
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES

FROM: DEBORAH SELDEN AND INTERNS DIMITRIOS GAKIDIS, JENNY BRZOWSKI, AND MARY MARTIN

SUBJECT: 06/27/07 COURT OF CRIMINAL APPEALS OPINIONS

DATE: 09/14/07

CC: JACK THOMPSON

***Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].**

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

FACTS: A jury convicted defendant of two counts of injury to a child by act and omission, and assessed his punishment for each conviction at 50 years in prison and a \$5,000 fine. The court of appeals affirmed and the Court of Criminal Appeals affirmed in part, reversed in part, and remanded, holding that: (1) double jeopardy prohibition against multiple punishments precluded punishing defendant for both his act in shaking baby and his omission in failing to seek medical help, and (2) conviction for injury to a child by omission would be vacated and conviction for injury to a child by act would be retained.

FIFTH AMENDMENT – SAME OFFENSE – MULTIPLE PUNISHMENTS

The Fifth Amendment double jeopardy clause protects against multiple prosecutions for the “same offense” following acquittal or conviction. It also protects against multiple punishments for the “same offense.” ***Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].**

SAME OFFENSE – MEANING

The constitutional meaning of “same offense” may vary depending upon which of the constitutional protections is at issue. ***Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].**

SAME OFFENSE – BLOCKBURGER TEST

In the context of “same offense,” the classical test for determining sameness embodied in the United States Supreme Court's opinion in *Blockburger v. United States* operates only as a rule of statutory construction, a mechanism for determining legislative

intent. *Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].

BLOCKBURGER TEST – LEGISLATIVE INTENT

Application of *Blockburger* does not serve to negate otherwise clearly expressed legislative intent. *Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].

BLOCKBURGER TEST – LEGISLATIVE INTENT

The *Blockburger* test cannot authorize two punishments where the legislature clearly intended only one.” *Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].

SIXTH AMENDMENT – JURY UNANIMITY

The jury need not be unanimous as to which alternative means of committing the offense the defendant was guilty in order to attain unanimity for Sixth Amendment purposes. *Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].

INJURY TO A CHILD BY ACT OR OMISSION – DOUBLE JEOPARDY

The Legislature intended that injury to a child by act or omission constitutes the “same” offense for jeopardy purposes. Both act and omission are contained within the same Penal Code section and sub section, and they are phrased in the alternative. The offense is called the same, whether committed by act or omission, and the punishment range is essentially identical. *Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].

INJURY TO A CHILD BY ACT OR OMISSION – DOUBLE JEOPARDY

The “gravamen” of the offense of injury to a child by act or omission is the same; the statute focuses on the result caused, without criminalizing any particularized conduct by which that result may have been caused. The statute employs a kind of “imputed theory of liability,” in the sense that it makes an offender equally criminally liable whether he actually engaged in the conduct that caused the result, or alternatively, failed to take measures to avert that result, even if he was not the actor or agent initially responsible for inflicting the injury. *Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].

INJURY TO A CHILD BY ACT OR OMISSION – DOUBLE JEOPARDY

The Legislature intended that serious bodily injury committed against the same victim at the same time should be considered the same offense for purposes of the double-jeopardy prohibition against multiple punishments regardless of whether that injury to that victim resulted from the actor's act, his omission, or by a combination of his act and omission.

***Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].**

DOUBLE JEOPARDY VIOLATION – REMEDY

The remedy for a double jeopardy violation is to retain the “most serious” offense, that is to say, the offense for which the sentencing entity assessed the highest punishment, and set aside the other. ***Villanueva v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0718-06 & 0719-06 06/27/07].**

***Davis v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1346-05, 06/27/07].**

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

FACTS: Defendant pled guilty to burglary of habitation and engaging in organized criminal activity. The court adjudicated guilt only as to the burglary charge. When the State moved to adjudicate, the district court adjudicated guilt on organized crime charge and revoked his community supervision on the burglary offense. The court of appeals affirmed. On PDR, defendant claimed that the prosecutor failed to comply with constitutionally-based oath requirements for elected officers. The Court of Criminal Appeals affirmed, holding that defendant failed to preserve the issue for appellate review.

RESERVATION IN LOWER COURTS OF GROUNDS FOR REVIEW –

In general, all but the most fundamental evidentiary and procedural rules or “rights” are forfeited if not asserted at or before trial. ***Davis v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1346-05, 06/27/07].**

JUDGMENT – JURISDICTION

A judgment of conviction is void only in very rare situations, usually due to a lack of jurisdiction. ***Davis v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1346-05, 06/27/07].**

JUDGMENT - VOID

Judgment of conviction is void when: (1) the document purporting to be charging instrument, does not satisfy constitutional requisites of a charging instrument, so that trial court has no jurisdiction over defendant; (2) the trial court lacks subject matter jurisdiction over charged offense, such as when misdemeanor involving official misconduct is tried in county court at law; (3) the record reflects that there is no evidence to support the conviction; or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel when right to counsel has not been waived. *Davis v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1346-05, 06/27/07].

