Published on *Voice For The Defense Online* (http://voiceforthedefenseonline.com)

April 2014 SDR - Voice for the Defense Vol. 43, No. 3

[1]SDR
[2]TCDLA
Tuesday, April 29th, 2014

Voice for the Defense Volume 43, No. 3 Edition

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Supreme Court

When the use of a drug D distributed was not an independently sufficient cause of decedent?s death or serious bodily injury, D could not be liable for penalty enhancement unless such use was a but-for cause of the death or injury.*Burrage v. United States,* 134 S. Ct. 881 (2014).

D sold heroin to a person who used the heroin and other drugs and died the next day. After expert witnesses testified that it was impossible to determine if decedent died from the heroin use alone, the court instructed the jury that if it found that the heroin was a contributing cause of the death, it could find D guilty of violating U.S.C. §?841(b)(1)(C) of the Controlled Substances Act by unlawfully distributing a schedule I or II drug resulting in death or serious bodily injury. D was convicted of violating §?841(b)(1)(C) and sentenced to that section?s maximum of 20 years? imprisonment. The Eighth Circuit affirmed. The Supreme Court reversed and remanded.

The Court held that at least where use of a drug distributed by a defendant was not an independently sufficient cause of a victim?s death or serious bodily injury, the defendant could not be liable for penalty enhancement under §?841(b)(1)(C) unless such use was a ?but-for? cause of the death or injury. Because the Act did not define ?results from,? the Court gave the phrase its ordinary meaning, which is that a thing ?results? when it arises as an effect, issue, or outcome from some action, process, or design. In the usual course, this requires proof that the harm would not have occurred in the absence of?that is, ?but for??defendant?s conduct.

Fifth Circuit

The Texas Department of Criminal Justice?s policy of prohibiting prisoners from wearing beards for religious reasons violated the Religious Land Use and Institutionalized Persons Act.*Garner v. Kennedy,* 713 F.3d 237 (5th Cir. 2013).

The TDCJ failed to carry its burden of showing that its no-beard policy was the least restrictive means

of furthering the compelling government interest in security. Accordingly, the Fifth Circuit upheld the district court?s grant of declaratory and injunctive relief in favor of plaintiff, a Muslim prisoner, to the extent that the policy prohibited him from wearing a quarter-inch beard (which, TDCJ did not contest, constituted a substantial burden on his religious exercise).

Texas state prisoner was not denied due process by the failure to grant street-time credit for the period between his erroneous release on parole and the revocation of that release.*Rhodes v. Thaler,* 713 F.3d 264 (5th Cir. 2013).

Under Texas law, D was not entitled to street-time credit for that period; thus, D had no protected liberty interest that was subject to due-process protection and was not entitled to habeas relief.

D?s acts of maintaining two sets of books, skimming income daily, and disguising alien-smuggling proceeds as parking income were sufficiently complex to support the sophisticated means money-laundering enhancement.*United States v. Chon,* 713 F.3d 812 (5th Cir. 2013).

In sentencing D convicted of alien smuggling, alien harboring, and money laundering, district court did not err in applying a ?sophisticated means? enhancement under USSG §?2S1.1(b)(3) of the money-laundering Guideline.

In imposing a 180-month sentence?a substantial upward departure from the applicable Guideline range of 108 to 135 months?the court did commit plain procedural error when it failed to give any explanation for the upward departure and made only a single passing reference to the sentencing factors of 18 U.S.C. §?3553(a); however, this error did not affect D?s substantial rights in light of the fact that the statement of reasons accompanying the written judgment explained the departure (namely, that the departure was for the reasons set out in the government?s motion for upward departure).

Where Mississippi attorney D was convicted, on his guilty plea, of mail fraud using the ?honest services? language later limited in*Skilling v. United States,* 130 S. Ct. 2896 (2010), D was not entitled to relief from his conviction under 28 U.S.C. §?2255; any defect in the prosecution arising from*Skilling* was not jurisdictional.*United States v. Scruggs,* 714 F.3d 258 (5th Cir. 2013).

Furthermore, D could not overcome the procedural default of his claims, as he could not show (1) cause and prejudice for the default or (2) actual innocence of the charges.

District court sufficiently discharged its obligation, un-der 18 U.S.C. §?3553(c), to explain D?s sentence; the court reviewed all the relevant materials and recounted D?s principal arguments. *United States v. Diaz Sanchez,* 714 F.3d 289 (5th Cir. 2013).

D, subject to a Guideline range of 46 to 57 months, was sentenced to 46 months? imprisonment; the district court sufficiently discharged its obligation to explain D?s sentence by stating it had reviewed all the relevant materials and recounted D?s principal arguments for a below-Guidelines sentence. The district court adopted the presentence report and its addenda, which themselves examined those arguments; the court then critically engaged with the positions of both defense counsel and government counsel, following which the court imposed a sentence that fell between defense counsel?s recommendation and government counsel?s recommendation. Nor did D overcome the presumption that his within-Guidelines sentence was substantively reasonable.

