the Jasuta / Schulman report

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Elijah Tates v. The State of Texas***

- **OFFENSE**: Evading Arrest
- **COUNTY**: Brazos
- **COURT OF APPEALS**: Corpus Christi 2023
- **C/A CITATION**: 692 S.W.3d 628
- **C/A RESULT**: Punishment Reversed
- **CCA. CASE No**. PD-0486-23 **DATE OF OPINION**: July 2, 2025
- **DISPOSITION**: Court of Appeals Affirmed
- **OPINION**: Judge David Newell **VOTE**: 4-4-1
- **TRIAL COURT**: 85th D/C; Hon. Kyle Hawthorne
- **LAWYERS**: Lane Thibodeaux (Defense); Ryan Calvert & Philip McLemore (State)

(**Background Facts**): Bryan Police Department Officer Liam Stewart testified that he initiated a traffic stop after twice witnessing Appellant fail to signal before turning. Stewart stated Appellant continued to drive before ultimately stopping his vehicle and fleeing on foot. Ultimately, Appellant denied committing any traffic violation prior to stopping his vehicle but conceded to fleeing on foot because he had marijuana in his possession.

[GS **201 Trial Courts / Treatment of Defendant (Defendant not Present)**]: Appellant was physically present during the entire guilt-innocence phase of the jury trial. Following a guilty jury verdict, Appellant elected for the trial court to assess punishment, and the punishment hearing was reset. The COVID-19 pandemic unfolded in the interim, and several months later, the trial court held a punishment hearing via videoconference. Appellant, who was in custody at the time, made his appearance remotely from the county jail, while his counsel appeared in-person from the courtroom. Prior to the initiation of punishment proceedings, Appellant's counsel informed the trial court that he had been unable to communicate with Appellant and was having technical difficulties setting up a virtual "private room." The trial court took a brief recess, and when the parties returned on the record, there was no mention of whether the issue had been resolved. Appellant's counsel nonetheless entered pleas of not true to the State's enhancement allegations "on behalf of [his] client." The State thereafter called several law enforcement witnesses to establish Appellant's identity for purposes of connecting him to prior judgments and to testify to

prior unadjudicated offenses. Appellant's counsel cross-examined each of the State's witnesses, and there appeared to be no pause in proceedings for Appellant to confer with his counsel. Appellant subsequently testified, advocating for a probationary sentence. At the conclusion of punishment proceedings, the trial court found the allegations in the State's enhancement paragraphs to be true and sentenced Appellant to five years' confinement. At no point did Appellant object to his lack of personal presence at punishment. On appeal, Appellant argues that the trial court erred in proceeding remotely during the punishment phase of trial, in violation of his constitutional and statutory rights to be personally present. The Court of Appeals found that Appellant did not need to object to appearing remotely at sentencing in order to preserve his claim. Looking to the Court of Criminal Appeals' decision in ***Lira v. State***, 666 S.W.3d 498 (Tex.Cr.App. 2023)(see ☙, Vol. 31, No. 1; 01/16/2023), the Court of Appeals concluded that "the right to be present at sentencing implicates the legality of the sentence and is not forfeited by a failure to object at trial" (see ☙, Vol. 31, No. 16; 05/29/2023).

Holding: On discretionary review, the State argued that the Court of Appeals erred when it "misappropriated" the Court's analysis in ***Lira*** to rationalize creating a new requirement that a defendant must affirmatively waive this new waivable-only right to physical presence. (**History**) Under the plain terms of Article 33.03, Appellant had the right to be "personally present" at trial unless he voluntarily absented himself. "Personally present" in this context means "in person." In 1856, the earliest codification of the criminal laws of Texas required that, [i]n every case of felony, the defendant shall be present in the court when any such proceeding is had . . .." In 1907, the Legislature introduced the concept of continuing after a defendant voluntarily absented themselves. In 1911, the Code of Criminal Procedure combined the personal presence requirement and voluntary absenting provisions in Article 899. *** Under Article 42.03, the trial court was required to pronounce the sentence in the defendant's "presence" absent a written waiver. Like the right to be personally present at trial, the pronouncement rule was also included in the earliest version of the Code of Criminal Procedure. *** (**Nature of the Right**) The issue before us is whether the court of appeals properly determined that Appellant did not forfeit his statutory complaint. Rule 33.1 of the Texas Rules of Appellate Procedure provides that a contemporaneous objection must be made to preserve error for review on appeal. This Rule, however, only applies to forfeitable rights known as category-three [right under ***Marin v. State***, 851 S.W.2d 275 (Tex.Cr.App. 1993)]. *** Category-two waivable only rights are those rights understood to be "so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection" such that the record must reflect that they have been "plainly, freely, and intelligently" waived at trial. Category-two rights "must be implemented by the system unless expressly waived." ***Proenza v. State***, 541 S.W.3d 786 (Tex.Cr.App. 2017)(see ☙, Vol. 25, No. 44; 11/20/2017). A claim that a waivable only right was violated can be raised for the first time on appeal. *** If the defendant does nothing, Article 33.03, like its predecessors, requires personal presence. (**Presence Requirement**) A defendant "need make no request at trial" to be present. Rather, he "must" be personally present. Based on the statute's text and the Court's historical interpretation of the statute's predecessors, we agree with the Court of Appeals' conclusion that

