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Supreme Court

When challenging a pre-trial asset seizure, a defendant who has been indicted is not constitutionally entitled to contest a grand jury?s determination of probable cause to believe he committed the crimes charged.*Kaley v. United States,* 134 S. Ct. 1090 (2014).

Two defendants were indicted by a grand jury of scheming to steal and resell prescription medical devices. At a hearing on a 21 U.S.C. §?853(e)(1) freezing of assets involved in the offenses, the lower courts held that Ds were not entitled to challenge the factual foundation supporting the grand jury?s probable cause determination. The Supreme Court affirmed and remanded.

Prior judicial precedent held that the probable cause standard governed the pre-trial seizure of forfeitable assets, even when they were needed to hire a lawyer. And judicial precedent repeatedly affirmed a corollary of that standard?i.e., a defendant had no right to judicial review of a grand jury?s determination of probable cause to think a defendant committed a crime. In combination, those settled propositions signaled defeat for Ds in the instant case because, in contesting seizure of their property, they sought only to relitigate the grand jury finding. In sum, if the question in a pre-trial forfeiture case was whether there was probable cause to think the defendant committed the crime, then the answer was whatever the grand jury decided.

A federal statute can be enforced on a portion of a military installation that is subject to a public roadway easement.*United States v. Apel,* 134 S. Ct. 1144 (2014).

The Department of the Air Force owns land that Highway 1 crosses, and the Department has granted roadway easements to the State of California and Santa Barbara County. Near the main gate of Vandenberg Air Force Base is a designated area for public protesting that falls under the Highway 1 easements. D was barred from Vandenberg?s property in 2007 for trespassing. In 2010, while the order barring him was still in effect, he entered the protest area three times and was asked to leave. He failed to leave each time. D was convicted of three violations of 18 U.S.C. §?1382, prohibiting a person from reentering a military installation after an officer has ordered him not to. D appealed, arguing that the statute requires the base to

have exclusive possession over the area. The district court affirmed the convictions. The Ninth Circuit reversed, holding that because the area is subject to an easement, the federal government does not have an exclusive right of possession, and so the convictions cannot stand. The Supreme Court disagreed.

For §?1382, part of an Air Force base that contains a designated protest area and an easement for a public road qualifies as a military installation. There has historically been a great deal of variation in the ownership status of U.S. military sites around the world; there is no precedent to support the view that a statute does not apply on a base merely because the base does not have exclusive ownership of the land. Despite the easement, the area remained under the jurisdiction of the base commander.

Fifth Circuit

A defendant sentenced under the Mandatory Victim Restitution Act is only responsible for paying restitution for the conduct underlying the offense of which he was convicted.*United States v. Mason,* 722 F.3d 691 (5th Cir. 2013).

In mortgage-fraud case, where one defendant was acquitted of the overarching conspiracy count and convicted only of substantive counts relating to one transaction, the district court committed reversible plain error in ordering that D to pay restitution for a transaction other than the one underlying his counts of conviction.

Although courts sometimes recognized extrinsic promises contained in cover letters submitted contemporaneously with plea agreements, here the email exchange took place weeks before D?s guilty plea, and copies thereof were not transmitted with the plea.*United States v. Long,* 722 F.3d 257 (5th Cir. 2013, writ denied).

The government did not breach its plea agreement with D by supporting the presentence report?s recommendation for an aggravating-role enhancement where the written plea agreement was silent on the issue but a subsequent email exchange between prosecutor and defense counsel showed prosecutor?s apparent agreement not to argue for an aggravated-role enhancement under the Guidelines. Moreover, by D denying under oath that there were any promises other than those contained in the plea agreement, the record shows that D did not rely on the email in pleading guilty; also, it would have been unreasonable for D to rely on the email given the plea agreement?s integration clause stating that the written plea agreement constituted the complete agreement between D and the government.

Search of D?s entire vehicle exceeded the scope of D?s consent, which was limited to his luggage; this required suppression not just of the drugs discovered, but also D?s inculpatory statements, as these were not shown to be sufficiently attenuated from the taint of the unconstitutional search.*United States v. Cotton,* 722 F.3d 271 (5th Cir. 2013).

