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Supreme Court

The categorical authority to detain incident to the execution of a search warrant should be limited to the immediate vicinity of the premises to be searched.*Bailey v. United States,* 133 S. Ct. 1031 (2013).

While police were preparing to execute a search warrant, detectives conducting surveillance saw D and another person leave the area above the apartment and drive away. D was stopped approximately one mile away; a pat-down revealed keys connecting D to the apartment. D was handcuffed and driven in a patrol car to the apartment, where the search team had already found a gun and drugs. D?s motion to suppress was denied, and he was convicted of drug and firearms possession. The district and appellate courts justified the detention under *Michigan v. Summers,* 452 U.S. 692 (1981), as incident to the execution of a search warrant. The Federal Courts of Appeals disagree as to whether *Summers* justifies the detention of occupants beyond the immediate vicinity of the prem-ises covered by a search warrant. The Supreme Court reversed the decision upholding denial of the suppression motion and remanded for the Second Circuit to determine if the detention could be justified alternatively under *Terry v. Ohio,* 392 U.S. 1 (1968).

An exception to the Fourth Amendment rule prohibiting detention absent probable cause should not diverge from its purposes and rationale. There were three important law enforcement rationales in *Summers* justifying the detention of an occupant who was on the premises during the execution of a search warrant: officer safety, facilitating completion of the search, and preventing flight. None of these interests applied to the detention of D, who was a former occupant of the premises and found away from the scene of the search.

The absence of a narcotics dog?s field performance records did not preclude finding PC.*Florida v. Harris,*133 S. Ct. 1050 (2013).

A trial court denied D?s motion to suppress evidence found after a narcotics dog alerted to his car, but the Florida Supreme Court (FSC) reversed for lack of records, including a log of the dog?s field performance, to establish the dog?s reliability. The dog, on two separate occasions, had falsely alerted to narcotics in D?s car; but in the first search, ingredients for methamphetamine were found. The U.S. Supreme Court reversed the FSC, which held that the State had to ?in every case present an exhaustive set of records?

to establish a dog?s reliability.

No matter how much other proof the State offered on a dog?s reliability, the FSC would have found that the absence of field performance records precluded finding probable cause?the antithesis of a totality-of-the-circumstances analysis. The FSC treated records of a dog?s field performance as the gold standard in evidence when in most cases they had relatively limited import. A dog could alert to a car in which no drugs were found because the drugs were hidden or in quantities too small to locate. The State introduced substantial evidence of the dog?s training and his proficiency in finding drugs. While the dog?s certification had expired, the officer and dog trained four hours weekly to keep skills sharp. Officer testified, and written records confirmed, that in those settings the dog always performed at the highest level. D had not challenged in the trial court any aspect of the dog?s training. And, D cooked and used meth on a regular ba-sis; so as officer later surmised, the dog likely responded to odors D had transferred to where the dog alerted.

Where the judge in D?s arson case erroneously held a particular fact to be an element of the offense and then granted a midtrial directed verdict of acquittal because the prosecution failed to prove that fact, double jeopardy barred retrial on that offense.*Evans v. Michigan,* 133 S. Ct. 1069 (2013).

After the State rested its case in petitioner?s arson trial, the court granted petitioner?s motion for a directed verdict of acquittal, concluding that the State had failed to prove that the building he allegedly burned was not a dwelling, a fact the court mistakenly believed was an element of Mich. Comp. Laws §?750.73. The State appealed, and COA and the Michigan Supreme Court held that the State could retry petitioner because the trial court made an error of law. The U.S. Supreme Court disagreed.

Retrial following a court-decreed acquittal is barred under the Double Jeopardy Clause of the U.S. Constitution, even in cases where a court misconstrued the statute under which a defendant was charged. In contrast to procedural rulings that result in orders dismissing a case or granting a mistrial on a basis unrelated to factual guilt or innocence, acquittals are sub-stantive rulings that conclude criminal proceedings and raise significant double jeopardy concerns.

Regardless of whether a legal question was settled or unsettled at the time of trial, an error is plain so long as it was plain at the time of appellate review.*Henderson v. United States,* 133 S. Ct. 1069 (2013).

