a 70-month prison sentence; defendant was not eligible for the ?safety valve? of 18 U.S.C. §?3553(f) and USSG §?5C1.2 be-cause he had more than one criminal history point. The greater discretion granted to sentencing courts in *United States v. Booker,* 543 U.S. 220 (2005), did not permit the district court to treat as advisory the Guideline provisions that are preconditions for the application of *statutory*?safety valve? relief under 18 U.S.C. §?3553(f). Because defendant had two criminal history points, the court had no discretion to do anything other than impose a sentence at or above the statutory minimum. The Fifth Circuit vacated defendant?s sentence and remanded for resentencing.

***United States v. Hoang,*636 F.3d 677 (5th Cir. 2011),*on denial of reh?g,*636 F.3d 746 (5th Cir. 3/25/11)**

Agreeing with the Fourth, Sixth, Seventh, and Eleventh circuits but disagreeing with the Eighth and Tenth circuits, the Fifth Circuit held that the registration requirement of the Sex Offender Registration and Notification Act (SORNA) became effective against state-law-registered pre-SORNA sex offenders only on the date the attorney general issued the Interim Rule declaring SORNA retroactive (Feb. 28, 2007), not on the date SORNA was enacted (July 27, 2006). Because defendant traveled in interstate commerce and failed to register in his new jurisdiction after SORNA?s enactment but before the attorney general issued the Interim Rule, SORNA did not apply to him. The Fifth Circuit remanded for dismissal of the indictment.

***United States v. Ortiz-Mendez,*634 F.3d 837 (5th Cir. 2011).**

Agreeing with the Seventh and Tenth circuits but disagreeing with the First, Eighth, and Ninth circuits, the Fifth Circuit held that the offense of marriage fraud under 8 U.S.C. §?1325(c) does not require the government to prove that the defendant did not intend to establish a life together with his or her spouse; rather, the government need only show that the defendant entered into the marriage with the purpose of evading immigration laws. Accordingly, the district court did not abuse its discretion in refusing defendant?s requested instruction on intent (or lack of intent) to establish a life together. Nor did the court abuse its discretion in refusing to instruct the jury not to find defendant guilty of marriage fraud simply because the putative spouse intended to commit marriage fraud; defendant was sufficiently protected from such an imputation of guilt by the requirement that the jury had to find beyond a reasonable doubt that she ?knowingly? entered into the marriage for the purpose of evading immigration laws.

***United States v. Miller,*634 F.3d 841 (5th Cir. 2011)**

(1) Even after *United States v. Booker,* 543 U.S. 220 (2005), supervised release revocation sentences should be reviewed on appeal under a ?plainly unreasonable? standard. Under this standard, the appellate court evaluates whether the district court procedurally erred before the appellate court considers the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard; if the sentence is unreasonable, then the appellate court considers whether the error was obvious under existing law.

(2) Agreeing with the Fourth and Ninth circuits but disagreeing with the Sixth Circuit, the Fifth Circuit held that in modifying or revoking a supervised release term, a district court may not rely upon 18 U.S.C. §?3553(a)(2)(A), which directs a court initially imposing sentence to consider the need for the sen-tence imposed ?to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.? Accordingly, the district court erred by determining that defendant?s supervised release revocation sentence was appropriate due to the ?seriousness of the offense? and defendant?s lack of ?respect for the law.? Despite this mistake, the court?s error was not plainly unreasonable because when the court sentenced defendant, the Fifth Circuit?s law on this question was unclear. The Fifth Circuit affirmed the sentence.

***United States v. Gutierrez,*635 F.3d 148 (5th Cir. 2011)**

In sentencing defendant on his conviction for escape from a halfway house, district court did not reversibly err in varying upward from a Guideline imprisonment range of 15 to 21 months to a sentence of 50 months; the court was not required to consider a departure under USSG §?4A1.3 (for underrepresentation of criminal history) prior to varying upward based on criminal history. Because the sentence was adequately explained, and because the length of the sentence was not unreasonable, the Fifth Circuit affirmed the sentence. Note: This holding seems contrary to USSG §?1B1.1 (Application Instructions), as amended on Nov. 1, 2010, which was not mentioned in this opinion.