Louisiana state D was not entitled to equitable tolling excusing his belated federal habeas petition beyond the AEDPA?s one-year limitations period; D was not diligent in asserting his rights.*Sutton v. Cain,* 722 F.3d 312 (5th Cir. 2013).

Moreover, D?s legal error (not signing a state petition for certiorari to be filed jointly with a co-defendant, thereby excluding himself as a party to that petition) was not an extraordinary circumstance preventing him from filing a timely federal petition. Nor was D entitled to statutory tolling; the Louisiana Supreme Court?s denial of D?s motion for leave to file an out-of-time petition for certiorari was not an adjudication on the merits restarting the AEDPA clock.

District court reversibly erred in denying D?s 28 U.S.C. §?2255 motion, in which he alleged ineffective assistance of counsel with respect to filing a notice of appeal; counsel?s duty to consult with D about appealing was triggered.*United States v. Pham,* 722 F.3d 320 (5th Cir. 2013).

Under *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), an at-tor-ney provides ineffective assistance if he fails to consult with his client regarding an appeal (1) where a rational defendant would want to appeal or (2) where the particular defendant rea-sonably demonstrated to counsel that he was interested in ap-peal-ing. Here, D satisfied the second category; counsel knew D wanted a probation sentence so he could take care of his sick wife, but got a prison sentence. Moreover, after sentencing, D said he was concerned about the sentence and wanted to do some-thing to get less time. This was enough, in context, to trigger counsel?s duty to consult with D about an appeal. The Fifth Circuit reversed the denial of §?2255 and remanded to give D an opportunity to file a direct appeal.

Texas courts did not unreasonably apply clearly es-tab-lished law by rejecting D?s Confrontation Clause chal-lenge to the admission of a soundless videotape of attempts to determine whether D?s 2½-year-old son could pull the trigger of the gun that killed D?s wife (D claimed the toddler accidentally killed his mother).*Dorsey v. Stephens,* 720 F.3d 309 (5th Cir. 2013).

No U.S. Supreme Court decision clearly establishes the contours of the Confrontation Clause in a factual setting even remotely analogous to a soundless video of a child?s responses and actions during an interview with law enforcement officials; furthermore, even if the Confrontation Clause had been clearly violated by the admission of the videotape, that evidence did not have a substantial and injurious effect on the jury?s verdict. Nor did appellate counsel provide ineffective assistance by failing to raise the Confrontation Clause issue on direct appeal; D failed to establish that this was deficient performance or that D was prejudiced thereby.

When a state?s procedural framework makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise an ineffective assistance of trial counsel claim on direct appeal, the good cause exception applies.*Ibarra v. Stephens,* 723 F.3d 599 (5th Cir. 2013).

In light of *Treviño v. Thaler*, 133 S. Ct. 1911 (2013), the panel majority granted rehearing in part, vacated its prior decision only to the extent inconsistent with *Treviño*, and remanded to the district court. *Treviño* held that when a state?s procedural framework makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise an ineffective assistance of trial counsel claim on direct appeal, the good cause exception from *Martinez v. Ryan*, 566 U.S. 1 (2012), applies.

Court of Criminal Appeals

Where D was convicted of aggravated robbery with a deadly weapon, the trial court did not err by ordering him to pay $294 in court costs because the bill of costs contained in the supplemental clerk?s record supported the charge.*Cardenas v. State,* 423 S.W.3d 396 (Tex.Crim.App. 2014).

D was convicted of aggravated robbery with a deadly weapon. The judgment of conviction ordered him to pay $294 in court costs. CCA granted D?s petition for review to determine whether COA erred in holding that the record supported the assessment of $294 and to construe an article of the Texas Code of Criminal Procedure that allows a defendant to file a motion to ?correct costs.? CCA affirmed, finding that there were a number of statutes to support the assessed amount of costs, and that convicted defendants have constructive notice of mandatory court costs set by statute. Furthermore, CCA was not required to construe Tex. Code Crim. Proc. art. 103.008, as D never filed a motion to correct costs.

