
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER , ELIZABETH WIEHLE, MARY MARTIN
SUBJECT: 11/07/07 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 12/18/07
CC: JACK THOMPSON

***Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/7/07]**

JOHNSON, J., *delivered the opinion of the unanimous Court*. MEYERS, J., *filed a concurring opinion in which KELLER, P.J., PRICE, and HERVEY, J.J., joined*.

FACTS: Defendant pleaded guilty to possession of a controlled substance. A jury sentenced him to ten years in prison and a \$5,000 fine. The officer stopped defendant for speeding and was going to let him go with a warning. Having received consent to search the car, the officer found marijuana and cocaine. Defendant was, instead, charged with possession of drug paraphernalia and possession of a controlled substance. The charges were tried separately. Defendant's first trial resulted in a judgment of acquittal on the paraphernalia charge because the State did not present evidence that there was probable cause for the traffic stop. Arguing collateral estoppel on the probable cause issue, defendant moved to suppress evidence on the controlled substance charge. The trial court denied the motion to suppress and defendant appealed. The court of appeals found that the State did not rebut the collateral estoppel presumption from the paraphernalia charge but affirmed the trial court's judgment on the controlled substance charge. The Court of Criminal Appeals affirmed the court of appeals, holding that collateral estoppel did not apply to the controlled substance charge because the facts from the paraphernalia prosecution were not essential to the controlled substance case.

FIFTH AMENDMENT—DOUBLE JEOPARDY-- COLLATERAL ESTOPPEL

The doctrine of collateral estoppel originates in the Double Jeopardy Clause of the Fifth Amendment and is fully incorporated by the 14th amendment. ***Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]**

COLLATERAL ESTOPPEL—APPLICATION & DEFINITION

Collateral estoppel deals only with the relitigation of specific fact determinations. When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in a future lawsuit arising out of the same transaction or occurrence *Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]

COLLATERAL ESTOPPEL—APPLICATION IN CRIMINAL CASES

In criminal cases, collateral estoppel must be applied practically within the totality of the circumstances of the proceeding. A more restrictive collateral estoppel rule would amount to a rejection of the doctrine in every case where the first judgment was based upon a general verdict of acquittal. *Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]

COLLATERAL ESTOPPEL—SCOPE OF FACTS

The scope of facts originally litigated determines the facts covered by collateral estoppel. The *exact* point or issue in a pending case must be determined in the prior proceeding for collateral estoppel to apply. *Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]

COLLATERAL ESTOPPEL—BURDEN OF PROOF

The defendant has the burden to prove that the facts at issue were decided in the prior proceeding. *Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]

COLLATERAL ESTOPPEL—TWO-STEP TEST

Collateral estoppel bars subsequent prosecution or relitigation of certain specific facts if the court determines: (1) exactly what facts were necessarily decided in the first proceeding and (2) whether those “necessarily decided” facts constitute an essential elements of the offense in the second trial. *Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]

COLLATERAL ESTOPPEL—FACTS AS AN ESSENTIAL ELEMENT

Even though collateral estoppel requires that the precise fact litigated in the first prosecution must arise from the same transaction or occurrence as the second prosecution, the fact litigated must also be an essential element of the subsequent offense. *Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]

PROBABLE CAUSE—USE IN PROSECUTION

While probable cause and consent to search are important preliminary issues, they are merely issues regarding the admissibility of evidence. *Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]

COLLATERAL ESTOPPEL—ESSENTIAL ELEMENTS OF THE OFFENSE

If a court’s final determination does not relate to the essential elements of an offense, that judgment does not foreclose the ability of the state to prosecute that offense. *Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]

COLLATERAL ESTOPPEL—ESSENTIAL ELEMENTS OF THE OFFENSE

If the final determination of a court is pertinent only to the admissibility of evidence and does not constitute an essential element of the offense, then the second prong of the collateral estoppel analysis is not fulfilled. *Murphy v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1297-06, 11/07/07]

Hunter v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

MEYER, J., *delivered the opinion for a unanimous Court.*

FACTS: Defendant was convicted by jury of capital murder. The jury found that the defendant was not mentally retarded and sentenced him to death. The Court of Criminal Appeals affirmed the trial court in finding that the defendant was not mentally retarded.

