ADDENDUM TO COURT OF CRIMINAL APPEALS UPDATE

Greg Westfall

JURY CHARGE

When is the omission of the state's burden of proof structural error?

***Olivas v. State*, 202 S.W.3d 137 (Tex. Crim. App. 2006)**

In this case, the court's charge to the jury contained a deadly weapon issue and asked the jury to find whether or not the defendant used or exhibited a deadly weapon. The jury charge did not, however, ask the jury to find whether, beyond a reasonable doubt, the defendant so used the deadly weapon. The court of appeals held this to be structural error (it had not been objected to) and reversed the case.

The CCA held that this was not structural error. Structural error occurs where the jury charge either (1) completely leaves out any reference to the state's burden of proof; or (2) affirmatively misrepresents what the state's burden of proof is. In this case, there was a burden of proof instruction and said every element of the offense must be proved beyond a reasonable doubt and the "beyond a reasonable doubt" language apparently appeared in all the other application paragraphs.

INEFFECTIVE ASSISTANCE OF COUNSEL – APPEAL

Even where counsel files an Anders brief, counsel must inform his client of his client's right to file a pro se petition for discretionary review and failure to do so is ineffective assistance of counsel.

***Ex Parte Owens*, ___ S.W.3d ___, No. AP-74,996, 2006 Tex. Crim. App. LEXIS 1691 (Tex. Crim. App., Sept. 13, 2006).**

Prior to this case, the rule was "an appellate lawyer need not prepare a petition for discretionary review for his client, nor even advise him of the merits or advisability of seeking such review, in order to render constitutionally sufficient assistance of counsel. But he must not neglect to timely inform his client that he has the right to seek such review, or in any way obstruct his client from doing so, by omission or commission."

In this case, the CCA merely applied this rule to the situation where counsel files an Anders brief. You still need to tell your client about his right to appeal further. It is a good practice to write this in a letter, including all deadlines up to the US Supreme Court as well as deadlines applied to 2254 writs of habeas corpus.

APPELLATE PROCEDURE

The court of appeals should allow the appointed counsel to withdraw after a well-taken Anders brief.

***Meza v. State*, ___ S.W.3d ___, No. PD-1181-05, 2006 Tex. Crim. App. LEXIS 1822 (Tex. Crim. App., Sept. 20, 2006).**

Where appointed counsel files an Anders brief and the court of appeals finds that there is no non-frivolous issues in accordance with that motion, then the court of appeals should allow the attorney to withdraw and not abate and remand to the trial court for that to be done. If the court of appeals, however, disagrees with the attorney's opinion that the appeal is wholly frivolous, then the case should be abated and remanded to the trial court for new appointed counsel.

This was a revocation of deferred case and was wholly frivolous, but the court of appeals felt it did not have the authority or jurisdiction to allow the attorney to withdraw. The CCA says they do.

MOTION TO SUPPRESS

If the non-prevailing party requests findings of fact and conclusions of law, the trial court must provide them.

***Davis v. State*, 195 S.W.3d 708 (Tex. Crim. App. 2006)**

Defendant won a motion to suppress and the state requested findings of fact and conclusions of law. The trial court said no. The CCA creates a new rule: if the non-prevailing party requests findings of fact and conclusions of law, the trial court must do it. Either the findings of fact and conclusions of law may be rendered orally into the record or written and filed within 20 days of the decision. If the non-prevailing party does not request findings of fact and conclusions of law, they can still appeal, but the "implied findings" rule of review will apply. If the state appeals, it must still file its notice within 15 days, even though findings and conclusions need not be filed for 20.

MOTION FOR NEW TRIAL

Hearing may proceed on affidavits, even where there is a factual dispute and the defense objects and requests a live hearing.

***Holden v. State*, 201 S.W.3d 761 (Tex. Crim. App. 2006)**

Defendant had an ineffective assistance of counsel claim in the context of a motion for new trial. Affidavits had been submitted from the defendant and her trial counsel. The court stated that it was going to proceed on just the affidavits, over the objection of the defendant and her new counsel and despite requests to call the former counsel because of factual disputes with his affidavit.

