
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS ROBERT OWEN, DIMITRIOS GAKIDIS, JENNY BRZOWSKI,
AND ZACHARY LEE
SUBJECT: 5/09/07 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 6/07/07
CC: JACK THOMPSON

***Gonzalez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].**

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

FACTS: On October 29, 2002, defendant and a juvenile companion robbed a convenience store. In the course of the robbery, defendant's juvenile companion shot the store clerk in the chest, killing him. The robbery and shooting were caught on the store's video surveillance camera. Local television stations aired the video and numerous stories about the incident appeared in local newspapers.

Defendant made a pre-trial motion for change of venue arguing that extensive local news coverage of the murder made it impossible for him to receive a fair trial. The trial court denied his motion, but gave him leave to reassert the motion at voir dire. During voir dire, about two thirds of the venire panel informed the court that they had heard of the case, and about one third of the venire panel stated that they could not set aside their preconceived opinions about the case. The court denied defendant's motion for change of venue. A jury convicted defendant and sentenced him to life in prison. Holding that pretrial publicity resulted in actual, identifiable prejudice to defendant, the court of appeals reversed. The Court of Criminal Appeals granted PDR, reversed the court of appeals and reinstated the judgment of the trial court.

CHANGE OF VENUE – REQUIREMENTS

A change of venue may be granted if the defendant establishes that so great a prejudice against him exists in the county where the prosecution is commenced that he cannot obtain a

fair and impartial trial. *Gonzalez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].

CHANGE OF VENUE – MEDIA ATTENTION

To justify a change of venue based on media attention, a defendant must show that the publicity was 1) pervasive, 2) prejudicial, and 3) inflammatory. Widespread publicity is not, in itself, inherently prejudicial. Even extensive knowledge of the case or defendant in the community as a result of pretrial publicity is not sufficient if there is not also some showing of prejudicial or inflammatory coverage. *Gonzalez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].

CHANGE OF VENUE – MEDIA ATTENTION - PERVASIVENESS

Mere existence of media attention or publicity, by itself, is not enough to merit a change of venue; however, absence of pervasive media coverage of a case is generally sufficient to support a trial court's ruling declining a motion to change venue. *Gonzalez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].

CHANGE OF VENUE – MEDIA ATTENTION – PREJUDICIAL AND INFLAMMATORY

In examining whether the pretrial publicity is prejudicial and inflammatory, a trial court may take three matters into consideration: 1) the nature of the publicity; 2) any evidence presented at a change of venue hearing; and 3) testimony received from venire members at voir dire. News accounts that are accurate and objective in their coverage are generally not considered inflammatory or inappropriately prejudicial. *Gonzalez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].

CHANGE OF VENUE – STANDARD OF REVIEW

Appellate courts use the abuse of discretion standard when reviewing rulings on change of venue motions. The trial court's decision concerning a motion for a change of venue will be upheld if falls within the zone of reasonable disagreement. *Gonzalez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].

Rodriguez v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].

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

FACTS: Defendant was charged with possession of cocaine with intent to deliver. The trial court denied defendant's pre-trial motion to suppress that claimed the affidavit supporting the search warrant did not contain sufficient facts to establish probable cause to search his garage.

After an informant notified police that defendant's uncle (the uncle) was selling and transporting large quantities of cocaine, narcotics officers began surveillance of the man. The officers observed the uncle leave defendant's garage with a package, look nervously around, and place the package in his car. When officers stopped the uncle for a traffic violation, he gave them written consent to search the car. During the search, the police discovered three kilograms of cocaine in the package they observed being removed from the garage. The officers then obtained a search warrant for defendant's garage and subsequently discovered forty-three kilograms of cocaine. A jury found defendant guilty and the court sentenced him to forty-seven years in TDCJ. The court of appeals reversed defendant's conviction. The Court of Criminal Appeals granted the State's PDR, reversed the court of appeals, reinstated the judgment of the trial court, and remanded the case for consideration of defendant's remaining claims.

FOURTH AMENDMENT – WARRANT REQUIREMENT

The Fourth Amendment of the United States Constitution commands that no warrants, either for searches or arrests, shall issue except upon probable cause. *Rodriguez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].

WARRANT REQUIREMENT – ISSUANCE OF A WARRANT

The test for whether a magistrate may issue a warrant is whether a reasonable reading of the affidavit would lead to the conclusion that the affidavit provided a substantial basis for the issuance of the warrant. *Rodriguez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].

WARRANT REQUIREMENT – ISSUANCE OF A WARRANT

A magistrate is not bound by such finely tuned standards as proof beyond a reasonable doubt or by a preponderance of the evidence; rather his sole concern should be probability. *Rodriguez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].

WARRANT REQUIREMENT – PROBABLE CAUSE

Probable cause exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found at the specified location.

Probability cannot be based on mere conclusory statements of an affiant's belief. An affiant must present an affidavit that allows the magistrate to independently determine probable cause and the magistrate's actions cannot be a mere ratification of the bare conclusions of others.

