the Jasuta / Schulman report

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Donnell Sledge v. The State of Texas***

- **OFFENSE**: Possession of Controlled Substance / Possession of a Firearm by Felon
- **COUNTY**: Dallas
- **COURT OF APPEALS**: Dallas 2021
- **C/A CITATION**: 637 S.W.3d 770
- **C/A RESULT**: New Punishment Hearing Ordered
- **CCA. CASE No**. PD-0065-22 through PD-067-22 **DATE OF OPINION**: March 8, 2023
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Jesse McClure **VOTE**: 5-4
- **TRIAL COURT**: Cr D/C 2; Nancy Kennedy
- **LAWYERS**: Ron Goranson (Defense); Emily Johnson-Liu (SPA)

(**Background Facts**): On the evening of June 27, 2017, approximately ten to fifteen people, including Appellant, were playing dice in a field near an apartment complex. Witnesses heard an argument between Appellant and another participant, Demarcus Johnson. After the two men's argument appeared to have calmed down, Johnson's mother, Margaret Hamilton, walked toward the field, yelling, "I'm fittin' to shut the block down." A few minutes later, Hamilton, Johnson, Hamilton's two other sons, and some of their friends all ran inside the apartment complex and into a unit before shutting the door. Witnesses sitting outside the apartment watched Appellant arrive at a run, while brandishing a gun, and enter the same apartment. Appellant exited the apartment to demand of the witnesses there that they inform him of where Hamilton was. When he did not locate Hamilton, Appellant left the apartment in a car driven by another individual. Appellant then proceeded down the street to the apartment complex where Hamilton lived. Appellant approached four individuals sitting on a porch in front of Hamilton's apartment complex

and asked where she was. When they did not respond, he walked past them and into the apartment complex where he fired shots into the hallway, kicked in the screen door to one unit, held his gun up to the head of the man who opened the door behind the screen, and demanded to know where Hamilton was. Appellant only left when he heard someone out in the hallway say that the police were on their way.

Ed Note (**Appellant's First Trial**): The case went to trial in 2018, with Appellant pleading not guilty before a jury. That jury found Appellant guilty of each offense and assessed punishment at 11 years' imprisonment in the drug cases and 10 years' imprisonment in the gun case. The jury found the deadly weapon enhancement alleged in the drug cases and the punishment enhancement paragraphs alleged in all three cases "not true." Five days later, Appellant moved for a new trial in all three convictions, with the sole stated ground being only that "the verdict is contrary to the law and evidence." The trial court's docket sheet indicates the State did not oppose the motions. There does not appear to have been any hearing on the motion for new trial, and neither party provided a record of the first trial. The trial court granted Appellant's motion for new trial in all three cases in July 2018.

Ed Note (**Appellant's Second Trial**): At one point between trials, defense counsel discovered that Appellant had been "inadvertently" shipped to TDC. A bench warrant was immediately prepared and presented and Appellant was returned to Dallas in October of 2018. In December 2018, Appellant filed an untimely *pro se* notice of appeal in the Fifth Court of Appeals. The appeal was dismissed the appeal for want of jurisdiction, on grounds the granted motions for new trial restored the cases to their pretrial status. Thereafter, throughout pre-trial matters, all parties appeared to agree that the State would try Appellant again. At arraignment, however, defense counsel argued double jeopardy barred a second trial because, while awaiting the second trial, Appellant was sent to TDCJ, given an inmate number, "and actually went up for parole." The State argued that there was no double jeopardy in this case. The trial court asked defense counsel for case law. She indicated she would provide it but, apparently, never did. Appellant was re-indicted for the aggravated assault of Rickey Pitts arising out of the same criminal transaction as that litigated during the first trial. After hearing the evidence, the jury found Appellant guilty of unlawful possession of a firearm, possession with intent to deliver cocaine, and possession with intent deliver heroin. They jury returned a verdict of not guilty as to the aggravated assault charge.

Ed Note (**Direct Appeal**): Appellant claimed that trial counsel was ineffective for failing to object to the State's deadly weapon allegations and habitual offender enhancement paragraphs on grounds of collateral estoppel when the jury from Appellant's first trial found them "not true." The State argued that the record was insufficient to show ineffective assistance of trial counsel and trial counsel was nevertheless not ineffective. Both parties' arguments centered on Appellant's entitlement to collateral estoppel on the punishment enhancements. Responding to the parties' allegations, the Court of Appeals analyzed the applicability of collateral estoppel only in relationship to the punishment enhancements. ***Sledge v. State***, 637 S.W.3d 770 (Tex.App. - Dallas 2021)(see G&S, Vol. 29, No. 33; 08/30/2021). The Court of Appeals recognized that "*there is no*

motion to set aside a verdict favorable to the accused," and further found no "authority suggesting the defendant must forego favorable portions of a verdict as a condition of challenging the balance of the verdict that was answered against him" or an indication that such was the intent of trial counsel since the motion was granted "without any specific grounds identified." Finally, the Court of Appeals found conclusive support for the contention that the State was precluded from relitigating the enhancement allegations. As a result of that conclusion and although the record was concededly silent as to trial counsel's justification for the failure to argue collateral estoppel, the Court of Appeals found trial counsel ineffective and remanded for a new hearing on punishment.

