Criminal Justice Section

The State Bar of Texas

November 5, 2015

Lydia Clay-Jackson, Chair

She needs no introduction. Known as "that lawyer in the hat" because of the hats she has worn to court every day for the last 26 years, Lydia Clay-Jackson is the 2015-2016 chair of the Criminal Justice Section of the State Bar of Texas. It is a section that she knows well and that knows her well because she has been a member for more than 20years.

After growing up in New Mexico, Ms. Clay-Jackson graduated from Cottey College in Nevada, Missouri and the University of Texas at Arlington. In 1985, she graduated from Houston College of Law. She has been a member of the State Bar of Texas for more than 30 years. She attained her Texas Board of Legal Specialization in 1996.

Ms. Clay-Jackson is a member of Texas Criminal Defense Lawyers Association, an association where she has held every position from member to president. She is the Dean of Students for the Texas Criminal TrialCollege, as well as an alumna of the college. She is a lifetime member of National Criminal Defense Lawyers Association. She also serves also as a director for Lone Star Legal Services.

Even with all of this organizational participation, Ms. Clay-Jackson is a very active trial lawyer, primarily in Montgomery County. Yet, she makes time to help other lawyers in trial.

Ms. Clay-Jackson brings all of this experience and knowledge to her chairmanship of the section. Her objective for her tenure as CJS chair is not different than the chairs who served before her: to make thesection responsive and relevant to the needs of its members.

Cheryl Brown Wattley, Newsletter Editor
Professor and Director of Experiential Education
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The beginning of a new chair's tenure in the CJS coincides with the start of a new academic year. Somehow that transition from summer to fall signals a return to business as usual. Vacations are becoming memories, dockets loom, work calls. It is time again to assess what we have done and what we can do better.

We're starting a new feature in the CJS Newsletter: Practice Tips. In various issues, we will highlight points that every criminal practitioner should bear in mind.

This issue we are introducing Jordan Pollock, an Assistant Public Defender in Dallas County where she is the Immigration Specialist. Ms. Pollock will provide tips and suggestions for attorneys involving cases that implicate immigration issues.

Prior to joining that office, Ms. Pollock was an Equal Justice Works Fellow/Staff Attorney at Public Counsel in Los Angeles, facilitating a Legal Orientation Program at two Orange County detention centers and representing detained immigrants in removal proceedings. She received her J.D. with honors from the University of Texas School of Law and a B.A. from Duke University. Before law school, Ms. Pollock was an accredited representative at the New York Legal Assistance Group, representing clients in affirmative immigration matters.

PRACTICE TIP

Jordan Pollock
Assistant Public Defender
Dallas County

Practice Tip: Drug offenses generally cause dire immigration consequences for non-citizens, but there is a limited exception to deportability (and waiver available for those seeking relief who have a qualifying relative) for a single simple possession of less than 30 grams of marijuana. Texas's misdemeanor marijuana statute does not specify the amount in grams, but rather references possession of less than 2 ounces of marijuana. Because 2 ounces is more than 30 grams, if you must plead a non-citizen client to a marijuana offense (although avoiding drug convictions is always the best practice if possible), make sure the record is clear about the actual amount possessed. Ensuring the record reflects the amount being less than 30 grams will help preserve immigration relief and clarify any debate as to deportability.

INTERESTING CASES

July – August 2015

Leo Demory Robinson v. State (Tex. Crim. App. July 1, 2015)

The CCA affirmed the Fifth District Court of Appeals which had reviewed a guilty verdict resulting from a bench trial. The CCA held that a conviction under Article 62. 012 (failure to comply with registrationrequirements as a sex offender) requires knowledge or recklessness only to the duty-to-register element of the offense. He had been charged with intentionally, knowingly, or recklessly failing to report his intent tomove. The question presented was what mental states applied and to which element of the offense: the duty to register or the failure to comply with the Texas Code of Criminal Procedure Ch. 62 requirements.

The appellant had been convicted of burglary of a habitation with intent to commit a sexual assault. He was required to register as a sex offender for life and had moved from his aunt's house where he resided after his release from prison. He had sent a fax to the police department notifying them he had moved residences a month earlier. The fax contained wrong information and was intended to notify the police ofappellant's intent to move, rather than providing notice of a past move. Appellant argued that since there was evidence he attempted to give required notice, the evidence was insufficient to show his failure to giverequired notice was intentional, knowing, or reckless.

