the Jasuta / Schulman report

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TIBA's Case of the Week

Fifth Court of Appeals (Dallas)

Case Name: ***Tavario Jermaine Smith v. The State of Texas***

- **OFFENSE**: Possession of Marihuana / Unlawfully Carrying a Weapon
- **COUNTY**: Collin
- **C/A CASE No**. 05-19-01057-CR & 05-19-01059-CR
- **DATE OF OPINION**: December 31, 2020 **OPINION**: Justice Lana Myers
- **DISPOSITION**: Convictions Affirmed
- **TRIAL COURT**: CCL 1; Hon. Corinne Mason
- **LAWYERS**: Kyle Therrian (Defense); Kate Harrison (State)

(**Background Facts**): On October 23, 2017, City of McKinney police officer Derek Stansell pulled Appellant over for speeding. He stopped Appellant's vehicle at Bradley and Louisiana streets, in McKinney, Collin County, Texas. Officer Stansell testified that when he approached Appellant's car he detected "[a] strong odor of marijuana." Appellant told the officer he had a loaded 10-millimeter pistol in the center console. Officer Stansell had Appellant exit the car, and he patted him down for officer safety. During the pat down, Stansell felt what he "believed was a small baggie of marijuana" in Appellant's right pocket. He did not immediately seize the marijuana and instead conducted a search (undertaken with Appellant's consent) of Appellant's car. Officer Stansell saw "marijuana shake," i.e., "[s]mall amounts of marijuana," on both seats and in the floorboard of the vehicle. He also found a backpack in the front seat of the car that contained a loaded AR-15 rifle. A Glock 10-millimeter pistol was in the vehicle's center console. During the search, both Officer Stansell and the backup officer, Luis Moreno, the other witness called by the State, saw Appellant (whose hands were by now handcuffed behind him) make a "furtive movement"

that indicated he was trying to move his hands around to reach his front pocket. Stansell believed Appellant was trying to get to the marijuana to destroy it. Officer Moreno seized the marijuana.

533 Sufficiency of the Evidence / Marihuana: Appellant argues the State failed to prove he possessed marijuana as that term is now defined by statute. Specifically, he claims that the substance involved did not have a concentration of more than 0.3% tetrahydrocannabinol ("THC"). This issue stems from the passage by the Texas Legislature in H.B. 1325, which regulates the growth, production, and consumption of legal hemp products in Texas. Defense counsel objected at trial, held in August of 2019, to the admission of the marijuana evidence (State's exhibit 3), arguing H.B. 1325 made it lawful to possess marijuana with a THC concentration of 0.3% or less. He also argued the State failed to prove the THC concentration of the marijuana and that, without evidence of the THC concentration, the marijuana was inadmissible because the State failed to prove it was, in fact, marijuana.

Holding: H.B. 1325 passed while Appellant's case was pending, taking effect on June 10, 2019. *** Therefore, the question here is whether the amended definition of marijuana applies to prosecutions for possession of marijuana offenses committed prior to H.B. 1325's enactment but prosecuted, as Appellant's case was, after its effective date. Appellant argues that H.B. 1325 should apply to possession of marijuana offenses committed before June 10, 2019, and in support he cites the doctrine of abatement (a common law rule of statutory construction) and the legislative history of H.B. 1325, among other arguments. According to Appellant, the State failed to prove he possessed illegal marijuana (as opposed to legal hemp) because it did not introduce evidence of THC concentration of more than 0.3 percent, pursuant to H.B. 1325. The State responds that the plain language of H.B. 1325 -- read in light of the Code Construction Act -- shows that it applies only to offenses committed after it took effect. We agree with the State. *** The plain language of H.B. 1325 reinforces the conclusion that it applies prospectively because there are directives in the bill calling for future action to develop a new regulatory scheme to enforce it. *** By amending the definition of marijuana to exclude hemp, the Legislature narrowed the scope of what is now considered illegal marijuana. The Legislature did not reduce the punishment or penalty range for the offense of possession of marijuana. Therefore, according to its plain language, H.B. 1325 is not a penalty reducing statute that falls under section 311.031(b) of the Code Construction Act. Instead, H.B. 1325 creates new offenses and leaves the punishment for possession of marijuana offenses unchanged. *** Appellant has not shown that due process concerns prevent us from following long-accepted rules of statutory construction. Accordingly, we conclude the changes enacted by the Legislature in H.B. 1325 apply prospectively to offenses committed after the date it took effect, June 10, 2019, and that, as a result, the trial court did not err in implicitly overruling Appellant's objection.

533 Sufficiency of the Evidence / Marihuana: During Stansell's testimony on direct examination that the State offered the seized marijuana into evidence. The trial court heard arguments from counsel regarding whether the State was required to prove the THC

concentration of the marijuana. The court asked for briefs from the parties and took the matter under advisement. The State conditionally offered State's exhibit 3 after the trial court asked for briefs from the parties, but the court withheld a final ruling until it had an opportunity to determine admissibility. The trial court did not directly rule on the marijuana's admissibility, but it ultimately found Appellant guilty of possession of marijuana and unlawful carrying of a weapon. Appellant contends that the evidence is insufficient to show he possessed a usable quantity of marijuana because the marijuana evidence (State's exhibit 3) was never admitted.