Law enforcement could not, even with probable cause, activate and search the contents of an inventoried cell phone that was immediately associated with D at his lawful arrest.*State v. Granville,* 423 S.W.3d 399 (Tex.Crim.App. 2014).

The issue is whether a person retains a legitimate expectation of privacy in the contents of their cell phone while that phone is temporarily stored in a jail property room. The trial judge granted D?s motion to suppress, concluding that the high-school student did not lose his legitimate expectation of privacy in his cell phone simply because it was being stored in the jail property room after D had been arrested for a Class C misdemeanor. COA and CCA affirmed that ruling.

CCA granted the State?s petition for review but rejected its argument that a modern-day cell phone is like a pair of pants or bag of groceries, for which a person loses all privacy protection once it is checked into a jail property room. Given modern technology and the incredible amount of personal information stored and accessible on a cell phone, D did not lose his reasonable expectation of privacy in the contents of his phone merely because the phone was stored in a jail property room. An officer could have seized D?s phone and held it while he sought a search warrant; but, even with probable cause, he could not activate and search the contents of the inventoried phone without one.

The Double Jeopardy Clause was not violated because the gravamina of D?s two convictions differed; therefore, the allowable units of prosecution for the two offenses were not the same.*Garfias v. State,* 424 S.W.3d 54 (Tex.Crim.App. 2014).

D was charged with aggravated robbery by threat and aggravated assault causing bodily injury and was convicted of both. D appealed that these multiple convictions violated dou-ble jeopardy. COA agreed and vacated his sentence for aggravated robbery. CCA reinstated D?s convictions: The gravamen of the two offenses in question, deemed the best indicator of legislative intent for an elements analysis, indicated that the Legislature intended to allow multiple punishments for aggravated robbery by threat and aggravated assault causing bodily injury. The offenses were not contained in the same statutory section, they were not named similarly, and they did not have identical punishment ranges.

Under Tex. Code Crim. Proc. art. 103.001, a bill of costs need not be in the record to support a particular amount of court costs.*Johnson v. State,* 423 S.W.3d 385 (Tex.Crim.App. 2014).

The aggravated robbery judgment against D ordered him ?to pay all fines, court costs, and restitution as indicated above.? The amount of $234 was written in the blank labeled ?Court Costs.? D appealed that there was insufficient record evidence to support the $234. COA ordered the district clerk to supplement the record with a bill of costs, if one existed, or an affidavit stating one did not exist. The clerk filed an affidavit stating that a bill of costs was not included in the record. Later, the clerk?s office filed a supplemental record including a document that appeared to be a bill of costs. COA concluded that the document was not a bill of costs and agreed with D that because ?[i]t is undisputed that the record in the trial court at the time this appeal was filed did not contain any evidence supporting the assessment of $234 in court costs[,]? the trial court erred by entering a specific amount of costs. CCA reinstated the costs.

The record was supplemented by a bill of costs. A bill of costs is sufficient absent a challenge to a specific cost or its basis for assessment. To afford litigants a ?roadmap? for questions regarding court costs, CCA said ?(1) a claim with respect to the basis of court costs need not be preserved at trial to be raised for the first time on appeal, (2) Appellant?s claim is ripe for review, (3) a record on appeal can be supplemented with a bill of costs, (4) the document in the supplemental clerk?s record is a bill of costs, (5) the court of appeals erred when it failed to consider the supplemental bill of costs, (6) a bill of costs need not be in the record to support a particular amount of court costs, and (7) the fact that most court costs (and certainly those discussed in this case) are mandated by statute and, thus, subject to the old adage that ?ignorance of the law is no excuse,? dispenses with the need for an ordinary sufficiency review.?

Trial counsel?s failure to request a sign language interpreter for deaf D constituted prejudicial error. *Ex parte Cockrell,*424 S.W.3d 543 (Tex.Crim.App. 2014).