JUDGMENT – INCOMPLETE RECORD

For judgment of conviction to be void, record must leave no question about existence of fundamental defect. In cases in which an appellate record is incomplete and the available portions tend to support the existence of a defect, but the missing portion of record could conceivably show that a fundamental defect does not, in fact exist, then the judgment is not void. *Davis v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1346-05, 06/27/07].

RAISE OR FORFEIT RULE – TIMELY OBJECTION

The “raise-or-forfeit rule” requires a criminal defendant to raise an issue at or before trial, or forfeit any rights in regard to that issue. The rationale behind the rule is that timely objection in trial court will afford to both trial judge and State notice of procedural irregularity and give them adequate opportunity to take appropriate corrective action. *Davis v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1346-05, 06/27/07].

Ex Parte Santana, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

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

FACTS: Defendant filed subsequent application based on claim of actual innocence. Defendant’s original application presented a claim of ineffective assistance of appellate counsel. The district court recommended dismissal of the application and the Court of Criminal Appeals agreed. The CCA’s dismissal held that the subsequent application was procedurally barred because it was filed after final disposition of initial application that challenged same conviction.

HABEAS CORPUS – SUBSEQUENT APPLICATION - REQUISITE EVIDENCE

If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that: (1) the current claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt. *Ex Parte Santana*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

HABEAS CORPUS – SUBSEQUENT APPLICATION

To serve as a procedural bar to a subsequent application for habeas corpus that challenges the same conviction and an earlier application, the final disposition of the earlier habeas must entail a disposition relating to the merits of all the claims raised. *Ex Parte Santana*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

HABEAS CORPUS – SUBSEQUENT APPLICATION

To determine whether a petition for writ of habeas corpus is barred by the final disposition of an initial application challenging the same conviction, a denial of a petition for habeas corpus indicates that a disposition is related to the merits is based on a determination that the merits can never be decided. In contrast, a dismissal is unrelated to the merits of any claims. *Ex Parte Santana*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

HABEAS CORPUS – SUBSEQUENT APPLICATION

In determining whether a petition for writ of habeas corpus is barred by the final disposition of an initial application challenging the same conviction, a “challenge to the conviction” means that the prior application presented claims regarding the validity of the prosecution or the judgment of guilt. *Ex Parte Santana*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

HABEAS CORPUS – OUT OF TIME APPEAL

When an initial application for writ of habeas corpus presents claims challenging the validity of the prosecution or the judgment of guilt and presents a claim concerning the

denial of the right to appeal and the Court of Criminal Appeals grants an out-of-time appeal while dismissing the remaining grounds for relief, the initial application does not qualify as an application that challenged the same conviction, for the purpose of the procedural bar to a subsequent application challenging the same conviction. Granting an out-of-time appeal restores the pendency of the direct appeal and makes any substantive claims challenging the conviction premature. *Ex Parte Santana*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

HABEAS CORPUS – OUT OF TIME APPEAL

An applicant seeking an out-of-time appeal due to the complete denial of the right to appeal need only make a limited showing of prejudice in order to be entitled to habeas corpus relief—a reasonable probability that, absent appellate counsel's errors, a particular proceeding would have occurred. *Ex Parte Santana*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

HABEAS CORPUS – INEFFECTIVE ASSISTANCE OF COUNSEL

A claim of ineffective assistance of counsel under Strickland requires a showing of both deficient performance and prejudice. *Ex Parte Santana*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

HABEAS CORPUS – SUBSEQUENT APPLICATION

In order to be entitled to habeas corpus relief on grounds of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's decision not to raise a particular point of error was objectively unreasonable. He must further show that there is a reasonable probability that, but for counsel's failure to raise that issue, the applicant would have prevailed on appeal. In this context, a “reasonable probability” is a probability sufficient to undermine confidence in the outcome of the proceeding. *Ex Parte Santana*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

HABEAS CORPUS – INEFFECTIVE ASSISTANCE

An allegation in an initial application for writ of habeas corpus on ineffective assistance of appellate counsel for failure to advance a point of error on direct appeal includes an underlying claim relating to the conviction that must be considered in analyzing deficient performance and prejudice, to determine whether a subsequent application challenging the same conviction is procedurally barred. *Ex Parte Santana*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [AP-75,284, 06/27/07].

***Alameda v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0231-06, 06/27/07].**

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

FACTS: A jury convicted defendant of two counts of aggravated sexual assault of a child and sentenced him to 30 years imprisonment. The trial judge ordered the sentences be served consecutively. The court of appeals and Court of Criminal Appeals affirmed. The CCA held that: (1) the mother of the victim could vicariously consent on behalf of victim to record defendant's telephone conversations, and (2) it was within trial court's discretion to cumulate sentences.

NO EXPECTATION OF PRIVACY – CHILDREN

A child has no reasonable expectation of privacy in his room when the parent routinely enters the room and a parent can give consent to officers to search the child's room.

