
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, PETER CHICKRIS, AND MARY MARTIN
SUBJECT: 09/10/08 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 11/03/08
CC: JACK THOMPSON

***Bass v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0494/95-07, 09/10/08].**

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

FACTS: A jury convicted defendant of two counts of indecency with a child. To rebut defendant's trial argument that the assault complaints were fabricated, the prosecution introduced extraneous offense evidence of unreported sexual assaults of other victims. Finding that the trial court abused its discretion in admitting the evidence of extraneous offenses, the court of appeals reversed. The Court of Criminal Appeals disagreed and reversed the court of appeals.

EVIDENCE—EXTRANEOUS OFFENSES--ADMISSIBILITY

Extraneous offense evidence is admissible if it has some logical relevance aside from character conformity. In frame-up and retaliation cases, proof of an extraneous offense may tend to disprove defense allegations that the victim has some motive to fabricate her claims. ***Bass v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0494/95-07, 09/10/08].**

EVIDENCE—EXTRANEOUS OFFENSES--REBUTTAL

Evidence of an extraneous offense is admissible when offered to rebut a defensive theory of fabrication, retaliation, or frame-up. If the State can show that a defendant has committed similar sexual assaults against unrelated and unconnected children, an affirmative defense allegation that the complainant fabricated her claims is less likely to be true. By showing that the complainant's allegations are less likely to be fabricated, the evidence directly rebuts the defensive claims and has logical relevance aside from character conformity. ***Bass v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0494/95-07, 09/10/08].**

EVIDENCE—EXTRANEOUS OFFENSES--REBUTTAL

In a prosecution for indecency with a child, defendant's opening statement raised the defense that under the circumstances of the charged offense, he lacked opportunity to molest the complainant. Defendant's statement opened the door to the admission of extraneous-offense rebuttal evidence that defendant molested other children under almost identical circumstances. *Bass v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0494/95-07, 09/10/08].

EVIDENCE—EXTRANEOUS OFFENSES--REBUTTAL

In a prosecution for sexual assault of child under seventeen, a defendant made a sweeping statement during direct examination in which he disavowed any sexual misconduct with minors. This statement opened the door to admission of extraneous-offense rebuttal evidence of defendant's sexual misconduct with another minor. *Bass v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0494/95-07, 09/10/08].

EVIDENCE—EXTRANEOUS OFFENSES--REBUTTAL

When considering acceptable rebuttal evidence, case law makes no categorical distinctions between “fabrication” defenses and “frame-up” or “retaliation” defenses. *Bass v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-0494/95-07, 09/10/08].

Grissam v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1532-07, 09/10/08].

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

FACTS: A jury convicted defendant of burglary of a habitation. The indictment accused the appellant of committing burglary of a habitation in each of two ways such an offense can be committed: 1) by entering with intent to commit theft, or 2) by entering and committing or attempting to commit theft. The trial court's charge to the jury should have explained both kinds of burglary and authorized them to convict on either offense. Instead, it explained one of the types of burglary in the abstract statement of the law and authorized conviction on the type of burglary in the application paragraph. Finding the jury charge insufficient to support the judgment, the court of appeals reformed the trial court's judgment, reversed and remanded for a new punishment hearing. The Court of Criminal Appeals (CCA) disagreed, vacated the conviction, and remanded to the court of appeals. The CCA found that both theories of burglary were in the charge, although only one was in the application paragraph; and held that the court of

appeals should have measured the legal sufficiency of the evidence against the requirements for conviction under either theory of burglary.

EVIDENCE—LEGAL SUFFICIENCY

The legal sufficiency of evidence is measured against the requirements for conviction in a correct charge of the court, as opposed to the charge that was actually given. *Grissam v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1532-07, 09/10/08].

EVIDENCE—LEGAL SUFFICIENCY

Due process prevents an appellate court from affirming a conviction based upon legal and factual grounds that were not submitted to the jury. The complete absence of a sufficient legal theory from a jury charge may render the charge unconstitutional. *Grissam v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1532-07, 09/10/08].

Barrera v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1642-07, 09/10/08].

HOLCOMB, J., *delivered the opinion of the Court, in which* KELLER, P.J., *and* PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, *and* COCHRAN, JJ., *joined*. MEYERS, J., *did not participate*.

