Criminal Justice Section

The State Bar of Texas

August 24, 2015

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

By the time you read this, I will have passed the torch to Lydia Clay Jackson, the new chair of the Criminal Justice Committee. I can assure you that the committee will be in good hands with her capable leadership. As I look back on the last year, I feel so grateful and honored to have worked with so many talented council members and section members.

Through the cooperative work of the council, we were able to accomplish many good things during the last year. While representing the Judiciary, the prosecutors, and the defense bar can be a challenge at times, it is so gratifying to see that we all have many common goals. We have been and hopefully will continue to be part of achieving these common goals.

The section was able to underwrite two important projects involving the Michael Morton Act. First, we were able to give the Texas District & County Attorneys Association the funds it needed to produce a video covering the responsibilities of a prosecutor in complying with the act. While mainly used as a CLE tool for prosecutors, the video is available to any interested person. The section was also able to provide money to the Texas Criminal Defense Lawyers Association for a study on the costs of compliance with the Michael Morton Act. This study is completed and is available to all interested parties.

Additionally, the section was able to continue its tradition of providing scholarships to the Advanced Criminal Law Course and the Rusty Duncan Course, as well as putting on a CLE presentation at the State Bar's Annual Meeting.

The section was also able to reinstitute a newsletter for all members. It will cover caselaw updates and timely articles and features. This newsletter is edited and produced by Cheryl Wattley, a professor of criminal law at the UNT Dallas College of Law. For those who know Prof. Wattley, you will expect and willreceive a high-quality product. For those who do not know her, it will not take you long to see what a valuable asset she is.

Again, let me say how much I enjoyed being part of this council for the last seven years. I know it is in

good hands and will continue to provide valuable services to the Bar.

Cheryl Brown Wattley, Newsletter Editor
Professor and Director of Experiential Education
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Sometimes in the hectic pace of today's lives, we don't take the time to pause and thank those individuals who give of their time, talents, and expertise to make our profession better. This issue's farewell by Judge Doug Skemp brought that reality to mind. Judges and attorneys who labor so diligently to enhance the profession, to further the goals of criminal justice and, indeed to continually push for justice, serve all of us. As we proceed with the transition to new officers, let us applaud those who choose to take on these roles. And, let us pledge our support and commitment to assist them in their leadership. So, Judge Skemp, thank you for your leadership and hard work. Ms. Jackson, thank you for your undertaking of this responsibility.

INTERESTING CASES

Ex parte Thomas Edward Castillo, (Tex. Crim. App. June 3, 2015) Reversing in part the Fourth Court of Appeals, Bexar County, the CCA held that a prior acquittal of capital murder barred a subsequent prosecution for burglary. But, the subsequent prosecution for aggravated assault was not barred.

The appellant and his wife had separated. She had moved in with her boyfriend. The appellant broke into their home and attacked his estranged wife and her boyfriend. While she survived the stabbing, the boyfriend died. The appellant was charged on the same date in two separate indictments: capital murder of the boyfriend in "the course of committing or attempting to commit . . . burglary" and aggravated assault and burglary relating to the attack on his estranged wife. Appellant was tried first on the capital murder case and was acquitted. Before his trial on aggravated assault and burglary, he filed a pre-trial writ application arguing that the prosecution was barred by double jeopardy. Evaluation of a claim of double jeopardy involves a two-step analysis: 1) a legal sameness determination of whether proof of one statutory provision requires proof of a fact which the other does not; and 2) if the offenses are legally the same, adetermination must be made as to whether the offenses are factually the same. The CCA rejected the state's argument the "attempt to commit burglary" was not legally the same as the "burglary" offense. Citing Tex. Code Crim. Proc. Art 37.09(4), the CCA held "as a matter of state law, an allegation of a completedoffense is the same as alleging an attempt to commit the same offense. " Concluding that the unit of prosecution for burglary is each unlawful entry, the court held that the state was prosecuting the appellant twice for the same unlawful entry into the house. Consequently, prosecuting appellant for burglary was barred by double jeopardy.

Appellant could be prosecuted for aggravated assault. Because aggravated assault was within the proof necessary for the state to establish capital murder, the offenses were legally the same. But, using a unit analysis, there were two different prosecutions because there were two different victims. Prosecution of the aggravated assault charge was not barred.