the right to personal presence at punishment proceedings is a substantive waivable-only right. *** The State, on the other hand, asserts that a violation of the right to personal presence under Article 33.03 has been held to be forfeitable by this Court in ***Routier v. State***, 112 S.W.3d 554 (Tex.Cr.App. 2003)(see ☙, Vol. 11, No. 20; 05/26/2003). *** The State contends we need only look to ***Routier*** to determine the right to personal presence at sentencing is in fact forfeitable. It is true that decades ago, in ***Routier*** we stated, without analysis, that by failing to object at the earliest opportunity the defendant failed to preserve her argument that the right to presence under Article 33.03 was violated when the trial court read and responded to a jury note in her absence. But the Court in ***Routier*** failed to even consider where the statutory requirement of a defendant's "personal presence at trial" fits within ***Marin***'s categorization of rights before declaring the issue unpreserved. And the Court went on to consider the merits of the Article 33.03 argument and concluded the trial court did not err "in accepting her attorneys' waiver of her appearance." Despite initially casting the issue as unpreserved, the Court found that a waiver of appearance had been made by counsel, which we held the trial court did not err to accept. Thus, ***Routier*** is not determinative as the State suggests. Rather, the Court's analysis supports the conclusion that an affirmative waiver is statutorily required. *** More recently, in ***Hughes v. State***, 691 S.W.3d 504 (Tex.Cr.App. 2024)(see ☙, Vol. 32, No. 20; 05/27/2014), we held the right to presence under the Due Process Clause was waivable only and thus, we could consider the defendant's argument that his right to presence was violated despite the lack of objection to remote proceedings. In that case, we held that the due process right to be present applies in hearings on motions to adjudicate guilt and the right was violated by remote proceedings on a motion to adjudicate. In concluding the error was waivable only, we noted that courts "have long treated the right to be present as subject to waiver (typically by the defendant's voluntary absence) regardless of the particular basis for the right, whether statute [Article 33.03], the Confrontation Clause, or even the Due Process Clause." While we do not base our decision on Hughes, we nevertheless point out that our position in this case is consistent with how we resolved the issue in ***Hughes*** when considering the due process right to be present during trial. (**Contradictions in the Case Law**) The Court of Appeals correctly held that the right to be present at sentencing is not forfeited by the failure to object at trial. However, we agree with the State that the Court of Appeals reached this conclusion by relying erroneously on our holding in ***Lira*** to conclude that the right to be present at punishment proceedings implicates the legality of the sentence. An illegal sentence is one that is not authorized by law. The Court of Appeals relied upon ***Lira***'s recognition that "a sentence rendered outside of the defendant's presence was 'no sentence at all'" to conclude a violation of the right to be present in this case implicated the legality of the sentence. But that recognition in ***Lira*** came from ***Casias v. State***, 503 S.W.3d 262 (Tex.Cr.App. 1973) in which this Court dismissed an appeal because the sentence was not pronounced in the defendant's presence despite a waiver of the right to appear. *** [The] statutory definition of "sentence" was amended in 1981 to remove the presence element. Likewise, today, the statutory definition of "sentence" does not include an element of presence. (**Emergency Orders**) Finally, we must consider the effect of the Emergency Order. We recognized in ***Lira*** that the Supreme Court's Emergency Orders cannot suspend a substantive right. To the extent the State argues recognizing

Article 33.03's right to personal presence to be waivable only conflicts with the Emergency Orders, we disagree. Appellant had a substantive statutory right to be present at the punishment proceedings and he does not forfeit the ability to complain about a violation of that right on appeal by not objecting at trial. Rather, the right must be affirmatively waived. That conclusion is consistent with our previous holdings regarding the Emergency Orders.

Concurring / Dissenting Opinions: Judge Kevin Yeary concurred. He was joined by Presiding Judge David Schenck and Judge Gina Parker and argued that because "Appellant did nothing to waive his claim that his right to be personally present was violated, the Court today is correct to conclude that he has not forfeited it for appellate review." Judge Gina Parker filed a separate concurring opinion. She was joined by Presiding Judge David Schenck and Judge Lee Finley, and wrote separately "to expand on a few points." She pointed out that, regardless "of how proceedings outside of open court are treated, we can be confident that the phrase 'voluntarily absents' required more in Appellant's case than a mere failure to object. Appellant was physically excluded from the entire punishment phase of trial." Judge Mary Lou Keel dissented and argued that Appellant forfeited his statutory right to personal presence "when he failed to object to his appearance via videoconference at his non-jury punishment hearing."

Sidebars

(**David A. Schulman**) Like books, movies, and songs with the name, Judge Newell's opinion "covers the waterfront," and I believe he is correct. Unanswered in this opinion (probably because it wasn't raised), is the role of the lawyer. Should defense counsel have informed Appellant that he had a right to be in the courtroom? Wouldn't the failure to do so have rendered any waiver by inaction involuntary? Finally, while I agree with this opinion, I wonder if it needed to be this long. I think that whether lengthy and complete or summary in nature, the outcome of the case would have been the same.

(**John G. Jasuta**) I agree with the majority and with Judge Yeary. Required an affirmative waiver and there wasn't one.