CCA holds that in such a situation, one is not PER SE entitled to a hearing. In this case, the trial court had an opportunity to assess the credibility and demeanor of the attorney during the plea hearing and had a PSI report. If not for this, the result might have been different – the judge needs an opportunity to assess credibility.

PROBATION

"Straight" probation vs. "deferred adjudication;" what is appealable, what is not.

***Davis v. State*, 195 S.W.3d 708 (Tex. Crim. App. 2006)**

This is a good case to read if you ever need to appeal from a revoked deferred or straight probation. As you know, an appellate court does not have jurisdiction to hear an appeal from an adjudication of guilt on a revocation of a deferred.

In this case, the defendant's deferred period was extended and he was not provided counsel for the proceeding that resulted in the extension of his deferred period. Thus, he could not have been revoked but for the fact that his period of deferred was extended. The CCA held that the court of appeals lacked jurisdiction. In the course, the CCA set out a good set of rules to remember:

"In the 'regular' probation context, ... the Legislature has authorized appeal in two instances: (1) from an order granting probation and (2) from an order revoking probation. There is no legislative authority for entertaining a direct appeal from an order modifying the conditions of a community supervision. A complaint about a modification can, however, be raised in an appeal from a revocation if the validity of the revocation depends on the validity of the modification."

"With regard to deferred adjudication, the Legislature authorized appeal of only two types

of orders: (1) an order granting deferred adjudication; and (2) an order imposing punishment pursuant to an adjudication of guilt. It follows that ... an order modifying the terms or conditions of deferred adjudication is not in itself appealable [even if that modification results in the revocation]."

Judge Cochran, in a concurring opinion, points out that habeas corpus is still available if the modification was imposed in an unconstitutional manner. In this case, the defendant was arguing that he was denied counsel. Thus, he could complain via habeas.

The meaning of "convicted of a felony" for purposes of probation eligibility.

***Milburn v. State*, 201 S.W.3d 749 (Tex. Crim. App. 2006).**

Defendant took a straight probation on a felony. The next day, he was tried in a different case and the jury convicted him of a different felony. The trial judge allowed evidence of the judgment of conviction before the jury, thus making him ineligible for probation. He objected and appealed.

The CCA holds that this was not a final conviction because the time had not yet expired for filing either a notice of appeal or a motion for new trial. The reasoning is kind of interesting in this case. Note that the issue is that at the time of the trial, the defendant still had the option of appealing or filing a motion for new trial. The CCA did not address this, but if the defendant had waived his right to appeal and his right to file a motion for new trial, then the result here would have probably been different.

DRUGS – ADULTERANTS AND DILUTANTS

"Adulterants and dilutants" means everything.

***Wright v. State*, 201 S.W.3d 765 (Tex. Crim. App. 2006).**

This is just a reaffirmation of the CCA's Seals v. State, 187 S.W.3d 417 (Tex. Crim. App. 2005), which appears in this paper. It is important to know that the CCA stands by that holding and if we want any relief, we need to see the Legislature about it.

In this case, the defendant had a jar containing 305.62 grams of a liquid containing .05% methamphetamine, or, in weight, .1528 grams of pure methamphetamine. Punishment: Life. Welcome to Afghanistan-light (in Afghanistan, she would probably get a death sentence).

PRESERVATION OF ERROR

Timely filed motion for new trial sufficient to preserve complaints that the statute is unconstitutionally vague or overbroad.

***Gillenwaters v. State,* ___ S.W.3d ___, No. PD-1443-05, 2006 Tex. Crim. App. LEXIS 1875 (Tex. Crim. App., Sept. 27, 2006).**

It is helpful to know the test that led the CCA to this decision: "The requirement that complaints be raised in the trial court (1) ensures that the trial court will have an opportunity to prevent or correct errors, thereby eliminating the need for a costly and time-consuming appeal and retrial; (2) guarantees that opposing counsel will have a fair opportunity to respond to complaints; and (3) promotes the orderly and effective presentation of the case to the trier of fact." Id. At *7. The CCA held that in this case, the timely filed motion for new trial did the trick because the trial court could have still saved the time and expense of an appeal.

HABEAS CORPUS

Habeas relief available for defendant convicted of felony DWI where one of the enhancements was defective.