***Alameda v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0231-06, 06/27/07].**

WIRETAPPING OF A CHILD’S TELEPHONE – VICARIOUS CONSENT

Under existing wiretap laws, a parent may vicariously consent to the recording of a child's telephone conversation, if the parent has an objectively reasonable, good-faith belief that consenting to the tap is in the child's best interest. ***Alameda v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0231-06, 06/27/07].**

WIRETAPPING OF A CHILD’S TELEPHONE – VICARIOUS CONSENT – LEGAL INCAPACITY

Unlike adults, minors do not have the legal ability to consent in most situations. In regards to the parent vicariously consenting to the recording of the child's telephone conversation, the vicarious-consent doctrine is necessary because children lack both the capacity to consent and the ability to give actual consent. ***Alameda v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0231-06, 06/27/07].**

VICARIOUS CONSENT – MINOR’S ACTUAL ABILITY

A minor's actual ability to consent does not preclude her mother's ability to vicariously consent on her behalf. ***Alameda v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0231-06, 06/27/07].**

JURY SENTENCING – CONSECUTIVE SENTENCES ORDERED BY JUDGE

The decision to cumulate sentences does not turn on a finding of fact, so even if the jury assessed the sentences, a trial judge may order that the sentences run consecutively.

Alameda v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0231-06, 06/27/07].

Stansberry v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0867-06, 06/27/07].

PRICE *delivered the opinion of the unanimous Court.*

FACTS: After the trial court denied his motion to suppress, defendant pled guilty to possession of child pornography. After receiving three years in prison, defendant appealed. The court of appeals dismissed appeal for lack of jurisdiction. On PDR, the Court of Criminal Appeals, reversed and remanded to the appellate court. Adopting the Texas Supreme Court's holding, the CCA held that the intermediate court's jurisdiction over appeal was not destroyed merely because the clerk's office misplaced defendant's timely filed notice of appeal.

APPELLATE COURT JURISDICTION – NOTICE OF APPEAL

A timely notice of appeal is necessary for an appellate court to have jurisdiction over a case and in the absence of such a notice, the intermediate court has no authority to do anything except to dismiss the appeal. *Stansberry v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0867-06, 06/27/07].

NOTICE OF APPEAL – MOTION FOR NEW TRIAL – TIME REQUIREMENT

The written notice of appeal must be filed with the clerk's office within thirty days of sentencing or ninety days after sentencing if a motion for new trial is timely filed. *Stansberry v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0867-06, 06/27/07].

COURT DOCUMENTS– CLERICAL ERROR

A court document is filed when it is placed in the custody or control of the clerk. Once a document is in the clerk's custody, an innocent party is not responsible for any administrative or clerical error and any later mishap shall not prejudice that party.

Stansberry v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0867-06, 06/27/07].

OUT-OF-TIME APPEAL – NOTICE OF APPEAL

When an out-of-time appeal is granted, the defendant is returned to the point in the appellate process at which he can properly give notice of appeal and then perfect an appeal

pursuant to the rules of appellate procedure. *Stansberry v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0867-06, 06/27/07].

APPELLATE COURT JURISDICTION – NOTICE OF APPEAL

A timely tendered notice of appeal vests an intermediate appellate court with jurisdiction to consider the merits of an appeal. *Stansberry v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0867-06, 06/27/07].

***!Thompson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0044-06, 06/27/07]!**

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

FACTS: A jury convicted the defendant, an associate pastor at a Baptist church, of injury to a child and aggravated assault. After receiving sentences of twenty-six years and twenty years for the respective offenses, he appealed. The court of appeals affirmed. The Court of Criminal Appeals also affirmed. The CCA held that under the concept of “transferred intent,” as defined in the Texas Penal Code, a person is criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a difference offense was committed. That is, under certain circumstances, intent may be transferred from a lesser offense to a greater offense, even when those worse offenses are contained within the same penal code section. Where the Penal Code permits the transfer of a culpable mental state, mistake of fact may be raised as a defense. The mistake, however, must be reasonable for it to constitute a circumstance that exculpates the defendant of the offense charged, and of course, the defendant would still be guilty of any lesser included offense that would be applicable if the facts were as the defendant believed. As far as *Honea v. State* conflicts with this holding, it is overruled.

STARE DECISIS – STATUTORY INTERPRETATION

Doctrine of stare decisis indicates a preference for maintaining consistency with past decisions, especially those that interpret statutory enactments. *Thompson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0044-06, 06/27/07].

STATUTORY INTERPRETATION

In cases of statutory construction, the Court of Criminal Appeals gives effect to the plain meaning of the statutory text, unless the language is ambiguous or the plain meaning

leads to absurd consequences that the Legislature could not possibly have intended.

***Thompson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0044-06, 06/27/07].**

TRANSFERRED INTENT – CRIMINAL RESPONSIBILITY

The Texas Penal Code provides that: (a) A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient. (b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that: (1) a different offense was committed; or (2) a different person or property was injured, harmed, or otherwise affected. ***Thompson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0044-06, 06/27/07].**

MISTAKE OF FACT DEFENSE – PENAL CODE

The mistake of fact defense provides: (a) It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense; (b) Although an actor's mistake of fact may constitute a defense to the offense charged, he may nevertheless be convicted of any lesser included offense of which he would be guilty if the fact were as he believed. ***Thompson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0044-06, 06/27/07].**