***Rodriguez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].**

WARRANT REQUIREMENT – AFFIDAVIT – LEVEL OF SPECIFICITY

To support a warrant, an affidavit must provide sufficient facts, coupled with inferences from those facts, to establish a fair probability that evidence of a particular crime will likely be found at a given location. The issue is not whether there are other facts that could have, or even should have, been included in the affidavit; the focus is on the combined logical force of facts that are in the affidavit, not those that are omitted from the affidavit. ***Rodriguez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].**

WARRANT – REVIEW

An evaluation of the constitutionality of a search warrant should begin with the rule that the informed and deliberative determinations of magistrates empowered to issue warrants are to be preferred over the hurried actions of officers. ***Rodriguez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].**

WARRANT – REVIEW – POLICY

In a close case, the reviewing court should give great deference to a magistrate's determination of probable cause to encourage police officers to use the warrant process rather than making a warrantless search and later attempting to justify their actions by invoking some exception to the warrant requirement. ***Rodriguez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].**

FOURTH AMENDMENT – WARRANT PREFERENCE

In a doubtful or marginal case of probable cause, a search conducted under warrant may be sustained where one without a warrant would fail. ***Rodriguez v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1750-05, 05/09/07].**

***Schmidt v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0402-06, 05/09/07].**

MEYERS, J., *delivered the opinion of the unanimous Court.*

FACTS: Defendant was indicted for threatening to harm a witness by striking her in retaliation for her serving as a prospective witness. A jury convicted defendant of retaliation and

sentenced him to seven years confinement. The court of appeals reversed the trial court's judgment and rendered a judgment of acquittal. The Court of Criminal Appeals granted the State's PDR, held that the evidence was legally sufficient to support the retaliation conviction, and reversed the judgment of the court of appeals. The case was remanded for further proceedings.

ASSAULT – STANDARD OF PROOF

To sustain a conviction of assault by threat, there must be some evidence of a threat being made. *Schmidt v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0402-06, 05/09/07].

ASSAULT – ELEMENTS

During a prolonged assault, the aggressor's actions can include both threats and actual harm. *Schmidt v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0402-06, 05/09/07].

ASSAULT – THREAT OF FURTHER HARM

In some cases, during a prolonged assault, infliction of harm itself can be a threat of further harm, in some cases, however, during a prolonged assault, inflict of harm is simply infliction of harm without a threat. *Schmidt v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0402-06, 05/09/07].

THREAT – STANDARD OF PROOF

To uphold a conviction for threat, there must be some evidence of a threat being made. *Schmidt v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0402-06, 05/09/07].

! Hall v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1594-02, 05/09/07]. !

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

FACTS: Defendant was charged with murder. He was convicted of aggravated assault by threat. The court of appeals held that aggravated assault was not a lesser included offense of murder, vacated the judgment of the trial court, and acquitted the defendant of charged offense of murder. The Court of Criminal Appeals took the case on PDR to resolve conflicts in its decisions about the method of determining whether the allegation of a greater offense includes a lesser offense. The Court of Criminal Appeals affirmed the judgment of the court of appeals.

! DETERMINATION – LESSER INCLUDED OFFENSE !

To determine whether the allegation of a greater offense includes a lesser offense, a court **must** compare the elements of the greater offense **as pled in the indictment**, with the elements in the statute that defines the lesser offense. *Hall v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1594-02, 05/09/07].

! LESSER INCLUDED OFFENSE – QUESTION OF LAW !

The determination of whether an offense is a lesser included offense of the alleged offense is a question of law. *Hall v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1594-02, 05/09/07].

! LESSER INCLUDED OFFENSE – CAPABLE OF DETERMINATION PRE-TRIAL !

To ensure defendant has adequate notice, a court must be able to ascertain whether an offense is a lesser included offense of the alleged crime before trial. The court would make this determination by comparing the elements of the offense as alleged in the indictment or information with the elements of the potential lesser-included offense. *Hall v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1594-02, 05/09/07].

LESSER INCLUDED OFFENSE – TEX. CODE OF CRIM. PROC art. 37.07

An offense is a lesser included offense if: 1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; 2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; 3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or 4) it consists of an attempt to commit the offense charged or an otherwise included offense. *Hall v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1594-02, 05/09/07].

LESSER INCLUDED OFFENSE – PROCEDURE FOR DETERMINATION

Charging a jury on a lesser included offense must be determined by a two-step process: 1) the court must decide whether the elements of the lesser offense are established by proof of the same or less than all the facts required to be established by the greater offense as charged in the indictment; 2) the evidence at trial must support giving the instruction to the jury (i.e. the evidence must support a conviction on the lesser included offense). *Hall v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1594-02, 05/09/07].

! LESSER INCLUDED OFFENSE – COGNATE PLEADINGS APPROACH !

In Texas, the cognate pleadings approach is the **sole** test for determining the first step as to whether a party may be entitled to a lesser-included-offense instruction. Under the cognate pleadings approach, if the statutory elements required to prove a lesser offense are different from, or in addition to, the elements required to prove the greater offense, then the lesser offense is not a lesser included offense of the greater offense. Determination of whether an offense is a lesser-included offense of the alleged offense is a question of law. It does not depend on the evidence produced at trial. *Hall v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1594-02, 05/09/07].

LESSER INCLUDED OFFENSE – EVIDENCE REQUIRED

A defendant is entitled to an instruction on a lesser-included offense where the proof for the offense charged includes the proof necessary to establish the lesser-included offense and there is some evidence in the record that would permit the jury to find the defendant guilty. Anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge. Further, the evidence must establish the lesser-included offense as a valid, rational alternative to the charged offense. *Hall v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1594-02, 05/09/07].