Damien Hernandez Cortez v. State, (Tex. Crim. App. June 17, 2015) Appellant was charged with fraudulent possession of 50 or more items of "identifying information." Appellant had been arrested and a search incident to arrest located an accordion file that contained three documents belonging to the victim: 1) canceled check; 2) credit card statement; and 3) Medicaid form. These documents contained the victim's name, date of birth, driver's license number, Social Security number, mailing address, credit card account number, bank account number, bank routing number. Appellant was charged with fraudulent possession of 50 or more items of identifying information. The issue raised on appeal was whether "identifying information" meant the document that contained the identifying information or whether it mean each item of information such that multiple pieces of information are contained on a single document. The CCA found that the statute was ambiguous because the word "item" was not statutorily defined and susceptible to more than one interpretation. Turning to the legislative history of the statute, the CCA concluded that "item of identifying information" referred to any single piece of personal, identifying information.

Jovany Paredes v. State, (Tex. Crim. App. June 3, 2015) The CCA held that the admission of a supervising DNA analyst's opinion regarding a DNA match, based upon computer generated data, does not violate the Confrontation Clause. The appellant had given the shirt that he had worn during a shooting to a female gang member to wash. Instead, she provided it to the police who sent it to a private forensic laboratory for DNA testing. DNA testing matched the blood of one of the shooting victims. The forensics laboratory director testified at trial about the DNA results. She explained the batch analysis and that she had not personally observed any of the testing process. But she had personally compared the DNA profiles. The CCA identified several principles: 1) admission of a lab report created solely by a non-testifying analyst, without calling that analyst to sponsor it, violates Confrontation Clause. A testifying expert must testify as to their own opinions and cannot simply be a surrogate. Because the DNA supervisor had formed an independent opinion, she could testify about that opinion.

Bobby Joe Peyronel v. State, (Tex. Crim. App. June 24, 2015) In a case of first impression, the CCA held that a defendant's right to a public trial is subject to forfeiture, reversing the COA. The opinion revolves around the question of whether the right to a public jury trial was preserved for review. The CCA discussed the differentiations between rights that are mandatorily enforced, rights subject to waiver, and rights subject to forfeiture set out in *Marin v. State*, 851 S.W. 2d 275, 279 (Tex. Crim. App. 1993). After reviewing approaches taken by other jurisdictions, the CCA held that "a complaint that a defendant's right to a public trial was violated is subject to forfeiture." Having held that the right was forfeitable, the CCA then determined that the issue had not been preserved for review.

Appellant had been convicted of aggravated sexual assault of a child under 14. During the punishment hearing, an unidentified female associated with the defense, approached a juror and asked "how does it feel to convict an innocent man?" The trial court excused all punishment witnesses. The state asked that all female members of the appellant's family also be excluded. Appellant's counsel protested the removal of the appellant's wife and daughter. The judge decided to exclude everyone from the gallery. In response, counsel argued that the proposed remedy was "too broad and would 'create the impression in the jury's mind that [Appellant] has absolutely no support whatsoever here." The CCA observed that this statement surely conveyed a concern about the jury's perception, it fell short of being the "functional equivalent" of asserting a violation of his constitutional right to a public trial. There was not "sufficient specificity" to make the trial court aware of the basis for the complaint.

Christopher Allen Phillips v. State, (Tex. Crim. App. June 3, 2015) Was a jury charge about the jailhouse witness corroboration statute required? Tex. Code Crim. Proc. art. 38.075(a)? What is the test for determining whether a hearsay statement is against defendant's interest? In a fact based analysis, the CCA held that an article 38.075(a) instruction was required and remanded to the COA for a harm analysis.

The Appellant burst into a hair salon, gun drawn, demanding money. He was dressed in all black and wore a black mask and black gloves. A salon employee had mace and sprayed the appellant. There was a fight over the mace and the employee was shot. The appellant grabbed a patron's purse and ran out of the store. A short time later, in a videotaped purchase, two men used a credit card from that purse.

Several days after the robbery, one of those men was arrested on outstanding warrants. The stolen purse was found in the car. The owner of the car identified appellant as the person who brought the purse to his car.

Two jailhouse witnesses testified at appellant's trial in rebuttal. The rebuttal witnesses testified that appellant had tried to get them to falsely testify that the owner of the car had told them that he had done the robbery by himself. This testimony provided the basis for the prosecutor's argument "does an innocentperson go around the jail asking people he's just met to sign affidavits and lie for him?" There was no objection to this argument.

The state argued that no jailhouse confession instruction was required because the testimony did not include statements against the appellant's interest. The jailhouse testimony did not "connect" appellant to the crime. No instruction was needed.

The CCA reviewed the purpose of the provision and decided that the "broadest possible meaning" should be given to the term in order to achieve the legislative purposes. A statement against interest is a statement that is adverse to a defendant's position. Because the statements were offered against the appellant, they were against his interest.