TRANSFERRED INTENT – INJURY TO A CHILD

Statutory provision providing that “a person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different offense was committed” authorizes the transfer of a culpable mental state between offenses contained in the same statute and also between greater and lesser included offenses; that authorization may be overridden by language defining a particular offense, as in the offense of capital murder, but no such impediment arises with respect to the injury-to-a-child offense. ***Thompson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0044-06, 06/27/07].**

TRANSFERRED INTENT – DEFENSE – MISTAKE OF FACT

The Penal Code authorizes the transfer of a culpable mental state between offenses contained in the same statute and between greater and lesser included offenses. That authorization may be overridden by language defining a particular offense. Where the Penal

Code permits the transfer of a culpable mental state, mistake of fact may be raised as a defense. The mistake, however, must be reasonable for it to constitute a circumstance that exculpates the defendant of the offense charged, and of course, the defendant would still be guilty of any lesser included offense that would be applicable if the facts were as the defendant believed. As far as *Honea v. State* conflicts with this holding, it is overruled. ***Thompson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0044-06, 06/27/07].**

FORFEITURE – FAILURE TO COMPLAIN AT TRIAL – RETROACTIVE RULES

Even new rules that are held to be retroactive can be forfeited by a party's failure to complain at trial. ***Thompson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0044-06, 06/27/07].**

***Ex Parte Reynoso*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [WR-66,260-01, 06/27/07].**

Per Curiam. PRICE, WOMACK, JOHNSON, and HOLCOMB, JJ., *dissent*.

FACTS: After being sentenced to death, defendant filed an application for writ of habeas corpus. The district court recommended grant of 270-day extension to file application. The Court of Criminal Appeals dismissed the application, holding that defendant failed to show good cause for failing to file timely application.

HABEAS CORPUS – APPLICATION NOT TIMELY FILED

When an initial capital habeas application has not been timely filed, the Court of Criminal Appeals has three options: (1) find that good cause has not been shown and dismiss the application; (2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or (3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel. ***Ex Parte Reynoso*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [WR-66,260-01, 06/27/07].**

HABEAS CORPUS – APPOINTMENT OF NEW COUNSEL

The provision for appointment of new counsel is designed to safeguard the statutory right to a habeas remedy from the actions of derelict counsel. That provision should not be used to afford a remedy when the applicant himself is responsible for the lateness of the application. Otherwise, applicants would acquire a new tool for “gaming the system” in order to delay execution. The Court of Criminal Appeals, absent good cause shown, has the

authority to dismiss the application. *Ex Parte Reynoso*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [WR-66,260-01, 06/27/07].

Castro v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

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

FACTS: After the trial court denied his motion to suppress, defendant pled guilty and was convicted of manufacture of methamphetamine. Defendant appealed and the court of appeals reversed. On State's petition for discretionary review, the Court of Criminal Appeals reversed the judgment of the court of appeals, holding that: (1) the police officer's observation of illegal lane change provided officer with specific, articulable facts to support reasonable suspicion of criminal activity to justify traffic stop, and (2) deputy's testimony as to what police officer told him was basis for traffic stop was not inadmissible hearsay at hearing on motion to suppress.

WARRANTLESS SEARCH AND SEIZURES – OBJECTIONS TO EVIDENCE

When the police conduct a warrantless search and seizure, the burden is on the State to show that the officer had reasonable suspicion to believe that an individual was violating the law. *Castro v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

INVESTIGATORY STOP – REASONABLE SUSPICION

Reasonable suspicion exists to justify an investigatory stop if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity. *Castro v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

INVESTIGATORY STOP – REASONABLE SUSPICION – TOTALITY OF CIRCUMSTANCES

A reasonable-suspicion determination as justification for an investigatory stop is made by considering the totality of the circumstances, giving almost total deference to the trial court's determination of historical facts and reviewing de novo the trial court's application of the law to facts not turning on credibility and demeanor. *Castro v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

FINDINGS OF FACT – APPELLATE REVIEW

When the trial court does not make explicit findings of fact, the appellate court reviews the evidence in a light most favorable to the trial court's ruling and assumes that the

trial court made implicit findings of fact supported by the record. *Castro v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

PROBABLE CAUSE

Probable cause for arrest can be established by objective facts or subjective opinions. *Castro v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

INVESTIGATORY STOP – REASONABLE SUSPICION ANALYSIS

An officer's opinions are not an effective substitute for specific, articulable facts in a reasonable-suspicion analysis, for the purposes of determining the validity of an investigatory stop, when the nature of the offense requires an officer to make a subjective determination; rather, in such cases, the officer must give specific, articulable observations to support his opinion. *Castro v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

HEARSAY INFORMATION – SUPPRESSION HEARING

Hearsay information is sufficient to support a fact or an opinion at a suppression hearing. *Castro v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

INVESTIGATORY STOP – REASONABLE SUSPICION ANALYSIS

While the officer who observed the traffic violation may be able to give more specific details regarding the reason for the stop, in the case of offenses requiring only an objective determination of whether the offense was indeed committed, the court does not need to know the subjective details of the stop from the officer's standpoint in order to find that the stop was reasonable. *Castro v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

FINDINGS OF FACT AND CONCLUSIONS OF LAW – SUPPRESSION HEARING

Upon request by the losing party in a motion to suppress evidence, a trial judge must enter findings of fact and conclusions of law so that appellate courts can better review the decision of the trial court without speculating about the reasons for the trial court's decision. *Castro v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1635-06, 06/27/07].