CAPITAL MURDER—EXECUTION OF MENTALLY HANDICAPPED

It is unconstitutional to execute someone who is mentally retarded. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—JUDICIAL GUIDELINES ABSENT A STATUTORY SCHEME

State legislatures have the duty to promulgate a statutory scheme for the presentation and determination of the issue of mental retardation in capital murder trials. Absent a legislative mandate, the duty falls to the courts to implement a temporary scheme for determining mental retardation. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER— MENTAL RETARDATION –JUDICIAL GUIDELINES

In Texas, the temporary judicial guidelines define mental retardation as a disability 1) characterized by “significantly subaverage” general intellectual functioning; 2) accompanied by “related” limitations in adaptive functioning; 3) the onset of which occurs prior to the age of 18. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—MENTAL RETARDATION—FACTORS

Factors that can be considered in determining the existence of mental retardation include the defendants: (1) ability to formulate plans; (2) leadership conduct; (3) rational responses to external stimuli; (4) lying to hide his own interests; (5) responding rationally to questioning; (6) planning of the offense; and (7) a third party's knowledge of defendant's disability during his developmental years. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—MENTAL RETARDATION—JURY DETERMINATION

A jury's determination of a defendant's mental retardation is not required in a post-conviction proceeding. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983].

CAPITAL MURDER—MENTAL RETARDATION—BURDEN OF PROOF

Like proving the affirmative defenses of insanity, incompetency to stand trial, and incompetency to be executed, a capital murder defendant has the burden to prove mental retardation by a preponderance of the evidence. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—MENTAL RETARDATION—SUFFICIENCY OF THE EVIDENCE

The sufficiency of evidence needed to support a jury's determination of mental retardation is considered against the total weight of the evidence relevant to that issue and whether the judgment rendered is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—STATUTORY SCHEME—JUDICIAL GUIDELINES

In the absence of legislation or a constitutional requirement directing when the determination of mental retardation is to be made, Texas courts have held that it is not error if a judge or jury determines the issue of mental retardation separately from the determination of guilt. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—DEFINITIONS—SOCIETY

A capital murder jury charge does not require a submission of a special instruction on the term "society." *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—FUTURE DANGEROUSNESS—FACTUAL SUFFICIENCY

Texas appellate courts do not conduct a factual sufficiency review of a capital jury's finding of future dangerousness. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—FUTURE DANGEROUSNESS—LEGAL SUFFICIENCY

In reviewing the legal sufficiency of a jury's ruling on future dangerousness, the court must look at all of the evidence in the light most favorable to the jury's finding and determine if, based on reasonable inferences from the evidence, a rational jury could have found beyond a reasonable doubt that defendant would be a future danger to society. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—FUTURE DANGEROUSNESS—PRISON BEHAVIOR

Good behavior in prison does not preclude a finding of future dangerousness. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—FUTURE DANGEROUSNESS—LEGAL SUFFICIENCY

Before a jury may make a finding of future dangerousness the evidence must be sufficient for a rational trier of fact to conclude, beyond a reasonable doubt, that there is a probability the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07].

CAPITAL MURDER—EXTRANEOUS OFFENSES—BURDEN OF PROOF

The absence of having a burden of proof instruction concerning extraneous offenses is not an error as long as the punishment charge properly requires the State to prove the special issues, other than mitigation and other affirmative offenses, beyond a reasonable doubt. *Hunter v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [AP-74983, 11/07/07]. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05, 11/07/07].