The Texas courts did not contravene or unreasonably apply clearly established federal law by rejecting D?s claim that his attorney provided ineffective assistance by failing to strike from his jury an attorney from the same prosecutor?s office that was prosecuting him.*Morales v. Thaler,* 714 F.3d 295 (5th Cir. 2013).

The state court finding that the defense attorneys? choice was strategic was not clearly erroneous. If defense attorneys may make a valid tactical decision to seat even an actually biased juror, they may certainly do so where the basis for striking the juror is only implied bias. The Fifth Circuit reversed the district court?s grant of habeas relief.

In prosecution for conspiracy to manufacture meth and possess and distribute pseudoephedrine, the district court did not abuse its discretion in admitting pseudoephedrine purchase logs from drug retailers because those logs were business records.*United States v. Towns,* 718 F.3d 404 (5th Cir. 2013).

Furthermore, the introduction of those logs did not violate the Confrontation Clause because the logs were not ?testimonial.? Nor did the district court err in denying ?safety valve? sentence reduction to D who went to trial; although the safety valve statute and Guideline do not require a defendant to plead guilty to qualify, they do require a defendant to truthfully admit his involvement in the offense. Here, the district court did not clearly err in finding that D had not done so.

D was not entitled to relief on his claim of ineffective assistance of counsel with respect to plea negotiations; that claim was scuttled by the state court?s factual de-ter-mination that D had again rejected the State?s 16-year plea offer after defense counsel informed D that the State rejected D?s 12-year counteroffer.*Miller v. Thaler,* 714 F.3d 897 (5th Cir. 2013).

Nor was D entitled to federal habeas relief on his claim that his right to self-representation was violated. The state habeas court reasonably rejected that claim, considering (1) counsel continued to represent D without objection from D, (2) D was equivocal in his intent to fire his counsel, and (3) no motion to withdraw was filed by defense counsel.

Court of Criminal Appeals

Ds were entitled to release on personal bond or bail reduction because they established that they were in custody for over ninety days and the State was not ready to try them on the offense for which they were being held.*Ex parte Gill,* 413 S.W.3d 425 (Tex.Crim.App. 2013).

Arrested for murder, Tommy and Charlie Gill were held in custody for over ninety days without being formally charged with an offense. They filed applications for writs of habeas corpus alleging that under Tex. Code Crim. Proc. art. 17.151, they were entitled to release on a personal bond or a reduction of bail. The trial judge denied Ds? applications, and COA affirmed. Because COA erred in holding that the judge properly considered factors outside of Article 17.151 in denying Ds relief under that provision, CCA reversed and remanded to the habeas court.

Where D was convicted of aggravated assault, her plea of ?true? to the allegations in the enhancement par-a-graph read in the proper order was sufficient to prove the enhancement allegations and to enhance her pun-ish-ment to that of a habitual offender.*Roberson v. State,* No. PD-0917-12 (Tex.Crim.App. Nov 20, 2013).

The record evidence, including penitentiary packets, reflected that the sequence of the alleged prior convictions did indeed occur in the required order. The State met its burden as the evidence was sufficient to prove the statutorily required sequence of convictions for D?s punishment to be enhanced to that of a habitual offender under Tex. Penal Code §?12.42(d). COA was justified in relying on an unpublished opinion, rather than a published opinion, regarding the issue of enhanced sentences and finality of the convictions in enhancement paragraphs.

D was explicitly entitled to notice of violations of a mu-nic-i-pal code before his subsequent violations could result in convictions.*State v. Cooper,* Nos. PD-0001-13 & PD-0202-13 (Tex.Crim.App. Nov 20, 2013).

The charging instrument failed to allege that D was given notice before being charged under Plano, Tex., Code of Ordinances §?6-46, which adopted the 2003 International Property Maintenance Code and explicitly required that persons were given notice that they were in violation and then failed to comply before they could be charged with the misdemeanor strict liability offense. ?The ordinance under which the City chose to charge the appellant is not ambiguous, and there is no need to look to other canons of statutory interpretation.? Therefore, the complaints were properly dismissed.

Applicant failed to satisfy Tex. Code Crim. Proc. art. 11.071, §?5(a); CCA shortly dismissed the application as an abuse of the writ without considering its merits.*Ex parte Buck,* No. WR-57,004-03 (Tex.Crim.App. Nov 20, 2013).

The trial court erred in refusing D?s request for a formal competency trial; there was at least some evidence that D lacked the capacity to engage rationally with his counsel or with respect to legal strategies.*Turner v. State,* No. AP-76,580 (Tex.Crim.App. Oct 30, 2013).