The CCA rejected appellant's argument and affirmed the COA decision. It noted that the failure to register offense is a circumstances-of-conduct offense, the gravamen of which is the duty to register. The CCAlooked to McQueen, which established that when circumstances of the conduct render specific conduct unlawful, a culpable mental state must attach to the circumstances of the conduct. *McQueen v. State*, 781 S.W.2d 600 (Tex. Crim. App. 1989). The culpable mental states of knowledge and recklessness apply only to the duty to register.

The CCA also ruled that a trial judge's Findings of Fact and Conclusions of Law relating to a bench trial are unauthorized. Criminal verdicts are general. An "appellate court should disregard a trial court's findings of fact and conclusions of law in their entirety." Instead, the *Jackson v. Virginia* standard should be applied.*Jackson v. Virginia*, 433 U.S. 307, 309, 319 (1979).

Stairhime v. Texas (Tex. Crim. App. July 1, 2015)

Reversing the First Court of Appeals, the CCA held that an attorney did not waive his earlier objections to voir dire proceedings when he responded "no objection" to the trial court's question as to whether there was an objection to the empaneling of the jury. During voir dire, defense counsel attempted to individually question venireman about the defendant's right not to testify. On three occasions the prosecution objected to the phrase of the question. The objections were sustained.

On appeal, the appellant tried to raise the issues of the court's ruling on the state's objections to the voir dire questions. The court of appeals did not address the merits of that argument, holding that the "noobjection" at the time the jury was empaneled waived any possible error.

The CCA expressly held that a "reply of 'None' or 'No, Your Honor" to the inquiries about whether there was an objection to the panel does not constitute a waiver of any previously preserved error.

Peraza v. Texas (Tex. Crim. App. July 1, 2015)

The CCA held that the courts do not become tax gatherers in violation of the separation of powers clause if the statute under which the court costs are assessed provides for an allocation of those collected court costs to be expended on legitimate criminal justice purposes. The collected court fees do not have to be directly associated with costs of that specific case.

The appellant, convicted of two counts of sexual assault of a child under 14, challenged the assessment of court costs of $250 "DNA Record Fee." The fee was imposed under Texas Code of Criminal Procedure,Article 102.020(a). The statute provided that 65% of the funds were to be used for criminal

justice planning and that 35% was to go to the state highway fund. Because the funds deposited to the state highway fund were to be used to defray costs incurred by the DPS collection, storing, and testing of DNA samples. The statute is constitutional.

Ex parte Espada (Tex. Crim. App. July 1, 2015)

The writ was granted because, in the course of attempting to prove knowing presentation of false testimony by the state, the applicant had established that the state unknowingly presented material false testimony in violation of due process. Citing Ex parte Chabot, 300 S.W.3d 768 (Tex. Crim. App. 2009), the CCA determined that the false testimony presented on the issue of future dangerousness was cause for a newpunishment hearing.

Following his conviction for capital murder, the state introduced evidence of applicant's prison conduct. One of the witnesses called by the state at trial was a deputy who testified as to applicant's disciplinary record. During the evidentiary hearing, evidence was introduced that discredited that deputy. The prosecutor testified that he would not have used the deputy's testimony if he had known about thosematters.

Despite the fact that there was other testimony as to future dangerousness, the CCA held that the state's express reliance on the deputy's testimony and the acts of misconduct that the deputy had reported "hadmore likely than not [served] as the tipping point" for the jury's affirmative finding. Applicant was entitled to a new punishment hearing.

Ex parte Padilla, Jr. (Tex. Crim. App., July 1, 2015)

On a Section 11.07 writ application, the applicant established that he had been promised by the trial judge, prosecutors and his defense counsel that his state sentences would run concurrently with his federalsentences. At the writ hearing, the trial court found that the applicant would not have entered into that plea agreement if he had known that he could not serve the sentence concurrently with the federal sentence or in a federal facility. The judgment was set aside.

Hargett v. State (Tex. App. Texarkana, August 31, 2015)

Reversing a revocation of community supervision, the court held that revocation is a criminal proceeding and the provisions of Article 38.35, Texas Code of Criminal Procedure apply. The appellant's communitysupervision was revoked following the testimony that a urinalysis was positive for methamphetamine and alcohol. At the revocation hearing, the analyst testified that his lab, "The Lab," was registered with DPS and DEA but was not DPS certified or accredited. The court rejected the state's argument that the revocation proceedings were primarily administrative hearings such that Article 38.35 did not apply. The court also rejected the state's argument that the urinalysis fell within the statutory exception pertaining to presumptive tests performed for the purpose determining compliance with probation conditions.