KELLER, P.J., *delivered the opinion of the Court, in which KEASLER, HERVEY, HOLCOMB, and COCHRAN, J.J., joined.* MEYERS, WOMACK, and JOHNSON, J.J., *joined Parts I and IIA and dissented to Part IIB.* PRICE, J., *filed a dissenting opinion.*

FACTS: While defendant was serving time in prison for sexual assault, he was convicted of felony escape, burglary of a habitation, and theft. For enhancement purposes during the

sentencing phase of trial, the prosecution used two previous judgments of escape and theft. On appeal, defendant claimed that because the sentences were being served concurrently, the escape and theft judgments were void because the statute requires the sentences be stacked. The court of appeals reversed the judgment and remanded for a new punishment hearing. On the State's petition for discretionary review, the Texas Court of Criminal Appeals reversed the appellate court. The CCA held that a defendant could not collaterally attack the prior judgment on the grounds that the sentence was too lenient.

SENTENCING—ENHANCEMENT—COLLATERAL ATTACK ON PRIOR JUDGMENT

A collateral attack is permitted only if the prior judgment is void, not merely voidable. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ENHANCEMENT—VOID JUDGMENTS

There is a difference between a void judgment and a portion of a judgment being void. When only one sentencing element is void, the *judgment* is rendered void *only* if the judgment cannot be reformed to cure the infirmity without resentencing. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ENHANCEMENT—VOID JUDGMENTS

A judgment is not void if a defect can be reformed on direct appeal of that judgment or in a *nunc pro tunc* order. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ENHANCEMENT—VOID JUDGMENT REMEDIES ON APPEAL

On direct appeal, a void cumulation order can be reformed and the conviction affirmed. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ENHANCEMENT—VOID JUDGMENT REMEDIES ON APPEAL

On a petition for habeas corpus, the Court of Criminal Appeals may reform and affirm a conviction that contains a void cumulation order. (For example, the CCA may remove an unauthorized fine and affirm the remainder of the conviction). *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ENHANCEMENT—VOID JUDGMENT REMEDIES ON APPEAL

When a concurrent sentence is not a part of a plea agreement, a court can reform a void judgment to make the sentences consecutive without requiring resentencing. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ENHANCEMENT—VOID JUDGMENT REMEDIES ON APPEAL

A cumulation order can be deleted without disturbing the remainder of a judgment because these situations do not involve a range of possible punishment options that would require a new resentencing hearing. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ENHANCEMENT—VOID JUDGMENT REMEDIES ON APPEAL

If concurrent resentencing between two sentences is invalid, and only one other valid sentencing option remains, reformation of the judgment is possible on direct appeal. The reformable nature of the defect means that the defect cannot render the prior judgment void. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ESTOPPEL

A flexible doctrine, estoppel is not limited to unilateral requests that require “invited error.” *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ESTOPPEL—ESTOPPEL BY JUDGMENT

Estoppel by judgment occurs when an individual who accepted the benefits of a judgment, decree, or judicial order is estopped from denying the validity or propriety of any part of that judgment on any grounds or rejecting the judgment’s burdensome consequences. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ESTOPPEL—ESTOPPEL BY JUDGMENT

The only exception to the estoppel by judgment principle is for challenges to the subject-matter jurisdiction of the court rendering the judgment. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ESTOPPEL—ESTOPPEL BY CONTRACT

“Estoppel by contract” occurs when a party who accepts benefits under a contract is estopped from questioning the contract’s existence, validity, or effect. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ESTOPPEL—APPLICATION

Estoppel can apply not only to unilateral requests, but also to mutual requests in the context of agreements, which are typically encountered when both parties benefit from a plea agreement. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

SENTENCING—ESTOPPEL—VOID JUDGMENT REMEDIES ON APPEAL

A defendant is not allowed to reap the benefits of an illegal sentence that is lighter than what the legal sentence should have been. As a result, a defendant is not permitted to collaterally attack a judgment based on illegal leniency. *Rhodes v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007). [PD-1597-05, PD-1598-05, PD-1599-05; 11/07/07].

State v. Neesley, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1396-06, 11/7/07].

