
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, ELIZABETH WIEHLE, MARY MARTIN, AND PETER CHICKRIS
SUBJECT: 05/07/08 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 07/21/08
CC: JACK THOMPSON

***Wright v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-546-06, 05/07/08].**

KEASLER, J., *delivered the opinion for a unanimous Court.*

FACTS: Defendant pleaded guilty to possession of a controlled substance and was sentenced to four years of deferred adjudication community supervision. The trial court denied defendant's pretrial motion to suppress, which argued that the no-knock warrant issued for his house was unreasonable. The court of appeals agreed and reversed. In light of a new U. S. Supreme Court opinion on the knock and announce rule, the Court of Criminal Appeals remanded the case to allow the court of appeals to reconsider the case.

EVIDENCE – KNOCK AND ANNOUNCE -SUPPRESS

In *Hudson v. Michigan*, the U.S. Supreme Court recently held that under the Fourth Amendment to the U. S. Constitution, a violation of the knock-and-announce rule does not require the suppression of evidence discovered during a search. ***Wright v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-546-06, 05/07/08].**

***Malone v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1647-06, 05/07/08].**

KEASLER, J., *delivered the opinion for a unanimous Court.*

FACTS: A jury convicted defendant of possession of a controlled substance with intent to deliver and sentenced him to twenty-five years imprisonment. In part, defendant's conviction was based on a conversation taped by two informants during a drug deal. The conversation was corroborated by the testimony of the investigating police officer. Finding that the corroborating evidence of the police officer's testimony did not sufficiently "tend to connect" the defendant to the offense, the court of appeals reversed. On state's petition for discretionary review, the Court of Criminal Appeals, held that: 1) in evaluating sufficiency of evidence corroborating covert agent testimony, the reviewing court must exclude testimony of agent from consideration and examine remaining

evidence to determine whether there is evidence that tends to connect defendant to commission of offense, and 2) whether the confidential informant's testimony regarding controlled drug buy was adequately corroborated by other evidence that tended to connect defendant to crime beyond mere presence. The CCA found the evidence to be sufficient and reversed the court of appeals' judgment.

EVIDENCE— ACCOMPLICE/WITNESS RULE

The Code of Criminal Procedure states that a defendant cannot be convicted under the Texas Controlled Substances Act on the testimony of a undercover non-licensed peace officer or special investigator who is acting on behalf of law enforcement or under color of law enforcement unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed. *Malone v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1647-06, 05/07/08].

EVIDENCE— ACCOMPLICE/WITNESS RULE

The accomplice-witness rule states that “[a] conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.” This rule is a statutorily imposed review and is not derived from federal or state constitutional principles that define the legal and factual sufficiency standards. *Malone v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1647-06, 05/07/08].

EVIDENCE— ACCOMPLICE/WITNESS RULE

When evaluating the sufficiency of corroboration evidence under the accomplice-witness rule, the court must eliminate the accomplice testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the defendant with the commission of the crime. *Malone v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1647-06, 05/07/08].

EVIDENCE— ACCOMPLICE/WITNESS RULE

To connect a defendant to the offense, the corroborating evidence does not have to solely prove the offense beyond a reasonable doubt; but rather, simply link a defendant in some way to the commission of the crime and show that rational jurors could conclude that the evidence sufficiently tended to connect the defendant to the crime. *Malone v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1647-06, 05/07/08].

EVIDENCE—ACCOMPLICE/WITNESS RULE

There is no set amount of non-accomplice corroboration evidence that is required for sufficiency purposes. Each case must be judged on its own facts and, in some situations, apparently insignificant circumstances can be sufficient corroboration. *Malone v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1647-06, 05/07/08].

EVIDENCE—ACCOMPLICE/WITNESS RULE

While mere presence at the scene of a crime is insufficient to corroborate accomplice testimony, proof that a defendant was at or near the scene of a crime, at or about the time of its commission, when coupled with other suspicious circumstances, may tend to connect that defendant has been found to be sufficient corroboration. *Malone v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1647-06, 05/07/08].

