the Jasuta / Schulman report

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TIBA's Case of the Week

Fort Worth Court of Appeals

Case Name: ***Bradley Earl Karr v. The State of Texas***

- **OFFENSE**: Failure to Register as a Sex Offender
- **COUNTY**: Tarrant
- **C/A CASE No**. 02-23-00220-CR
- **DATE OF OPINION**: February 8, 2024 **OPINION**: Justice Mike Wallach
- **DISPOSITION**: Conviction Reversed
- **TRIAL COURT**: 396th D/C; Hon. George Gallagher
- **LAWYERS**: Bryant Cabrera (Defense); Steven Conder (State)

(**Background Facts**): Appellant was convicted in 2007 of an offense under the Uniform Code of Military Justice ("UCMJ") at the Mountain Home Air Force Base in Idaho that required him to register in Idaho as a sex offender. Specifically, Appellant was convicted for possessing child pornography. When Appellant moved to Texas in 2015, DPS determined that the elements of his military-justice offense were substantially similar to the elements of a Texas offense requiring registration. Appellant thus had to register as a sex offender in Texas as well. Thereafter, the State indicted Appellant twice for not registering as a sex offender. Once in 2016 and once in 2018. Appellant was convicted of both offenses on the same date in 2018. He received concurrent three-year sentences.

[GS **294.02 Hearsay & Confrontation / Exceptions / Government Records**]: In February 2022, Appellant called the police because he feared his home was being burglarized. The police responded but did not find a burglar. During their investigation, the police determined that Appellant had not registered as a sex offender. In May 2022, the State indicted Appellant for failing to register as a sex offender. The State structured the indictment to use one of Appellant's prior convictions to enhance his offense and the other prior conviction to enhance his punishment. During the jury trial on guilt or innocence, to prove that Appellant had an offense from another jurisdiction that required him to register as a sex offender in Texas, the State relied on a DPS document that listed offenses under the UCMJ that corresponded to Texas offenses requiring registration. On appeal, Appellant contends that the trial court erred by admitting the DPS document over his hearsay objection. He also contends that the DPS document was the only evidence showing that his military-justice conviction shared the same elements as a Texas offense requiring registration; therefore, he concludes, its admission was harmful.

Holding: DPS had a legal duty to compile the document [under Article 62.003(a), C.Cr.P.]. It must annually prepare a document determining which convictions from other jurisdictions correspond to Texas offenses requiring registration. *** This document is the only means that the State may use to prove that a defendant has a conviction from another jurisdiction requiring him to register in Texas. See ***Crabtree v. State***, 389 S.W.3d 820 (Tex.Cr.App. 2012)(see §§, Vol. 20, No. 44; 11/05/2012; Vol. 21, No. 3; 01/21/2013). *** [Appellant] maintains that the DPS document was inadmissible hearsay. We disagree. *** Whether DPS employees are law-enforcement personnel is not dispositive; the nature of their work is. In ***Cole v. State***, 839 S.W.2d 806 (Tex.Cr.App. 1992), a DPS chemist worked on a specific criminal investigation; his report was inadmissible under Rule 803(8)(B) for lack of trustworthiness because it was prepared as part of the adversarial process in a specific case. *** The Court in ***Cole*** distinguished the chemist's reports from other types of reports: "[T]he [chemist's] reports were not prepared for purposes independent of specific litigation, nor were they ministerial, objective observations of an unambiguous factual nature." *** This distinction is dispositive. *** [Appellant] does not argue that the DPS document was otherwise untrustworthy under Rule 803. *** We hold that the trial court did not abuse its discretion by admitting the DPS document as a public record under Rule 803.

[§§ **534.01 Sufficiency of the Evidence / Prior Convictions**]: The State's theory of the case was that Appellant committed a third-degree felony, that the offense was enhanced to a second-degree felony by a prior conviction for failure to register, and that the punishment for this second-degree felony was further enhanced to that of a first degree felony based on a second prior conviction for failure to register. The State's indictment tracks this theory of the case. The trial court found two enhancement paragraphs true and assessed Appellant's punishment at 15 years' confinement. On appeal, Appellant argues that the evidence was insufficient to prove the State's habitual offender allegation under Section 12.42(d) of the Penal Code. He argues that an enhancement under Section 12.42(d) (two prior convictions, the second offense being committed after the first conviction became final) would not be possible under his facts because his two prior convictions were on the same date.

Holding: To the extent that [Appellant] argues he was improperly tried as a habitual offender under Section 12.42(d), i.e., he was tried as having previously committed a second offense after his first conviction had become final, his argument fails. He is correct that he could not be enhanced under that provision because his two prior convictions were on the same date. *** The trial court was not, however, proceeding under Section 12.42(d). Under Section 12.42(d), the punishment range is life or any term of years of not more than 99 or less than 25 years. *** Because [Appellant] was not tried for a second-degree felony, the punishment enhancement under Section 12.42(b) was not available to the trial court. That, however, is what the trial court used when it announced that [Appellant]'s punishment range was for any term not exceeding 99 years or less than 5 years. *** Consequently, although we disagree with [Appellant] that his punishment range was improperly enhanced under Section 12.42(d), we agree that his punishment range was nevertheless improperly enhanced under Section 12.42(b). The State concedes this point in its brief. *** [Appellant] contends that the trial court, when determining

his sentence, applied an incorrect range of punishment. We agree. The State agrees too, but it maintains that [Appellant] was not harmed. *** Rather than assume that the trial court would have assessed the same punishment if it had applied the correct range of punishment, we conclude the better course is to ensure the integrity of the sentencing procedure. See ***Grado v. State***, 445 S.W.3d 736 (Tex.Cr.App. 2014)(see ☙, Vol. 22, No. 42; 10/20/2014). To do that, we must insist on a punishment assessed under the correct law.

Sidebars

(**David A. Schulman**) That two convictions entered on the same day equals one conviction is pretty well something you know (or should know) when you leave law school. There were at least three lawyers involved here, maybe five, but none of them caught this glitch? Talk about "asleep at the switch." Wow.