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

FACTS: Defendant was a suspect in a DWI traffic accident. Because the first blood sample taken from the defendant was contaminated, the arresting officers drew a second sample. The trial court granted the defendant’s motion to suppress the second blood sample. The State appealed. Section 742.012 (b) of the Texas Transportation Code provides that an officer is required to take a blood or breath specimen in cases where a person was killed or has suffered serious bodily injury as a result of a car accident. The State argued that (1) the statute should be construed to mean at least one “usable” breath or blood specimen; and (2) that no additional authorization was required for the second blood draw because drawing additional blood from the defendant was merely an extension of the initial blood draw. The court of appeals held that a “specimen,” as defined in the statute, means a single specimen, regardless of usability. On the State’s appeal the Court of Criminal Appeals (“CCA”) reversed the appellate court and remanded. The CCA held that the “specimen” should be construed to mean a *usable* sample and that only one specimen (as so defined) may be taken.

STATUTORY CONSTRUCTION

A court is constitutionally permitted to determine a sensible statutory interpretation only where the plain language of a statute would lead to absurd results or where the language is ambiguous, and only when it is absolutely necessary. *State v. Neesley*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1396-06, 11/7/07].

STATUTORY CONSTRUCTION

In determining a sensible statutory construction, a court considers extra-textual factors, including executive or administrative interpretations of the statute and legislative history. *State v. Neesley*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1396-06, 11/7/07].

STATUTORY CONSTRUCTION—AMBIGUOUS/UNAMBIGUOUS

A statute is *ambiguous* when “reasonably well-informed” people can understand it to have more than one meaning. A statute is *unambiguous* when it does not have more than one meaning. *State v. Neesley*, __ S.W.3d __ (Tex. Crim. App. 2007) [PD-1396-06, 11/7/07].

STATUTORY CONSTRUCTION –TRANSPORTATION CODE

The Transportation Code unambiguously provides that, under certain prescribed circumstances, an officer *must* take at least one specimen of the person’s breath or blood; however, the statute is ambiguous as to how many specimens it permits to be taken. *State v. Neesley*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1396-06, 11/7/07].

STATUTORY CONSTRUCTION—TRANSPORTATION CODE-- DEFINITIONS

When a person was killed or has suffered serious bodily injury as a result of a car accident, the statutory scheme set forth in the Transportation Code only permits one specimen to be drawn by an officer when a suspect refuses to submit; however, the statute is ambiguous as to the meaning of “specimen.” *State v. Neesley*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1396-06, 11/7/07].

CODE CONSTRUCTION ACT-FACTORS TO CONSIDER

In construing a statute the court may consider the: (1) objective to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; and (4) consequences of a particular construction. *State v. Neesley*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1396-06, 11/7/07].

STATUTORY CONSTRUCTION—TRANSPORTATION CODE

The objective of chapter 724 of the Transportation Code's is to "save lives and decrease the number of casualties caused by drunken drivers. *State v. Neesley*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1396-06, 11/7/07].

STATUTORY CONSTRUCTION—SPECIMEN—MEANS USABLE

Based on the statute's objective and the circumstances at the time it was enacted, the term "specimen" in the Transportation Code should be construed to mean a "usable" sample. *State v. Neesley*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1396-06, 11/7/07].

Durgan v. State, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1069-06, 11/7/07].

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

FACTS: Defendant pled guilty to delivery of less than one gram of cocaine in a drug free zone. The trial court deferred defendant's adjudication and placed her on five years community supervision. The State filed a motion to adjudicate, alleging that defendant violated her community supervision. The trial court granted the motion, imposed additional terms of supervision, and ordered defendant to reside in a "Special Need Substance Abuse Felony Punishment Facility" for no more than a year. The State later filed a second motion to adjudicate, alleging that defendant failed to attend and successfully complete the substance-abuse-treatment facility's requirements. Finding the defendant guilty of violating the terms and conditions of her community supervision, the trial court sentenced her to ten years imprisonment. Defendant filed a motion for reconsideration or a new trial, asserting that new and material evidence was discovered regarding her competency at the time of the hearing on the second motion to adjudicate. Trial court denied defendant's motion. On appeal, the defendant argued, among other things, that the trial court erred in not having defendant evaluated to determine if she was competent to answer the allegations raised during a revocation hearing. The court of appeals dismissed, holding it was precluded from hearing an appeal involving a defendant's competence at an adjudicatory hearing because it would involve a trial court's determination of whether to proceed with adjudication. The Court of Criminal Appeals (CCA) reversed and remanded. The CCA held that the court of appeals had jurisdiction to consider defendant's competence claim and should have considered its merits.

