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TDCAA Weekly Case Summaries - October 3, 2008

October 3, 2008

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Texas Court of Criminal Appeals

Klein v. State

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10/1/2008 : Cite No. PD-502-06 : Hearsay

Issue: Did the court of appeals err in reversing the trial court for admitting the child complainant's prior out-of-court statements to two outcry witnesses under [Rule of Evidence 801\(e\)\(1\)\(B\)](#) when the complainant gave conflicting trial testimony about her father's abuse?

Holding: No. [Rule 801\(e\)\(1\)\(B\)](#) allows a party to rehabilitate a witness who, on cross-examination, has been accused of recently fabricating or changing her testimony for some improper reason. Here, the State was entitled to show the jury that it was not the questions by the prosecutor that caused the girl to testify that she had been sexually assaulted by introducing evidence that she had said the same thing to others earlier.

Dissenting: While Judge Price agrees that the trial court did not err to find that the complainant's out-of-court statements constituted prior consistent statements, he disagrees with the majority's ruling that the trial court could reasonably have concluded that the prior consistent statements were offered to rebut an express or implied charge of recent fabrication or improper influence of motive. [Judge Cochran](#) writes separately to emphasize that no one in the case accused the child complainant of fabricating her testimony, so prior out-of-court statements made by the child could not qualify as statements offered to rebut an explicit or implicit charge of recent fabrication.

[➔ read dissenting opinion](#)

Commentary: What makes this use of the "prior consistent statement" non-hearsay rule all the more remarkable is the fact that the victim had recanted her previous allegations against the defendant. And she did so in her testimony at trial. However, she also admitted the allegations as well, permitting the use of Rule 801(e)(1)(B). This is, therefore, a very fact-intensive decision, but it is a good application of the rule. You will want to keep this one close by, especially if you often prosecute child abuse or family violence cases.

Vega v. State

[➔ read opinion](#)

10/1/2008 : Cite No. PD-615-06 : Law of Parties

Issue: Did the appellate court err when it determined that evidence adduced at the appellant's trial was factually insufficient to support his conviction for capital murder under the law of parties?

Holding: Yes. The jury could have convicted the appellant under [TPC §7.02\(a\)\(2\)](#) or §7.02(b) even though the erroneous charge only applied the law of parties under §702(a)(2). The case is remanded for the court of appeals to assess factual sufficiency under §7.02(b).

Commentary: This is an application of the court's recent decision in *Wooley v. State*, in which the court held that the factual sufficiency of the evidence is to be reviewed according to the hypothetically correct jury charge for the case.

Huffman v. State

[→ read opinion](#)

10/1/2008 : Cite No. PD-1539-07 : Charging in the Disjunctive

Issue: Does charging the jury in the disjunctive with respect to various statutory methods of committing the offense of failure to stop and render aid result in a violation of the constitutional requirement of a unanimous jury verdict?

Holding: No. The various statutory methods for committing the offense do not create separate offenses. Failing to stop, failing to return, and failing to remain are merely alternative methods of committing the same offense.

Concurring: Judge Johnson concurs to point out that under [Tex. Trans. Code §550.021\(c\)](#) leaving the scene is only part of the gravamen of the offense; the operator must also remain at the scene until he has provided his name, address, and insurance information and has provided assistance to injured persons. An operator could stop at or return to the scene, yet still commit an offense under §550.021 if, while staying at the scene, the operator refused to reveal the required information or made no effort to assist or obtain medical assistance for any injured party.

[→ read concurring opinion](#)

Commentary: There appears to be differences among the various members of the court as to how to view the offense of failure to stop and render aid. But the bottom line is that the trial court should charge the jury as to the various ways of committing the offense in the alternative (assuming that they are applicable to your particular FSRA case). The court also acknowledges a different way of viewing offenses by their type in this decision. We have heard of "result of conduct" offenses, and "nature of conduct" offenses. The court recognizes FSRA to be a "circumstances of conduct" offense.

Walter v. State

[➔ read opinion](#)

10/1/2008 : Cite No. PD-1929-06 : Statement Against Penal Interest

Issue: Under [Rule of Evidence 803\(24\)](#) is an entire conversation between a defendant and co-defendant admissible as a statement against interest or only those specific portions that were against the co-defendant's penal interest?

Holding: Only the self-incriminating and "blame-sharing" statements are admissible under Rule 803(24). Self-exculpatory statements which shift the blame to another must be excluded. The case was reversed and remanded to the lower court for a harm analysis.