FACTS: A jury convicted defendant of murder and the trial judge sentenced him to 99 years imprisonment and a \$10,000 fine. Although there was no evidence to support his order, the trial court ordered defendant to pay \$12,000 restitution to the victim's estate. The defendant did not object at the time the trial court entered the order. Finding insufficient evidence to support the order of restitution, the court of appeals affirmed the trial court's judgment as modified. The State filed PDR. The Court of Criminal Appeals 1) remanded the case for a new restitution hearing because of the court of appeal's finding that the restitution order was unsupported by the record, and remanded for new restitution hearing; and 2) found that double jeopardy considerations did not bar the State from presenting evidence at a new hearing before the trial court and asking that the defendant be ordered to make restitution to the victim's estate. Accordingly, the CCA reversed in part and remanded to the trial court for a new hearing on the issue of restitution.

DOUBLE JEOPARDY – SENTENCING – NON CAPITAL

Double jeopardy protections are not applicable to non-capital sentencing proceedings. *Barrera v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1642-07, 09/10/08].

EVIDENCE--RESTITUTION – AMOUNT

A restitution order must be supported by evidence that provides a reasonable basis for estimating the loss. *Barrera v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1642-07, 09/10/08].

RESTITUTION--INSUFFICIENT EVIDENCE--AUTHORIZED ORDER

If a trial judge is authorized to order restitution and the only defect in the order is that the amount of restitution is unsupported by the record, the case may be remanded for a new hearing on the issue of restitution. *Barrera v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1642-07, 09/10/08].

RESTITUTION – INSUFFICIENT EVIDENCE – REMEDY UNAUTHORIZED ORDER

If a trial judge is not authorized to order restitution, the proper remedy is for the reviewing court to delete the restitution condition from the trial court's judgment. *Barrera v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1642-07, 09/10/08].

RESTITUTION – INSUFFICIENT EVIDENCE – REMEDY

When a restitution order is not supported by the record, the proper remedy depends on whether the trial judge acted lawfully. *Barrera v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1642-07, 09/10/08].

RESTITUTION – FORFEITURE OF COMPLAINT

If a defendant wishes to complain about the appropriateness of (as opposed to the factual basis for) a trial court's restitution order, he complain explicitly to the trial court. If the defendant does not make his complaint to the court explicitly and in a timely manner, he forfeits his right to challenge the trial court's authority to impose the restitution order on appeal.

Barrera v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1642-07, 09/10/08].

Abbott v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1816-07, 09/10/08].

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

FACTS: A jury convicted defendant of indecency with a child and sentenced him to 20 years imprisonment. The court of appeal affirmed in part, reversed in part, and remanded. On remand, a jury sentenced defendant to ten years in prison and recommend his sentence be suspended subject to community supervision. The trial court placed defendant on community supervision for ten years, imposed a 180-day period of incarceration in county jail as a condition of community supervision, and denied his motion for time credit. The court of appeals held that the

trial court did not have the discretion to deny defendant credit for time previously served. Finding that the appeal court lacked jurisdiction to rule on the time-credit issue, the Court of Criminal Appeals reversed the court of appeals and remanded for further proceedings.

JURISDICTION—STANDARD

The standard for determining whether a court has jurisdiction is not whether or not the appeal was precluded by law, but whether the appeal is authorized by law. *Abbott v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1816-07, 09/10/08].

JURISDICTION—TIME--CREDIT APPEAL

There is no rule, constitutional provision, or statute that authorizes an appeal from a trial court's post-judgment order denying a time-credit motion. *Abbott v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1816-07, 09/10/08].

Shepherd v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1551-07, 09/10/08].

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

FACTS: Defendant pleaded guilty to possession of marijuana and was sentenced to ten days in jail. The police received a call that defendant's front door was left open and no one was at home. When the police arrived to investigate, they found marijuana in plain view inside the house. Defendant moved to suppress the evidence of the marijuana under the Fourth Amendment. The court of appeals affirmed the trial court, finding that the search was constitutional. The Court of Criminal Appeals affirmed the court of appeals.

FOURTH AMENDMENT—EMERGENCY DOCTRINE

The Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Such a search must be strictly circumscribed by the exigencies which justify its initiation. *Shepherd v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1551-07, 09/10/08].

FOURTH AMENDMENT—EMERGENCY DOCTRINE

If a search is justified under the emergency doctrine, the police may seize any evidence that is in plain view during the course of their legitimate emergency activities. *Shepherd v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1551-07, 09/10/08].