DECISION TO ADJUDICATE- REVIEW

There is no appellate review of a trial court's decision to adjudicate guilt. *Durgan v. State*,_S.W.3d_ (Tex. Crim. App. 2007) [PD-1069-06, 11/7/07].

DECISION TO ADJUDICATE- REVIEW

A defendant is entitled to a hearing upon an allegation or violation of a community service condition of his deferred-adjudication. This hearing, however, is limited to the court's determination of whether it should proceed with an adjudication of guilt on the original charge. The defendant has no right to appeal the courts determination of whether to proceed. *Durgan v. State*,_S.W.3d_ (Tex. Crim. App. 2007) [PD-1069-06, 11/7/07].

DECISION TO ADJUDICATE- REVIEW

Any claim of error regarding a court's use of discretion to adjudicate guilt should be dismissed by the appellate court without reaching the merits. The Code of Criminal Procedure, however, does not bar appellate review of complaints that do not challenge a trial court's decision to adjudicate. *Durgan v. State*,_S.W.3d_ (Tex. Crim. App. 2007) [PD-1069-06, 11/7/07].

COMPETENCY – AT TIME OF ADJUDICATION

A defendant's claim that he lacked competency at the time his guilt was adjudicated does not challenge the trial court's decision to adjudicate. The status of being incompetent is not a violation of a community service term or condition; therefore, a defendant's incompetence cannot be the basis for a motion to adjudicate. *Durgan v. State*,_S.W.3d_ (Tex. Crim. App. 2007) [PD-1069-06, 11/7/07].

COMPETENCY – MOTION TO ADJUDICATE

Incompetence is a separate and distinct inquiry from a motion to adjudicate; consequently, a court's determination of a defendant's competency is appealable, and a court of appeals has jurisdiction to resolve that issue. *Durgan v. State*,_S.W.3d_ (Tex. Crim. App. 2007) [PD-1069-06, 11/7/07].

COMPETENCY – MOTION TO ADJUDICATE

A claim that a defendant was not competent at the time of adjudication raises a preliminary due-process issue that must be resolved before the adjudication process may begin. *Durgan v. State*,_S.W.3d_ (Tex. Crim. App. 2007) [PD-1069-06, 11/7/07].

***Kubosh v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].**

PRICE, J., *delivered the opinion for a unanimous Court.*

FACTS: Defendant was the principle surety for two bail bonds on a man who failed to appear in court. The trial court ordered that the State recover \$50, 000 per bond from the defendant and a third party co-surety. Defendant filed a general denial and asked for an equitable remittitur of one-half (\$25,000) of each bond. Denying his motion, and overruling his objections to the default judgment, the trial court signed final judgments of forfeiture. The court reporter was not instructed to make a record of the proceeding until some undetermined time after the hearing began. When defendant appealed to the court of appeals, he moved for a “Correction of Inaccuracies in the Reporter’s Record,” because the court reporter’s record did not cover the entire hearing. The court of appeals remanded the case to the trial court to resolve the dispute. At the hearing to correct the record, defendant testified that the prosecutor approached the bench to ask for the default judgments, but never asked the trial court to take judicial notice of the bail bonds or judgments *nisi* (judgments of bond forfeiture). Defendant further testified that the only thing the record lacked was the prosecutor approaching the bench and asking for the default judgments before the case was called. The prosecutor’s version of events was different. He testified that he asked for the Court to take judicial notice of the bonds and judgments *nisi*, and approached the bench with two final judgments. On cross, re-direct, and re-cross, the prosecutor testified that he erred in asking for the default judgments against the defendant. Trial court found that, although the prosecutor misspoke when he asked for the default judgments, the court was not confused. Finding that it had not mistakenly granted the default judgments against the defendant, the trial court found that it rendered a final judgment of forfeiture. On appeal, the defendant argued insufficiency of the evidence and, that the State erroneously moved for default judgments against the defendant, who had filed an answer and appeared. The court of appeals held that 1) because the trial court took judicial notice of the bonds and judgments *nisi* , it had sufficient evidence to grant final judgments in forfeiture, and 2) defendant’s second claim was meritless because the prosecutor simply misspoke when he requested the default judgments against the defendant. The Court of Criminal Appeals affirmed.

