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Please do not rely solely on the summaries below. Each case name links to the full text of the opinion, which we recommend you read in addition to these brief synopses. The SDR is sent to current TCDLA members.

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SUPREME COURT

Certiorari from the Fifth Circuit

[5]Sossamon v. Texas, 563 U.S. ___, 08-1438 (4/20/11)

Affirmed: Thomas (6-2); [5]Sotomayor dissented w/Breyer

Facts: Texas inmate Harvey Sossamon sued the state of Texas and various state officials in their official and individual capacities in a Texas federal district court. In part, he argued he was denied access to the prison's chapel and religious services in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The district court dismissed the claim.

The Court of Appeals for the Fifth Circuit held that Sossamon could not sue Texas officials in their individual capacities under the RLUIPA. The court reasoned that because the Act was passed pursuant to Congress' Spending Power and not its Fourteenth Amendment Power, it did not create a cause of action for damages against state officials sued in their individual capacities.

Question: Under the RLUIPA, can a person sue a state official in his individual capacity for damages?

Conclusion: No. "States, in accepting federal funding, do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA." Justice Sonia Sotomayor filed a dissenting opinion joined by Justice Stephen J. Breyer. "Our precedents make clear that the phrase 'appropriate relief' includes monetary relief," she argued. "By adopting a contrary reading of the term, the majority severely undermines the 'broad protection of religious exercise' Congress intended the statute to provide."

Summaries by [6]Oyez. For a list of issues pending before the Court, click [7]here.

FIFTH CIRCUIT

[8]United States v. Cashaw, 625 F.3d 271 (5th Cir. 2010). District court did not err in denying minor-role adjustment, under USSG § 3B1.2, to defendant sentenced as a "career offender" under the Guidelines. The only Chapter Three adjustment permitted for career offenders is the adjustment for acceptance of responsibility under USSG § 3E1.1. Thus, career offenders are categorically ineligible for mitigating role reductions under USSG § 3B1.2.

[9]United States v. Cruz-Rodriguez, 625 F.3d 274 (5th Cir. 2010). District court did not err in applying a 16-level "crime of violence" enhancement under USSG § 2L1.2(b)(1)(A)(ii); although defendant's prior California state conviction for making criminal threats (in violation of Calif. Penal Code § 422) was not a qualifying "crime of violence" conviction, defendant's prior California state conviction for willful infliction of corporal injury (in violation of Calif. Penal Code § 273.5)*was* a qualifying "crime of violence" under § 2L1.2's residual "crime of violence" definition.

[10]United States v. Allen, 625 F.3d 380 (5th Cir. 2010). District court did not reversibly err in denying defendant's motion to suppress evidence (child pornography) seized pursuant to a search warrant; although the search warrant was not sufficiently particularized and although the attachment detailing the items to be seized was not incorporated by reference in the warrant, the fruits of the search were admissible under the good-faith exception to the exclusionary rule. Under the analysis of [11]Herring v. United States , 129 S. Ct. 695 (2009), the particularity defects in the warrant did not merit application of the exclusionary rule. Furthermore, the information in the search warrant affidavit was not stale (though it was 18 months old when the warrant was issued).

[12]United States v. McNealy, 625 F.3d 858 (5th Cir. 2010).

(1) In prosecution for possession and receipt of child pornography, defendant was not impermissibly tried beyond the 70 days prescribed by the Speedy Trial Act (STA); the district court satisfied the STA's reasons requirement for an "ends of justice" continuance by stating its reasons for the continuance and by stating that those reasons were in the district court's mind when it granted the continuance. Moreover, although the first continuance was open-ended and did not specify a trial date, a district court may decide to continue a trial indefinitely when it is impossible, or at least quite difficult, for the parties or the court to gauge the length of an otherwise justified continuance. Finally, a second continuance, granted at the behest of the government based on the unavailability of a witness, likewise resulted in excludable time under the STA. Moreover, the requirement to set out ends-of-justice findings did not apply because the continuance was granted under 18 U.S.C. § 3161(h)(3) based on the "absence or unavailability of ... an essential witness" and was not granted under 18 U.S.C. § 3161(h)(7).