Vannortrick v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].

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

FACTS: Defendant pled guilty of aggravated sexual assault of child under age 14 and the jury assessed punishment. On appeal, the court of appeals reversed and remanded. On State's

petition for discretionary review, the Court of Criminal Appeals affirmed the judgment of the court of appeals, holding that: (1) trial court was required to admonish defendant of deportation consequences of guilty pleas, and (2) error in failing to admonish defendant about deportation consequences of guilty pleas was not harmless.

PLEA OF GUILTY – DUE PROCESS

A trial court's admonitions to and inquiries of a defendant prior to his plea of guilty serve to protect several constitutional rights. Primarily, it assures the court that the defendant's waiver of these rights in entering a guilty plea comports with due process, that is, the waiver was made voluntarily and with knowledge of the consequences of the plea.

***Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].**

GUILTY / NOLO CONTEDERE PLEAS – STATUTORY REQUIREMENTS

Reviewing courts look for substantial compliance with the statutory requirement to admonish a defendant of the consequences of a guilty or *nolo contendere* plea. ***Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].**

GUILTY / NOLO CONTENDERE PLEA – ADMONISHMENT - DEPORTATION

The non-constitutional violation of the right to be admonished about the deportation consequences of a guilty or *nolo contendere* plea is subject to harmless error review. That is, any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded; but if the error affected substantial rights, then, it is not harmless. ***Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].**

NON-CONSTITUTIONAL ERROR – REVIEW

To decide whether the trial court's non-constitutional error affected substantial rights and was harmful, a reviewing court must conduct an independent examination of the record as a whole. ***Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].**

NON-CONSTITUTIONAL ERROR – BURDEN OF PROOF

In determining on appeal whether a non-constitutional error was harmless, neither party has the burden to prove harm or harmlessness resulting from the error. ***Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].**

GUILTY / NOLO CONTENDERE PLEA - NON-CITIZEN – HARMFUL ERROR

When the record shows that defendant was not a citizen at the time of his guilty plea, the trial court's error in failing to give him the immigration / deportation admonition is not harmless. *Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].

NON-CONSTITUTIONAL ERROR – HARMLESS ERROR ANALYSIS

Except for a narrow category of federal constitutional errors, no error is exempt from a harmless error analysis. *Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].

HARMLESS ERROR ANALYSIS – REVIEW – REASONABLE INFERENCES

When reviewing a trial court's failure to admonish a defendant about the consequences of pleading guilty, appellate courts should draw reasonable inferences from facts in the record when conducting a harm analysis. *Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].

GUILTY PLEA – HARMLESS ERROR ANALYSIS – REVIEW – REASONABLE INFERENCES

When the record is silent regarding the consequences of conviction in the context of a guilty plea, the reviewing court infers that the defendant did not know the consequences of his plea. *Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].

GUILTY PLEA – REVERSAL – RECORD – REASONABLE INFERENCES

To warrant a reversal on direct appeal based on the trial court's failure to admonish the defendant of the consequences of a guilty plea, the record must support an inference that appellant did not know the consequences of his plea. *Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].

GUILTY PLEA – ADMONISHING DEFENDANT – IMMIGRATION CONSEQUENCES – HARM

Knowing about the immigration consequences of a guilty plea would have no impact on defendant who is a United States citizen. *Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].

GUILTY PLEA – ADMONISHING DEFENDANT – IMMIGRATION CONSEQUENCES – HARM

When the trial court fails to admonish a defendant about the immigration consequences of his guilty plea, a silent record on citizenship, or a record that is insufficient to determine citizenship, establishes harm. *Vannortrick v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0923-06 & PD-0924-06, 06/27/07].

***Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].**

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

FACTS: The three defendants moved to quash charges of conspiracy to violate certain provisions of the Election Code. When the district court quashed the charges, the State appealed. After the court of appeals affirmed, the State filed petitions for discretionary review. The Court of Criminal Appeals affirmed, holding that prior to September 1, 2003, the criminal conspiracy provisions of the Texas Penal Code did not apply to the felony offense of making an illegal contribution under the Texas Election Code.

CRIMINAL CONSPIRACY – ILLEGAL CONTRIBUTIONS

Prior to September 1, 2003, the criminal conspiracy provisions of the Texas Penal Code did not apply to the felony offense of making an illegal contribution under the Texas Election Code. ***Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].**

CRIMINAL CONSPIRACY – CONTROLLED SUBSTANCES

The criminal conspiracy statute does not apply to offenses defined outside of the Penal Code unless an extra-Penal Code provision provides otherwise. ***Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].**

FELONY – DEFINITION

Felony offense is defined as an offense so designated by law or punishable by death or confinement in a penitentiary. ***Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].**

CRIMINAL CONSPIRACY – DEFINITION

A person commits criminal conspiracy if, with intent that a felony be committed: (1) he agrees with one or more persons that they or one or more of them engage in conduct that

would constitute the offense; and (2) he or one or more of said persons performs an overt act in pursuance of the agreement. *Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].

