the Jasuta / Schulman report

Volume 29, Number 16 ~ Monday, May 3, 2021 (Report No. 1,367)

TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Vith Loch v. The State of Texas***

- **OFFENSE**: Murder
- **COUNTY**: Harris
- **COURT OF APPEALS**: Houston [1st] 2018
- **C/A CITATION**: Unpublished
- **C/A RESULT**: Conviction Reversed
- **CCA. CASE No**. PD-0894-18 **DATE OF OPINION**: April 28, 2021
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Kevin Yeary **VOTE**: 6-3-0
- **TRIAL COURT**: 209th D/C
- **LAWYERS**: Cheri Duncan (Defense); Stacey Soule (SPA)

(**Background Facts**): Appellant was arrested in 2016 and charged with the "cold case" 2004 murder of Soeuth Nay. At trial, Tavey Mao, the deceased's cousin, testified that he saw Appellant threaten the deceased with a firearm near the time of his murder. Appellant was the last person seen with the deceased on the night he went missing. Witnesses stated that the two were arguing then left together in Loch's truck. The deceased's decomposed body was found three weeks later.

217 Pleas of Guilty / Admonishments by Trial Court / Voluntariness of Plea: At his arraignment, the trial court advised Appellant as to the range of punishment for the offense of murder, but it did not provide any further admonitions. Appellant testified that he discussed his case at length with his trial counsel, including all potential defensive theories and strategies.

However, despite his trial counsel's presentation of various possible defensive strategies, he chose to plead guilty to committing the murder. He also pled true to a single enhancement paragraph from his indictment. The trial court then gave Appellant a perfunctory pre-plea admonishment that included only the range of punishment that he faced. Appellant subsequently entered his plea of guilty before a jury, and a trial was had on the issue of his punishment. On direct appeal, Appellant complained that his plea was involuntary because of the trial court's failure to admonish him, pursuant to Article 26.13(a)(4), that pleading guilty might result in his deportation. In an unpublished opinion, the Court of Appeals reversed and remanded, holding that the trial court erred by failing to include the admonishment, and that this error was harmful. Although the Court of Appeals acknowledged in its harm analysis that the strong evidence of Appellant's guilt "unquestionably favored the State," it concluded that it made no difference here because there was no evidence that Appellant knew about the deportation consequences of his plea. Referencing the "fair assurance" standard that the Court of Criminal Appeals announced in ***VanNortrick v. State***, 227 S.W.3d 706 (Tex.Cr.App. 2007)(see 🙞, Vol. 15, No. 25; 07/02/2007), the Court of Appeals concluded that "we cannot have fair assurance that his decision to plead guilty would not have changed had the trial court admonished him of the possible deportation consequences of his guilty plea." Both Appellant and the SPA agree that, prior to the entry of his pleas, the trial court failed to admonish him about the possibility that his plea might result in his deportation. The SPA argues that Appellant was already removeable before he pled guilty as a result of his several prior convictions, including felonies in both Florida and Texas, and that, as a result, any failure on the trial court's part to admonish him about possible deportation as a result of his guilty plea must have been harmless. In addition, the SPA argues that Appellant would not have changed his guilty plea, even if he had been admonished, because he knew he was already removeable, there was strong evidence of his guilt, and he was morally motivated to plead guilty.

Holding: Federal immigration law is complex and subject to change. *** There are even periods of time when the federal executive branch refuses to enforce it. *** So, it is of course possible that Appellant may never be removed from the United States. On the other hand, it is also possible that, if he ever is removed, the United States Government may even rely in whole or in part upon his conviction in this case to compel his removal. But it is clear to this Court that, at the time of his plea, he was likely already subject to removal for multiple reasons. *** A single prior felony conviction can lead to the deportation of a non-United States citizen. But as a non-citizen, Appellant's numerous prior criminal convictions, including felonies in two states, presented what must be described as serious obstacles to his ability to avoid deportation. And the Florida pen pack reflects that, as of December 21, 2015, the federal government still sought to arrest and remove Appellant from the country. *** A strong likelihood of Appellant's removal already existed, and it would not have appreciably changed regardless of whether Appellant pled guilty, or he went to trial on the question of his guilt and was acquitted. *** The fact that this strong likelihood existed, combined with the fact that the evidence of guilt in this case was strong, leads us to conclude that,

even had he been properly admonished, it would not have had an impact on his decision to plead guilty. Of this we have a fair assurance.

Concurring / Dissenting Opinions: **Judge Barbara Hervey**, **Judge David Newell**, and **Judge Scott Walker** each concurred, each without note.

(**David A. Schulman**) Based on my experienced with people in this fellow's situation, and considering the facts and circumstances set out in the Court of Appeals unpublished opinion, the fact that they have a "strong likelihood" of being removed is only one more reason NOT to plead guilty. If Appellant even considered the possibility of removal, he would have probably recognized that he had "nothing" to lose and would not have pled guilty. As to the SPA's argument that, since he knew he was removeable he would have been "morally motivated to plead guilty," I suggest you read the opinion of the court below. Based on the defendant described in that opinion, I'm reasonably certain that this fellow's "morals" had absolutely nothing to do with his decision making process.

(**John G. Jasuta**) I did think the moral motivation argument was humorous. Who says lawyers are without a sense of the absurd?