(2) District court did not err in admitting images of putative child pornography retrieved from defendant's computer, notwithstanding the fact that no expert testified that these were unaltered images of actual minors actually engaged in the conduct depicted. The Fifth Circuit has held (as have other circuits) that the question of whether images depict actual minors may be decided by lay jurors (or judges) without expert testimony. This case law compelled the conclusion that there was no authentication problem barring admission of the images, especially in the absence of any evidence that the images were not of actual children or that the state of technology is such that the images could have been of "virtual" children.

(3) District court did not err in denying defendant's motion to dismiss the indictment for failure to receive a fair trial; the alleged pornography was, at all times, "reasonably available" for inspection by the defense, as required by 18 U.S.C. § 3509(m)(2). Defendant had full access to the pornography exhibits and could have done all the forensic tests that he allegedly was prevented from doing. Any concerns about prosecution of a defense expert for possession of child pornography could have been allayed by obtaining a protective order. Finally, defendant did not identify any expert he wished to consult but was prohibited from doing so.

(4) District court did not err in finding that the government's destruction of defendant's computer (done after the course of civil forfeiture proceedings) was not done in bad faith. Even though defendant indicated that he intended to contest the forfeiture, and even though the government was negligent in failing to provide defendant with adequate notice of the forfeiture proceedings, there was no evidence that the destruction of the computer was done to impede defendant's defense in the criminal case. Moreover, it appears highly likely that all relevant evidence was preserved in the forensic images of the working hard drives of defendant's computers.

COURT OF CRIMINAL APPEALS

Direct Appeal from Cameron County

[13]Ex parte Gutierrez, __S.W.3d__ (Tex.Crim.App. No. AP-76,406, 5/4/11)

Affirmed: Cochran (8-0)

Appellant was convicted of capital murder and sentenced to death for his participation in the robbery and murder of eighty-five-year-old Escolastica Harrison. At the time of Harrison's murder, she kept about $600,000 cash in her home. Appellant raises five issues on appeal. The first relates to the denial of his motion for counsel; the rest relate to the denial of the motion for DNA testing. CCA holds as follows: (1) Appellant is not entitled to appointed counsel because "reasonable grounds" do not exist for the filing of a motion for post-conviction DNA testing; (2) Appellant's second issue is without merit because Appellant was "at fault" in not seeking DNA testing at trial; (3) Appellant has not shown that "the single loose hair" that he would like to have tested currently exists or could be delivered to the convicting court; (4) The trial judge acted within his discretion in finding that identity was not and is not an issue in this case; (5) Appellant has failed to establish, by a preponderance of evidence that he would not have been convicted of capital murder if exculpatory results had been obtained through DNA testing.

In sum, granting DNA testing in this case would "merely muddy the waters." Appellant does not seek testing of biological evidence left by a lone assailant, and a third-party match to the requested biological evidence would not overcome the overwhelming evidence of his direct involvement in the multi-assailant murder.

Application for Writ of Habeas Corpus from Green County

[13]Ex parte Evans, __S.W.3d__ (Tex.Crim.App. No. AP-76,445, 5/4/11)

Granted: Cochran (8-0); [14]Keller concurred

Applicant contends that the Texas Department of Criminal Justice-Parole Division (TDCJ) improperly and without due process placed "Special Condition X" (sex-offender conditions) on him after he had been released on mandatory-supervision parole. Based on the evidence in the record, the habeas judge entered findings that Applicant had not been convicted of a sex offense and that his conviction for Injury to a Child did not involve evidence of sexual abuse. The habeas judge further found that Applicant was not afforded constitutional due process before the sex-offender conditions were imposed. The judge recommended that CCA grant relief. CCA agrees with the habeas judge that under*Meza v. Livingston*, 623 F.Supp.2d 782 (W.D. Tex. 2009), aff'd in part, 607 F.3d 392 (5th Cir. 2010), Applicant is entitled to immediate reinstatement of his release on mandatory supervision and removal of "Special Condition X" from the terms of his parole.

