
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, ELIZABETH WIEHLE, MARY MARTIN, AND PETER CHICKRIS
SUBJECT: 06/04/08 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 06/30/08
CC: JACK THOMPSON

***State v. Maldonado*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1552-07, 06/04/08].**

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

FACTS: Defendant was indicted for indecency with a child. Finding that the police officers had initiated communications with defendant while he represented by counsel, the trial court granted defendant's pretrial motion to suppress his written confession. The State appealed and the court of appeals affirmed. Finding the police did not initiate communications, the Court of Criminal Appeals reversed.

FIFTH AMENDMENT—RIGHT TO COUNSEL

A defendant in custody who invokes his right to counsel may not be questioned by law enforcement in the absence of counsel unless the defendant initiates further communications with the law enforcement officers. ***State v. Maldonado*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1552-07, 06/04/08].**

SIXTH AMENDMENT—RIGHT TO COUNSEL

The Sixth Amendment right to counsel attaches after a defendant has been formally charged. ***State v. Maldonado*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1552-07, 06/04/08].**

SIXTH AND FIFTH AMENDMENTS—RIGHT TO COUNSEL

The right to counsel under the Sixth Amendment gives as many protections as the Fifth Amendment during any custodial interrogation. If the police initiate interrogation of a defendant after he has asserted his Sixth Amendment right to counsel, any waiver of

his right to counsel after defendant has asserted that right is invalid. *State v. Maldonado*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1552-07, 06/04/08].

SIXTH AMENDMENT—RIGHT TO COUNSEL- LAW ENFORCEMENT COMMUNICATION

After the right to counsel has attached, law enforcement can validly initiate communication and seek a waiver of counsel if the defendant: (1) has been admonished; (2) has not invoked his right to counsel; and (3) is not yet represented by counsel. *State v. Maldonado*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1552-07, 06/04/08].

SIXTH AMENDMENT—RIGHT TO COUNSEL- NOTICE OF INTERROGATION

The Sixth Amendment right to counsel does not permit police-initiated interrogation of a defendant who has appointed or retained counsel without giving notice to his counsel. *State v. Maldonado*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1552-07, 06/04/08].

SIXTH AMENDMENT—RIGHT TO COUNSEL- VOLUNTARY COMMUNICATION

Nothing in the Sixth Amendment prevents a defendant represented by counsel from voluntarily choosing to speak with police in the absence of an attorney. Although the defendant may later regret his decision to speak with the police, the Sixth Amendment does not prevent a defendant from exercising his free will. *State v. Maldonado*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1552-07, 06/04/08].

SIXTH AMENDMENT—RIGHT TO COUNSEL-INITIATED COMMUNICATION

To determine whether an officer initiated communication for Sixth Amendment purposes, the court must determine whether the officer engaged in conduct designed to elicit an incriminating response from a defendant before he communicated, or expressed his desire to communicate, information about the offense. *State v. Maldonado*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1552-07, 06/04/08].

Dejean v. District Clerk of Dallas County, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,928, 06/04/08].

Per Curiam

FACTS: In 2007, relator filed four 11.07 applications for writs of habeas corpus in the trial court. When the court did not issue any timely orders designating issues, relator sought mandamus relief and asked the Court of Criminal Appeals (CCA) to order the district clerk to forward the appropriate order copies. In April, 2008, the CCA abated and

ordered the district clerk to respond. While the clerk forwarded copies of the orders designating the issues, at the time of the opinion the CCA had still not received the 11.07 applications; the Court granted mandamus relief and ordered the district clerk to forward the records.

HABEAS CORPUS—STATE RESPONSE

The State’s attorney must respond to an application for writ of habeas corpus challenging a final felony conviction within fifteen days of receipt. *Dejean v. District Clerk*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,928, 06/04/08].

HABEAS CORPUS—TRIAL COURT DETERMINATION OF ISSUES

Once time has expired for the State to respond, the trial court must determine whether the application contains allegations of previously unresolved disputed facts material to the legality of the applicant’s confinement. If so, the trial court must enter an order designating the issues of fact to be resolved. *Dejean v. District Clerk*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,928, 06/04/08].

HABEAS CORPUS—TRIAL COURT – TIME FOR RESPONSE

After an application for writ of habeas corpus is filed, a trial court has only 35 days to enter an order designating issues. The trial court may not extend the statutory time limitations. *Dejean v. District Clerk*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,928, 06/04/08].

HABEAS CORPUS—DISTRICT CLERK’S DUTY

Without a timely entry of an order designating issues, the Code of Criminal Procedure *requires* the clerk of the trial court to immediately transmit the record from the application for a writ of habeas corpus to the Court of Criminal Appeals. The trial court’s inaction is deemed to have been a finding that no issues of fact require further resolution. *Dejean v. District Clerk*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,928, 06/04/08].

HABEAS CORPUS—NO TRIAL COURT ORDER-DISTRICT CLERK’S DUTY

When the trial court fails to enter an order designating issues, the district clerk has no authority to continue to hold applications for a writ of habeas corpus. The district clerk is under a ministerial duty to *immediately* forward the records of the applications. *Dejean v. District Clerk*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [AP-75,928, 06/04/08].

***Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].**

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

FACTS: A jury convicted defendant of aggravated robbery and sentenced him to 75 years imprisonment. On direct appeal, defendant argued that the trial court erred in failing to instruct the jury on the law of voluntariness of custodial confessions. The court of appeals affirmed, concluding that, because a challenge to the voluntariness of a confession is a defensive issue, the defense must request a jury instruction before any error can result. Reversing and remanding, the Court of Criminal Appeals (CCA) held that Article 38.22 of the Code of Criminal Procedure, not Article 32.38, was the applicable law.

VOLUNTARINESS – GROUNDS FOR CHALLENGE

Three different theories allow a defendant to claim that, because his statement was not freely and voluntarily made, it may not be used as evidence against him. He may claim it was involuntary under one, two, or all three of the following: (1) state law governing general voluntariness of statements (Article 38.22 §6); (2) *Miranda v. Arizona* as expanded in the Texas Confession Statute (Article 38.22 §§ 2 & 3); or (3) the due process clause of the 14th Amendment. ***Oursbourn v. State*,_S.W.2d._ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].**

INVOLUNTARY STATEMENTS- U.S. CONSTITUTION / CONFESSION STATUTE

A statement that is “involuntary” as a matter of constitutional law is also “involuntary” under the Texas Confession Statute, but the converse need not be true. ***Oursbourn v. State*,_S.W.2d._ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].**

VOLUNTARY STATEMENTS- U.S. CONSTITUTION – MENTAL IMPAIRMENT

A confession may be involuntary under the Due Process Clause only when there is police overreaching. Even if a confession is not the product of a meaningful choice (for example, when it is made in response to hallucinations or to a private person's threat), it is nonetheless “voluntary” within the meaning of the Due Process Clause absent some coercive police activity. The Due Process Clause is aimed at protecting suspects from police overreaching, not at protecting people from themselves or other private actors. ***Oursbourn v. State*,_S.W.2d._ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].**

VOLUNTARY STATEMENTS- MIRANDA WARNINGS – MENTAL IMPAIRMENT

If a defendant understands the *Miranda* warnings yet is moved by a crazy impulse to blurt out a confession, the confession is admissible because it is not a product of coercion. *Oursbourn v. State*, S.W.2d. (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

VOLUNTARY STATEMENTS- OBJECTIVE ASSESSMENT – POLICE BEHAVIOR

Due-process and *Miranda* claims of involuntariness generally do not require sweeping inquiries into the state of mind of a criminal defendant who has confessed. They involve an objective assessment of police behavior. The Constitution leaves voluntariness claims based on the defendant's state of mind to be resolved by state laws, such as the Texas Confession Statute, that govern the admission of evidence. *Oursbourn v. State*, S.W.2d. (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

STATEMENTS – ADMISSIBILITY

The Code of Criminal Procedure sets out rules governing the admissibility of an accused's written and oral statements that are the product of custodial interrogation. TEX. CODE CRIM. P. art. 38.22. Case law however, has held that Section 6 of Article 38.22 applies to *both* an accused's custodial and non-custodial statements because it provides that only “voluntary” statements may be admitted. Sections 2 and 3 apply to an accused's custodial-interrogation statements and provide that only “warned and waived” statements may be admitted. In other words, an accused's custodial-interrogation statement is not admissible unless, prior to making the statement, he received the warnings provided in Article 15.17 or Article 38.22 (sections 2(a) and 3(a) incorporate the requirements of *Miranda*), and he knowingly, intelligently, and voluntarily waived those rights. *Oursbourn v. State*, S.W.2d. (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTIONS—VOLUNTARINESS OF CONFESSION

Under the Code of Criminal Procedure, there are three types of jury instructions applicable to confessions: 1) a “general” voluntariness instruction (Article 38.22 §6); 2) a “general” warning instruction (Article 38.2, §7 that involves warnings given under §2 and §3); and 3) a “specific” exclusionary-rule instruction (Article 38.23(a)). *Oursbourn v. State*, S.W.2d. (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTIONS—GENERAL- VOLUNTARINESS OF CONFESSION

The “general” instruction (Article 38.22 §6) asks the jury: “Do you believe, beyond a reasonable doubt, that the defendant’s statement was voluntarily made? If it was not, do not consider the defendant’s confession.” *Oursbourn v. State*, S.W.2d. (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTIONS—GENERAL WARNINGS- REQUIREMENTS

The “general” warnings instruction sets out the statutory requirements for warnings (Article 38.22 §2 or §3) and asks the jury to decide whether all of those requirements were met. *Oursbourn v. State*, S.W.2d. (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTIONS—GENERAL / SPECIFIC INSTRUCTIONS