JUDICIAL INTERPRETATION OF A STATUTE – LEGISLATIVE SILENCE

Prolonged legislative silence or inaction following a judicial interpretation of a statute implies that the Legislature has approved of the interpretation. *Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].

JUDICIAL INTERPRETATION OF A STATUTE – LEGISLATIVE SILENCE

Legislative inaction does not necessarily equate to legislative approval. *Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].

JUDICIAL INTERPRETATION OF A STATUTE – LEGISLATIVE SILENCE

The Court of Criminal Appeals presumes the Legislature intends the same construction to continue to apply to a statute when the Legislature meets without overturning that construction. *Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].

STATUTORY INTERPRETATION – LEGISLATIVE INTENT

When interpreting a statute to give effect to the collective legislative intent or purpose, the justices of the Court of Criminal Appeals concentrate on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment. *Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].

STATUTORY INTERPRETATION – LEGISLATIVE INTENT

When interpreting a statute, the Court of Criminal Appeals gives effect to the plain meaning, if, when read using the established canons of construction relating to such text, the meaning of the text should have been plain to the legislators who voted on it. *Colyandro, Ellis and Delay v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-826-06, PD-827-06, PD-828-06, PD-829-06, PD-830-06, PD-831-06, PD-832-06, PD-833-06, 06/27/07].

***Fakeye v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0514-06, 06/27/07].**

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

FACTS: Defendant pled guilty of organized criminal activity and a jury assessed punishment at five years' incarceration and a \$1,652 fine. On appeal, the court of appeals, reversed and remanded because the trial court failed to admonish defendant of deportation consequences of plea. On State's PDR, the Court of Criminal Appeals affirmed the decision of the court of appeals,. The CCA held that: (1) the court of appeals was not precluded from considering allegations in motion in limine in determining whether there was inference that defendant was not citizen, and (2) abatement of appeal and remand for hearing to determine defendant's citizenship status and awareness of deportation consequences of his plea would not cure the harm from trial court's failure to admonish defendant of deportation consequences of plea.

ADMONISHMENTS - DEPORTATION CONSEQUENCES – REQUIREMENT

The Texas Code of Criminal Procedure requires that, *before* accepting a guilty plea, the trial court must admonish the defendant of the possibility of deportation. ***Fakeye v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0514-06, 06/27/07].**

ADMONISHMENTS - DEPORTATION CONSEQUENCES – STATUTORY ERROR

The failure of a trial court to admonish a defendant of the deportation consequences of a guilty plea is a statutory error rather than a constitutional error. Therefore, when conducting a harm analysis, courts of appeals must disregard the error unless it affected the defendant's substantial rights. ***Fakeye v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0514-06, 06/27/07].**

ADMONISHMENTS - DEPORTATION CONSEQUENCES – STATUTORY ERROR

When determining whether there is reversible error in a criminal case for failure to give an admonition, the appellate court must determine whether, considering the record as a whole, there is fair assurance that the defendant's decision to plead guilty would not have changed had the court admonished him. ***Fakeye v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0514-06, 06/27/07].**

HARMLESS ERROR ANALYSIS – ADMONISHMENTS - DEPORTATION CONSEQUENCES

Three inquiries can be useful to this determination of harm arising from the trial court's failure to admonish the defendant of the deportation consequences of his guilty plea: 1) whether the defendant was a citizen of the United States; 2) whether the defendant was

aware of the consequences of his plea, and 3) the strength of the evidence of guilt. *Fakeye v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0514-06, 06/27/07].

RULES OF APPELLATE PROCEDURE – RULE 44.4

The Remediable Error Rule (44.4) of the Texas Rules of Appellate Procedure is implicated when a trial court’s error prevents the proper presentation of the case to the appellate court and that error can be remedied without requiring an entire new trial or new punishment hearing. *Fakeye v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0514-06, 06/27/07].

RULES OF APPELLATE PROCEDURE – ABATEMENT

Courts of appeals may abate a case to the trial court for further proceedings when a trial court has erroneously withheld information necessary to evaluate a defendant’s claim on appeal (e.g. failure to file required findings of fact) or has prevented the defendant from submitting information necessary to evaluate his claim (e.g. his refusing to permit an offer of proof). In such situations, the appellate court must direct the trial court to remedy the error so that the appellate court will be in position to evaluate the appeal properly. In the cases in which abatement was necessary or proper, the trial court’s errors usually involved failure to conduct a required hearing or erroneously excluding testimony in a hearing. *Fakeye v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0514-06, 06/27/07].

CITIZENSHIP INFERENCE – ADMONISHMENT - DEPORTATION CONSEQUENCES

It is not a requirement that support for an inference regarding citizenship status of a defendant be direct evidence. While statements made by the attorneys are not evidence, they are references found in the record that can support an inference. *Fakeye v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0514-06, 06/27/07].

HARMLESS ERROR ANALYSIS – ADMONISHMENTS - DEPORTATION CONSEQUENCES

A silent record regarding the consequences of a defendant’s guilty plea supports an inference that the defendant is unaware of the consequences of his plea. *Fakeye v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0514-06, 06/27/07].

