December 3rd, 013

FINDINGS OF FACT AND CONCLUSIONS OF LAW
TCCA backing off on re-doing fact findings –defendant loses in TCT and TCCA affirms trial court

Delafuente v. State, No. PD-0066-13, Johnson, publish, 11/27/13, the suppression hearing was done on the police report alone without any live testimony. The defendant was stopped for traveling too slowly. Ofcr put in his report that the vehicle was impeding traffic by traveling too slowly. That is a legal conclusion. Driving at a speed that is less than the posted limit is not, by itself, sufficient for reasonable suspicion; a violation occurs only when the normal and reasonable movement of traffic is impeded. *Texas Dept. of Pub. Safety v. Gonzalez*, 276 S. W. 3d 88, 93 (Tex. App.—San Antonio 2008). Although a police officer cannot testify (in this case through his report) to a legal conclusion --there were facts in his report to substantiate that the defendant actually was impeding the movement of traffic by traveling too slowly. Alcala's dissent points out-the fact findings were wholly inadequate because no live hearing to determine facts and would have the intermediate appellate court abate the appeal for more complete fact findings. Janet's thoughts: if def had won in the TCT instead of lost and the TCT had these paltry fact findings, defendant would have lost in appellate orbit or at the very least faced a remand to the TCT for additional fact findings.

EVIDENTIARY SUFFICIENCY: LAW OF PARTIES-CONSPIRACY THEORY

Anderson v. State, No. PD-0408-12, 11/27/13, Meyers, unanimous, publish. For a defendant to be found guilty as a party to a secondary offense (another felony committed by one of the conspirators during the attempt to carry out the original felony see TEX. PENAL CODE section 7.02 (b))the jury must determine that the second felony was committed in furtherance of the unlawful purpose and was one that the co-conspirator should have anticipated as a result of carrying out the conspiracy. It is not required that the State prove that the Appellant actually anticipated the secondary felony, only that the crime is one that *should* have been anticipated.
In this case, where Appellant and the codefendant were acting together in a criminal business to sell moderate amounts of meth and that, given the volume of drugs involved, the codef's assault of the officer in this case was one that should have been anticipated as a result of carrying out the conspiracy. This is true despite the fact that it was an assault with a motor vehicle (as opposed to an assault with a switchblade or a pistol). The def/codef were more than just small-time dealers, "Because of the number of repeat transactions, the distance traveled to complete the sale, the quantity of drugs involved, and the amount of cash possessed, Appellant should have anticipated that he and [the codef] might become the target of a thief or a police investigation, and that violence might be used to protect the drugs or to escape. . . The evidence supports the jury finding that Appellant should have anticipated the aggravated assault of a public servant [codef tried to run over cop while attempting to flee from cops on undercover bust] in furtherance of the of the conspiracy to commit the offense of possession of a controlled substance with intent to deliver. There is no indication that the jury engaged in speculation or guessing about the meaning of the evidence or facts to reach this conclusion." Janet's thoughts—this is a scary case. Essentially it imposes strict liability for violent acts of the codef in big drug cases that were neither actually anticipated nor intended because drugs and violence go together like peas and carrots.

MNT GRANTS FLIPPED BY TCCA
JURY TRIAL LESSER INCLUDED
Cognate pleadings test continues to be brujeria

State v. Meru, No. PD-1635-12, Meyers, Publish, 11/27/13. TCCA reversed the TCT's grant of a MNT based on the failure to submit a lesser included on criminal trespass with burglary charge. In determining whether a defendant is entitled to a jury instruction on a lesser included offense the cognate pleadings test is applied. (1) First step: is it a lesser? This does not apply to evidence and is done purely from the statutes and the indictment. Both statutory elements and any descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced. and (2) is there evidence (any) that would raise the issue that the defendant is guilty only of the lesser. It is held in this case that criminal trespass is not a lesser of burglary because the indictment just alleged entry not entry with all or part of the body. Burglary can be entry of part of the body whereas criminal trespass requires entry with the entire body. FILE A MOTION TO QUASH ON ALL BURGLARIES REQUESTING THE STATE ALLEGE WITH SPECIFICITY HOW THE ENTRY WAS ACCOMPLISHED –WITH ALL OR PART OF THE BODY. IN MOST CASES IT WILL BE WITH ALL OF THE BODY THEREFORE YOU WILL BE ABLE TO GET YOUR LESSER ON CRIMINAL TRESPASS IF YOU DO NOT FILE MOTIONS TO QUASH IN BURGLARY CASES (AND MANY OTHER CASES) YOU ARE SCREWING YOUR CLIENT OUT OF THE LESSER INCLUDED.

MNT GRANT FLIPPED: IAC, STATUTE OF LIMITATIONS
Who knows what the statute of limitations is on agg assault maybe two years maybe three

Bennet v. State, No. PD-0354-12, Keasler, many dissents and concurrences bickering about what the SOL is on aggravated assault. Publish. 11/27/13. It is not ineffective assistance to fail to challenge an indictment for aggravated assault on statute of limitations grounds because it is not clear whether that statute of limitations is for two[1] or three[2] years. PRACTICE NOTE: IF IT HAPPENED OVER TWO YEARS AGO FILE A MOTION TO BAR PROSECUTION BASED ON A TIME BAR AND LET THE APPELLATE COURTS FIGHT IT OUT. THIS OPINION HAS THREE OCCURENCES AND A DISSENT AND READS LIKE A BAR FIGHT. (AND WHO DOESN'T LIKE BAR FIGHTS??)

APPELLATE LAW STUFF
Law nerd porno: how to brief cumulative error

Linney v. State, No. PD- 0675-13, Cochran concurrence to denial of PDR, published. 11/27/13. A number of errors may be found harmful in their cumulative effect even if each error considered separately would be harmless. Cumulative error is an independent ground for relief or legal claim that requires the law of cumulative error to be applied to the specific facts. The arguments on the issue must refer to the facts with enough specificity to direct the attention of the appellate court to the error about which complaint is made. When raising a cumulative error point: provide guidance to the appellate court as to why the combined effect of these particular errors in this particular case combined to deprive him of some specified substantial right. (i.e. the denial of right to cross examine on issue combined with admission of hearsay denied appellant of the right to present a defense in the following particulars by giving the jury a false impression).

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[1] TCCP 12.03(d) "Except as otherwise provided by this chapter, any offense that bears the title 'aggravated' shall carry the same limitation period as the primary crime.

[2] TCCP 12.01 (7) catch all provision, "three years from the commission of the offense: all other felonies."