BOND FORFEITURE – STATE’S BURDEN

The State has the burden of proof in a bail bond forfeiture action. To sustain a bond forfeiture claim, the State must prove the existence of the bond, the judgment *nisi*, and the judicial declaration of the forfeiture of the bond. *Kubosh v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

BOND FORFEITURE – JUDICIAL NOTICE

Typically, the State is required to present and offer both the bond and the judgment *nisi* into evidence; however, a court *may* take judicial notice of the judgment *nisi*. *Kubosh v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

BOND FORFEITURE – JUDICIAL NOTICE

A bail bond is considered an adjudicative fact in a bond forfeiture proceeding because (1) each bail bond is specific to each particular proceeding and (2) a bond itself is typically established by evidence. *Kubosh v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

JUDICIAL NOTICE-ADJUDICATIVE FACTS-NO REASONABLE DISPUTE

To be judicially noticed, adjudicative facts must be relevant to the ultimate matter in dispute and not subject to reasonable dispute. *Kubosh v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

BOND FORFEITURE – JUDICIAL NOTICE

A trial court is not required to follow Rule 201 of the Texas Rules of Evidence to take judicial notice of a bond in a bond forfeiture proceeding, if it is assumed that the proceeding is “regarding bail” and is not a “hearing denying, revoking, or increasing bail.” *Kubosh v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

BOND FORFEITURE – JUDICIAL NOTICE

Even though a trial court judge does not announce that he has taken judicial notice of a bond and judgment *nisi*, it is sufficient to establish that the court properly took judicial notice of the documents *if* they are in the court’s file prior to the hearing and the trial judge has considered them previously. *Kubosh v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

EVIDENCE—JUDICIAL NOTICE—ADJUDICATIVE TEST

Trial court has discretion to take judicial notice of an adjudicative fact without being asked, and may do so at any stage of the proceeding. *Kubosh v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

EVIDENCE—JUDICIAL NOTICE--HEARING

Upon timely request, the party adverse to a judicial notice is entitled to be heard concerning the propriety of the judicial notice. *Kubosh v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

EVIDENCE- JUDICIAL NOTICE – NEW TRIAL

Defendant may request an opportunity to be heard on the propriety of judicial notice for the first time in a motion for a new trial. *Kubosh v. State*, _ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

JUDICIAL NOTICE--BOND FORFEITURE – OPPORTUNITY TO BE HEARD

If a defendant fails to make timely request for an opportunity to challenge the propriety of the judicial notice or fails to question the tenor of the particular bonds that were judicially noticed, the defendant defaults any complaint they may have that the bonds were not properly judicially noticed under the Rules of Evidence. *Kubosh v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

BOND FORFEITURE – OPPORTUNITY TO BE HEARD

An opposing party’s request to be heard after judicial notice has been taken is considered timely if the trial court did not give the parties prior notice the court was taking judicial notice of an adjudicative fact. *Kubosh v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-1925-06, 11/7/07].

Stringer v. State,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

Keasler, J., delivered the opinion for a unanimous Court.

