
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS ROBERT OWEN, DIMITRIOS GAKIDIS AND JENNY BRZOWSKI
SUBJECT: 06/20/07 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 06/27/07
CC: JACK THOMPSON

***Harris v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1453-05, 06/20/07].**

WOMACK, J., delivered the opinion of the unanimous Court.

FACTS: After the trial court denied her pre-trial motion to suppress, defendant was convicted of possession of a controlled substance and sentenced to ten years' imprisonment. The court of appeals reversed, and the State filed PDR. The Court of Criminal Appeals reversed the decision of the court of appeals.

FRANKS HEARING – WARRANT AFFIDAVIT– FALSE STATEMENT

The Fourth Amendment may entitle a defendant to a *Franks* hearing if he makes a substantial preliminary showing that an affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement in a warrant affidavit. This hearing is required if requested by defendant and only where the false statement is essential to the probable cause finding. ***Harris v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1453-05, 06/20/07].**

FRANKS HEARING – VOID SEARCH WARRANT – EXCLUSION OF EVIDENCE

If the defendant establishes his allegation of perjury or reckless disregard by a preponderance of the evidence at a *Franks* hearing, the false material contained in the affiant's statement's is set aside. If the affidavit's remaining content does not establish sufficient probable cause, the search warrant must be voided. The evidence resulting from a search pursuant to such a warrant is excluded. ***Harris v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1453-05, 06/20/07].**

FRANKS HEARING – REQUIREMENTS

To be entitled to a *Franks* hearing, a defendant must: 1) allege that the affiant engaged in a deliberate falsehood or reckless disregard for the truth by specifically

pointing out the portion of the affidavit claimed to be false; 2) accompany these allegations with an offer of proof detailing the supporting evidence; and 3) show that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant. *Harris v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1453-05, 06/20/07].

FRANKS HEARING – PLEADINGS – REQUIREMENTS

The U.S. Supreme Court has held that a defendant must point out specific allegations and evidence apparent in the pleadings before a trial court should entertain a request for a *Franks* proceeding. The defendant's attack on the affidavit supporting the issuance of the warrant must be 1) more than conclusory and 2) supported by more than a mere desire to cross-examine. *Harris v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1453-05, 06/20/07].

Volosen v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0492-06, 06/20/07].

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

FACTS: In a bench trial, the court placed defendant on probation after finding him guilty of cruelty to animals for killing his neighbor's dog without legal authority. On appeal, appellant claimed that the evidence was legally insufficient to support his conviction because his legal authority to kill the dog had been established as a matter of law. The court of appeals agreed and reversed his conviction. The Court of Criminal Appeals granted the State's PDR, reversed the judgment of the court of appeals and remanded the case for consideration of defendant's remaining points of error.

RULES OF APPELLATE PROCEDURE – FILING A BRIEF

The Rules of Appellate Procedure require an appellant to file a brief; however, the rules do not impose such a requirement on an appellee. *Volosen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0492-06, 06/20/07].

RULES OF APPELLATE PROCEDURE – REVIEW OF CLAIMS

Regardless of whether an appellee files a brief, the intermediate appellate court has an obligation to conduct a thorough review of an appellant's claims. This duty includes reviewing any subsidiary issues that might result in upholding the trial court's

judgment. *Volosen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0492-06, 06/20/07].

PDR – FACTORS

An appellee’s failure to make a particular argument is a factor that may be considered when the Court of Criminal Appeals decides whether to exercise its discretion to grant review; however, the appellee’s failure to do so does not bar the Court from granting review to address the issue if review is warranted. *Volosen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0492-06, 06/20/07].

APPELLATE PROCEDURE – JUDICIAL NOTICE

Where a matter is appropriately subject to judicial notice, an appellate court may take judicial notice of the matter for the first time on appeal. *Volosen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0492-06, 06/20/07].

RULES OF EVIDENCE – JUDICIAL NOTICE – COUNTY OR MUNICIPAL ORDINANCE

Rule 204 of the Texas Rules of evidence requires a court to take judicial notice of a county or municipal ordinance upon request; however the rule also permits a court to take judicial notice sua sponte. *Volosen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0492-06, 06/20/07].

JUDICIAL NOTICE – COUNTY OR MUNICIPAL ORDINANCE – REVIEW

A court’s decision to take judicial notice of a county or municipal ordinance is subject to review as a ruling on a question of law. *Volosen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0492-06, 06/20/07].

JUDICIAL NOTICE OF LOCAL LAW – BURDEN OF PROOF

The defendant bears the burden to demonstrate the content of a local law; accordingly, he cannot meet his burden of proof if the content of local law cannot be ascertained. *Volosen v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0492-06, 06/20/07].