***Ex Parte Sparks,* ___ S.W.3d ___, AP-75,083, 2006 Tex. Crim. App. LEXIS 1823 (Tex. Crim. App., Sept. 20, 2006)**

Def. pled guilty to felony DWI and stipulated to the priors. He got 8 years and did not appeal. He then figured out, apparently, that one of the priors could not be used because it violated the (now obsolete) 10-year rule. The CCA granted relief and remanded for sentencing as a class-A misdemeanor. The CCA observed that he could not have challenged this enhancement on appeal because he stipulated to it. However, on habeas corpus, this is an actual innocence issue and if he can prove it, he is entitled to relief. He did and he got it.

Crawford v. Washington claims not retroactive for purposes of habeas corpus.

***Ex Parte Keith,* ___ S.W.3d ___, No. AP-75,367, 2006 Tex. Crim. App. LEXIS 1876 (Tex. Crim. App., Sept. 27, 2006)**

Straight analysis under *Teague v. Lane*, 489 U.S. 288 (1989). Applicant had a *Crawford* claim but it arose prior to the Supreme Court handing the opinion down. *Crawford v. Washington*, 541 U.S. 36 (2004). The CCA holds that *Crawford* holding is not retroactive for purposes of habeas relief. The CCA does note that the US Supreme Court has not addressed this issue yet. Perhaps this case will give them a chance.

DOUBLE JEOPARDY

Double jeopardy precludes convictions on both burglary with intent to commit theft and burglary with intent to commit sexual assault arising out of the same transaction.

***Ex Parte Cavazos*, ___ S.W.3d ___, No. AP-75,269, 2006 Tex. Crim. App. LEXIS 1969 (Tex. Crim. App., Oct. 4, 2006)**

This is a great case to read in its entirety because it really sets out the theory of "allowable units of prosecution" as well as the analysis for which is the "most serious offense" once the court determines that the convictions violate the multiple punishments aspect of double jeopardy.

In this case, the defendant was tried and convicted for the two theories of burglary of a habitation. Burglary with intent to commit theft as to one complainant; burglary with intent to commit sexual assault with a different complainant. He was convicted on both and, as a habitual offender, got 25 years on each case to run concurrently. On the burglary of a habitation with intent to commit theft case, he was also assessed $122.00 in restitution.

As to the "allowable unit of prosecution" issue, the CCA held that the allowable unit of prosecution as intended by the legislature in a burglary case is the unlawful entry. Thus, there can only be one conviction for one unlawful entry. In contrast, the "allowable unit of prosecution" in an assaultive offense is each complainant. The state argued that this was a "complainant case" but to no avail.

The analysis then shifted to which of the two was the "more serious offense." The rule is: "the most serious offense is determined by the degree of the felony, range of punishment and sentence imposed, with rules of parole eligibility and good-conduct time as a tie-breaker." In this case, the tie-breaker was the $122.00 in restitution, which the CCA considers punishment.

Interestingly, the CCA vacated the conviction that would have made the defendant register for life as a sex offender. The court kind of had to, though, because to recognize sex offender registration as a "punishment" (which it really should be anyway) would have, needless to say, opened up a pandora's box. The CCA could have decided, I suppose, that collateral consequences can figure into the "more serious offense" analysis, but that same pandora's box would have been waiting.

LEGAL SUFFICIENCY ISSUES

Does a "threat" have to be perceived by the complainant in order to support a conviction for assault by threat?

***Olivas v. State*, ___ S.W.3d ___, No. PD-1936-04, 2006 Tex. Crim. App. LEXIS 1967 (Tex. Crim. App., Oct. 4, 2006)**

In this case, an uber-stalker ex-boyfriend was harassing his ex-girlfriend repeatedly. On the occasion in question, he pursued her on the road in his mother's car, pulled along side her, rolled down the window and did something and then drove off. While he was beside her, she heard two "pops." She pulled over to see what had "popped." She discovered two bullet holes in her truck. He was tried for agg. assault by "intentionally or knowingly threaten[ing] another with imminent bodily injury" with a deadly weapon. Tex. Penal Code § 22.01(a)(2). He got a pretty good stack of time (probably richly deserved) and appealed because at the time he had fired the shots, she had not perceived the threat because she did not actually know what happened.

