Criminal Justice Section

The State Bar of Texas

April 30, 2015

Judge Doug Skemp, *Chair*
Dallas County Criminal Court No. 3

It is my pleasure to serve as the chair of the State Bar of Texas Criminal Justice Section. Your board has been diligently working on programs and issues important to our section. One of our initiatives is to reinstitute our monthly newsletter. We all know how important it is for lawyers, especially criminal practitioners, to be systematically updated on opinions issued by the Texas Court of Criminal Appeals and the various Texas courts of appeals. It is our belief that this monthly newsletter will be a resource for attorneys by the spotlight it places upon court opinions. As you will read below, the newsletter will also provide our section members the opportunity to share news about cases in their counties that might be of interest as well as profile section members. We are excited about this outreach to our members and believe that you will find it to be an interesting and helpful tool.

Cheryl Brown Wattley, Newsletter Editor
Professor and Director of Experiential Education
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Because I have been honored to have the opportunity to produce the monthly newsletter for the Criminal Justice Section of the State Bar of Texas, I would like to introduce myself. I began my career as a federal prosecutor with the United States Attorney's Office in Connecticut, then transferred to the Dallas office. After seven years as a federal prosecutor, I entered private practice with a significant focus on defense work. I have been privileged to handle several wrongful conviction cases that have resulted in the exoneration of my clients. In 2006, I joined the faculty of the University of Oklahoma College of Law. At OU, I was a tenured

professor and taught criminal law, criminal procedure and professional responsibility and directed the clinical education program. In January 2014, I became an inaugural faculty member at UNT Dallas College of Law. We enrolled our first class in August 2014.

This is your newsletter. As such, I want it to provide information that you want to receive and stories that are of interest to you. While I have some ideas, I invite your input, ideas, and feedback.

The newsletter will be produced monthly. Each month, there will be updates on interesting cases. But each quarter, an expanded version of the newsletter will be issued. If there are any "hot topics" or happenings in your county that you would like to bring to the attention of other section members, let me know so that we can publish important information. If there is a story or article that you would like to share, we might be able to include it in the quarterly newsletter. If there is someone who should be featured because of an unusual and unique case, let me know. I want you to look forward to receiving these quarterly issues.

Consideration is being given to setting up an advisory committee for this newsletter. If you would like to assist and serve on such a committee, please let me know. Please feel free to email me.

Interesting Cases: January - April, 2015

Ehrke v. State, 2015 WL 1823480 (Tex. Crim. App. April 22, 2015): Reviewing a trial court denial of a request for independent testing of methamphetamine, the court clarified that the standard for such a motion is materiality and thus, no showing of good cause is required. Defendants have an absolute right to pay for an independent chemist to analyze the controlled substance in a controlled-substance case. But, appointment of an expert to do that testing requires a showing of a material issue of potentially disputed facts.

Ex parte Usulf Shaheed Benson, 2015 WL 1743459 (Tex. Crim. App. April 15, 2015) (NO. WR–81,764–01) Intoxication assault and felony DWI are not the same offense when they arise out of the same transaction for double-jeopardy purposes. Under the Blockburger test, different elements are required for the offenses. The focus of each of the offenses is different. Intoxication assault is a result-oriented offense; felony DWI is a conduct-oriented or circumstance-oriented offense, but not result.

Miller v. State, 2015 WL 1743581 (Tex. Crim. App. April 15, 2015)(NO. PD–0038–14) Court held that the corpus delicti rule does not apply when a defendant confesses to multiple criminal offenses within a single criminal episode or course of conduct. Rejecting the state's request that the corpus delicti rule be abolished or replaced, the court stated that the rule performs an important function of providing essential protection for defendants who might, due to mental infirmity or other reasons, confess to imaginary crimes. However, a "closely related crime" exception is needed to strike a balance between public policy concerns and the purpose of the corpus delicti rule. This exception only applies when the "temporal relationship between the offenses is sufficiently proximate that introduction of the confession" would not violate the policy reasons

for the corpus delicti rule.

Price v. State, 2015 WL 1743388 (Tex. Crim. App. April 15, 2015) (NO. PD–0383–14): In a case charging a defendant under Tex. Penal Code §22.01(b)(2)(B) with family violence assault by strangulation, the court held that the "intentionally, knowingly, or recklessly" language of that provision applies to the result of impeding the breathing or blood flow, not the manner or means by which the flow of breath or blood is impeded. Defendant had argued that the trial court had erred when it did not include a jury charge that he had to "intentionally, knowingly, or recklessly apply pressure to the person's throat or neck or by blocking the person's nose or mouth."

Rene Daniel Villarreal v. State, 453 S.W.3d 429 (Tex. Crim. App. 2015) (NO. PD-0332-13): Reversing the San Antonio Court of Appeals' reversal (393 S.W.3d. 867, 2012), the court held that there was not egregious harm when the trial court failed to give an instruction about a presumption of the reasonableness of a person's belief that force was immediately necessary to protect himself.

Ex Parte Eric Michael Heilman: --- S.W.3d ---- 2015 WL 1245933 (Tex. Crim. App. March 18, 2015): Reversing the Ninth Court of Appeals, the Court held that waiver of statute of limitations defense is a category three forfeitable right. The court overruled its decision in *Phillips v. State*, 362 S.W.3d 606 (Tex. Crim. App. 2011) by holding that a **pure-law limitations defense can be waived**. A police officer, pursuant to a plea agreement, had entered a deferred adjudication plea to a misdemeanor offense in exchange for an agreement by the state not to pursue state jail charges. The two-year statute of limitations for the misdemeanor offense had already expired. After the terms of the plea had been satisfied and the case dismissed, the officer filed a writ because he was no longer able to obtain a peace officer's license.