Despite the Tex. Code Crim. Proc. art. 38.31 requirement of an interpreter for deaf defendants, none was provided for applicant, who was unable to understand a substantial portion of his jury trial. Applicant contended that his counsel rendered ineffective assistance by failing to seek accommodations for his deafness. He further contended that as a result of counsel?s errors, he was deprived of his constitutional rights to confront the witnesses against him, to understand the nature and substance of the proceedings, and to assist in his defense. CCA agreed and remanded for a new trial.

?It is well settled that, if a defendant cannot hear, fundamental fairness and due process of law require that an interpreter be provided. The federal Constitution ?requires that a defendant sufficiently understand the proceedings against him to be able to assist in his own defense.? Article 38.31 . . . implements the constitutional right of confrontation, which includes the right to have trial proceedings conducted in a way that the accused can understand. It was trial counsel?s responsibility to ensure that applicant?s constitutional rights were not violated, and counsel wholly failed to do this.?

District court improperly declined to give prisoner D information regarding the costs of transcripts for a habeas application.*In re Bonilla,* 424 S.W.3d 528 (Tex.Crim.App. 2014).

In denying relator?s request for information, the district clerk relied on statutory authority in Tex. Gov?t Code §?552.028 that broadly permits a governmental body to decline to give information requested by an imprisoned individual or his agent unless that agent is an attorney. ?We conclude that when the information sought by an imprisoned individual relates only to the amount that it would cost to obtain trial and appellate transcripts for use in preparing an application for a writ of habeas corpus, application of Section 552.028 to deny the prisoner access to that information unconstitutionally infringes on his federal constitutional right to have access to the courts. Although relator has established that he had no adequate remedy at law and a clear right to relief, we decline to grant his request for relief in this application for a writ of mandamus because, while this case was under abatement, the district clerk provided the information to him and, therefore, his request for relief is now moot.?

The Supreme Court holding that forbids mandating life in prison without possibility of parole for juvenile of-fenders applies retroactively.*Ex parte Maxwell,* 424 S.W.3d 66 (Tex.Crim.App. 2014).

Habeas corpus relief was appropriate here where D, a juvenile at the time of the commission of a capital murder offense, was given a mandatory sentence of life imprisonment without the possibility of parole under Tex. Penal Code §§?19.03(a)(2), 12.31(a). *Miller v. Alabama,* 132 S. Ct. 2455 (2012), applied retroactively to this claim raised in a post-conviction proceeding because it announced a new substantive rule; it put a juvenile?s mandatory life without parole sentence outside the ambit of a State?s power. New substantive rules can apply retroactively in collateral proceedings under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. Here, further sentencing proceedings were required to permit the factfinder to assess D?s sentence at life with the possibility of parole or without the possibility of parole after consideration of his conduct, circumstances, and character. CCA granted habeas relief and remanded for sentencing consistent with *Miller.*

Trial court?s error in barring defense counsel from questioning the jury panel on the differences between criminal and civil burdens of proof was a non-constitutional, harmless error.*Easley v. State,* 424 S.W.3d 535 (Tex.Crim.App. 2014).

In voir dire, the judge prohibited defense counsel from comparing other legal burdens of proof to beyond-a-reasonable-doubt in criminal trials. COA found the judge?s ruling erroneous, but harmless after applying a non-constitutional harm analysis. CCA affirmed.

CCA overruled its relevant cases, which held that barring defense counsel from asking proper questions

of the venire is an error of constitutional dimension per se. The error in pro-hibiting defense counsel from questioning the panel on the criminal and civil burdens of proof did not affect a defendant?s right to counsel and was, therefore, a non-constitutional error to be analyzed under Tex. R. App. P. 44.2(b). COA correctly found the error to be harmless because counsel was free to question the venire concerning their concept of reasonable doubt, albeit in a different manner, and the evidence supporting D?s conviction was substantial.

D should be allowed his right to appeal even though he initially omitted the correct cause numbers. *Gonzales v. State,*421 S.W.3d 674 (Tex.Crim.App. 2014).