Ex parte Mohammed (Tex. App. Ft. Worth, August 27, 2015)

Due process required that the trial court hold a hearing on the appellant's Motion for Bond pending appeal. The appellant had been convicted of various felony offenses, including aggravated assault with a deadlyweapon; assault causing serious bodily injury; recklessly causing bodily injury to an elderly person. He was assessed six years confinement which was suspended, and he was placed on community service.

There is no statutory requirement that a trial court has to hold a hearing prior to denying bond pending appeal. But due process requires reasonable notice and a hearing to provide an appellant a meaningfulopportunity to be heard prior to any denial of bond pending appeal. See *Schockley v. State*, 717 S.W.2d 922, 925 (Tex. Crim. App. 1986).

Zahorik v. Texas (Tex. App. Houston, August 25, 2015)

Finding that evidence was legally insufficient to support the appellant's conviction for false report to a police officer, the court reversed appellant's conviction. The state did not offer evidence that the report was made in bad faith or other reasons other than to obtain action on a valid grievance.

The appellant had received a notice from Equifax that his credit report had been checked for employment purposes by a Tennessee governmental department. Because he had not applied for a job in Tennessee, he made inquiries as to what steps he should take. He had been involved in a traffic arrest in Tennessee which also made him concerned about this credit inquiry. The appellant was directed to file reports with theTennessee Highway Patrol (THP) and the Galveston Police Department. The appellant exchanged letters with a captain of the THP. It was ultimately determined that a THP officer had accessed appellant's credit report as part of the prosecution for the traffic offense. During the time that this review was being made, Galveston officer investigated appellant's report. The appellant was charged with filing a false police report because at the time that he made the report, he knew that the THP had accessed his credit report. Because the uncontroverted testimony was that appellant was filing the police report at the instruction of the FTC, the state failed to prove that he did so in bad faith or for any improper reason.

Veliz v. State (Tex. App. Houston, August 18, 2105)

Holding that the state had failed to demonstrate by clear and convincing evidence that the testifying expert reliably assess the appellant's BAC at the time he was stopped, the court reversed the conviction for DWI. The appellant had been observed driving by a police officer. He drifted into another lane; smelled of alcohol; had glassy eyes; admitted that he had drunk two beers; and stumbled getting out of the truck. The officer administered the HGN test which exhibited six clues of intoxication. The appellant was unable to perform the one-legged stand test. He was then arrested. At the police station, he refused to perform any more sobriety tests and refused a breath or blood test. A warrant was obtained for a blood draw. The appellant had a BAC of .081.

At trial, the criminalist testified that a .081, using retrograde extrapolation analysis, demonstrated that the appellant would have had a BAC of .095-.0124 when he was pulled over. Relying upon *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001), the court held that the witness' testimony did not establish by clear and convincing evidence that her retrograde extrapolation was reliable.

Saenz v. State (Tex. App. Houston, August 13, 2015)

Reversing a conviction for intoxication manslaughter, the court held that the trial court's failure to include an application paragraph about the appellant's concurrent causation defense and the exclusion of evidence of the decedent's toxicology report were error. There was no dispute that the appellant's truck struck the decedent. The issue was whether her intoxication caused the accident. The decedent was wearing darkclothing as he walked down a dimly lit stretch of road, in a 45 mile speed zone. Those conditions would have made it hard for any driver to see him and have sufficient time for evasive action. The decedent also had a BAC of .172 as he was walking down the road. The appellant's defense was that the decedent was a concurrent cause of the accident. She was entitled to a jury instruction with an application paragraph. The decedent's BAC was relevant because it could have contributed to the explanation as to why he was walking in the middle of the road.

Lampkin v. State (Tex. App. Texarkana, August 11, 2015)

In a lengthy opinion, the court of appeals rejected all points of error except a claim for ineffective assistance of counsel. A new punishment hearing was required. An appellant had been convicted of DWI and, based upon enhancements, received a 99-year sentence. He argued that counsel was ineffective because he had not investigated or presented mitigating evidence at the punishment stage. The appellant's behavior had, at least initially, caused his counsel to question his competency. But as their interactions continued, counsel concluded that appellant was competent. Counsel did not attempt to investigate appellant's mental health history. He did not inquire of jail authorities whether appellant was receiving mental health services. There was no evidence that counsel or an investigator attempted to talk with any family members. Once counsel had concluded that the appellant was competent, which was a reasonable determination, he still had an obligation to investigate to determine whether there were any mental healthissue that could be presented in mitigation.