State v. Villareal, 2014 WL 6734178 (Tex. Crim. App., February 25, 2015) (NO. PD–0306–14): The Court of Criminal Appeals held that the warrantless, nonconsensual testing of a DWI suspect's blood does not categorically fall within any recognized exception to the Fourth Amendment's warrant requirement, nor can it be justified under a general Fourth Amendment balancing test. The defendant had been stopped on a traffic suspicion. When he refused to perform any of the field sobriety tests, he was arrested on suspicion of DWI. He refused to give a blood sample. After the criminal history check revealed two prior DWI convictions, the officer invoked Transportation Code §724.012(b)(3)(B) and obtained defendant's blood sample. There were no exigent circumstances that precluded obtaining a warrant. Citing the U.S. Supreme Court decision in *Missouri v. McNeely*¸133 S. Ct. 1552, the court held that the nonconsensual search of a DWI suspect's blood conducted pursuant to the mandatory-blood-draw and implied-consent provisions in the Transportation Code, when undertaken in the absence of a warrant or any applicable exception to the warrant requirement, violates the Fourth Amendment.

Henry v. State, 2015 WL 1736953, (Tex. App.-Texarkana, April 16, 2015) (No. 06–14–00130–CR): Trial court's refusal to allow evidence of defendant's diminished capacity at the guilt-innocence stage was upheld. A defense psychologist had found the defendant to be mentally retarded and mentally ill; unable to read, write, complete simple mathematical problems, identify his parents' occupations or recite his birthdate. Defendant was on disability. Defense sought to introduce this evidence to negate the mens rea requirement of evading arrest by motor vehicle.

David Cary v. State, No. 05-13-01010-CR (Tex. App.–Dallas, March 25, 2015 (Not published): The Court of Appeals reversed a conviction for bribery, money laundering, and engaging in organized criminal activity. The court affirmed the conviction of Stacy Carey, the co-defendant, *Stacy Cary v. State*, 2014 WL 4261233

(Tex. App.-Dallas, March 25, 2015)

Dezmone Pinkston v. State, NO. 02-14-00041-CR (Tex. App.-Ft. Worth, March 19, 2015)(Not published): Defendant's Motion to Suppress was granted. Police officers were conducting a walk-through of apartments in a high-crime area. They heard yelling and screaming consistent with a domestic assault. As the officer approached the couple, defendant and the female stopped arguing and began to walk away. As they continued to walk away, the officer yelled "stop police." The defendant kept walking. At that point, he was followed and arrested for evading arrest or detention. He was patted down and crack cocaine was found in his pocket. The officer lacked reasonable suspicion to detain the defendant.

Waddell v. State¸ 2015 WL 512916 (Tex. App.- Corpus Christi-Edinburg, February 5, 2015) NUMBER 13–13–00611–CR) Imposition of three consecutive sentences for three counts of indecency with a child charged in a single indictment arose from the same criminal episode. Even though the indecent conduct occurred on separate dates, they were the "same or similar offense" and thus were part of the same criminal episode. Under Tex. Penal Code §3.03(b), such sentences can be imposed to be served consecutively.

Henley v. State, 454 S.W.3d 106 (Tex. App.-Ft. Worth, February 5, 2015) (NO. 02–13–00178–CR) The trial court improperly restricted defendant's testimony that would have explained his motivation for his actions in a trial on charges of assault causing bodily injury to a family member. Defendant and the victim were involved in a custody dispute. Defendant had custody of their two young sons. The family court had ordered that the mother's visit be supervised because of testimony that her boyfriend's stepson had been sexually abusing the children. On the date of the incident, defendant attempted to talk with the mother about newly disclosed allegations of sexual abuse and was refusing to produce the children for their visit. When the mother called 911, defendant produced the children who got into the mother's car. Defendant continued in his efforts to talk with the mother. After the mother ignored him, he grabbed the door handle, pulled her from the car, punched her in the face, and banged her head on the ground. Defendant then drove off. The trial court's exclusion of this testimony denied defendant the opportunity to present the jury with evidence of his justification defense.

Ex Parte S.D., 2015 WL 222338 (Tex. App.-Amarillo, January 15, 2015)(No. 07–13–00168–CV). Because the primary purpose of the expunction statute is to allow the record of a wrongful arrest to be expunged, expunction of a DWI arrest would not be proper when defendant entered a plea to reckless driving charges that arose of the DWI arrest. Defendant was originally charged with DWI and reckless driving. He entered a deferred adjudication plea to reckless driving and the DWI charges were dismissed. After completion of the deferred adjudication probation, defendant sought an order of expunction for the DWI charges and non-disclosure for the reckless driving charges.

Melton v. State, 2015 WL 167207 (Tex. App.-Amarillo, January 13, 2015)(No. 07–13–00032–CR) When a jury returned a verdict convicting defendant of possession of a controlled substance in a drug-free zone, it assessed a fine of $15,000, above the statutory maximum. The trial judge reformed the judgment to reflect the maximum amount and individually asked the jurors: "Do you accept and approve my reformed verdict for the fine being $10,000?" A new punishment hearing as to the fine was required because the judge's actions did not allow the jury to exercise its discretion to impose a lawful fine.

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