Holding: Although the marijuana in this case was never formally admitted into evidence, the evidence is sufficient to show Appellant possessed a usable quantity of marijuana. The evidence showed the marijuana weighed 4.8 grams, and both officers testified Appellant possessed marijuana and that he possessed it in a usable amount. Appellant has not cited, nor have we found, legal authority holding the evidence insufficient merely because seized marijuana was never formally admitted into evidence. Based on the record in this case, a rational trier of fact could have reasonably concluded the elements of the offense of possession of marijuana were established beyond a reasonable doubt. Thus, the evidence is sufficient to support Appellant's conviction for possession of marijuana . . ..

423 Judgments & Sentences / Cruel and Unusual Sentences: Appellant argues the Fifth and Eighth Amendments of the U.S. Constitution prohibit punishing Appellant for his conviction for possession of marijuana because the Legislature reduced the punishment for Appellant's conduct to zero. Therefore, according to Appellant, any punishment in excess of zero exceeded the statutory maximum penalty for Appellant's conduct, constituted cruel and unusual punishment, and violated due process.

Holding: The State argues these sentencing issues were not preserved for Appellate review, and we agree. The record shows Appellant did not object to his sentence -- nor did he raise a proportionality complaint -- at the time the trial court sentenced him. Appellant also did not raise these issues in a motion for new trial. We conclude Appellant's complaints were not preserved for Appellate review. *** Furthermore, even if we overlooked the lack of preservation, the record shows Appellant was charged with possession of marijuana in an amount less than two ounces, a Class B misdemeanor punishable by up to 180 days in jail and/or a fine not to exceed $2,000. *** Appellant was also charged with unlawful carrying of a weapon, a class A misdemeanor punishable by up to one year in jail and/or a fine not to exceed $4,000. The trial court found Appellant guilty of both offenses. During the punishment hearing, defense counsel asked the court to sentence Appellant to two days' confinement, with credit given for two days already served. The State requested a jail sentence of thirty days' confinement and forfeiture of the seized weapons. The trial court ultimately assessed punishment for each offense of twenty days' confinement in the county jail, a $500 fine, court costs, and it ordered forfeiture of the seized weapons. *** Generally, so long as the sentence is within the proper range of punishment, we do not disturb it on appeal. Appellant fails to show how the trial court's assessment of punishment

(which was at the lower end of the penalty ranges for both offenses) constituted an abuse of discretion.

(**John G. Jasuta**) A similar situation occurred many years ago which proves Appellate counsel's reduction in sentence theory wrong, and shows that the Court of Appeals reached the correct decision, regardless of the Legislature's intent. Prior to the 1973 Legislature, possession of marijuana was a felony under Article 725b of the (1925) Penal Code. Section 6.01(c) of the Texas Controlled Substances Act, enacted in 1973, authorized "re-sentencing" as misdemeanors in certain cases in which the offense occurred prior to enactment of section 6.01(c). That provision was held to be unconstitutional in ***Ex parte Giles***, 502 S.W.2d 774 (Tex.Cr.App. 1973), and ***Smith v. Blackwell***, 500 S.W.2d 97 (Tex.Cr.App. 1973). In ***Giles***, the CCA held that "a resentencing to a less severe punishment would amount to a commutation of sentence which is exclusively a prerogative of the Governor under the Texas Constitution." Subsequently, in ***State ex rel. Pettit v. Thurmond***, 516 S.W.2d 119 (Tex. 1974), our Supreme Court held that, because the defendants involved had been convicted and placed on probation under the previous statute, the trial judge had no discretion, upon the revocation of their terms of probation, but to sentence them pursuant to Article 725b, rather than Section 6.01(c). Thus, the fact that the Legislature re-defined marihuana to exclude "road weed," the near beer of this particular prohibition, and CBD products, could not help this Appellant who had the misfortune of being caught too early. One a more personal note, this is, once again, a violation of the cardinal rule to not commit multiple offenses simultaneously, here speeding and leaving a bunch of "shake" all over your car.

(**David A. Schulman**) John's recollection of ancient Texas criminal law history is once again most beneficial. Certainly prior to the 2019 legislative action, that one possessed hemp rather than marihuana was unimportant in a prosecution for possession of marihuana. See ***Pena v State***, 226 S.W.3d 634 (Tex.App. - Waco 2007)(see ☙, Vol. 15, No. 18; 05/14/2007). It should also be noted that possession of hemp was never determined to be unconstitutional. Rather, the Legislature simply decided the State would no longer prosecute for hemp possession. Had Appellant's trial taken place after the 2019 legislative action, I would probably agree (John's history lesson notwithstanding) that the change in the statute was a reduction in punishment for possession of hemp, and that due process would have required the State to prove that the substance was marihuana, not hemp. As the change in the law came after trial, while the case was on appeal, however, I think there would need to be evidence in the record which indicated that, if true, the defendant possessed hemp, rather than marihuana. Thus, in this case, because this is direct appeal, I think the Court of Appeals reached the correct result. I fully expect there will be *en banc* reconsideration and, thus, a significant possibility of a petition for discretionary review.

Ed Note: The Court of Appeals also rejected Appellant's claim that there was no trial for the offense of unlawful carrying of a weapon because he was not arraigned for and did not enter a

plea to that offense. The Court found that the judgment recited the events occurred and "we presume the trial court's written recital in the final judgment of conviction that Appellant pleaded not guilty to unlawful carrying of a weapon is truthful."