the Jasuta / Schulman report

Volume 30, Number 43 ~ Monday, November 21, 2022 (Report No. 1,444)

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Published By
Texas Independent Bar Association
1801 E. 51st St., Ste. 365-474
Austin, Texas 78723
Tel. 512-850-6544

Web Page: www.texindbar.org

TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Ex parte Genovevo Salinas Salinas v. The State of Texas***

- **NATURE OF THE CASE**: Post-Conviction *Habeas Corpus*
- **COUNTY**: Harris
- **CCA. CASE No**. WR-90,982-01 **DATE OF OPINION**: November 16, 2022
- **DISPOSITION**: Relief Denied
- **OPINION**: Judge Kevin Yeary **VOTE**: 5-1-1
- **TRIAL COURT**: 230th District Court
- **LAWYERS**: Neal Davis (Defense);

Ed Note: This is a lengthy opinion with a complicated set of facts and a complicated application of law. Members are strongly encouraged to read the entire opinion.

(**Background Facts**): The underlying offense involved the double homicide of Juan and Hector Garza, committed in December of 1992. Applicant was only charged with the murder of Juan Garza -- not the capital murder of both. Aware that the police suspected him of the crime, Applicant absconded and was not arrested until 2007. Applicant's first trial, in 2008, resulted in a hung jury. But a different jury found him guilty at his second trial in 2009, and it assessed his punishment at confinement in the penitentiary for twenty years and a $5,000 fine.

Ed. Note (**Procedural History**): Applicant's trial attorneys were the same for both trials. He argues here that they performed deficiently at his second trial, primarily by allowing the admission of evidence that he stood mute -- saying nothing at all -- when investigating officers posed one particular question during an interview at the station house in January of 1993. The investigating detectives asked Applicant whether forensic toolmark examination would reveal that the shotgun recovered from his parents' home, where he lived at the time of the offense, was the weapon used to kill the Garzas. Applicant, who had waived his right to silence and readily responded to their questions up to that point, would not answer. At Applicant's second trial, in 2009, trial counsel objected to the admission of this evidence based upon Applicant's Fifth Amendment privilege not to be compelled to be a witness against himself, arguing that his pretrial silence could not constitutionally be used against him regardless of whether he was in custody at the time of the interview. Applicant pursued this argument on direct appeal. His contention was rejected at every stage. See, e.g., ***Salinas v. State***, 368 S.W.3d 550 (Tex.App. - Houston [14th] 2011)(see ¶§, Vol. 19, No. 13; 04/04/2011); ***Salinas v. State***, 369 S.W.3d 176 (Tex.Cr.App. 2012)(see ¶§, Vol. 20, No. 12; 04/30/2012), and ***Salinas v. Texas***, 570 U.S. 178 (2013)(see ¶§, Vol. 21, No. 25; 06/24/2013) (plurality opinion). In this *habeas corpus* application, Applicant argues that trial counsel at the second trial performed in a constitutionally deficient manner by failing to object to the use of his pre-trial silence on two other grounds.

Ed. Note (**Applicant's Silence**): In January 1993, Houston police began to suspect Petitioner of having committed two murders the previous month. Police visited Petitioner at his home and he agreed to hand over his shotgun for ballistics testing and police asked Petitioner to come to the police station to take photographs and to clear himself as a suspect. At the station, police took Petitioner into what he described as "an interview room." Because he was "free to leave at that time," the police did not give him ***Miranda*** warnings. The police then asked Petitioner questions, and Petitioner answered until the police asked him whether the shotgun from his home"would match the shells recovered at the scene of the murder." At that point Petitioner fell silent and refused to answer.

[¶§ **124 Right to Counsel / Ineffective Assistance of Counsel**]: Before introducing the subject of Applicant's refusal to answer the one question at issue here, the prosecutor approached the bench pursuant to a motion in limine that he said had been granted pretrial (although no such motion/order appear in the record). Applicant's counsel objected that to introduce Applicant's refusal would violate his Fifth Amendment privilege to remain silent "whether he was in custody or not." Without any allusion to the ***Miranda*** warnings, the prosecutor commenced to lead a State's witness (Sgt. Elliott) through a narrative of the questions Applicant did answer at the station (as reflected in the offense report). Eventually, Elliot testified that he asked Applicant whether shells from the shotgun in question would match the shells recovered at the scene of the murder. He then testified that Applicant "would not answer." In his application, Applicant argues that trial counsel should have objected that admission of the evidence of his silence violated the Fourteenth Amendment's Due Process Clause as "fundamentally unfair" because it came after he was cautioned by police, pursuant to the dictates of ***Miranda v. Arizona***, 384 U.S. 436 (1966), that

his silence could not be used against him. See ***Doyle v. Ohio***, 426 U.S. 610, 619 (1976) ("We hold that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving ***Miranda*** warnings, violated the Due Process Clause of the Fourteenth Amendment").In its written findings and conclusions, drafted by Applicant's *habeas* counsel, the convicting court found that Applicant's silence had occurred **after** he was in custody and **after** he was given ***Miranda*** warnings, and it concluded that there was "no reasonable defense strategy" that would justify "counsels' failure to object to the admission of [Applicant's] custodial interrogation which included his silence."