***Jones v. Joslin,*635 F.3d 673 (5th Cir. 2011)**

District court did not err in denying defendant?s 28 U.S.C. §?2241 habeas petition, challenging the Federal Bureau of Prisons? (BOP?s) treatment of his federal sentence as consecutive to, rather than concurrent with, a previously imposed state sentence. When a sentencing court makes no mention of a prior state sentence, the federal sentence shall run consecutively to the state sentence. The federal judgment here, although inartfully worded and perhaps even ambiguous, never mentions the state sentence and therefore cannot be deemed to order the federal sentence to run concurrently with the state sentence. If the federal district court wanted to depart from the usual presumption of 18 U.S.C. §?3584(a) (that is, if it wanted the federal sentence to be concurrent), it should have discussed why this departure was justified with reference to the 18 U.S.C. §?3553(a) factors and the specific offenses for which defendant was convicted. Moreover, BOP fully complied with 18 U.S.C. §?3585(b) by crediting defendant with all his days in federal custody that were not credited toward the state sentence.

***United States v. Curtis,*635 F.3d 704 (5th Cir. 2011)**

(1) District court did not err in refusing to suppress text messages uncovered as the result of a warrantless search of defendant?s cell phone. *United States v. Finley,* 477 F.3d 250 (5th Cir. 2007), established that police can search the contents of an arrestee?s cell phone incident to a valid arrest. Even if *Finley* was cast into doubt by *Arizona v. Gant,* 556 U.S. 332 (2009), suppression was not called for because the search was conducted in good faith reliance upon the pre-*Gant* precedent then in effect (*i.e., Finley*), which permitted such a search.

(2) A defendant?s right to presence imposes two requirements on the exercise of peremptory challenges: First, the defendant must be present for the substantial majority of the jury-selection process; second, the defendant must be present when the court gives the exercise of peremptory challenges formal effect by reading into the record the list of jurors who were not struck. Under this rubric, defendant?s right to be present was not violated. He was present during voir dire and when the peremptory challenges were allotted; he was also present at the lunch recess when the defense?s peremptory challenges were submitted and when the challenges were given formal effect via the impaneling of the jury. He was absent only for a short time before the recess, apparently while his counsel was mulling over the peremptories; this did not constitute error, much less plain error (the standard applicable in the absence of an objection).

***United States v. Jacobs*,635 F.3d 778 (5th Cir. 2011)**

Where district court sentenced defendant to 36 months? imprisonment as an upward *variance* from the correct Guideline imprisonment range of 4 to 10 months, appeal of that sentence was barred by the appeal waiver provisions of defendant?s plea agreement, which allowed him to appeal only an upward *departure* not requested by the government. Sentencing departures are distinct from variances. If the parties had intended to allow defendant to appeal any sentence exceeding the high end of the Guideline range, they could have drafted the waiver of appeal to say so. Finding that the waiver barred defendant?s appeal, the Fifth Circuit granted the government?s motion to dismiss the appeal. The Fifth Circuit rejected the seemingly contrary decision in *United States v. Manuel*, 208 Fed. Appx. 713 (11th Cir. 2006) (unpublished).

Court of Criminal Appeals

Direct Appeal

***Leza v. State*,No. 76,157 (Tex.Crim.App. 10/12/11); Affirmed (9?0)**

Appellant was convicted of intentional murder committed in the course of a robbery, and the jury answered the statutory special issues in such a way that the trial court was obliged to assess the death penalty.

HELD: CCA rejected Appellant?s 14 points of error, notably the following. Appellant claimed the trial court erred in failing to suppress his video-recorded oral statement. He argued that admission of the statement violated federal *Miranda* law and state law under Tex. Code Crim. Proc. art. 38.22. While Appellant was not made aware that the interrogation would be outside the scope of his initial traffic violation, was under the influence of heroin, and did not provide the police with an express waiver, the State met its burden of establishing that Appellant waived his *Miranda* rights.

Appellant urged CCA to order a new punishment hearing, arguing that the court erred in failing to grant his request for a mistrial at that stage of trial. Having found that testimony of a prison guard was admitted erroneously, the court instructed the jury in no uncertain terms to disregard it; but Appellant argues that the testimony was so inflammatory that no instruction to disregard it could prove efficacious. The State responds that no instruction to disregard was called for because the testimony was properly admitted; CCA agreed.

Appellant attached two letters that his appellate counsel received from an assistant district attorney, apparently in relation to another case and sent by mistake regarding a sheriff who was charged with aggravated perjury. CCA overruled this point of error without prejudice, so that Appellant may pursue any *Brady* claim that further investigation might turn up.

