Jan 15, 2014

TRIAL PROCEDURE: COMPETENCY OF CHILD WITNESS, CRITICAL STATE, ERROR PRESERVATION, RIGHT TO COUNSEL, CONFRONTATION CLAUSE

Gilley v. State, Price, Publish, 1-15-14, Price,PD-1581-12, there was an *in camera* examination of the child complainant, the court reporter was present but the defendant and the attorneys for both sides were excluded. TRE 601 (a) (b) provides that children "shall be incompetent to testify" if, "after being examined by the court, [they] appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated. " The party seeking to exclude the witness from testifying must raise the issue of his competency and shoulders the burden of establishing incompetency." This is a preliminary question for the court to determine under TRE 104(a) and the TCT is not bound by the rules of evidence in making that determination. TCT may inquire if the child witness can distinguish a truth from a lie. Party participation is allowed however it is not required. Both defense counsel and the State can submit proposed questions but it is up to the TCT whether or not to actually ask them. The TCCA reached issues that the intermediate appellate court never reached and Keasler (joined by Hervey and Alcala) dissented on this issue. Objecting on Sixth Amendment grounds did not preserve the right to counsel point despite the fact that the right to counsel is actually contained in the Sixth Amendment. No objection made on denial of counsel at critical stage of proceeding. If this is a critical stage of the proceeding than no objection is needed to preserve the error in denial of counsel—it must be affirmatively waived as it cannot be waived by inaction alone.[1] Held not to be a critical stage. Test is whether the presence of counsel is necessary to assure fairness and the effective assistance of counsel at trial.[2] Trial Counsel faulted for failing to request/obtain transcript of this in-chambers hearing. Trial Counsel had a chance to cross the child witness at trial and in fact did so. Although MNT filed, did not complain in irregularities in this procedure. Johnson's dissent aptly points out, "We cannot constitutionally use, as a standard, a task that cannot be performed." A little tough to get a transcript in time to cross a witness when the hearing is held the day voir dire starts. Also a transcript does not show body language, tone of voice etc. The pretrial hearing on determination of competency is important because it determines whether or not a critical witness will testify. Janet's practice note: many of this defendant's points of error were poured out because they were multifarious (more than one complaint squished into each point of error), shows why it hurts clients to do crucial hearings the day of trial, it also is important to always request transcript, In this case he would have had to ask for a continuance to do this and if he had not exercised due diligence to have pretrial matters heard early the TCT might have been within its rights to deny such continuance. Should have also objected to exclusion of client separately under the 6th A, right to effective assistance of counsel under 6A, confrontation clause Sixth A, right to put on a defense and due process under the 14th Am. This appellant also raised TX Const claims which is always a good idea but those were waived because not separately briefed and argued. Finally this should have been raised in a MNT, an argument could have been made there and more specifically at trial as to what specifically trial counsel would have done if allowed in chambers i.e. as suggested in Judge Johnson's dissent—want to see child's demeanor, lack of eye contact, the way the Judge asks her questions etc.

---

[1] Oliver v. State, *872 S. W. 2d 713, 716 (Tex. Crim. App. 1994).*

[2] Green v. State, *872 S. W. 2d 717,719 (Tex. Crim. App. 1994); United* States v. Ash, *413 U.S. 300, 313 (1973).*

THE GREAT WRIT: FAULTY FORENSICS

State's chemist is just "dry-labbing"[3]—he is not doing it to specifically hurt your client – he is just doing it. And he is not shooting up the stuff—just not testing it.

*Ex parte Leroy Edward Coty,*No. WR-79-318-02, Publish, 1-15-14, Hervey unanimous, "In order to prove a false-evidence claim, the applicant must first show the evidence in his or her case was false, and second that the evidence was material to his or her conviction or punishment." The TCCA will not presume falsity and materiality simply based on a lab analysist's misconduct on other cases. WE HOLD: that an applicant can establish that a lab tech's sole possession of a substance and testing results derived from that possession are unreliable, and we will infer that the evidence in question was false, if the applicant shows that: (1)technician in question is a state actor (2) the technician in question has committed **MULTIPLE** instances of **INTENTIONAL** misconduct in another case or cases (3) the technician is the same technician that worked on the applicant's case, (4) the misconduct is the type of misconduct that would have affected the evidence in the applicant's case, and (5) the applicant handled and processed the evidence in the applicant's case within roughly the same period of time as the other misconduct. Once the applicant has satisfied this initial burden – THEN the applicant has to prove the extent of the pattern of misconduct the technician is accused of then the burden shifts to the State to offer evidence demonstrating the lab tech committed no misconduct in applicant's case. THEN the applicant must prove the false evidence was material to his or her case. Price joins the majority but also gives us a concurrence advising us not to conflate materiality and falseness of the report. Janet's thoughts: Wow, wow, wow this is a difficult burden for the applicant who does not have access to the lab. I was privileged to have read all of the briefs connected to this case and to have observed the oral arguments. I was humbled by the brilliant lawyering, -- I think that the TCCA is saying we are bored with writs on drug cases –let's move on to something new.

THE GREAT WRIT PROCECURE
1107 NOW HAS PAGE/WORD LIMITS

Ex parte Charles Ray Walton, No. WR-75,599-03, Publish, 1-15/14, Keller unanimous, Each ground for relief raised on the form shall not exceed the two pages provided for it in the form and the brief shall only be 50 pages or less or 15,000 words or less.

PROBATION REVOCATIONS

Due process rights are violated when probation is revoked for violations occurring prior to the defendant being continued on probation (at prior MTR hearing) –in the absence of any newly discovered evidence of that violation

Tapia v. State, memorandum opinion, 1/9/14, 13th court of appeals. Notably this appellant did not specifically make a due process objection at his hearing and the TCCA probably would find that he should have to preserve error. It would be the epitome of arbitrariness for a court first to conduct a hearing on alleged violations and exercise its discretion to return the probationer to probation(whether by continuance of the probation or continuance of the probation) and then decide several months later to exercise its discretion in the opposite fashion by revoking the probation without any determination of a new violation. This does not apply to newly discovered

---

[3] *Pretending to test dope and giving a false positive on a lab report for a substance not ever tested.*

evidence of a previous violation that was not known at the first hearing. Or when a violation changes to a criminal conviction in the interim. See *Matheson v. State,* 719 S.W. 2d 204, 205 (Tex. Crim. App. 1986), *Rogers v. State*, 640 S. W. 2d 248, (Tex. Crim. App. 1981)(op. on State's first motion for rehearing),*McQueen v. State*, No. 13-11,00475-CR, 2012 WL 2860767.

The ever popular unpublished remand list which I report only to show, if it does, what issues the TCCA is remanding writs to the TCT to further develop the record so you can know the sexy new spring fashions

- ✓ *Alleged in the same writ, coerced into accepting a plea and allowed a favorable plea offer to expire.*
- ✓ *Bad advice on time credit.*
- ✓ *Complainant signed affidavit stating that she did not know anyone had been convicted of assault against her and Applicant was not the one who assault her although they found his dna.*
- ✓ *Dr. Coons is still a bad expert but plenty of evidence to affirm conviction without his testimony.*