the Jasuta / Schulman report

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Eluid Lira & Scott Huddleston v. The State of Texas***

- **OFFENSE**: Assault on a Public Servant
- **COUNTY**: Jones
- **COURT OF APPEALS**: Eastland 2021
- **C/A CITATION**: 630 S.W.3d 439 (***Lira***); 630 S.W.3d 436 (***Huddleston***)
- **C/A RESULT**: Convictions Reversed
- **CCA. CASE No**. PD-0212-21 (***Lira***); PD-0213-21 (***Huddleston***)
- **DATE OF OPINION**: January 11, 2023
- **DISPOSITION**: Court of Appeals Affirmed
- **OPINION**: Judge David Newell **VOTE**: 5-1-3
- **TRIAL COURT**: 259th D/C; Hon. Brooks Hagler
- **LAWYERS**: John Moncure (State Counsel for Offenders); John Messinger (SPA)

(**Background Facts**): Both Appellants reached plea agreements with the State and their cases were set for back-to-back pleas via a "zoom/video-conference plea docket." Prior to the hearing, counsel for Appellants filed identical motions objecting to the trial court's setting the cases for plea hearings via a Zoom videoconference. In the motions, Appellants argued that pleading by videoconference would violate their constitutional right to counsel, right to public trial, and statutory rights under Articles 27.18 and 27.19, C.Cr.P. The State filed identical responses to the motions and argued that the use of Zoom videoconference technology during the hearings would not affect the Appellants' ability to consult with counsel; intrude on confidential communications between Appellants and their attorneys; or restrict the public's access to the proceeding. Ultimately, the State argued that Emergency Orders issued by the Supreme Court of Texas controlled over the Code of Criminal Procedure.

[**201 Trial Courts / Treatment of Defendant (Defendant not Present)**]: When the day for the videoconference arrived, the trial court heard arguments regarding the Appellants' motions and overruled them. The parties agreed that Appellants would retain their right to appeal "on constitutional issues, public trial issues, the 27.18 all of those issues, the right to counsel . . .." On appeal, the Appellants argued that their statutory right to enter a guilty plea in person in open court was a substantive right. Because of this, it was not subject to the Texas Supreme Court's emergency orders regarding the modification or suspension of deadlines and procedures. The State argued that, if preserved, Appellants' arguments failed because the Texas Supreme Court had the authority to modify or suspend "the act of criminal defendants appearing live in live courtrooms[.]" Relying in part on ***State ex rel Ogg***, 618 S.W.3d 361 (Tex.Cr.App. 2021)(see , Vol. 29, No. 8; 03/08/2021), the Court of Appeals agreed with the Appellants, holding that paragraph 3(c) of the Seventeenth Emergency Order could not require a defendant in a criminal case to appear via videoconference for a plea hearing over his objection. ***Lira v. State*** and ***Huddleston v. State***; 03/25/2021 (see , Vol. 29, No. 11; 03/26/2021). On discretionary review, the SPA claimed that Appellants had not "lost a substantive right or been harmed."

Holding: This is akin to the situation we faced in ***Lilly v. State***, 365 S.W.3d 321 (Tex.Cr.App. 2012)(see , Vol. 20, No. 16; 04/23/2012), in which the defendant objected to the location of a plea-bargain proceeding (claiming it violated his right to a public trial) prior to entering the plea. In ***Lilly***, we rejected the argument that the defendant's public trial claim had been waived by acceptance of the plea bargain. To the extent that the SPA is arguing that Appellants consented to the videoconference by accepting the plea bargain, we reject that argument just as we rejected the waiver argument in ***Lilly***. *** According to the SPA, this case is distinguishable from ***Ogg*** because the statute at issue does not confer jurisdiction or authority over a particular type of proceeding. Finally, the SPA argues that, even if the trial court was not authorized to suspend the consent requirement, the result was regular trial error subject to non-constitutional harm analysis and the Appellants were not harmed because they "got everything [they] wanted." *** The State argues that we should hold that any error in proceeding without Appellants' personal presence (or without a written consent to presence via videoconference) is subject to a harmless error analysis. The State's point is well taken. We have held before that no error, except those labeled as structural error is categorically immune to a harm analysis. We acknowledge that there are cases in which we have held that lack of compliance with Article 1.13 can be harmless. But those cases involved situations in which there was at least consent as a matter of fact even if the appropriate form of consent was not present in the record. Here, the Appellants did not consent in fact to proceed via videoconference. The error was not merely the failure to file the appropriate paperwork. Proceeding without securing Appellants' consent abrogated Appellants' substantive statutory right to be present. *** Moreover, these cases pre-date ***Ogg***. In ***Ogg*** we went beyond saying that the lack of written consent to a jury waiver meant that the trial court had a ministerial duty to empanel a jury. *** This case boils down to the simple question of whether the Supreme Court's Emergency Order granted a trial court authority to preside over videoconferenced plea hearings when the Appellants had not consented. We conclude that it does

not. A trial court has no authority to hold a videoconferenced plea hearing when the defendant has not consented. As we held in ***Ogg***, the Texas Supreme Court's Emergency Order cannot grant authority where none exists.

> **Concurring / Dissenting Opinions**: Presiding Judge Sharon Keller filed a dissenting in which **Judge Mary Lou Keel** and **Judge Michelle Slaughter** joined. She was the author of the Court's opinion in ***Ogg*** and argued that ***Ogg*** does not support the majority opinion. She believes that remote proceedings were authorized and that, even if they were not and the trial court erred, the error was harmless because the "Appellants here received exactly what they wanted: the sentences they bargained for." **Judge Kevin Yeary** concurred without note.

Sidebars

(**John G. Jasuta**) Maybe the State should have negotiated presence as a part of the plea bargain. With respect to the conspiracy theorists, given the plea bargain, it seems like much ado about nothing

(**David A. Schulman**) The majority rejects the SPA's harm analysis and the cases on which it relies because: (a) the right to be present is a substantive right, and (b) "these cases pre-date ***Ogg***." In that regard, I agree with Judge Keller in that that ***Ogg*** does not support the majority opinion. The court proceedings ***Ogg*** were contested, while the proceedings in these cases were uncontested. Rather than simply say that the trial court was not authorized to conduct the plea proceedings remotely, the Court should have addressed whether denying a defendant the right to admit his or her guilt in a courtroom that is open to the public is a substantive right. That, after all, is all the Appellants have won.