D pleaded guilty to four indictments for delivery of methamphetamine and pleaded true to the enhancement allegations. The charges were consolidated under a single cause num-ber for a jury trial on punishment. After being sentenced, D filed a pro-se notice of appeal, listing only the cause number used at trial. Before briefs were filed, D filed an amended notice with all four numbers. COA dismissed D?s appeals for the three causes that D originally omitted. Here, both D and the State alleged that COA erred. CCA reversed COA, and remanded the cases to COA.

COA dismissed D?s appeals for lack of jurisdiction; not too long ago, this would have been in accordance with CCA jurisprudence. However, in 2002 the Rules of Appellate Procedure were amended to prevent just such a result. After this amendment, CCA noted that ?defects in notices of appeal should not be described as affecting jurisdiction.? Further, CCA criticized its older cases as elevating ?form over substance.? CCA provided ?a more equitable path? that allowed appellants to cure ?apparently any defects in notices of appeal? because Tex. R. App. P. 25.2(c)(2) holds that a notice is sufficient if it shows the party?s desire to appeal. The judgments here went against these considerations. Notice was not an issue; the State did not object to D?s amendment and readily conceded that it understood D?s desire to appeal all four convictions. Further, Rule 25.2(f) explicitly allows amendments for the purpose of correcting ?omissions.? Here, it was clear that the one cause number had been used in trial for all four charges. D?s failure to list the three others was clearly an ?omission.?

D?s appeal of court costs more than thirty days after the costs were issued in his deferred-adjudication order was untimely.*Perez v. State,* 424 S.W.3d 81 (Tex.Crim.App. 2014).

In 2008, D plead guilty to burglary and was placed on deferred-adjudication community supervision, fined $300, and ordered to pay court costs of $203. He did not appeal. In 2012, the trial court adjudicated D?s guilt and assessed punishment at two years? incarceration, a $300 fine, and court costs of $240. D appealed that the record did not substantiate the court costs, and that the list of costs was not a proper ?cost bill? because it was generated well after the judgment and gave him no opportunity to object. D also argued that the list of costs was made of ?screen shots? and contained no detail. COA agreed. CCA reversed COA and dismissed D?s appeal with respect to $203 of the costs.

D?s failure to appeal $203 of costs within 30 days of being placed on deferred-adjudication community supervision constituted a procedural default under *Manuel v. State,* 994 S.W.2d 658 (Tex.Crim.App. 1999); a defendant must raise issues relating to the original plea proceeding only in a timely appeal taken when deferred-adjudication community supervision is first imposed. Further, D waived his right to appeal when he pled guilty and was placed on community supervision.

COA does have jurisdiction to consider the appeal of the remaining $37 of costs. CCA held in *Johnson v. State,* No. PD-0193-13 (Tex.Crim.App. Feb 26, 2014), that ?a record on appeal can be supplemented with a bill of costs,? and the fact that most court costs are mandated by statute dispenses with the need for an ordinary sufficiency review. Because COA did not have the benefit of *Johnson* when it addressed D?s claims, CCA remanded to COA.

A trial judge may not, over objection, order an indigent defendant to pay for a SCRAM device as a term of his probation without considering defendant?s financial abil-ity.*Mathis v. State,* 424 S.W.3d 89 (Tex.Crim.App. 2014).

COA properly found that the trial court erred under Tex. Code Crim. Proc. art. 42.12, §?11(b), by failing to consider D?s ability to pay for a Secure Continuous Remote Alcohol Monitor (SCRAM) device at sentencing; D presented two sworn affidavits of indigency and was appointed counsel at trial and on appeal, and there was nothing in the record that showed he would be able to find a suitable job that would allow him to support himself without undue hardship and also pay restitution, court costs, attorney?s fees, and the monthly SCRAM fees. However, COA erred by holding that the remedy was to simply delete the requirement. CCA reversed COA and remanded for the trial court to consider D?s financial ability in deciding whether to order him to pay for a SCRAM device.