Dissenting: Judge Hervey dissents from the majority opinion's decision that blame-shifting statements that are within a generally self-inculpatory narrative do not satisfy the first-stage foundational requirement for the "against interest" hearsay rule exception. She offers the example of a declarant's out-of-court statement, "Stephon and I robbed the bank, but Stephon killed the bank teller" - if offered against Stephon in Stephon's criminal prosecution for this conduct, the statement that "Stephon killed the bank teller" would be excluded under the majority's ruling even if this statement is clearly supported by other indicia of reliability.

[➔ read dissenting opinion](#)

Commentary: If you were not aware of this construction of Rule 803(24), you certainly could have seen it coming. This is going to make it even more difficult to get admitted into evidence "statements against interest." With regard to the typical co-defendant or accomplice statement, I am wondering whether we should bother introducing them into evidence at all.

Texas Courts of Appeal

Stephens v. State - 6th COA

 [read opinion](#)

9/26/2008 : Cite No. 06-08-00022-CR : Actual vs. Constructive Delivery

Issue: Where is the fine line between actual delivery and constructive delivery of narcotics?

Holding: The State's evidence showed that the appellant actually delivered cocaine, but the evidence did not prove that appellant had any knowledge or intent that those same narcotics would be ultimately transferred to a third party. The State's evidence did show that the appellant was a crack dealer but unfortunately did not prove all of the elements required to show constructive, as opposed to actual delivery. Since the State only alleged constructive delivery in its indictment, the evidence is legally insufficient.

Commentary: This case stresses the importance of looking at your delivery cases closely and determining what you can prove. If you are uncertain as to what you can prove, you may need to allege a different transferee or recipient of the drugs. Or you may need to rely upon multiple theories of delivery, as well as the law of parties.

Ford v. State - 6th COA

 [read opinion](#)

10/1/2008 : Cite No. 06-08-00046-CR : Suppression of Police Report

Issue: Did the trial court err during a pre-trial suppression hearing when it admitted and considered a police report which was unaccompanied by any form of affidavit or sponsoring testimony?

Holding: Yes. The trial court is permitted to make a pre-trial ruling based on the motion itself, upon competing affidavits and/or based on live testimony. Here, the sole basis to deny the motion was unsworn and unsupported evidence, and that was error.

Commentary: The court does seem to suggest that the police report might have been admissible if it had been accompanied by an affidavit or some sponsoring testimony. That may be the case, but I am not sure that I would want to make a habit of supporting my burden of proof by introducing the police report only. Obviously, that was not the intention here. Bad things happen when your testifying officer cannot or does not show up at the motion to suppress hearing.

Newman v. State - 7th COA

[→ read opinion](#)

9/30/2008 : Cite No. 07-07-0276-CR : Conflicting Statutes

Issue: Where the defendant was convicted of both possessing a controlled substance in a drug-free zone and engaging in organized criminal activity, must those sentences run consecutively?

Holding: Yes. While there was one criminal episode which resulted in joint prosecutions and convictions in the same trial, two conflicting sentencing statutes were implicated. The specific must trump the general and because the possession in a drug free zone ([Health and Safety Code §481.134\(h\)](#)) is the more specific offense based on the circumstances in the case, it's mandatory stacking requirement controls over the general rule found in [Penal Code §3.03](#) and the sentences must run consecutively.

Commentary: This is a great decision. Keep this in mind if you have a "drug free zone" case, and the defendant has committed multiple offenses. This decision would also appear to apply to any other offenses that have their own consecutive-sentence requirement. That specific consecutive-sentence requirement would control over the general rule set forth in Section 3.03 of the Penal Code.

Texas Attorney General Opinions

RQ-0740-GA

 [read opinion](#)

9/8/2008

Issue: A request has been submitted to the Attorney Generals Office by the Texas Department of Public Safety with regard to the following items: 1) whether the Public Safety Commission is a politically accountable governing body at the state level as the term is used in *Holt v. State*, 887 S.W.2d 16 (Tex. Crim. App. 1994)? 2) whether the Commission can authorize a driver license checkpoint program to be implemented by commissioned officers of the Department of Public Safety? 3) whether the Commission can authorize other state and local law enforcement agencies to implement a driver license checkpoint program established by the Commission?

Holding: Anyone with input on this issue may write the Attorney General.

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criminal forum. The U.S. Supreme Court and the Fifth Circuit have not released any opinions this week.

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