D pled guilty to being a felon in possession of a firearm. The district court imposed a 60-month sentence. D appealed, claiming the district court plainly erred in sentencing him to an above-Guidelines prison term solely for rehabilitative pur-poses. After D was sentenced but before his appeal was heard, the Supreme Court issued a decision making his sentence unlawful and the district court?s decision to impose that sentence plainly erroneous. D?s counsel had not objected in the trial court. The Fifth Circuit concluded that D could not show that the error was plain, because an error was plain only if it was clear under current law at the time of trial. The Supreme Court reversed and remanded.

Whether the legal question was settled or unsettled at the time of trial, as long as the error was plain as of the time of appellate review, the error was ?plain? within Fed. R. Crim. P. 52(b). The Court interpreted Rule 52(b)?s phrase ?plain error? as applying at the time of review because (1) to hold to the contrary would bring about unjustifiably different treatment of similarly situated individuals, (2) the ?time of error? interpretation would make the appellate process yet more complex and time consuming, and (3) a ?time of review? interpretation furthered the principle that an appellate court must apply the law in effect at the time it renders its decision. NOTE: The Fifth Circuit had already so held in *United States v. Escalante-Reyes,* which is one of the following summaries.

Fifth Circuit

D?s Confrontation Clause rights were not violated by the introduction of a recording of conversations of a controlled drug deal between a government informant and two unidentified men because the statements were not testimonial.*Brown v. Epps,* 686 F.3d 281 (5th Cir. 2012).

In trial of Mississippi state D convicted of the sale of crack cocaine, an objective analysis would conclude that the primary purpose of the unidentified individuals? statements was to arrange the drug deal, not to create a record for trial. The Fifth Circuit reversed the district court?s judgment granting federal habeas relief on D?s Confrontation Clause claim.

The Supreme Court?s holding that ineffective assistance of postconviction counsel can excuse procedural default of ineffective assistance claims is inapplicable to Texas defendants.*Ibarra v. Thaler,* 687 F.3d 222 (5th Cir. 2012).

Fifth Circuit denied Texas D?s motion to vacate the district court?s denial of habeas relief in light of the intervening decision in *Martinez v. Ryan,* 132 S. Ct. 1309 (2012). *Martinez v. Ryan*?namely, that ineffective assistance of postconviction counsel could, in some instances, excuse procedural default of ineffective assistance of counsel (IAC) claims with respect to trial/plea or sentencing?is inapplicable to Texas defendants. Unlike the Arizona scheme at issue in *Martinez v. Ryan,* Texas does not require that IAC claims be deferred until collateral review. Rather, Texas permits defendants to raise IAC via a motion for a new trial, and defendants may challenge IAC on direct appeal even without the benefit of a motion for a new trial.

Government not entitled to a writ of mandamus to prevent D?s expert from examining alleged child pornography evidence at the expert?s own facility (the district court had granted D?s motion).*United States v. Jarman,* 687 F.3d 269 (5th Cir. 2012).

In light of the evidentiary record, the district court?s determination that there was not ?ample opportunity? to view the evidence at the government facility did not rise to the level of clear and indisputable error as necessary to grant a writ of man-damus. Under 18 U.S.C. §?3509(m), a district court shall deny copies of property or material containing child pornography to the defense ?so long as the Government makes the property or material reasonably available to the defendant.? Rea-sonable availability means ?the Government provides ample opportunity for inspection, viewing, and examination at a Government facility.? The Fifth Circuit affirmed the district court?s order but cautioned that inconvenience to an expert or complexity of the case do not, as a general rule, add up to a failure to make the evidence reasonably available; rather, making the evidence available for inspection at a government facility *is* reasonable availability, and the only issue to be resolved pretrial relating to §?3509(m) discovery is whether the government inspection conditions imposed on a defendant?s ac-cess at that facility ?provid[e] ample opportunity? to inspect, view, or examine the material.