EVIDENCE—ACCOMPLICE/WITNESS RULE

The accomplice-witness rule applies to a covert agent's evidence because, like an accomplice, a covert agent can fall into the same class as a discredited witness with selfish interests and possibly corrupt motives. *Malone v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1647-06, 05/07/08].

Allen v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0468-07, 05/07/08].

PRICE, J., *delivered the opinion for a unanimous Court.*

FACTS: A jury convicted defendant of misdemeanor assault and assessed punishment at a \$500 fine and 180 days imprisonment, probated for one year. Defendant raised the defense of consent, but the trial judge did not instruct the jury that it must acquit the defendant if it finds reasonable doubt with respect to any defense. The court of appeals reversed. Finding that the trial court's failure to instruct jury that it had to acquit defendant on charge of simple assault if it had reasonable doubt as to whether victim consented to assault did not rise to level of egregious harm, the Court of Criminal Appeals vacated the judgment of the court of appeals and remanded.

DEFENSE – SIMPLE ASSAULT - CONSENT

It is a defense to the offense of simple assault that the victim effectively consented to the defendant's assaultive conduct or that the defendant reasonably believed that the victim consented, at least so long as the conduct did not threaten or inflict serious bodily injury. When evidence at trial raises the defense of consent, the court shall charge [the jury] that a reasonable doubt on the issue requires that the defendant be acquitted. *Allen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0468-07, 05/07/08].

JURY CHARGE—UNOBJECTED-TO ERROR

In the absence of egregious harm, an unobjected-to jury charge error will not result in reversal of a conviction. *Allen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0468-07, 05/07/08].

JURY CHARGE—EGREGIOUS HARM

An erroneous jury charge is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. To determine egregious harm, the reviewing court must examine: 1) the entire jury charge; 2) the state of the evidence, including the contested issues and the weight of the probative evidence; 3) the final arguments of the parties; and 4) any other relevant information revealed by the trial record as a whole. *Allen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0468-07, 05/07/08].

DEFENSIVE ISSUES – BURDEN OF PROOF / PERSUASION

Although the state has no burden of production of evidence on a defensive issue, once a defense is raised it is the state's burden to *persuade* the jury with respect to that issue, since a reasonable doubt on the issue requires that the defendant be acquitted. *Allen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0468-07, 05/07/08].

JURY CHARGE—ABSENCE OF EGREGIOUS HARM

In the absence of egregious harm, an unobjected-to jury charge error will not result in reversal of a conviction. *Allen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0468-07, 05/07/08].

JURY INSTRUCTION—DEFENSIVE ISSUES

A defendant is entitled to an instruction on every defensive issue raised by the evidence, whether that evidence is weak or strong, unimpeached or uncontradicted, and regardless of what the trial court may or may not think about the credibility of the defense. *Allen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0468-07, 05/07/08].

Porteous v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0684-07, 05/07/08].

HERVEY, J., *delivered the opinion for a unanimous Court.*

FACTS: A jury convicted defendant of attempted capital murder of a police officer. The Court of Criminal Appeals initially granted discretionary review on the right of the defendant to a self-defense instruction, but dismissed the petition for discretionary review as improvidently granted.

***Bjorgaard v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0791-07, 05/07/08].**

Per Curiam

FACTS: A jury convicted defendant of attempted sexual assault and sentenced him to twenty years imprisonment. Defendant objected to the use of a prior conviction during the guilt phase of the trial. The court of appeals reversed and remanded, holding that defendant had been harmed by the inclusion of the prior conviction evidence. The Court of Criminal Appeals granted the state's petition for discretionary review, but dismissed it as improvidently granted.