Smith v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

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

FACTS: Indicted for the capital murder of a child younger than six years of age, the defendant pled guilty to the reduced charge of reckless injury to a child, a second degree felony. The trial court assessed defendant maximum punishment of twenty years' confinement and a \$10,000 fine. The court of appeals reversed and remanded for re-assessment of punishment. On State's petition for discretionary review, the Court of Criminal Appeals affirmed the judgment of the court of appeals and remanded the case to the trial court for reassessment of punishment. The CCA held that a pre-sentence investigation (PSI) report does not necessarily have to establish beyond a reasonable doubt that the defendant is responsible for extraneous misconduct before a court may consider it in assessing punishment.

SENTENCING – PSI - EXTRANEOUS MISCONDUCT

A pre-sentence investigation (PSI) report does not necessarily have to establish *beyond a reasonable doubt* that the defendant is responsible for extraneous misconduct before a court may consider it in assessing punishment. The PSI, however, must provide the trial court with *some basis* from which it can rationally infer that the defendant was responsible before using the report to inform its normative judgment of what punishment to assess within the statutorily prescribed range. *Smith v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

SENTENCING – EXTRANEOUS MISCONDUCT – EVIDENCE

Notwithstanding provisions in the Texas Rules of Evidence governing the admissibility of extraneous bad acts in general, a trial court may permit the introduction of any other evidence of an extraneous crime or bad act, regardless of whether it has resulted in a criminal conviction. But, this express authority is not unconditional. Unless the extraneous misconduct evidence is such that the sentencing entity can rationally find the defendant criminally responsible for the extraneous misconduct, the court is not permitted to admit it at punishment. *Smith v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

SENTENCING – EXTRANEOUS MISCONDUCT – EVIDENCE

When a trial court is admitting evidence relevant to sentencing, the extraneous offense must be shown by the proponent of the evidence (usually the state) *beyond a reasonable doubt* to have been committed by the defendant, or that the defendant could be held criminally responsible, regardless of whether he has previously been charged with or

finally convicted of the crime or act. *Smith v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

SENTENCING – EXTRANEOUS MISCONDUCT – EVIDENCE

Unless the extraneous misconduct evidence is such that the sentencing entity (either the judge or jury) can rationally find the defendant criminally responsible for the extraneous misconduct, the trial court is not permitted to admit it at a punishment hearing. Once the evidence is admitted, the sentencing entity must actually find the defendant criminally responsible to a level of confidence *beyond a reasonable doubt* before considering the extraneous misconduct evidence against him in assessing his punishment within the legislatively prescribed range. *Smith v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

SENTENCING – EXTRANEOUS MISCONDUCT – PSI – RULES OF EVIDENCE

The rules of evidence do not control what may be included in a pre-sentence investigation and by implication, what a trial court may consider in a PSI. *Smith v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

STATUTORY INTERPRETATION – PSI – VICTIM IMPACT PROVISIONS

The victim impact provisions are inapposite in interpreting the meaning of the pre-sentence investigation statutes. *Smith v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

PSI – EXTRANEOUS MISCONDUCT EVIDENCE

The Code of Criminal Procedure does not prohibit a trial court, as a sentencing entity, from considering extraneous misconduct evidence in a PSI in assessing punishment just because the extraneous misconduct has not been shown to have been committed by the defendant beyond a reasonable doubt. *Smith v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

SENTENCING – RULES OF EVIDENCE

The United States Supreme Court has long recognized that due process does not require that a trial court must glean all relevant information from evidence presented in a formal courtroom proceeding in assessing punishment within the legislatively prescribed range. *Smith v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

DUE PROCESS – SENTENCING – EXTRANEOUS MISCONDUCT

It would violate due process for a trial court to consider evidence of extraneous misconduct during sentencing, even contained in a pre-sentence investigation (PSI) report, if there was no evidence from any source from which it could be rationally inferred that the defendant had any criminal responsibility for that extraneous misconduct. *Smith v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1486-06, 07/27/07].

Rollerson v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

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

FACTS: In a consolidated trial, the trial court convicted defendant of burglary of a habitation, theft of a firearm, and being felon in possession of a firearm, arising from three separate burglaries committed on separate days. Defendant appealed judgments in each case. In separate opinions dealing with each individual burglary, the court of appeals upheld all three convictions arising from the burglary of one home, reversed the conviction for burglary of the second home and remanded for new trial. The court of appeals further held that the State could not seek deadly weapon finding on retrial of any reversed counts. Defendant sought review of Court of Appeals' judgment in first case, and State sought review of judgment in second case. On consolidated review, the Court of Criminal Appeals affirmed defendant's convictions for theft of a firearm and felon in possession of a firearm, holding that: (1) the evidence was sufficient to support conviction for theft of firearm stolen in course of burglary; (2) the evidence was sufficient to support conviction for possession of firearm by convicted felon; and (3) the State was not collaterally estopped from relitigating the issue of whether defendant used or exhibited deadly weapon in the retrial of the burglary.

