
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, DIMITRIOS GAKIDIS AND MARY MARTIN
SUBJECT: 10/17/07 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 10/29/07
CC: JACK THOMPSON

***Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].**

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

FACTS: A jury convicted defendant of misdemeanor driving while intoxicated (DWI) and the court assessed punishment at 90 days in jail and a \$1,000 fine, probated for 18 months. Shortly before jury selection began, defense counsel made an oral motion for continuance and filed written motion to recuse. When the court denied the motion to recuse defense counsel announced that he was “not ready for this trial,” that he would “be unable to effectively represent [his] client,” and he could “not participate” in the trial. Throughout the course of the trial defense counsel refused to: participate in jury selection; enter a plea on the defendant’s behalf; make an opening statement, object to or cross-examine the State’s witnesses; or present a case on behalf of the defendant. The next day, the court denied defense counsel’s motions for continuance and for instructed verdict. The jury only took fifteen minutes to return a guilty verdict. The Court of Criminal Appeals reversed and remanded on two of defendant’s grounds of review. The CCA held that defense counsel’s behavior, considered as a whole, constructively denied defendant his Sixth Amendment right to effective assistance of counsel. The Court further directed the Clerk of the Court to send a copy of the opinion to the State Bar’s Chief Disciplinary Council of the State Bar for investigation and appropriate action against defense counsel.

GROUND OF REVIEW

A claim of ineffective assistance of counsel may be brought for the first time on appeal. ***Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].**

RIGHT TO COUNSEL – CRIMINAL PROSECUTIONS

The Sixth Amendment right to counsel applies to, among other proceedings, state criminal prosecutions in which a defendant is accused of a misdemeanor and a sentence of incarceration is actually imposed. *Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].

RIGHT TO COUNSEL – EFFECTIVE ASSISTANCE

The Sixth Amendment right to counsel is not merely the right to have counsel physically present in the courtroom; it is the right to have the effective assistance of counsel in the courtroom. *Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].

INEFFECTIVE ASSISTANCE – REVERSAL OF CONVICTION

To obtain a reversal of a conviction on the ground of ineffective assistance of counsel, a defendant must usually demonstrate both deficient performance and prejudice. That is, defendant must demonstrate that 1) defense counsel's performance fell below an objective standard of reasonableness and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. If a defendant can demonstrate that defense counsel *entirely failed* to subject the prosecution's case to meaningful adversarial testing, to the extent that there was a constructive denial of the assistance of counsel altogether, then prejudice is legally presumed. *Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].

INEFFECTIVE ASSISTANCE – PRESUMED PREJUDICE

Defense counsel's failure to test the prosecution's case must be complete before a reviewing court may presume the defendant's case was prejudiced. *Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].

SIXTH AMENDMENT – RIGHT TO COUNSEL

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of advocate." The right to the effective assistance of counsel is the accused's right to test the prosecution's case in the crucible of a meaningful adversarial proceeding. *Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].

SIXTH AMENDMENT – RIGHT TO COUNSEL

When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. *Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].

SIXTH AMENDMENT – INEFFECTIVE ASSISTANCE

In the usual case in which an ineffective-assistance claim is made, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision making as to overcome the presumption that counsel's conduct was reasonable and professional. *Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].

INEFFECTIVE ASSISTANCE – REVIEW

There are rare ineffective-assistance cases in which the record is sufficient for an appellate court to make a decision on the merits. *Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].

DEFENSE COUNSEL DUTIES – RULES OF PROFESSIONAL CONDUCT

Under the Disciplinary Rules of Professional Conduct, every defense counsel owes to his client his zealousness, competence, and diligence. When a defense counsel fails to fulfill those obligations, he opens himself up to disciplinary proceedings as well as a civil law suit for malpractice. *Cannon v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1084-05, 10/17/07].

Miles v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1019-06, 10/17/07].

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

FACTS: Defendant pleaded guilty and was convicted of driving while intoxicated. After hitting a car, defendant ran his purple Corvette under the bumper of a limousine. The limo driver and his passengers, several professional football players, observed the defendant and concluded that he was drunk. While waiting for the police arrive, defendant became very nervous and fled the scene. Believing defendant was too drunk to drive and was a danger to himself and others, approximately six tow truck drivers who were at the scene gave chase.

Eventually, the wrecker drivers corralled defendant in a parking lot. One of the tow truck drivers attempted to take defendant's car keys and affect a citizen's arrest. Eventually, the police arrived and took defendant into custody. The trial court denied defendant's motion to suppress the arrest. Defendant's motion argued there was no probable cause for the arrest and the evidence of his conduct and the chase should be excluded because the wrecker drivers broke several traffic laws while pursuing him, that evidence should be excluded. The court of appeals and Court of Criminal Appeals affirmed. The Court held that: 1) the tow truck drivers had probable cause to make a citizen's arrest on public safety grounds, and 2) the evidence provided by that arrest was not excludable because the tow truck drivers had to break traffic laws to safely confine defendant.