***State v. Vasilas*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1473-06, 05/07/08].**

HOLCOMB, J., *delivered the opinion of the Court, in which MEYERS, PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, and COCHRAN, J.J., joined. KELLER, P.J., concurred.*

FACTS: This is the second time this case has been before the Court of Criminal Appeals (CCA). Defendant was charged with four counts of tampering with a governmental record after filing a petition for expunction in his client's case. Finding the Texas Penal Code and Rule 13 of Texas Rules of Civil Procedure to be *in pari material*, the trial court quashed the indictment. The court of appeals affirmed and the state filed pdr. The CCA reversed the court of appeals and remanded for consideration of issue whether the penal statute governing offense and procedural rule governing sanctions for filing pleadings in bad faith were *in pari materia*. On remand, the court of appeals, determined that statute and rule were not *in pari materia*. Finding that, as matter of first impression, the doctrine of *in pari materia* did not apply to determination whether prosecution was governed by penal statute or civil procedural rule governing sanctions for pleadings filed in bad faith, the CCA affirmed

GOVERNMENTAL RECORD - PETITIONS

The legislature's definition of a governmental record is clear and unambiguous and may include a court record, such as a petition for expunction. ***State v. Vasilas*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1473-06, 05/07/08].**

STATUTORY INTERPRETATION—*IN PARI MATERIA*

The doctrine of *in pari material* is a principle of statutory interpretation used to determine the Legislature's intent in enacting a particular statute or statutes. To arrive at a proper construction of two similar statutes, a court will read and construe the statutes together, with each enactment in reference to the other, as though they were parts of the same law. ***State v. Vasilas*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1473-06, 05/07/08].**

STATUTORY INTERPRETATION—*IN PARI MATERIA*

Statutes that deal with the same general subject, have the same general purpose, or relate to the same person, thing, or class are considered as being *in pari materia* even though they contain no reference to one another and were passed by the legislature at different times. *State v. Vasilas*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1473-06, 05/07/08].

STATUTORY INTERPRETATION—*IN PARI MATERIA*

The purpose of the *in pari materia* rule of construction is to carry out the full intent of the legislature by giving effect to all laws and provisions bearing on the same subject. The rule is based on the supposition that that several statutes relating to the same subject are intended to be consistent and harmonious in their several parts and provisions. *State v. Vasilas*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1473-06, 05/07/08].

STATUTORY INTERPRETATION—*IN PARI MATERIA*

The *in pari materia* doctrine applies when one statute deals with a subject in comprehensive terms and another statute deals with a portion of the same subject in a more definite way. When a general statute and a more detailed enactment are in conflict, the more detailed statute will prevail, regardless of whether it was passed prior or subsequently to the general statute, *unless* the legislature intended to make the general act controlling. The rule is not applicable to enactments that cover different situations and those statutes that were apparently not intended to be considered together. *State v. Vasilas*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1473-06, 05/07/08].

***IN PARI MATERIA* – STATUTES NOT RULES**

The purpose of the *in pari materia* doctrine is to harmonize the different provisions of the law passed by the same governmental entity: the legislature; accordingly, the doctrine may only be applied to statutory construction. There is no legal justification for applying the *in pari materia* doctrine to a statute and a court-made rule. *State v. Vasilas*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1473-06, 05/07/08].

Cantu v. State, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

COCHRAN, J., *delivered the opinion for the unanimous Court.*

FACTS: Defendant pled guilty to driving while intoxicated and the trial court placed him on community supervision for twelve months. Finding the defendant was denied his right to a speedy trial, the court of appeals reversed. On the state's pdr, the Court of Criminal Appeals (CCA), determined that the defendant 1) did not diligently assert his right to a speedy trial and that 2) he

was not prejudiced by pre-indictment delay. The CCA reversed the court of appeals judgment and affirmed the trial court.