Writ of Habeas Corpus

***Ex parte Medina*,No. 75,835-01 (Tex.Crim.App. 10/12/11); Remanded (5?4)**

CCA received a document titled ?Application for Writ of Habeas Corpus? in connection with this death-penalty case.

HELD: The document was not in fact an ?application for writ of habeas corpus? under Tex. Code Crim. Proc. art. 11.071 because it only contained a short list of conclusory statements and failed to plead specific facts upon which relief could be granted. Furthermore, counsel waited until the last day possible to file the document. Counsel said he knew what he was doing and thought it was a tactical advantage to proceed as such. ?Under these unique and extraordinary circumstances, involving not habeas counsel?s lack of competence but his misplaced desire to challenge the established law at the peril of his client,? CCA concluded that under Article 11.071 §?4A(a), counsel failed to file a cognizable writ application. Thus, under Section 4A(b)(3), CCA shall appoint new counsel to represent applicant and establish a new date for

the application to be filed in the convicting court. CCA dismissed applicant?s pro se Motion to Amend the Petition for State Habeas Corpus, held his original habeas counsel in contempt of court, and entered an order denying him compensation under Section 2A.

Court?s PDR

***Geick v. State,*No. 1734-10 (Tex.Crim.App. 10/5/11); Affirmed (9?0)**

Appellant was indicted for theft by deception. At trial, the jury charge allowed for a conviction without limiting the manner in which the theft was committed. The jury found Appellant guilty ?as charged in the indictment? and sentenced him to 3 years in prison with a $10,000 fine. COA acquitted Appellant, finding no evidence of deception. CCA refused the State?s PDR, but granted review on its own grounds: Did COA err in requiring the State to prove theft by deception, where deception was alleged in the indictment?

HELD: When the State unnecessarily pleads a statutory definition that narrows the manner and means in which an offense may be committed, that definition is ?the law as authorized by the indictment,? and thus the allegation must be proved beyond a reasonable doubt. Because here the State unnecessarily pled that the theft was by deception but provided no proof of deception, the evidence was insufficient to support a conviction.

State?s PDR

***State v. Davis,*No. 0042-11 (Tex.Crim.App. 10/5/11); Reversed, remanded (9?0)**

Appellee pled guilty to burglary of a habitation with intent to commit aggravated assault and was sentenced to 15 years? imprisonment. He subsequently filed a Motion for Reconsideration or Reduction of Sentence. The trial court granted his motion, without a hearing, and reduced the sentence to 12 years. Three days later, the trial court signed a second judgment reducing his sentence to 12 years. There is no record of an oral pronouncement of the modified sentence in the presence of all the parties. The State appealed, arguing that the trial court?s second judgment was void because the sentence was not pronounced in open court with the parties present. COA affirmed the order reducing Appellee?s sentence.

HELD: While the trial court had authority to set aside the sentence because Appellee?s motion was timely filed and the effect of the order granting that motion was functionally equivalent to granting a new trial on punishment, Appellee was not properly sentenced because he was sentenced outside the presence of his attorney or the State. Thus, the trial court should resentence Appellee.

Appellant?s & Court?s PDRs

***Adames v. State,*No. 1126-10 (Tex.Crim.App. 10/5/11); Affirmed COA, remanded to trial court (9?0)**

In connection with an aggravated kidnapping, Appellant was charged with capital murder. The jury convicted Appellant of capital murder, and the trial court automatically sentenced Appellant to life imprisonment without parole. COA found that the evidence is legally sufficient to support Appellant?s conviction as a party to capital murder, but that the jury charge was erroneous as the application paragraph did not include instructions necessary for the jury to find Appellant guilty as a party. ?The actual charge at trial charged him with that offense [capital murder] as a primary actor but, as a party, only with respect to the underlying aggravated kidnapping.?

CCA granted Appellant?s PDR to determine whether COA erred in refusing to review Appellant?s issues regarding legal insufficiency under the Due Process Clause of the 14th Amendment to the U.S. Constitution, as required by *Jackson v. Virginia,* 443 U.S. 307 (1979). CCA granted an additional ground, on its motion, to decide whether COA erred in failing to distinguish between a sufficiency review under *Malik v. State,*

953 S.W.2d 234 (Tex.Crim.App. 1997), an independent state ground for review, and *Jackson,* a federal constitutional review.