Holding: Perhaps the most comprehensive discussion of "selective silence" in a case that applied Doyle to grant relief is the Ninth Circuit opinion in ***Hurd v. Terhune***, 619 F.3d 1080 (2010) another AEDPA opinion that issued more than a year after Applicant's second trial. After he was Mirandized, Hurd expressed a willingness to speak with investigators, but during the interview he repeatedly refused to "reenact" the offense or submit to a polygraph. The Ninth Circuit disagreed that an apparent waiver of ***Miranda*** rights meant that a defendant could not thereafter rely upon ***Miranda***'s implicit promise that silence could not be used against him without his first at least re-invoking that right. *** "That silence may not require police to end their interrogation," the court observed, "but it also does not allow prosecutors to use silence as affirmative evidence of guilt at trial." The court concluded that the state court judgment to the contrary was not simply incorrect, but an unreasonable application of the applicable federal law. *** Had Applicant's trial counsel invoked ***Doyle*** on the facts of this case, they would have been no more assured of success in keeping out the evidence of Applicant's refusal to answer the "shotgun comparison" question than they could have been of obtaining relief on the Fifth Amendment-based objection that they actually did make at trial. Even if ***Hurd*** represents a trend in Applicant's favor, the law remains ultimately unsettled. Under these circumstances, we cannot declare that counsel's failure in 2009 to invoke ***Doyle*** was so professionally derelict as to fall outside "the wide range of reasonable professional assistance[.]" *** We cannot conclude that Applicant's trial counsel performed deficiently in this respect.

[124 **Right to Counsel / Ineffective Assistance of Counsel**]: Applicant argues that trial counsel could and should have kept the evidence of his refusal to answer out because it was elicited as part of an oral statement made while Applicant was in police custody, and such statements are inadmissible as a matter of state law [Article 38.22, sec. 3(1)(1)] unless they are electronically recorded ("No oral . . . statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless . . . an electronic recording . . . is made of the statement[.]").

Holding: At least judging by his oral statement at the writ hearing, the convicting court judge seemed most convinced that Applicant's trial counsel performed deficiently in failing to re-assert an Article 38.22, Section 3, objection to Applicant's entire oral statement including his refusal to answer the "one" question at the second trial. And this does in fact seem to be a closer question. Counsel could have sought a pretrial hearing at which to develop a record outside the presence of the jury in order to more precisely ascertain whether [police officers] would in fact adhere to

the chronology of events memorialized in their offense report. There was a substantial argument to be made that Applicant's statement was, in its entirety, objectionable under the statute as an unrecorded custodial statement. *** Nevertheless, it is far from clear that this argument would have prevailed had Applicant's trial counsel asserted it at least not as it pertained to Applicant's silence. This Court has yet to speak to the question of whether the refusal to answer a question during a police interrogation that is not electronically recorded actually counts as part of the "oral statement" that Article 38.22, Section 3, contemplates. At least one Court of Appeals, the Amarillo Court of Appeals, has held that it does not, and its opinion was published a decade before Applicant's second trial. See ***Beck v. State***, 976 S.W.2d 265 (Tex.App. - Amarillo 1998)(see 🙾, Vol. 6, No. 29; 07/29/1998). *** Nothing in the record shows that Applicant's trial counsel was unaware of this intermediate-court authority. Counsel also testified at the writ hearing that he thought it actually benefitted Applicant to admit at least part of the statement. *** This Court refused discretionary review in both ***Beck*** and ***Pina v. State***, 38 S.W.3d 730 (Tex.App. - Texarkana 2001)(see 🙾, Vol. 9, No. 4; 01/29/2001), thus leaving the question whether silence should be regarded as part of an "oral statement" for purposes of Article 38.22, Section 3(a), in an unsettled state. That was the state of the law at the time of Applicant's second trial in 2009, and it remains the state of the law to this day. Under these circumstances, we cannot fault Applicant's trial counsel for opting to make an all-encompassing objection based on Applicant's constitutional right to silence. That this strategy did not ultimately prevail does not render trial counsels' performance constitutionally deficient. See ***Martin v. State***, 623 S.W.2d 391 (Tex.Cr.App. 1981).

Sidebars

(**John G. Jasuta**) Damn! I do love me an old-fashioned American apology dance. Everyone gets one except the defendant.

(**David A. Schulman**) The first thing that struck me was that the trial court's factual findings appear to contradict the facts set out in the SCOTUS opinion back in 2013, which stated that because Applicant was "free to leave at that time . . . they did not give him ***Miranda*** warnings." If nothing else, that difference demonstrates the politics involved. Reviewing the three previous published opinions in this case (cited above), I have to conclude that the Court has reached the correct result.

Ed Note: The Court rejected Applicant's four other ineffective assistance claims, finding that there is no reasonable probability that they would have altered the outcome of Applicant's trial.

Concurring / Dissenting Opinions: **Judge Barbara Hervey** concurred without note, while **Judge Scott Walker** dissented without note. **Judge David Newell** and **Judge Mary Lou Keel** did not participate.