The appellant's extensive mental health history should have been identified and presented in mitigation at punishment. The court found that there was a reasonable probability that the sentence would have been less severe if that mental health history had been provided.

Ansari v. State (Tex. App. San Antonio, August 5, 2015)

The trial court erred in denying a requested jury charge that there must be a unanimous finding as to the specific incident of assault to sustain a guilty verdict. The appellant had been charged with assault causing injury. The testimony identified three separate assaults. The refusal to give that instruction allowed the jury to convict the appellant on less than a unanimous verdict.

To determine whether the appellant suffered harm as a result of this refusal, the court looks to the jury charge as a whole, the arguments of counsel, evidence and other relevant information. Because it could not be said that the appellant did not suffer harm, the case was reversed.

State v. Welborn (Tex. App. Ft. Worth, July 30, 2015)

Upon review of a trial court grant of a Motion to Suppress, the COA for the Second District, held that the CCA opinion in *Crider v. State*, 352 S.W.3d 704 (Tex. Crim. App. 2011) did not require the suppression ofevidence seized pursuant to a search warrant that contained a clerical error.

A police officer observed an appellant's driving and stopped the appellant. After the appellant failed some field sobriety tests, he sought a blood draw. He filed an affidavit for a blood search warrant. In drafting the affidavit, the officer wrote that the traffic stop occurred on Sunday, September 1, 2013 at approximately 0352. In two other places in the affidavit, the officer stated that the offense occurred on the 2nd day of September.

The appellant filed a Motion to Suppress alleging that the time frames reflected in the warrant that there was a 26 hour period between her detention and the issuance of the warrant. The appellant argued thatunder *Crider v. State* probable cause no longer existed for the warrant because alcohol would have dissipated from the bloodstream.

The officer testified that the reference to September 1, 2013, was a clerical error and the arrest occurred on September 2, 2013. The Court of Appeals held that parol evidence can be used to explain technicaldefects. Crider did not mandate the suppression of the blood draw.

Garcia v. State (Tex. App. San Antonio July 28, 2015)

The Court of Appeals held that the warrantless blood search violated the Fourth Amendment requiring that the evidence of the appellant's blood alcohol level had to be suppressed. The "good faith" exception doesnot apply.

The appellant had been convicted of reckless bodily injury to a child and intoxication manslaughter. The appellant was part of a head on collision that resulted in the death of a mother and injury of her child. The appellant appeared disoriented and lacking the normal use of his mental faculties at the accident scene. Officers subsequently found an open container of liquor in the appellant's vehicle and a marijuana pipe. He could not answer questions put to him by the police. His eyes were red and bloodshot. A DPS trooper was sent to the hospital to obtain a blood sample pursuant to Section 724.012 of the Texas Transportation Code.

The state conceded that the warrantless blood draw could not be justified under that section of the Texas Transportation Code. But the state argued that the blood evidence was properly admitted under the goodfaith exception to the exclusionary rule. Holding that the good faith exception does not apply, the court determined that it could not find beyond a reasonable doubt that the erroneously admitted blood draw results did not contribute to his conviction.

Cruz v. State (Tex. App. Dallas, July 7, 2015)

Holding that the District Court had erred in denying a requested self-defense jury instruction, the Court of Appeals reversed the conviction. The appellant had admitted that he had shot the victim because he was approaching him in an aggressive manner. Without a self-defense instruction, the appellant did not have a defensive theory and the jury could not find in his favor.

Vidales v. Texas (Tex. App. Amarillo, July 7, 2015)

An appellant had been convicted of evading arrest or detention with a vehicle. After a finding that the enhancement paragraphs were true, the appellant was sentenced to 62 years in prison. Because the jury had not been instructed that they had to find that the second previous felony conviction was for an offense that occurred subsequent to the first prior offense becoming final, the jury never made an essential fact finding necessary to elevate the punishment range. The court reversed the punishment portion of the judgment and remanded for a new punishment hearing.

Navarro v. State (Tex. App. Houston, July 7, 2015)
Reversing a conviction for a DWI Class A misdemeanor, the court held that a per se theory of intoxication could not be based upon the alcohol content of blood plasma rather than whole blood. At trial, the judgefailed to submit a question to the jury as to whether the BAC was at least .15 as charged to support the Class A misdemeanor conviction. The determination of whether the BAC was least .15 is an element that needs to be found by the jury, not a sentencing enhancement.