State's PDR from Harris County

[15]Ex parte Garza, __S.W.3d__ (Tex.Crim.App. No. PD-0381-09, 5/4/11)

Affirmed: Price (6-2); Keller dissented w/Cochran

After the jury was empanelled and sworn but before trial commenced in this misdemeanor DWI case, one juror became at least temporarily indisposed and the trial was continued for a few days. Ultimately, the trial court declared a mistrial over Appellant's objection. When the case was reset, Appellant filed a pre-trial application for writ of habeas corpus arguing that because a manifest necessity for the mistrial was lacking, his re-prosecution violated double jeopardy. The convicting court denied relief, but COA reversed and remanded, presumably so that the convicting court might dismiss the information against Appellant.

CCA granted the State's PDR to consider, inter alia, whether COA erred to hold that the trial court should not have granted the mistrial without first exploring the option of proceeding to trial with only five jurors, Appellant having expressed at least a tentative willingness to waive his constitutional right to a full complement of six. CCA rejects the State's arguments that there was manifest necessity for a mistrial. Under circumstances in which Appellant's counsel at least suggested a willingness to proceed with less than a full complement of jurors, the failure of the trial court even to explore that option cannot be attributed to Appellant, whether or not he obtained an express ruling on his suggested alternative or actually executed a formal waiver.

State's PDR from Lubbock County

[16]Meekins v. State, __S.W.3d__ (Tex.Crim.App. No. PD-0261-10, 5/4/11)

Reversed; Affirmed: Cochran (7-1); [17]Keller concurred; [18]Johnson concurred; [19]Meyers dissented w/ Price

An officer stopped Appellant for a traffic offense and, during that stop, asked if he could search the car. In Appellant's pocket, officer found a pill bottle containing marijuana. Appellant filed a motion to suppress the evidence, arguing that he did not voluntarily consent to the search of his car. The trial judge denied the motion and Appellant pled guilty to possession of marijuana. COA reversed.

While the audio recording of officer and Appellant's interaction is not of high quality, careful listening would support an implied finding that appellant replied "Yes" to officer's sixth and final request to search Appellant's car. At a minimum, the recording fails to clearly rebut the officer's testimony that Appellant said, "Yes." But even if the trial judge concluded that Appellant said, "I guess," that phrase could reasonably be interpreted as a positive response, a colloquial equivalent of "Yes." Indeed, the Texas Supreme Court has held that a response of "I guess so" to an officer's request to search, combined with other circumstances, supported the finding of voluntary consent.

Regardless of whether Appellant said "Yes" or "I guess," the trial judge was also required to decide what an objectively reasonable person standing in the arresting officer's shoes would conclude that response meant. Both officer's and Appellant's actions immediately after the response supports the trial judge's implicit finding that Appellant intended to consent. While Appellant's response of "Yes" or "I guess" may be open to interpretation, there can be little doubt that officer believed Appellant consented because he immediately asked Appellant to step out of the car so that he could search it without difficulty. If Appellant intended to refuse consent, it seems reasonable that he would have objected, complained, or refused to get out of his car. Instead, he readily complied.

State's PDR from Hale County

[20]Griego v. State, __S.W.3d__ (Tex.Crim.App. No. PD-1226-10, 5/4/11)

Affirmed: Per Curiam (8-0)

A jury convicted Appellant of evading arrest or detention, and assessed punishment at confinement of 10 years. COA found the evidence legally insufficient to support a third-degree felony offense level because the State failed to present proof of a prior conviction at the guilt/innocence stage of trial. Additionally, COA remanded the case for a new trial having determined the evidence was factually insufficient to prove Appellant evaded arrest or detention.

The State contends, among other things, that the case should be remanded to COA in light of CCA's recent opinion in [21]Brooks v. State, 323 S.W.3d 893 (Tex.Crim.App. 2010), in which CCA overruled *Clewis v. State* and set aside its factual sufficiency standard of review, holding that the*Jackson v. Virginia* standard for legal sufficiency is the "only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." In the instant case, COA did not have the benefit of*Brooks* . CCA remands this case for reconsideration.