D was indicted beyond the 30 days permitted by the Speedy Trial Act; although the government attributed some of the time to the absence of an essential witness (one of D?s co-defendants, who was a fugitive), the co-defendant was not an essential witness within the excludable-time provision of 18 U.S.C. §?3161(h)(3)(A) because his testimony would have been merely cumulative for a grand jury indictment.*United States v. Ortiz,* 687 F.3d 660 (5th Cir. 2012).

Because the indictment was untimely, 18 U.S.C. §?3161(b) of the Speedy Trial Act required its dismissal. The Fifth Circuit therefore reversed D?s conviction and remanded for the district court to decide in the first instance whether to dismiss with or without prejudice.

Where federal prisoner, who was an alien subject to a detainer, challenged the Federal Bureau of Prisons? regulations excluding him from consideration for participation in drug-treatment programs and release to a halfway house, district court erred in dismissing for lack of subject-matter jurisdiction.*Gallegos-Hernandez v. United States,* 688 F.3d 190 (5th Cir. 2012).

Because participation in these programs could decrease D?s sentence, D?s claims were properly raised under 28 U.S.C. §?2241. Furthermore, district court?s alternative ruling that D had not properly exhausted administrative remedies was also in error; an attempt to exhaust would have been futile, since he raised constitutional challenges to the regulations that the agency charged with enforcing them clearly would reject. However, on the merits, D was not entitled to relief. These programs did not create any liberty interest in early release that could support a due-process claim; nor did D show an equal-protection violation, because there was a rational basis for the regulations in question.

In sentencing D convicted for distribution of child pornography, district court reversibly erred in applying a three-level enhancement under USSG §?2G2.2(b)(7)(B) based on the number of additional images found on D?s computer.*United States v. Teuschler,* 689 F.3d 397 (5th Cir. 2012).

The government failed to show that the extra images, recovered in a search of D?s computer nearly two months after the offense of conviction, were ?relevant conduct? with respect to the offense of conviction. Under *United States v. Fowler,* 216 F.3d 459 (5th Cir. 2000), such a showing requires more than simply showing that both the images distributed and the images possessed were child pornography.

D not entitled to a court-appointed attorney to help him dispose of a prior Iowa conviction that could enhance his pending sentence.*United States v. Garcia,* 689 F.3d 362 (5th Cir. 2012).

D, who pleaded guilty to illegal reentry in the Southern District of Texas, was not entitled to an additional court-appointed attorney, in Iowa, to attempt to set aside a prior Iowa conviction (that would be used to enhance D?s reentry sentence). The challenge to a prior, unrelated conviction in a state court that could affect the sentence a defendant receives on a new federal conviction is not an ?ancillary matte[r]? as to which counsel may be appointed.

The district court plainly erred by considering D?s need for anger-management treatment in setting D?s sentence; the error affected D?s substantial rights and warranted correction even on plain-error review.*United States v. Escalante-Reyes,* 689 F.3d 415 (5th Cir. 2012) (en banc).

On initial en banc consideration, the Fifth Circuit held that for purposes of plain-error review, when the law is unsettled at the time at the time of the forfeiture but becomes clear while the case is pending on appeal, the plainness of the error is judged at the time of appeal. Under that rule, D was entitled to the benefit of *Tapia v. United States,* 131 S. Ct. 2382 (2011), which was handed down after his sentencing hearing. Under *Tapia,* the district court plainly erred by considering D?s need for anger-management treatment in setting D?s sentence; because the error affected D?s substantial rights and warranted correction even on plain-error review, the Fifth Circuit vacated the sentence and remanded. NOTE: In *Henderson v. United States,* see above, the Supreme Court likewise held that an error is ?plain? so long as the error is plain at the time of appellate review.

The government failed to establish that venue was proper in the Western District of Texas for Ds? charges of attempt to possess with intent to distribute cocaine; venue for a criminal attempt is based on an individual?s actions as opposed to action in concert with others.*United States v. Thomas,* 690 F.3d 358 (5th Cir. 2012).

Accordingly, the Fifth Circuit reversed Ds? attempt convictions.

Court of Criminal Appeals

Once the jury was discharged, it was improper to reconvene them and accept a new punishment verdict; D?s ?mistrial? motion properly expressed ?stop this proceeding.?*Cook v. State,* 390 S.W.3d 363 (Tex. Crim. App. 2013).