D was convicted of the murder of his wife and mother-in-law and sentenced to death. In this automatic direct appeal to CCA, D did not challenge the sufficiency of the evidence; in fourteen of his points of error, he claimed that he was incompetent to stand trial and that the trial court should at least have paused the proceedings at various stages to conduct a formal competency hearing, as his counsel repeatedly requested. CCA abated D?s appeal and remanded to the trial court.

The trial court erred in failing to grant D?s request for a formal competency trial under Tex. Code Crim. Proc. art. 46B.005 because there was at least some evidence from which it could rationally be inferred that D suffered some degree of debilitating mental illness, D obstinately refused to cooperate with counsel to his own apparent detriment, and D?s mental illness was what fueled his obstinacy. The standard for requiring a formal competency trial is not particularly onerous?whether, putting aside competing evidence of competency, there is more than a scintilla of evidence to support a rational fact-finding that the accused is incompetent to stand trial.

On a competency-to-be-executed claim, D made a sub-stantial showing of incompetency because there was evi-dence that at least some of the time, as a result of men-tal illness, he did not believe he committed the crime and did not think he would be executed; the trial court erred in weighing the evidence of incompetency against evidence of competency.*Druery v. State,* 412 S.W.3d 523 (Tex.Crim.App. 2013).

D was convicted of capital murder and sentenced to death. Shortly before his scheduled execution on August 1, 2012, he filed a motion to determine competency to be executed under Tex. Code Crim. Proc. art. 46.05. The trial court held an informal hearing, found D had not made a ?substantial showing? of incompetency, and denied the motion. As a result, there was no formal hearing on the merits to determine if D was incompetent to be executed. D moved to send the record to CCA, and the trial court granted that motion. After reviewing the record, CCA determined that further review was needed and stayed the execution. On August 9, 2012, CCA ordered briefing from the parties concerning five issues. Having reviewed the parties? briefing on these issues, CCA here found that D made a substantial showing of incompetency to be executed, so he is entitled to further proceedings, including appointment of at least two mental health experts and a determination regarding competency. CCA ordered that the stay of execution remain in effect pending the outcome.

In a trial for intentional or knowing injury to a child, D was entitled to an instruction on the lesser-included offenses of reckless and criminally negligent injury to a child.*Wortham v. State,* 412 S.W.3d 552 (Tex.Crim.App. 2013).

D was convicted of intentional or knowing injury to a child under Tex. Penal Code §?22.04(a). COA affirmed. CCA reversed, finding that COA misapplied the analysis to determine the availability of lesser-included offense instructions. Based on the elements of the offense as modified by the indictment, which did not charge injury by omission, reckless and criminally negligent injury to a child by committing an act were lesser-included offenses of intentional or knowing injury to a child. It was error to deny D?s request for the lesser-included instruction on the basis that the medical evidence overwhelmed D?s explanation of the cause of the injuries, instead of determining whether more than a scintilla of evidence supported the instruction. There was sufficient evidence to support the instruction because a detective?s testimony included D?s assertion that he shook the child in an attempt to revive her.

Tex. Penal Code §?33.021(b), barring sexually explicit on-line solicitation of a minor, was facially unconstitutional; it was overbroad because it barred constitutionally protected speech and was not narrowly drawn only to protect children from sexual abuse.*Ex parte Lo,* No. PD-1560-12 (Tex.Crim.App. Oct 30, 2013).

D was charged with the third-degree felony of communicating in a sexually explicit manner with a person he believed to be a minor with an intent to arouse or gratify his sexual desire. He filed a pretrial habeas application alleging that this specific subsection of the felony offense of online solicitation of a minor is facially unconstitutional. The trial judge denied relief, and COA affirmed. CCA reversed and remanded to the trial court to dismiss the indictment.

?In sum, everything that Section 33.021(b) prohibits and punishes is speech and is either already prohibited by other statutes (such as obscenity, distributing harmful material to minors, solicitation of a minor, or child pornography) or is constitutionally protected.? COA mistakenly applied the usual standard of review, including the presumption of the statute?s validity, instead of the presumption-of-invalidity standard of review for First Amendment, content-based statutes; the State had to show the statute?s validity because it regulated speech content, so it was presumed invalid and subject to strict scrutiny.

The dispositive nature of D?s motion to suppress was a term of his plea agreement, and it rendered moot D?s motion to disclose an informant; denials of both motions stand.*Bland v. State,* 417 S.W.3d 465 (Tex.Crim.App. 2013).