SPEEDY TRIAL CLAIM – ANALYZED ON *AD HOC* BASIS

State courts must analyze federal constitutional speedy-trial claims on an *ad hoc* basis by weighing and balancing the four *Barker* factors: 1) length of the delay, 2) reason for the delay, 3) assertion of the right, and 4) prejudice to the accused. No single factor, however, is a necessary or sufficient condition to find that a defendant has been deprived his right to a speedy trial. Rather, the court must weigh the factors separately and then balance their relative weights in light of the conduct of the prosecution and the defendant. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

SPEEDY TRIAL – INTERESTS OF DEFENDANT

The Sixth Amendment to the U. S. Constitution guarantees an accused the right to a speedy trial. A speedy trial protects three interests of the defendant: freedom from oppressive pretrial incarceration, mitigation of the anxiety and concern accompanying public accusation, and avoidance of impairment to the accused's defense. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

SPEEDY TRIAL – WHEN RIGHT ATTACHES

The right to a speedy trial attaches once a person becomes “an accused”-that is, once he is arrested or charged. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

SPEEDY TRIAL CLAIM - PROOF

The state must justify the length of delay, while the defendant must prove the he asserted his right to a speedy trial and show that the state’s delay caused him prejudice. The greater the state’s bad faith or official negligence and the longer its actions delayed a trial, the less a defendant must show actual prejudice or prove diligence in asserting his right to a speedy trial. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

SPEEDY TRIAL CLAIM – BIFURCATED STANDARD OF REVIEW

A trial court’s ruling on a defendant’s federal constitutional speedy trial claim is subject to a bifurcated standard of review: 1) an abuse of discretion standard for the factual components, and 2) a *de novo* standard for the legal components. While a review of the individual *Barker* factors necessarily involves fact determinations and legal conclusions, the balancing test as whole is a purely legal question. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

SPEEDY TRIAL CLAIM— REVIEW

A reviewing court should show great deference to a trial judge's resolution of factual issues in the speedy-trial context by not only deferring to a trial judge's resolution of disputed facts, but also to the trial judge's right to draw reasonable inference from those facts. In assessing the evidence at a speedy-trial hearing, however, the trial judge may completely disregard a witness's testimony, based on credibility and demeanor evaluations, even if that testimony is uncontroverted. The trial judge may disbelieve any evidence so long as there is a reasonable and articulable basis for doing so. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

SPEEDY TRIAL CLAIM— REVIEW

The defendant has no duty to bring himself to trial -- that is the state's duty. The defendant, however, has a duty to assert his right to a speedy trial. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

SPEEDY TRIAL CLAIM— REVIEW

A defendant, who fails to seek a speedy trial before seeking dismissal of the charges, should provide the court with cogent reasons for his failure. Such a request supports an inference that the defendant wants only a dismissal of the charges, rather than a trial. When a state's delay in charging the defendant makes it impossible for the defendant to make a speedy-trial complaint in any form, then the defendant has a sufficient reason for his failure to seek a speedy trial before seeking dismissal. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

SPEEDY TRIAL CLAIM— REVIEW

Under *Barker*, the defendant's failure to diligently and vigorously seek rapid resolution is entitled to strong evidentiary weight against any prejudice he may have suffered. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

SPEEDY TRIAL CLAIM— REVIEW

When a trial court analyzes the prejudice to the defendant, it must do so in light of the type of prejudices that the speedy-trial right was designed to protect against, such as: 1) to prevent oppressive pretrial incarceration; 2) to minimize the accused's anxiety and concern that is beyond the normal level of anxiety or concern associated with a criminal charge or investigation; and 3) to limit the possibility that the accused's defense will be impaired. *Cantu v. State*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD-1176-07, 05/07/08].

***State v. Garcia-Cantu*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD- 0936-07 & 0937-07, 05/07/08].**

COCHRAN, J., *delivered the opinion of the Court in which MEYERS, PRICE, WOMACK, JOHNSON and HOLCOMB, JJ., joined.* KELLER, P.J., *filed a dissenting opinion in which KEASLER and HERVEY, JJ., joined.* KEASLER, J., *filed a dissenting opinion in which KELLER, P.J., and HERVEY, J., joined.*

FACTS: Charged with possession of marijuana and carrying a weapon, defendant filed a motion to suppress. Defendant's motion claimed that his detention by a police officer was an improper Fourth Amendment seizure because the officer, without reasonable suspicion, shined his spotlight on the defendant and used his patrol car to block any available exit. Making no explicit fact findings, the trial court granted defendant's motion to suppress. On the state's appeal, the appellate court reversed. The Court of Criminal Appeals (CCA) granted defendant's petition to determine if, under *Bostick's* "totality of the circumstances," the police officer's actions constituted a Fourth Amendment detention requiring reasonable suspicion. The CCA reversed the court of appeals' judgment and affirmed the trial court.