A jury convicted D of manslaughter and returned a punishment verdict of six years? confinement with a recommendation that it be probated. The trial judge formally sentenced D. Nearly 45 minutes later, the discharged jury was called into the courtroom to be polled. At that time, the jury had amended their punishment verdict to reflect six years? confinement with-out probation. The judge again sentenced D, without probation. What happened between those two formal sentencing pronouncements is only partially reflected in the record. On appeal, D sought reinstatement of his probated sentence. COA held that the judge?s decision to reconvene the jury under the particular facts in this case was harmful error, and it remanded the case for a new punishment hearing. The State argued that COA should have found the error forfeited.

CCA concluded that D preserved this re-sentencing issue for appellate review, and reinstated his original, probated sentence. ?There is no getting around the fact that [D] had already been sentenced and the discharged jury had dispersed outside the presence of the trial judge for seven minutes?a substantial amount of time under the circumstances.?

A defendant who testifies at the punishment stage of trial and admits his guilt does not forfeit his right to complain on appeal about the guilt stage.*Jacobson v. State,* No. PD-1466-11 (Tex.Crim.App. Feb 6, 2013).

A jury convicted D of aggravated sexual assault of a child. During punishment, D testified and admitted he had a sexual relationship with a young girl. COA held that under *De Garmo v. State,* 691 S.W.2d 657 (Tex.Crim.App. 1985), and *Leday v. State,* 983 S.W.2d 713 (Tex.Crim.App. 1998), D was estopped from complaining about the State?s jury argument in the guilt phase because he had later admitted his guilt. CCA remanded to COA to consider the merits of D?s complaint.

CCA granted D?s PDR to decide whether *Leday?s* exceptions to the *De Garmo* estoppel doctrine should have been extended to a broader class of guilty-phase errors. CCA concluded that *Leday?s* reasoning applied to all guilt-stage claims of error, not merely ?fundamental? claims, and overruled any vestiges of the *De Garmo* doctrine.

D preserved his objections; it is clear that the judge was ruling on the reliability*and* relevance of the expert?s testimony and the admission of the videotape itself.*Everitt v. State,* No. PD-1693-11 (Tex.Crim.App. Feb 6, 2013).

A jury found D guilty of DWI. D appealed the denial of his objections to videotape evidence of his admission that he took hydrocodone that day, and the accompanying expert tes-ti-mony about the video and the effects of combining hydrocodone and alcohol. COA held that ?the trial court merely ruled that [D?s] admission of hydrocodone use was relevant, not unfairly prejudicial, and therefore admissible,? but the trial court ?never ruled on the reliability? of the expert?s analysis. CCA reversed COA and remanded for consideration of the admissibility of the video and the expert testimony.

D let the trial court know what he wanted by filing a motion to suppress and following up with objections to admission. He made it clear why he thought he was entitled to suppression by repeatedly citing precedence requiring relevancy and precedence requiring reliability. COA?s parsing of D?s objections was the kind of hyper-technical analysis that CCA has repeatedly rejected. COA erred by distinguishing between admitting scientific evidence and admitting expert testimony under Tex. R. Evid. 702. Scientific evidence and expert testimony are typically admitted together; a defendant?s admission to taking drugs is relevant to show intoxication only with competent testimony as to the effect of the drug. COA also erred in distinguishing between admissibility based on relevance and admissibility based on reliability. Both relevance and reliability of the expert testimony are components of a court?s ruling on admissibility.

D can be guilty of only one of the two alleged attempted capital murders because the second conviction violates double jeopardy; each attempted capital murder conviction required at least two victims not included in the other attempted capital murders, and D?s two convictions involved the same three victims.*Ex parte Milner,* No. AP-76,481 (Tex.Crim.App. Feb 13, 2013).

D pleaded guilty to two counts of attempted capital murder and one count of murder. In a habeas corpus application, D raised a double-jeopardy claim, arguing that he was subjected to a second prosecution for a single violation of the same penal statute (attempted capital murder) and assessed two separate imprisonment terms for the same offense. CCA vacated the trial court?s judgment as to D?s second conviction for attempted capital murder and remanded to the trial court with instructions to enter an acquittal.