HELD: Both the state and federal standards measure the sufficiency of the evidence against the elements of the offense, as in a hypothetically correct jury charge; they diverge, however, in distinguishing between ?substantive elements,? the only elements used in a *Jackson* analysis, and the *Gollihar v. State,* 46 S.W.3d 243 (Tex.Crim.App 2011), ?elements of the offense as defined by the hypothetically correct jury charge.? The hypothetically correct jury charge may include elements that must be in the charging instrument under Texas procedural rules, such as the manner and means of an offense, but which lie outside the Texas Penal Code and are not ?substantive elements as defined by state law? for a *Jackson* review.

Malik and its progeny, including *Gollihar,* established that an appellate court should apply the *Jackson* standard to the hypothetically correct jury charge. As such, COA did not fail to distinguish between sufficiency reviews under *Malik* and *Jackson.* COA correctly applied the *Jackson* standard and found the evidence legally sufficient to support Appellant?s conviction.

Appellants? PDRs

***Tillman v. State,*No. 0727-10 (Tex.Crim.App. 10/5/11); Reversed, remanded (9?0)**

Appellant was convicted of capital murder by a jury and given the automatic punishment of life in prison. COA affirmed. Appellant argues that the trial court improperly excluded testimony by Psychologist Malpass about the reliability of eyewitness identifications, because the testimony was relevant and reliable as it satisfied the three requirements of *Nenno v. State,* 970 S.W.2d 549 (Tex.Crim.App. 1998), for ?soft sciences.?

HELD: Under *Nenno,* the proponent of the evidence must establish that (1) the field of expertise involved is a legitimate one, (2) the subject matter of the expert?s testimony is within the scope of that field, and (3) the expert?s testimony properly relies upon or utilizes the principles involved in that field. CCA believes that psychology is a legitimate field of study, and that the study of the reliability of eyewitness identification is a legitimate subject within the area of psychology. The third prong is satisfied by Malpass? extensive experience in eyewitness research.

As for the relevancy challenge, while jurors might have their own notions about the reliability of eyewitness identification, that does not mean they would not be aided by the findings of a trained psychologist on the issue. Furthermore, Malpass? testimony is sufficiently tied to the facts of this case. CCA?s conclusion is not undermined by the fact that Malpass was not present during the testimony of several witnesses.

***Rushing v. State,*No. 0727-10 (Tex.Crim.App. 10/5/11); Affirmed (9?0)**

Appellant was convicted of aggravated sexual assault of a child and other sex offenses. The State successfully sought an automatic-life enhanced sentence using Appellant?s prior court-martial convictions under the Uniform Code of Military Justice (UCMJ) for carnal knowledge and indecent acts with a child. Tex. Penal Code §?12.42(c)(2)(B)(v) provides that if it is shown that the defendant convicted of aggravated sexual assault has previously been convicted ?under the laws of another state containing elements that are substantially similar to the elements? of indecency with a child, sexual assault, aggravated sexual assault, or other enumerated offenses, the defendant shall be sentenced to life imprisonment. COA held that because the ?UCMJ is subject to the legislative authority of the United States,? Appellant?s sentence was not unlawfully enhanced.

HELD: Under the definition of ?state? in Tex. Government Code §?311.005(7), Appellant?s sentence was properly enhanced to life imprisonment under Section 12.42(c)(2)(B)(v). Convictions ?under the laws of

another state? in Section 12.42(c)(2)(B)(v) includes prior convictions under the UCMJ, regardless of the serviceperson?s geographical location. Therefore, a prior UCMJ conviction constitutes ?conviction[s] under the laws of another state? for purposes of Section 12.42(c)(2)(B)(v).

***Soliz v. State,*No. 0117-11 (Tex.Crim.App. 10/5/11); Affirmed (8?1)**

Appellant was indicted for continuous sexual abuse of a young child under Jessica?s Law (Tex. Penal Code §?21.01). Without objection from Appellant, the offense of aggravated sexual assault was submitted to the jury as a lesser-included offense. The jury found Appellant not guilty of continuous sexual abuse of a young child, but guilty of aggravated sexual assault.