FOURTH AMENDMENT—EMERGENCY DOCTRINE

Unlike the exigent-circumstances exception to the Fourth Amendment's warrant requirement, the emergency doctrine does not apply when the police are carrying out their crime fighting role by conducting a search based on probable cause to gather evidence of a crime.

***Shepherd v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1551-07, 09/10/08].**

FOURTH AMENDMENT—EMERGENCY DOCTRINE

The emergency doctrine allows police to engage in conduct that would otherwise violate the Fourth Amendment when acting on a reasonable belief that doing so is immediately necessary to protect or preserve life or avoid serious injury. ***Shepherd v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1551-07, 09/10/08].**

FOURTH AMENDMENT—EMERGENCY DOCTRINE

To determine if police officers have a reasonable belief that there is an immediate necessity, the court takes into consideration the officers' training and experience in similar situations as well as the facts known to the officers at the time. ***Shepherd v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1551-07, 09/10/08].**

EVIDENCE—MOTION TO SUPPRESS

Motions to suppress evidence are reviewed for abuse of discretion. The reviewing court views the facts in a light most favorable to the trial court's determination. The reviewing court gives almost total deference to the trial court's express or implied determination of historical facts and conducts a *de novo* review of the trial court's application of the law to those facts.

***Shepherd v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1551-07, 09/10/08].**

***Tita v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1574-07, 09/10/08].**

HOLCOMB, J., *delivered the opinion of the Court, in which* PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, *and* COCHRAN, JJ., *joined*. KELLER, P.J., *concurred in the result*. MEYERS, J., *did not participate*.

FACTS: A jury convicted defendant of multiple counts of aggravated theft by a government contractor and sentenced him to 23 years imprisonment and a \$10,000 fine. Before trial, defendant moved to dismiss some of the indictments as barred by the statute of limitations. The court of appeals affirmed the trial court, finding that the trial court did not err in denying the motion to dismiss. The Court of Criminal Appeals found that 1) the State's failure to plead in indictment that statute of limitations had been tolled by pending indictments subjected indictment to dismissal; 2) the State was not required to prove that its prosecution of defendant

was not limitations barred; and 3) defendant was entitled to a harm analysis on his right to a jury instruction allowing consideration of the statute of limitations, and reversed and remanded to the court of appeals.

INDICTMENTS—TIME OF THE OFFENSE

The time of the offense mentioned in an indictment must be some date before the presentment of the indictment and not so remote that the prosecution is barred by limitation.

Tita v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1574-07, 09/10/08].

INDICTMENTS—STATUTE OF LIMITATIONS

If it appears from the face of the indictment that prosecution is barred by the applicable statute of limitations, a defendant may object to the substance of an indictment. *Tita v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1574-07, 09/10/08].

INDICTMENTS—STATUTE OF LIMITATIONS

If a comparison of the date on which the offense is alleged to have been committed and that on which the charging instrument was presented indicates that the charging instrument was not presented within the applicable period of the statute of limitations, the charging instrument must be dismissed. *Tita v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1574-07, 09/10/08].

INDICTMENTS—STATUTE OF LIMITATIONS

The State is statutorily required to plead facts tolling the statute of limitations in the indictment itself so that the face of the document will indicate that prosecution is not barred.

Tita v. State, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1574-07, 09/10/08].

INDICTMENTS—STATUTE OF LIMITATIONS

If the State's pleading includes a tolling paragraph, an explanatory averment, or implied allegations of a time, the pleading is sufficient, on its face, to show that the action is not barred by the statute of limitations. *Tita v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1574-07, 09/10/08].

INDICTMENTS—STATUTE OF LIMITATIONS

The State does not need to negate the existence of a defense in an indictment; however, the indictment must indicate that it is not barred by limitations. *Tita v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1574-07, 09/10/08].

INDICTMENTS—STATUTE OF LIMITATIONS

A statute of limitations defense is forfeited if the defendant does not assert the defense at or before the guilt / innocence stage of trial. *Tita v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1574-07, 09/10/08].

INDICTMENTS—STATUTE OF LIMITATIONS

Before trial, a defendant may assert his right to a statute of limitations defense by filing a motion to dismiss or by requesting a jury instruction on the limitations issue. To be successful, there must be, from any source, *some* evidence before the jury that the prosecution is time-barred. If such an instruction is requested with the appropriate evidence, the State must prove that the prosecution is not time -arred beyond a reasonable doubt. *Tita v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2008) [PD-1574-07, 09/10/08].