During the trial against D for possession of a controlled substance, D and the State agreed that D?s motion to suppress would be dispositive of the case?that if the judge ruled in D?s favor, the State would dismiss the case; if the judge ruled in the State?s favor, D would plead. D also filed a motion to disclose the identity of an informant. The bases for the motion to disclose were that the informant could testify (1) at the motion to suppress hearing or (2) at the guilt phase of trial. The judge denied both the motion to suppress and the motion for disclosure. D pled guilty. COA and CCA affirmed the trial court.

D failed to preserve his complaints about the rulings on his motions. Also, he failed to sufficiently apprise the trial court of his intent to challenge the motion to disclose on this second basis or to challenge (or renege on) the dispositive nature of the plea agreement. As D did not withdraw from the plea agreement after the denial of the motion to disclose, he failed to sufficiently apprise the trial court of his intent to challenge the motion. Because D pled guilty despite any concerns he might have had, the dispositive nature of the motion to suppress was part of the plea agreement and binding on him.

Denial of D?s severance motion was harmless error be-cause the consolidated charges related to each other and were based on a common set of facts.*Werner v. State,* 412 S.W.3d 542 (Tex.Crim.App. 2013).

In two separate indictments, D was charged with stalking his former girlfriend. The judge permitted the State to consolidate the offenses and denied D?s motion to sever. The jury convicted D of both offenses, and the judge assessed punishment at ten years? confinement for each offense, to run concurrently. D appealed that the judge erred by denying his motion to sever. COA held that D had an absolute right to sever under Tex. Penal Code §?3.04. Finding the error harmful, COA reversed D?s conviction and ordered a new trial. CCA reversed COA and remanded to address D?s remaining points of error.

CCA granted the State?s petition to decide if denying a severance motion is harmful error when the evidence of guilt is overwhelming for the first offense and evidence of that first offense would have been admissible in a trial of the second offense. Because the State was entitled to offer evidence of D?s prior acts of harassment relevant to the first offense to prove the elements of the second offense, CCA concluded that the error was harmless under Tex. R. App. P. 44.2(b).

Because the State was never confronted with its burden to establish the scientific reliability of its breath-test results, inadmissibility of that evidence was not a ?theory of law applicable to the case? available to justify the trial court?s erroneous grant of D?s motion to suppress.*State v. Esparza,* 413 S.W.3d 81 (Tex.Crim.App. 2013).

Following his DWI arrest, D filed a motion to suppress ?all evidence seized as a result of illegal acts by the state.? Specifically, he alleged that his arrest was illegal and that the circumstances under which blood-alcohol breath testing was conducted rendered the results illegally obtained for purposes of Tex. Code Crim. Proc. art. 38.23. At a pretrial hearing on the motion to suppress, the State presented testimony from one of the arresting officers and then rested. The trial court de-ter-mined that D?s arrest was legal but granted D?s motion to suppress on the explicit basis that the State ?failed to present any testimony regarding the breath test results[.]? The State appealed, and COA reversed. CCA affirmed COA.

D?s claim, first raised on appeal, that the results were inadmissible under Tex. R. Evid. 702 was not ?law applicable to the case? available to justify the trial court?s ruling because the issue was not raised in trial court. The State was never confronted with a need to show the scientific reliability of the results.

Court of Appeals

Trial court properly refused DNA testing because a self-defense claim does not raise the issue of establishing innocence by excluding the defendant as the perpetrator.*Peyravi v. State,* No. 14-13-00118-CR (Tex.App.?Houston [14th Dist] Nov 7, 2013).

?Appellant has not made the identity of the person who stabbed his girlfriend an issue; he admits he stabbed her to death, but argues DNA testing will prove he acted in self-defense when he stabbed her. . . . The purpose of DNA testing under article 64.03 is to provide an avenue by which a defendant may seek to establish his innocence by excluding himself as the perpetrator of the offense. . . . A trial court is not required to order DNA testing under circumstances where, as here, the appellant admitted to being the perpetrator but seeks to establish self-defense. . . . Because identity was and is not an issue, the trial court did not abuse its discretion in denying appellant?s motion for post-conviction DNA testing.?

Failing to register as a sex offender under Tex. Code Crim. Proc. art. 62.102 bears on the defendant?s character for truthfulness.*Vasquez v. State,* 417 S.W.3d 728 (Tex.App.?Houston [14th Dist] 2013, pet. refused).

As the State provided ?ample evidence that appellant knew of his duty to register annually but failed to register and up-date his address,? the court overruled D?s claim that counsel was ineffective for eliciting testimony regarding D?s prior conviction for failing to register as a sex offender. By failing to register, D concealed information to the public; this factor favored admission under Tex. R. Evid. 609(a). Another

factor that favored admission was that the crimes at issue were identical. For Sixth Amendment purposes, had counsel objected, it would not have been an abuse of discretion for the trial court to rule that D?s prior conviction was admissible. COA affirmed D?s conviction for failing to register.

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