Although due process and *Miranda* claims may warrant both the general and specific voluntariness instructions, Texas statutory claims warrant only a general voluntariness instruction. It is the defendant's responsibility to delineate which type of “involuntariness” he is claiming—a general (perhaps subjective) lack of voluntariness or a specific police-coerced lack of voluntariness—because the jury instruction is very different depending upon the type of claim. *Oursbourn v. State*, S.W.2d. (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—VOLUNTARINESS OF CONFESSION

Precedent holds that the Code of Criminal Procedure’s general voluntariness statute (Article 38.22 §6), applies to both an accused’s custodial and non-custodial confession because the statute provides that a court may admit only voluntary statements into evidence. Therefore, a custodial-interrogation confession is not admissible unless, prior to making the confession, defendant received the statutory warnings (Article 15.17 or Article 38.22 §§ 2 or 3), and knowingly, intelligently, and voluntarily waived those rights. *Oursbourn v. State*, S.W.2d. (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—VOLUNTARINESS OF CONFESSION

A defendant may raise an involuntariness claim in the following fact scenarios: 1) the suspect was ill and on medication and that fact may have rendered his confession involuntary; 2) the suspect was mentally retarded and may not have knowingly, intelligently, and voluntarily waived his rights; 3) the suspect lacked the mental capacity

to understand his rights; or 4) the suspect was intoxicated, and he did not read or know what he was signing. *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—VOLUNTARINESS- FACTORS TO CONSIDER

Youth, intoxication, mental retardation, and other disabilities by themselves are not enough to render a statement inadmissible under Article 38.22; however, they are factors that a jury, with proper instruction, is entitled to consider. *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—VOLUNTARINESS –NOTICE TO COURT

A trial judge must be notified that voluntariness is an issue before a defendant has a right to a jury instruction. *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—VOLUNTARINESS OF CONFESSION

A general voluntariness instruction under Article 38.22, §6 of the Code of Criminal Procedure contemplates the following sequence of events: 1) a party notifies the trial judge that there is an issue about the voluntariness of the confession (or the trial judge raises it *sua sponte*); 2) the trial judge holds a hearing outside the presence of the jury; 3) the trial judge decides whether the confession was voluntary; 4) if the trial judge decides the confession is voluntary, it is admitted into evidence, and a defendant may offer evidence before the jury that the confession was not voluntary; and 5) if such evidence is offered before the jury, the trial judge *shall* give the jury a voluntariness instruction. *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION- VOLUNTARINESS- CUSTODIAL STATEMENTS

Under Article 38.22, §7 of the Code of Criminal Procedure, a defendant is entitled to have the jury decide whether he was adequately warned of his rights and knowingly and intelligently waived these rights when: 1) the defendant made his statements as a result of a custodial interrogation, and 2) the evidence raises the involuntariness issue. *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—EXCLUSIONARY RULE – DISPUTED MATERIAL FACTS

The exclusionary rule requires a jury instruction *only* when there is a genuine dispute about a material fact. *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—EXCLUSIONARY RULE – REQUISITES

To trigger an exclusionary instruction 1) the evidence heard by the jury must raise an issue of fact; 2) the evidence on that fact must be affirmatively contested; and 3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the statement claimed to be involuntary. *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—VOLUNTARINESS-EVIDENCE

A defendant must offer evidence that, if credited, would create a reasonable doubt as to a specific factual matter essential to the voluntariness of the statement. This factual dispute can be raised only by affirmative evidence, not by mere cross-examination questions or argument. *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—EXCLUSIONARY RULE

A specific exclusionary-rule instruction for a confession is generally warranted only where an officer uses inherently coercive practices. In Texas, a specific exclusionary-rule instruction under Article 38.23 of the Code of Criminal Procedure is appropriate when there is a disputed fact issue about whether coercive practices were employed by an officer or a private citizen to extract a confession from the defendant. *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—EXCLUSIONARY RULE

A trial court has no duty to instruct the jury on the voluntariness of a defendant’s statement when the issue of voluntariness with regard to the defendant’s confession is a defense issue. Rather, the court has such a duty when the voluntariness issue is the “law applicable to the case.” *Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].

JURY INSTRUCTION—DUTY TO INSTRUCT

The general voluntariness instruction under Article 38.22 §6 of the Code of Criminal Procedure is the law applicable to any case in which the issue regarding the

general voluntariness of the defendant's confession is raised and litigated. When the issue has been raised and litigated, the trial judge must: 1) make an independent determination that the statement was made under voluntary conditions; and then 2) instruct the jurors that they shall not consider the statement for any purpose unless they believe, beyond a reasonable doubt, that the statement was made voluntarily. ***Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].**

JURY INSTRUCTION—DUTY TO INSTRUCT

The specific exclusionary-rule instruction under Article 32.23 of the Code of Criminal Procedure is the law applicable to *any* case in which a specific disputed issue of fact is raised concerning the *constitutional voluntariness* of the making of the defendant's statement. And when the voluntariness of a defendant's statement is at issue, there are statutorily mandated instructions and the trial judge must include them in the jury instruction. ***Oursbourn v. State*, ___ S.W.2d. ___ (Tex. Crim. App. 2008) [PD 1687-06, 6/4/08].**