FACTS: Without a plea-bargain agreement with the State, defendant entered a guilty plea for possession of child pornography, a third degree felony, before the trial judge. In entering his plea, defendant signed a written admonishment, which stated that he waived his “right to a jury in both assessment of his guilt and punishment.” Defendant did not, however, waive the preparation of a pre-sentence investigation report (“PSI”). After the PSI was complete, the State asked the trial judge to take judicial notice of the PSI. Defendant objected to admission

of the extraneous information regarding unadjudicated offense in the “Adult Felony History” section of the PSI on the basis of the Confrontation Clause of the 6th Amendment of the U.S. Constitution. The court overruled defendant’s objection but allowed him to have a running objection. The trial court found Defendant guilty and sentenced him to nine years imprisonment. The appellate court rejected defendant’s argument that the trial judge erred in admitting the “Adult Felony History” section of the PSI, and held that defendant’s written waiver of his right to confront and cross-examine witnesses applied to the punishment stage. The dissent argued that the waiver applied only to the guilt phase and not the punishment phase. The Court of Criminal Appeals reversed the court of appeals and remanded.

CONFRONTATION CLAUSE—TESTIMONIAL STATEMENTS

Defendant has the right to confront the witnesses against them. Admissions of testimonial statements are prohibited, unless the declarant is not available to testify and the accused had a prior opportunity for cross-examination. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER—CONFRONTATION CLAUSE - PRESUMPTIONS

While a defendant may waive his right to confront and cross-examine witnesses, a court must “indulge every reasonable presumption against waiver or fundamental constitutional rights.” Accordingly, a court may not presume the waiver of the right to confront and cross-examine witnesses from a silent record. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER--RIGHTS—KNOWING AND INTENTIONAL WAIVER

To be effective, a waiver must clearly establish that the defendant intended to relinquish or abandon a known right or privilege. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER-- SUFFICIENCY

In determining if the waiver is sufficient, a court examines the specific facts and circumstances surrounding the waiver, including, but not limited to the defendant’s background, experience, and conduct. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER- RIGHT TO CONFRONT AND CROSS-EXAMINE

Language in a waiver stating, “I waive and give up my right to a jury, both as to my guilt and assessment of my punishment,” is not sufficient to waive a defendant’s right to

confront or cross-examine witness at a punishment hearing. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER- RIGHT TO CONFRONT AND CROSS-EXAMINE

A waiver must explicitly refer to punishment to be sufficient as a waiver of a defendant's right to confront and cross-examine witnesses during punishment stage. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER—SCOPE—GUILT PHASE

The scope of a written waiver will be defined by an introductory reference to Article 1.15 of the Code of Criminal Procedure, such as, “in accordance with Art. 1.13 and 1.15 of the Code of Criminal Procedure.” This reference limits the waiver’s application to the guilt stage only, and the waiver does not apply to the punishment stage. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER—GUILT PHASE ONLY

Article 1.15 applies only where a felony-defendant waives the right to a trial by jury at the guilt stage, because it speaks to the introduction of evidence showing the defendant’s guilt and evidence to support a defendant's conviction. It does not refer to punishment. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER—GUILT PHASE ONLY

The written waiver requirement only applies where a defendant consents to stipulate to evidence for the trial judge’s consideration in rendering a verdict on guilt. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER—APPLICATION IN PUNISHMENT

Article 1.15 does not apply in jury cases regardless of whether punishment is assessed by the court or by a jury. Nor does the article encompass a judge’s assessment of punishment after a jury enters a guilty verdict, therefore waiver does not apply at the punishment stage. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].

WAIVER—GUILT PHASE V. PUNISHMENT PHASE

A defendant does not knowingly, voluntarily, and intelligently waive his right to confront and cross-examine witnesses at sentencing when he signs a written waiver of his rights during the guilt stage. *Stringer v. State*,_ S.W.3d_ (Tex. Crim. App. 2007) [PD-757-06, 11/7/07].