MOTION TO SUPPRESS—REVIEW

In reviewing a trial court's ruling on a motion to suppress, an appellate court views all the evidence in the light most favorable to the trial court's ruling. If a trial court does not make explicit fact findings, the appellate court infers the necessary factual findings in support of the trial court's ruling as long as these implied fact findings are supported by the evidence in the record. ***State v. Garcia-Cantu*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD- 0936-07 & 0937-07, 05/07/08].**

FOURTH AMENDMENT -- CONSENSUAL V. ENCOUNTER – DE NOVO REVIEW

A trial court's decision as to whether a defendant's encounter with a police officer is a consensual police-citizen encounter or a Fourth Amendment detention is subject to *de novo* review because it is an issue of law involving the application of legal principles to specific set of facts.

***State v. Garcia-Cantu*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD- 0936-07 & 0937-07, 05/07/08].**

FOURTH AMENDMENT – POLICE BEHAVIOR - ENCOUNTER V. DETENTION

Police officers are as free as any other citizen to knock on someone's door and ask to talk with them, to approach citizens on the street or in their cars and to ask for information or their cooperation. Such social interactions may involve embarrassment and inconvenience, but they do not involve official coercion. It is only when the police officer "engages in conduct which a reasonable man would view as threatening or offensive even if performed by another private citizen," does such an encounter become a seizure. It is the display of official authority and the implication that this authority cannot be ignored, avoided, or terminated, that results in a Fourth

Amendment seizure. *State v. Garcia-Cantu*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD- 0936-07 & 0937-07, 05/07/08].

DETENTION V. ENCOUNTER

A “detention” implicates the Fourth Amendment’s search and seizure restrictions and requires reasonable suspicion to support even a temporary seizure. An encounter, however, is not subject to any Fourth Amendment requirements or restrictions. *State v. Garcia-Cantu*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD- 0936-07 & 0937-07, 05/07/08].

FOURTH AMENDMENT - DETENTION

A Fourth Amendment seizure occurs only when, after taking into account all of the circumstances surrounding the encounter, the police officer displayed a physical force or a show of authority which would have communicated to a reasonable person that he was not a liberty to ignore, avoid or terminate the police officer’s authority and go about his business. *Garcia-Cantu*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD- 0936-07 & 0937-07, 05/07/08].

FOURTH AMENDMENT – DETENTION V. ENCOUNTER

A Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement, nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement, but only when there is a governmental termination of freedom of movement *through means intentionally applied*. The objective nature of the test also means that whether an encounter has become a seizure depends on the officer's objective behavior, not any subjective suspicion of criminal activity. *Garcia-Cantu*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD- 0936-07 & 0937-07, 05/07/08].

ENCOUNTER V. DETENTION – OFFICER’S USE OF SPOT LIGHT

A police officer’s use of a spot light does not create a *per se* Fourth Amendment detention, because determination of whether an encounter between a police officer and a citizen constitutes a Fourth Amendment detention depends on specific facts about the manner of the encounter, the degree of authority the officer displayed, and all other circumstances surrounding the incident. *Garcia-Cantu*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD- 0936-07 & 0937-07, 05/07/08].

ENCOUNTER V. DETENTION – BOXING IN CAR

Most courts have held that when an officer “boxes in” a car to prevent its voluntary departure, this conduct constitutes a Fourth Amendment seizure. *Garcia-Cantu*, _ S.W.3d _ (Tex. Crim. App. 2008) [PD- 0936-07 & 0937-07, 05/07/08].