The CCA ultimately holds that she did perceive a threat and affirmed the conviction. But that is not the interesting part. The fairly long opinion, which is basically all *dicta*, goes through a *Boykin* analysis of the word "threaten" and whether or not the complainant has to actually perceive the threat. The CCA strongly suggests that the person does not have to perceive the threat. The analysis has some weaknesses, including this quote, where the CCA examines robbery by threat to try to divine whether "threaten" and "place in fear of imminent bodily injury" are two different things:

"A person commits robbery by threat if 'in the course of committing theft ... he ... intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.' By defining robbery to be threat plus *either* threatening *or* placing another in fear, this statute demonstrates that the term 'threaten' means something other than placing a person 'in fear of imminent bodily injury or death."

My question is this: during the course of a robbery, how does it help to "threaten" imminent bodily injury or death if that threat does not "place the complainant in fear" of imminent bodily injury or death? And how do you "place someone in fear of imminent bodily injury or death" without a threat? I dunno.

In any event, it was good enough for Chief Justice Keller, who, in a concurring opinion, chided the rest of the court for not actually holding that threats do not have to be communicated.

DEADLY WEAPON FINDINGS

Does a complainant have to see a deadly weapon for it to be a deadly weapon?

Herring v. State, **___ S.W.3d ___, No. PD-0476-05, 2006 Tex. Crim. App. LEXIS 1878 (Tex. Crim. App., Sept. 27, 2006)**

Nope. In this case, the defendant hog-tied the complainant face down. He then told the complainant he had a knife and was either going to get his money or he was going to kill him. The complainant never saw or felt a knife. Defendant was convicted of aggravated robbery (deadly weapon) and appealed. Court of appeals held this was legally insufficient to show use of a deadly weapon. CCA disagreed:

"Herring's statement that he had a knife and his threat to kill Jones qualify as admissions under the Texas Rules of Evidence, Section 801(e)(2). As such, they are not hearsay and are admissible as substantive evidence. Therefore, they qualify as evidence which, if believed by the trier of fact, ... would support a finding that Herring did indeed possess a knife and did in fact threaten to kill Jones."

Note that Herring gave a written confession, but DID NOT admit to using a knife. Thus, the only evidence was from the complainant.

DWI – ENHANCEMENTS IN FELONY DWI

Procedure for stipulating to priors in a felony DWI trial set out.

Martin v. State, **200 S.W.3d 635 (Tex. Crim. App. 2006)**

If you are going to try a felony DWI, this case is mandatory reading. It sets out all the current rules and procedures for stipulating to priors and the effect of same.

STACKING

Determining whether sentences are stackable under Tex. Penal Code § 3.03 for sex cases in same proceeding.

Ex Parte Bahena, **195 S.W.3d 704 (Tex. Crim. App. 2006)**

In this case the defendant was charged in two indictments with two cases of aggravated sexual assault of a child. They were tried together and the judge stacked his sentences.

One of the indictments alleged an offense date of July 1, 1996, the other alleged an

offense date of August 1, 1998. In 1997, such cases became stackable, but the enacting language says that the rule only applies for offenses committed on or after September 1, 1997. The defendant's argument was that the indictment alleging the July 1, 1996 offense did not qualify as stackable, so the stacking order should be overturned. He lost.

Both indictments were filed on March 2, 1999, clearly after September 1, 1997. In addition, both contained the "on or about" language. Finally, the evidence at trial was that the sexual abuse was ongoing and occurred both before and after September 1, 1997.

CREDIT FOR TIME SERVED

Defendant entitled to credit for time spent in Mexican prison awaiting extradition to US.

***Ex Parte Rodriguez*, 195 S.W.3d 700 (Tex. Crim. App. 2006)**

Defendant was held in a Mexican prison for 14 months awaiting extradition on a TDCJ parole warrant. There was never a detainer placed on him, but the evidence showed that the only reason he was being held was because of the extradition matter. He filed a writ to get the 14 months credit. The state argued no detainer, no credit! CCA disagreed. The rule is, either a detainer (a "hold") or evidence that the defendant was being held for no other reason than the fugitive warrant.