Ed Note (**Rehearing**): The State filed a motion for rehearing in the Court of Appeals in which it noted, for the first time, that the motions for new trial granted in all three cases were not void of specific grounds as the Court of Appeals had recited, but were explicitly based on insufficiency of the evidence. It also noted that the State lost its opportunity to challenge the orders under the Code of Criminal Procedure when it did not appeal and twenty-one days passed after the orders were entered. The State went on to posit that, if the trial court intended to grant the motions on grounds of legal insufficiency, it was required to enter a judgment of acquittal. The State requested abatement in order to determine the basis on which the motions were granted. The court of appeals denied the State's motion for rehearing in a summary response which reiterated its grounds for granting a new punishment hearing, but it did not address the effect the "contrary to" language had on Appellant's right to avoid a subsequent trial for the same offenses in detail. The appellate court recited only that it is "obliged by the presumption of regularity to reject the notion that trial counsel entered into a secret agreement contrary to the record and the premise of this appeal and failed to record it or disclose it to this Court." The motion for ehearing was denied. ***Sledge v. State***, 637 S.W.3d 967 (Tex.App. - Dallas 2022)(see 𝔊𝔖𝔖, Vol. 30, No. 1; 01/10/2022).

[𝔊𝔖𝔖 **61.01 Challenges to Prosecution / Double Jeopardy / Actual Jeopardy**]: The State Prosecuting Attorney's Office petitioned this Court, requesting clarification on the effect of a motion for new trial granted on grounds that "the verdict is contrary to the law and evidence." The State concedes that this Court has explicitly held the contrary-to-law language translates to legal insufficiency as decided in ***State v. Zalman***, 400 S.W.3d 590 (Tex.Cr.App. 2013)(see 𝔊𝔖𝔖, Vol. 21, No. 23; 06/10/2013). It also notes that such an interpretation of the contrary-to language would necessitate removal of the ground from Rule 21.3, Tex.R.App.Pro., which outlines the grounds for which a new trial must be granted. The State further posits that it could have appealed the ruling, but where it failed to do so and appreciating ***Zalman*** as precedential, "a motion with only these magic words requires Appellant and others like him to be acquitted." The State would encourage a narrower application of ***Zalman***, however, based on the use of contrary-to language as a "catch all" category and the unusual circumstances of this case which purportedly suggest the motion for new trial was granted on grounds other than legal insufficiency. The State's support for such an interpretation in this case lies in the fact the motion was neither opposed nor appealed by the State and that there is an absence of express reasoning

in the record for the decision to grant a new trial. The State argues that specificity in the ruling operated solely to the benefit of the State. As such, it could waive that benefit as it did here. Appellant opposes the State's interpretation of the motions, but not the applicable law. He agrees that the interpretation of "contrary to the law and evidence" as constituting a legal sufficiency challenge is inapposite with Rule 21.3 permitting a new trial on those grounds. Because the motions and orders provided no more context than the bare recital, however, the default interpretation must be based on the plain language of the motions, not an imagined justification outside the record.

Holding: This case thus pivots on this Court's interpretation of silence and the bare language, "the verdict is contrary to the law and evidence." ******* Because double jeopardy concerns affect fundamental, constitutional rights, they "may be raised for the first time on appeal, or even for the first time on collateral attack when the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record and when enforcement of usual rules of procedural default serves no legitimate state interests." ***Gonzalez v. State***, 8 S.W.3d 640 (Tex.Cr.App. 2000)(see ᏫᏋᏚ, Vol. 8, No. 1; 01/10/2000). Here, the issue was raised for the first time on appeal, and the Court of Appeals addressed the effect of the motion for new trial on both the convictions and the enhancements. ******* Because the double jeopardy concerns were raised before the Court of Appeals, and the Court of Appeals addressed them in its decision, the issue is properly before us. ***Stringer v. State***, 241 S.W.3d 52 (Tex.Cr.App. 2007)(see ᏫᏋᏚ, Vol. 15, No. 44; 11/12/2007). ******* Under principles of double jeopardy, no person may be "subject for the same offence to be twice put in jeopardy of life or limb." The Fifth Amendment offers three distinct protections: "protection against a second prosecution for the same offense after acquittal;" "protection against a second prosecution for the same offense after conviction;" and "protection against multiple punishments for the same offense." ***Bigon v. State***, 252 S.W.3d 360 (Tex.Cr.App. 2008)(see ᏫᏋᏚ, Vol. 16, No. 2; 01/21/2008). Our review in this case concerns the first category, namely whether Appellant's first prosecution and conviction -- which culminated in the trial court's decision to grant a boilerplate motion for new trial -- constituted an acquittal such that Appellant's second prosecution for the same offenses violated the Fifth Amendment. ******* Under Texas Rule of Appellate Procedure 21.3, "a defendant must be granted a new trial, or a new trial on punishment," for any of the eight listed reasons in that rule, including (h), "when the verdict is contrary to the law and the evidence." ******* This provision, standing alone, "raise[s] a sufficiency challenge and only a sufficiency challenge." *** [This case] presents the novel issue of whether a motion for new trial granted on explicit sufficiency grounds, operates to preclude a second trial on the same offenses. The State asks this Court to employ a double standard and hold that, where an appellant complains the verdict is contrary to the law and evidence, he is confined to litigating only sufficiency on appeal, but otherwise where the order granting a new trial is not appealed and an appellant is tried a second time, we may imply an alternate meaning in the motions and corresponding orders. We refuse to subscribe to this reasoning. ******* While we find it strange that the State was unopposed to Appellant's motions and subsequently did not appeal the trial court's decision to grant them, those facts alone do not sufficiently alert us to any specific, alternate meaning behind the trial court's decision to grant the motions. If, as the State suggests, this Court