EVIDENCE – EXCLUSION--OBTAINED

The Texas exclusionary rule mirrors the federal exclusionary rule in many respects, but is, in fact, broader. Unlike the Fourth Amendment, Article 38.23 also applies to certain actions by private individuals as well as those by government officials. *Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].

EVIDENCE – EXCLUSION-- FRUITS OF AN ILLEGAL SEARCH-- “OTHER PERSONS”

Under Article 38.23, if an officer's illegal conduct violates a person's privacy rights, the fruits of that illegal search or seizure are inadmissible in a criminal proceeding. If that same illegal conduct undertaken by an “other person,” that tainted evidence is also subject to the Texas exclusionary rule. *Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- 1019-06, 10/17/07].

EVIDENCE – EXCLUSION—SEARCHES/SEIZURES -- “OTHER PERSONS”

A private person can do what a police officer standing in his shoes can do legitimately; likewise, a private person cannot do what a police officer cannot. If the police cannot search and seize, neither can a private citizen. *Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].

EXCLUSIONARY RULE-- INVOCATION

A violation of law does not always invoke the provisions of Texas' exclusionary rule. The primary purpose of the rule is to deter unlawful actions that violate the rights of criminal suspects. The law that is violated in obtaining evidence *must* exist for the purpose of regulating the acquisition of evidence to be used in a criminal case. *Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].

TEXAS EXCLUSIONARY RULE—VIGILANTE GROUPS

The Texas legislature enacted an exclusionary rule broader than its federal counterpart, in part, because of the widespread problem of vigilante-type private citizens, who acted in concert with the police conducting illegal searches for whiskey. *Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].

CITIZEN’S ARRESTS –ARRESTABLE OFFENSES

A peace officer may arrest offenders for any misdemeanor or felony committed within his view. Citizens, however, may carry out an arrest only for a felony or misdemeanor that is an offense against the public peace. *Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].

CITIZEN’S ARRESTS – TIME OF ARREST

The right of a private individual to arrest without a warrant for a breach of the peace, committed in his presence or view, is limited to the time the offense is committed or while there is continuing danger of its renewal. This right does not include the general right to pursue and arrest for the purpose of insuring the apprehension or future trial of the offender. *Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].

CITIZEN’S ARRESTS – BREACH OF THE PEACE

Whether a specific act constitutes a breach of the peace depends on the surrounding facts and circumstances in the particular case. Some crimes, by their very nature, are offenses against the public peace including public drunkenness and driving while intoxicated. *Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].

EVIDENCE—ACCEPTABLE SEARCH/SEIZURE—OTHER PERSONS

A few Texas cases have sanctioned searches and seizures by private individuals: 1) the search of a department store dressing room by a store security officer; 2) cases in which an individual who has permission to be on defendant’s property and took an item in plain view with no intent to deprive the owner of his property. *Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].

BREACH OF THE PEACE-- DEFINITION

As a general rule, actual or threatened violence is an essential element of breach of the peace. In fact, breach of the peace includes all violations of the public peace, order, or decorum. The breach may be 1) a disturbance of the public tranquility by any act or conduct inciting others to violence or tending to provoke or excite others to break the peace; or 2) a

disturbance of public order by any act, including violence that is likely to produce violence.

***Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].**

CITIZEN'S ARRESTS – WARRANTLESS EXIGENT CIRCUMSTANCES

The statutory authorization for both officers and citizens to arrest for an "offense against the public peace" codifies an "exigent circumstances" exception to the warrant requirement. These exigent circumstances require an immediate arrest and include 1) offenses committed in the presence or view of an officer or citizen that pose a continuing threat to the public peace; 2) theft offenses in which the perpetrator may disappear along with the stolen property; and 3) escapes of felony offenders. ***Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].**

CITIZEN'S ARRESTS – EXIGENT CIRCUMSTANCES

A citizen may make a warrantless arrest of a person who commits a misdemeanor within the citizen's presence or view if the evidence shows that the person's conduct poses a threat of continuing violence or harm to himself or the public. It is the exigency of the situation, not the title of the offense that gives both officer and citizen statutory authorization to protect the public from an ongoing threat of violence, harm, or danger by making a warrantless arrest. ***Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].**

CITIZEN'S ARRESTS – TRAFFIC -- VIOLATION IN PURSUIT

By following the original rationale of Texas' exclusionary rule, if a peace officer would be justified in violating traffic laws to arrest an offender, the evidence obtained by a private citizen who does so is not barred by the exclusionary statute. ***Miles v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD- PD-1019-06, 10/17/07].**