HELD: The trial judge makes an initial determination of whether, as a matter of law, an offense qualifies as a lesser-included offense; the judge then decides whether the lesser offense was raised by the evidence. *Hall v. State,* 225 S.W.3d 524 (Tex.Crim.App. 2007). Appellant claimed Jessica?s Law created an exception to this analysis and requires the jury to deliberate whether a submitted lesser offense is in fact a lesser-included offense of the crime charged; CCA disagreed. Subsection (e) of Jessica?s Law declares that ?an offense listed under Subsection (c)? of the law ?is considered by the trier of fact to be a lesser included offense of the offense alleged under Subsection (b).? There-fore, to the extent that a continuous-sexual-abuse indictment alleges certain specific offenses, an ?offense listed under Subsection (c)? of Jessica?s Law will always meet the first step of the *Hall* analysis. Unlike cases in which the lesser offense is not actually listed in the indictment (*e.g.*, criminally negligent homicide in a murder indictment), continuous sexual abuse is, by its very definition, the commission under certain circumstances of two or more of the offenses listed in Subsection (c). The inclusion of ?considered by the trier of fact to be? ensures that the lesser-included offense was actually submitted to the jury, considered by the jury, and found to be true.

***Ouellette v. State,*No. 1722-10 (Tex.Crim.App. 10/12/11); Affirmed (6?2)**

Appellant was charged by information with DWI ?by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, or a combination of two or more of those substances into the body? after rear-ending a car. The trial court?s charge repeated that language, and the jury convicted her. COA affirmed.

CCA granted review to answer the following: ?In a driving while intoxicated case, where the evidence is legally sufficient to support a conviction on the theory that the defendant was intoxicated by . . . alcohol . . . is it proper for the trial court, in its charge, to also authorize a conviction on an alternative theory that the defendant was intoxicated by . . . a drug, or a combination of alcohol and a drug . . . where the evidence merely shows that medications prescribed for the defendant were found in her car . . . ??

HELD: The jury charge reflected the law as it applied to the evidence produced at trial. Appellant appeared intoxicated, police found in her vehicle a drug that could have produced the observed symptoms of intoxication, and she refused a blood test. While there was no direct evidence that Appellant consumed the drug discovered by the officer, there was enough evidence from which a rational juror could have found that she did.

***Sweed v. State,*No. 0273-10 (Tex.Crim.App. 10/19/11); Reversed, remanded (8?0)**

Appellant was indicted for the felony offense of aggravated robbery, enhanced with two prior felony convictions. The trial court denied Appellant?s requested jury instruction on the offense of theft. The jury found Appellant guilty of aggravated robbery and assessed punishment at 38 years? confinement. CCA granted Appellant?s PDR to review the application of the second step of the lesser-included-offense analysis. Tex. Code Crim. Proc. art. 37.09.

HELD: CCA assumed that the first step of the analysis is satisfied (*i.e.*, that the lesser-included offense

of theft is included within the proof necessary to establish the charged offense of aggravated robbery)and held that the second step is also met as there was trial evidence that supported giving a theft instruction. To prove aggravated robbery, the State must prove robbery plus an aggravating factor, such as the defendant ?uses or exhibits a deadly weapon.? The robbery element of ?in the course of committing theft? is defined as ?conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.? If ?in the course of committing theft? could not be proven at trial, then the theft and the assault were separate events, and Appellant could not be found guilty of robbery or aggravated robbery. Consequently, be-cause Appellant did not dispute that he committed theft, the central issue at trial was whether Appellant pulled a knife on the victim. CCA found that there is enough evidence from which the jury could have reasonably determined that theft is a valid, rational alternative to aggravated robbery.

Court of Appeals

Summaries by Chris Cheatham of Cheatham Law Firm, Dallas

***Sanchez v. State,*No. 01-10-00433-CR (Tex.App.?Hous-ton [1st Dist] 5/19/11)**

Judge of statutory county court, acting as a magistrate, did not have authority to issue a search warrant for drawing blood in a different county. ?[U]nlike district judges, who may act for one another, with no geographical restrictions . . . no such grant of authority exists for statutory county court judges[.]?

***Montgomery v. State,*No. 14-09-00887-CR (Tex.App.?Houston [14th Dist] 6/2/11)**

D?s cell phone use at the time of auto accident insufficient to support conviction of criminally negligent homicide. ?One of the State?s [expert witnesses] testified that he believed cell phone usage was a factor in a growing number of accidents and could have been a factor here, but he cited no data. . . . In addition to failing to present any evidence of an increased risk of death, the State also failed to present any evidence that such greater risk was generally known and disapproved of in the community. . . . Supported by additional scientific research and increased public awareness, Texans may one day determine that cell phone usage while operating a vehicle is morally blameworthy conduct that justifies criminal sanctions; however, the State failed to establish that such was the case in March 2008, at the time of this accident.?