could imply an alternate meaning whether based on evidence recited in the motion, the arguments presented at the hearing, or the trial court's oral justifications for its decision to grant the motions, we certainly cannot do so where the record is silent, or worse yet, absent. *** We share the State's concern that, if the contrary-to language is listed in Rule 21.3 as a ground for a motion for new trial, it logically would contain some meaning other than legal insufficiency. Indeed, we have so held. See ***Ortega v. State***, 668 S.W.2d 701 (Tex.Cr.App. 1983). *** Again, we would stress that no such alternate meaning has been presented to this Court. We cannot imply such meaning by the parties' false impression that the orders "reset" the trial, rather than require acquittal. *** Allowing the State to litigate the legitimacy of the motion for new trial where it has otherwise sat on its rights, would improperly provide it a second opportunity not permitted in the Rules of Appellate Procedure. As a result, we stress that our opinion should not be construed to endorse vague motions for new trial, especially when unaccompanied by a corresponding hearing. *** [The] trial court's reasoning for granting a second trial is unknown. The record, motion, and order are altogether void of explanation. As a result, we must assume that the plain language used in the motion for new trial reflects the intention of the trial court, despite the perplexing reactions of the parties, including the State's acquiescence in the motion, subsequent failure to appeal, and both parties' false impressions that Appellant could be tried again for the same offenses. Giving effect to the language at issue, a second prosecution would violate principles of double jeopardy.

Concurring / Dissenting Opinions: Judge Kevin Yeary dissented. He argued that "there is no double jeopardy issue before this Court to address on discretionary review. Under these circumstances, the Court's opinion in this case is a prohibited advisory opinion." **Presiding Judge Sharon Keller**, **Judge Mary Lou Keel**, and **Judge Michelle Slaughter** dissented, each without note.

Sidebars

(**Troy McKinney**)(Guest Commentator) This is the epitome of the blind leading the blind when no one knew what was going on. The visual and legal acuity of the prosecutor who recognized the issue is due great credit for raising the issue. This is what "seeing that justice is done" is all about. While it is technically true that the double jeopardy issue was not a ground granted for review or decided by the Court of Appeals, in this instance, it is largely form over substance, as the Court of Criminal Appeals has the power to grant review on its own motion and it avoided the post-conviction *habeas corpus* application that would have followed. The dissenting opinion is little more than an attempt to bail out the State by changing clearly established law to benefit the State and, not insignificantly, law that the State asked for and got to avoid a defendant getting relief in a prior case. The irony cup runneth over. Let's be honest: the most obvious and likely explanation for the State agreeing to the motion for new trial being granted was because it wanted another bite at a greater punishment. The blind and ignorant greed bit them in the arse.

(**David A. Schulman**) As Troy . . . uh . . . suggests, this case is a mess. I think the first problem is too many lawyers and Judges involved. Besides representing himself in parts of

both the trial and an attempted appeal, Appellant was represented by at least four other lawyers, with different lawyers on direct appeal and on PDR. As to Judge Yeary's comment that "It is almost inconceivable to me that the trial judge in this case granted Appellant's motions for new trial under the belief that he was thereby declaring the evidence to be legally insufficient to support the three offenses for which the jury had convicted him," there is also nothing in the record which supports the idea that the judge who granted the new trial was the same judge who presided over the second trial --- and it appears that different judges presided over the two trials. Who granted the new trial isn't clear. Finally, in defense of appellate counsel, it seems to me that, although the Court goes to some length to say that it's clear that the unopposed grant of a new trial meant the defendant was entitled to an acquittal, I disagree. That is certainly the law after this case, but it seems patently obvious that the State didn't think so when it didn't oppose the new trial and didn't appeal that action. It's also clear from the actions of defense counsel at the second trial, that she didn't think the result of the first trial caused a double jeopardy situation. Her theory seems to have been that the second trial resulted in the defendant "inadvertently" having spent time in TDCJ . . . and that dog was never gonna' hunt. This is a situation of "too many cooks."

(**John G. Jasuta**) This was a situation in which there were multiple mistakes, many made by the State, and others by defense counsel, but it comes down to the failure to appeal the grant of the motions. The Court's refusal to follow the State's call for disparate treatment of parties is good to see. No apologies here.