Only one of D?s attempted capital murder convictions could be upheld because each attempted capital murder conviction under Tex. Penal Code §?15.01(b) required at least two victims not included as victims in other attempted capital murder provisions under those same penal code sections, and D?s two convictions had resulted from allegations involving the same three victims. D thus showed that his conviction and sentencing for the second offense of attempted capital murder violated the Double Jeopardy Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. He also accompanied his meritorious double-jeopardy claim with a prima facie showing of actual innocence as to the second attempted capital murder conviction and thereby satisfied his habeas burden under Tex. Code Crim. Proc. art. 11.07, §?4(a)(2).

The dog scent evidence and corroborating evidence were insufficient to support D?s convictions for capital murder and conspiracy to commit capital murder.*Winfrey v. State,* 393 S.W.3d 763 (Tex.Crim.App. 2013).

D was convicted by a jury of capital murder during the course of robbery and conspiracy to commit capital murder. Her father and brother were named as co-conspirators. The vic-tim, a janitor at the school D attended who lived near D, was found murdered in his home. The police found blood, a bloody footprint, and fingerprints; no physical evidence connected D or her family to the scene. The only evidence that connected D to the scene was a dog scent lineup: two dogs alerted to D?s scent being on the victim?s clothes. The trial court sentenced D to life imprisonment for the capital-murder count and 45 years? imprisonment for the conspiracy count. COA affirmed. CCA reversed COA and rendered acquittals on both counts.

The dog scent evidence was insufficient, alone, to support the conviction. CCA considered corroborating evidence and concluded that it was insufficient to establish D?s guilt. This evidence included testimony that D believed the victim had money in his home, and she wanted it; her father provided specific non-public information about the murder to his cell-mate; D discussed a possible alibi for the night of the murder with her ex-husband; she allegedly shaved her pubic area to prevent the taking of a sample of her pubic hair; and D told her ex-boyfriend that the victim?s home ?was an easy lick.? There was also insufficient evidence of an agreement with one or both of the alleged co-conspirators to commit capital murder.

D suffered ineffective assistance due to counsel?s failure to introduce testimony from a missing witness; the witness was the only one who could directly corroborate D?s story.*Frangias v. State,* 392 S.W.3d 642 (Tex.Crim.App. 2013).

After he was convicted of sexual assault and sentenced to eight years? confinement, D filed a motion for a new trial. The trial court allowed the motion to be denied by operation of law under Tex. R. App. P. 21.8(c), and COA affirmed. CCA reversed and remanded.

COA erred by concluding that D?s trial counsel did not per-form deficiently because counsel?s failure

to introduce testimony from a missing witness was not the product of any con-sidered strategy of counsel. The witness was the only one who could directly corroborate D?s account that the drunken woman who arrived at the hotel was a particular woman and that he never entered her room, and counsel?s affidavits confirmed that they regarded the witness? putative testimony as exculpatory, beneficial, and critical to D?s case. Counsel should have sought to take the witness? deposition once his doctor advised him that he could not travel to testify; it was apparent from counsel?s affidavits that with the proper documentation, they should have been able to meet the standard of Tex. Code Crim. Proc. art. 39.02, and it was not a foregone conclusion that the court would have denied the application as time-barred. Counsel should have sought a second continuance, as it was reasonable to infer that the witness would have supplied an affidavit from his doctor concerning his inability to travel.

Court of Appeals

Summaries by Chris Cheatham of Cheatham Law Firm, Dallas

Seizure of blood deemed proper (even though the blood-draw warrant was assumed defective by the court) because good faith exception satisfied.*Franklin v. State,* No. 14-11-00961-CR (Tex.App.?Houston [14th Dist] Sep 6, 2012).