Appellant's PDR Granted from Travis County

10-1547?Dustin Doan ?Theft

COA erred in holding that the Brazos County Attorney and the Travis County Attorney were not the "same parties" for collateral estoppel purposes.

Appellant's PDR Granted from El Paso County

10-1675?Abraham Cavazos ?Murder

1. COA erred when it held manslaughter was not a lesser-included offense of the charged murder.

2. COA erred when it held the trial court did not err by denying Appellant's request to instruct the jury on manslaughter.

State's PDR Granted from Smith County

11-0230?Charles Nieto ?Murder

1. Does the fact that a venireperson shares the same last name as a known criminal family constitute a racially neutral reason for a prosecutor to exercise a peremptory strike? (RR III: 15-17)

2. Does the fact that a venireperson is noted to be "glaring" at a prosecutor during voir dire constitute a racially neutral reason for a peremptory strike? (RR III: 15-17)

3. Did the 1st Court of Appeals fail to consider the "entire record of voir dire" where it did not review the record regarding the prosecutor's racially neutral reasons for striking four other minority venire persons. Nieto, 2010 Tex. App. LEXIS 9953 * 12-18

Appellant's PDR Granted from Dallas County

11-0312?Ronnie Tienda, Jr. ?Murder

COA erred in finding that it was not an abuse of discretion to admit, over objection, MySpace evidence without proper authentication.

State's PDR Granted from Ector County

11-0435?Joshua Lee Goad ?Burglary

Does a trial court abuse its discretion by refusing to submit a lesser included instruction that is only "supported" by unrelated hearsay admitted through the victim?

For a list of issues pending before the court, click [22]here.

COURT OF APPEALS

Summaries by Chris Cheatham of Cheatham Law Firm, Dallas

[23]Kelly v. State, 331 S.W.3d 541 (Tex.App.-Houston [14 Dist] 2011). Although officer stopped D for no front license plate, officer's questioning of D about whether he possessed narcotics was reasonably related to the stop, in part because of officer's knowledge of D's background with narcotics. "Because [officer's] suspicions were aroused, in part, by [D's] furtive movements inside the vehicle and [D's] nervousness after being stopped, [officer's] questioning about whether [D] possessed narcotics was reasonably related to the traffic stop investigation ? especially given the fact that [officer] learned of [D's] criminal background involving narcotics and asked [D] about this information...."

[24]Glenn v. State, No. 11-09-00099-CR, 2011 WL 322451 (Tex.App.-Eastland Jan 27, 2011). The following exchange was deemed sufficient to constitute D's consent to search. In response to officer's request for permission to search the vehicle, D asked the officer: "You want to have a look inside?" Then D asked the officer: "You want me to open the trunk?"

[25]Jones v. State, Nos. 01-08-00828-CR, 01-08-01015-CR, 01-08-01016-CR, 2011 WL 339213 (Tex.App.-Houston [1 Dist] Jan 31, 2011). Lack of specific dates in search warrant affidavit was not fatal to search warrant because the affidavit "includes several direct and indirect references to the timing of the controlled buy. First, [officer] described his contact with the first confidential informant as having occurred 'recently.'? The investigation culminated in the controlled buy forming the basis for probable cause, which was described as occurring 'after' [officer] 'recently' met with the first confidential informant."

[26]Sosa v. State, No. 06-10-00161-CR, 2011 WL 346215 (Tex.App.-Texarkana Feb 4, 2011). The following insufficient to give rise to RS: D was present just outside a storage facility after its normal business hours, D failed to pass through the gate in thirty or forty seconds of observation, and the storage facility is occasionally broken into. "'The fact that a car is parked in close proximity to a business that is [closed], is not, in and of itself, suspicious; instead, it is only a factor to consider in deciding whether there is reasonable suspicion.'? In addition, the time of day is not sufficient.... All the facts indicate is that [D] was

present in front of a business late at night, after normal business hours, and that storage buildings are occasionally broken into."

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