EVIDENCE – LEGAL SUFFICIENCY

In assessing the legal sufficiency of the evidence to support a criminal conviction under *Jackson v. Virginia*, the reviewing court shall consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences from that evidence, a rational juror could have found the essential elements of the crime *beyond a reasonable doubt*. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

EVIDENCE – LEGAL SUFFICIENCY – OVERTURNING THE VERDICT

Even if the evidence is legally sufficient, if it is factually insufficient to support the verdict, or the verdict is clearly wrong, or manifestly unjust, or against the great weight and preponderance of the evidence, the verdict should be overturned. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

EVIDENCE – LEGAL AND FACTUAL SUFFICIENCY

Both legal and factual sufficiency standards for reviewing the sufficiency of the evidence to support a conviction require the reviewing court to consider all of the evidence. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

EVIDENCE – LEGAL AND FACTUAL SUFFICIENCY

The difference between the legal sufficiency to support a conviction and the factual sufficiency to support a conviction is that the former requires the reviewing court to defer to the jury's credibility and weight determinations, while the latter permits the reviewing court to substitute its judgment for the jury's on these questions albeit to a very limited degree. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

EVIDENCE – INFERENCE – STOLEN PROPERTY

A defendant's unexplained possession of property recently stolen in a burglary permits an inference that the defendant is the one who committed the burglary.

Rollerson v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

EVIDENCE – INFERENCES

A factfinder is entitled to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

PARTIES TO AN OFFENSE – PRINCIPLE AND ACCOMPLICES

A person may be convicted as a party to an offense if that person commits the offense by his own conduct or by the conduct of another for whom he is criminally responsible. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

BURGLARY – PERSONS LIABLE

Whether the defendant actually entered the home is not determinative of whether he is responsible for all items stolen in the burglary. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

BURGLARY – PERSONS LIABLE

All participants in a burglary are criminally responsible for all items stolen under the law of parties, regardless of whether they are caught red-handed with each and every individual item. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

EXCLUSIVE POSSESSION OF RECENTLY STOLEN PROPERTY – EVIDENCE

The rule of exclusive possession of recently stolen property is not always the sole criterion for sufficiency of the evidence. The evidence is sufficient if the facts and circumstances show that appellant was the guilty party to the exclusion of reasonable doubt. Each case must depend upon its own facts connecting the party with the crime charged. If the State relies only upon the fact of possession, then it must be exclusive and unexplained. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

UNLAWFUL POSSESSION OF FIREARM – PROSECUTION REQUIREMENT

In prosecution for the unlawful possession of firearm, the State is required to prove that the defendant knew of the firearm's existence and that he exercised actual care, custody, control, or management over it. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

DOUBLE JEOPARDY– ACQUITTAL

The Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of the crime charged. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

DOUBLE JEOPARDY– SENTENCING

The United States Supreme Court has resisted attempts to extend the Double Jeopardy Clause to sentencing, because the imposition of a particular sentence usually is not regarded as an acquittal of any more severe sentence that could have been imposed. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

DOUBLE JEOPARDY– SENTENCING

Generally, the Double Jeopardy Clause does not impose any absolute prohibition against the imposition of a harsher sentence at retrial after a defendant has succeeded in having his original conviction set aside. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

DOUBLE JEOPARDY– SENTENCING

Double jeopardy does not apply to sentencing proceedings of a trial for a non-capital offense. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

CONCLUSIVENESS OF ADJUDICATION– COLLATERAL ESTOPPEL

Under the doctrine of “collateral estoppel,” when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

CONCLUSIVENESS OF ADJUDICATION– COLLATERAL ESTOPPEL

Under the collateral-estoppel component of double jeopardy, the government may not litigate a specific elemental fact to a competent factfinder (i.e., judge or jury), receive an adverse finding by that factfinder on the specific fact, learn from its mistakes, hone its prosecutorial performance, and relitigate that same factual element that the original factfinder had already decided against the government. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

USE OF A DEADLY WEAPON– COLLATERAL ESTOPPEL

The use of a deadly weapon can be an ultimate issue, subject to the principles of collateral estoppel. If a factfinder determines a defendant did not use a deadly weapon, the State cannot contest the jury’s finding of that fact in a subsequent proceeding. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

RE-LITIGATION OF A DISCRETE FACT – COLLATERAL ESTOPPEL

Before collateral estoppel will apply to bar re-litigation of a discrete fact, that fact must necessarily have been decided in favor of the defendant in the first trial. The key to collateral estoppel is that the *original* factfinder, whether judge or jury, has necessarily determined an essential fact. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

CONCLUSIVENESS OF ADJUDICATION– COLLATERAL ESTOPPEL

Under the constitutionally based doctrine of collateral estoppel, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. That is, once a jury determines a discrete fact in favor of a criminal defendant, the State cannot contest the jury's finding in a subsequent proceeding. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

COLLATERAL ESTOPPEL

In applying the doctrine of collateral estoppel, courts must first determine whether the jury determined a specific fact, and if so, how broad -in terms of time, space and content- was the scope of its finding. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].

RE-LITIGATION OF A DISCRETE FACT – COLLATERAL ESTOPPEL

Before collateral estoppel will apply to bar relitigation of a discrete fact, that fact must necessarily have been decided in favor of the defendant in the first trial. *Rollerson v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-0962-06 & PD-0964-06, 06/27/07].