***Carmen v. State,*No. 01-10-00124-CR (Tex.App.?Hous-ton [1st Dist] 6/30/11)**

State?s argument on punishment that ?if [D] kills again, that is on you? permissible, despite D?s argument that it interjects new facts not on the record relating to D?s propensity to commit a future murder. ?The State?s argument does not indicate the likelihood of such a future occurrence. It merely poses the hypothetical possibility that a person who has murdered once could do so again. The evidence at trial supports the State?s theory that [D] prepared for the murder by practicing firing the pistol, that [D] lay in wait in order to ambush his father when he arrived home after work, and that [D] showed no emotion or remorse after killing his father.?

***Delacerda v. State,*No. 01-09-00972-CR (Tex.App.?Hous-ton [1st Dist] 7/21/11)**

Officer?s testimony during murder prosecution regarding witness? identification of person in photo array, *as being the one present in the back of pickup truck involved in the shooting* (this testimony occurred after witness? testimony that he did not recall making such identification), fell within the hearsay exclusion for identifications. ?We agree with the rationale of the Illinois Supreme Court and the District of Columbia Court of Appeals that limiting admissible testimony under the identification exclusion to the hearsay rule solely to the declarant?s naming of the identified individual and not allowing testimony regarding what the declarant identified the individual as doing is unduly restrictive.?

Deemed proper was State?s commitment question during voir dire to determine whether venire could

convict D in the absence of physical evidence if the State otherwise proved the elements of the offense beyond a reasonable doubt. ?The questions did not attempt to commit the prospective jurors to a specific set of facts prior to the presentation of evidence at trial. Rather, the only fact that the questions included was the absence of physical evidence, such as DNA or fingerprinting evidence, and this fact was necessary to test whether a prospective juror possessed a bias against a phase of the law upon which the State was entitled to rely[.]?

State v. Dominguez,**No. 01-10-00428-CR (Tex.App.?Houston [1st Dist] 7/28/11)**

An individual?s diet and cologne affects his odor; this finding was properly used to exclude, as unreliable, evidence of scent-discrimination lineup procedure in which three bloodhounds purportedly identified D?s scent on items from crime scene. Also deemed unreliable was dog handler?s opinion due, in part, to lack of oversight and verification of his test results. ?[Dog handler] stated his task in interpreting the dogs? alerts is subjective in nature. [State?s expert] stated it is up to the handler to decide whether the dog ?alerted.? Neither [State?s expert] nor [D?s expert] could discern the dog signals identifying an alert in a video demonstration of [dog handler?s] scent-discrimination lineup. . . . Finding 13 states that, unlike a dog?s alert to a bomb or to drugs, the matching of a scent in a lineup is not verifiable. Likewise, Finding 20 states that no laboratory analysis can verify the scent-discrimination lineup. The undisputed evidence at the hearing was that no analysis or instrument currently exists to verify the results of a scent-discrimination lineup, and that only the handler can verify that the dog has alerted to the correct scent.?

Hassan v. State,**No. 14-10-00067-CR (Tex.App.?Hous-ton [14th Dist] 7/28/11)**

D raised inference of racial discrimination in jury selection, where State used its three strikes to remove two (of five) African-American venire members and one (of two) Asian venire members; State failed to rebut presumption of racial discrimination, despite the prosecutor?s testimony. ?[T]he prosecutor testified that he exercised a strike on venire member 5, who is Asian, because she was a certified public accountant (CPA). The prosecutor stated that he never seats a person who works as a CPA on any jury. In his view, CPAs tend to overanalyze cases. . . . Therefore, the prosecutor offered a race-neutral reason for striking one of the two Asian venire members. . . . The prosecutor also testified at the *Batson* hearing that, in examining the 2005 trial record, he could not recall why he struck venire member 2 and venire member 8. . . . In response to cross-examination questions, the prosecutor likewise could not recall anything specific about these particular venire members, though he added, ?I can tell you without a doubt that I never struck a [potential] juror for an improper reason including race or sex. While I cannot sit here and tell you today why they were struck, I can tell you with certainty they were not struck for any improper reason.? A prosecutor may not rebut the presumption merely by denying that he had a discriminatory motive or by ?affirming his good faith in individual selections.??