CCA was not required to provide notice to the Texas Attorney General pursuant to Tex. Gov?t Code §?402.010 of its holding that Tex. Penal Code §?33.021(b) was unconstitutional; §?402.010 violated separation of powers.*Ex parte Lo,* 424 S.W.3d 10 (Tex.Crim.App. 2014).

In October 2013, CCA held that Tex. Penal Code §?33.021(b), barring sexually explicit online solicitation of a minor, was facially unconstitutional. The State alleged here that CCA erred by finding §?33.021(b) unconstitutional without first providing notice to the state attorney general pursuant to Tex. Gov?t Code §?402.010. CCA denied the State?s motion for rehearing. CCA held that §?402.010(a) and (b) were an unconstitutional violation of separation of powers, Tex. Const. art. II, §?1, where entering a final judgment was a core judicial power, which fell within that realm of judicial proceedings so vital to the efficient functioning of a court as to be beyond legislative power.

Court of Appeals

Trial court properly ordered garnishment of inmate?s trust account for $10,275.00 for the fine and costs from his possession of a controlled substance conviction because inmate received a copy of the withdrawal notice and had an opportunity to be heard when he filed his motion to cease garnishment. *Nelson v. State,* No. 06-13-00121-CV (Tex.App.?Texarkana Feb 13, 2014).

Trial court erred by rendering judgment against D for attempted escape as a third-degree felony because the jury charge did not include a finding that D used or threatened to use a deadly weapon. *Musgrove v. State,* 425 S.W.3d 601 (Tex.App.?Houston [14th Dist] 2014).

The trial court also erred by entering judgment against D on his assault convictions as second-degree felonies: ?The jury found appellant guilty of two counts of assault of a public servant, which is a third-degree felony. *See* Tex. Penal Code §?22.01(a)-(b)(1). The trial court properly enhanced the range of appellant?s punishment as to these convictions based on appellant?s prior convictions, but erroneously reflected in the judgment a second-degree offense. *See id.* §?12.42(a). Although Penal Code section 12.42 increases the range of punishment ap-pli-cable to the primary offense, it does not increase the severity level or grade of the primary offense.?

Lastly, COA found error in D?s sentence for attempted es-cape, enhanced by the same prior conviction that was used as an essential element of the charged offense. ?The use of a prior conviction to prove an essential element of an offense bars the subsequent use of that prior conviction in the same indictment for enhancement purposes.? Therefore, D?s 10-year sentence was void and illegal, and he was entitled to a new punishment trial under Tex. Code Crim. Proc. art. 44.29(b).

Trial court did not err by permitting a caseworker to tes-tify as an expert, even though her experience was al-most exclusively with the DA?s office, because she detailed her experience working with victims of domestic violence and their tendency to minimize or recant allegations.*Salinas v. State,* 426 S.W.3d 318 (Tex.App.?Houston [14th Dist] 2014).

?Appellant first challenges Hutchinson?s qualifications because she had only ?one frame of reference? and ?one type of training and belief? after working for 12 years in the district attorney?s office. Appellant cites no authority suggesting that a witness must work with more than one employer to qualify as an expert. In any event, Hutchinson stated that she has worked in internships in a group home, a hospital, and another health care facility. She testified that she has two degrees in social work and has attended numerous ?conferences, trainings and seminars where domestic violence was the [main] topic.? . . . The record gives no indication that Hutchinson?s education, training, and experience were too limited or ?one-sided? to prevent her from qualifying as an expert.?

Trial court erred in denying D?s motion to suppress be-cause officers engaged in an illegal search when they intruded onto D?s curtilage to look in his kitchen window, a window not located near any established pathway to a door to the house.*Sayers v. State,* No. 01-12-00712-CR (Tex.App.?Houston [1st Dist] Mar 27, 2014).

The circumstances presented did not justify a protective sweep, as the arresting officers, at the time they initially approached D?s house, did not possess an objectively reasonable belief, based on specific and articulable facts, that the house harbored individuals who posed a danger to those on the scene.