?Confronted with this split in authority, [CCA] is presently considering whether Texas law requires a face-to-face meeting between officer and judge. We need not decide that issue here, as we may dispose of this case on narrower grounds. Assuming without deciding that the affidavit was defective due to the manner in which it was presented, we conclude that [D?s] blood was seized pursuant to an applicable ?good faith exception? provided under [Tex. Code Crim. Proc. art. 38.23]. . . . [Officer] prepared a comprehensive affidavit in which he asserted numerous facts pertaining to [D?s] intoxication. At the suppression hearing, Officer testified that he believed that he was in possession of a valid search warrant. . . . [Officer] stated that there was nothing about the warrant that may have caused him to believe that it was invalid, and that he had a good faith belief that the warrant was issued based on probable cause by a neutral magistrate. [Officer] also testified that after he ex-e-cuted the warrant, he signed it and turned it in along with his report to the municipal court.?

Officers? peering through two-inch gap in window?while approaching residence to investigate noise com-plaint?did not constitute a search, even though of-fi-cers had to strain to view contents of home. *State v. Hunt,* No. 12-11-00186-CR (Tex.App.?Tyler Sep 12, 2012)(unpublished).

However, officers lacked exigent circumstances by which to enter home where officers merely observed through a window D holding a methamphetamine pipe, despite officers? reported concern that D would destroy the evidence through consumption of the drugs. ?First and foremost, we note that the [officers] testified that they did not fear for their safety, and that they believed the occupants of the home were completely unaware of their presence before [officer] entered the home. . . . Next, there is no testimony about the amount of time that would have been necessary to obtain a warrant.? The evidence showed (1) officers ?never actually saw any drugs at all prior to entering the residence, (2) they saw only a man holding a meth-amphetamine pipe to his mouth with no smoke emanating from it or an ignition source. . . . Therefore, the trial court reasonably could have concluded that the entry was illegal and the fruits obtained from the entry should be suppressed.?

D lacked reasonable expectation of privacy inside apart-ment in which he was a visitor, even though he had permission from tenant to be in apartment and had intended to stay one or two nights.*Windom v. State,* 379 S.W.3d 463 (Tex.App.?Beaumont 2012).

?[D] did not have a property or possessory interest in the premises. He did not have the right to control who entered the apartment. He testified that he had permission . . . to be there that day, and he intended to

stay one or two nights. He did not bring any extra clothes with him, however. He acknowledged that he did not know for sure whether he would spend the night. No evidence suggests that he kept any personal belongings at the apartment or had ever stayed there before.?

Although D refused field sobriety tests, officer had PC to arrest D for DWI due to slurred speech, bloodshot eyes, and revving his vehicle engine at 2:30 a.m. on Christmas in icy conditions with his window rolled down, among other factors.*Stovall v. State,* No. 02-11-00174-CR (Tex.App.?Fort Worth Sep 13, 2012, pet. ref?d).

Court cited case law for proposition that refusal of field sobriety tests is among the factors that can support probable cause to arrest for DWI.

Warrantless entry into fenced carport for the reported purpose of securing a pit bull to protect officers? safety in anticipation of obtaining search consent from resident (who had not yet arrived home) and also to protect K-9 dog while performing sniff, even if unconstitutional, did not taint subsequent consent to search home.*Sanchez v. State,* No. 14-11-00690-CR (Tex.App.?Houston [14th Dist] Sep 18, 2012, pet. ref?d).

?[D] contends caging the dog was flagrant because it was ?the equivalent of picking a lock.? We decline to adopt this analogy considering no case in Texas has addressed the propriety of police entering a carport area with a non-privacy fence, unlocked gate, a pit bull-type dog, and ?beware of dog? sign.?

Consent to search safe located in home deemed voluntary, despite officer telling D that they could request the fire department to bust into it.*Phillips v. State,* No. 14-11-00415-CR (Tex.App.?Houston [14th Dist] Oct 9, 2012).

?After [D] made several unsuccessful attempts to open the safe, he claimed that he had recently purchased the safe and was contemplating returning it to the store where he purchased it after experiencing problems with it. The officers told [D] they could take the safe to a local fire department to have them open it. [D] eventually entered the correct combination to allow the police to open and search the safe after he admitted the safe contained pills, marijuana, and a handgun. . . . [D] agreed to provide the combination to the safe and even attempted several times to open it for the officers, impliedly demonstrating his consent to the search of the safe.?
