the Jasuta / Schulman report

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Michael Kleinman v. The State of Texas***
Case Name: ***Auspro Enterprises, L.P. v. The State of Texas***

- **OFFENSE**: Municipal Ordinance Violations
- **COUNTY**: Williamson
- **COURT OF APPEALS**: Austin 2024
- **C/A CITATION**: 706 S.W.3d 391
- **C/A RESULT**: Trial Court Affirmed
- **CCA. CASE No**. (PD-0966-24 thru PD-0980-24) **DATE OF OPINION**: July 30, 2025
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Kevin Yeary **VOTE**: 8-1-0
- **TRIAL COURT**: CCL 5; Hon Will Ward
- **LAWYERS**: David Botsford & Gerry Morris (Defense); Lauren Marfin (State)

(**Background Facts**): Appellant Kleinman and his business entity, Auspro Enterprises, L.P., opened a store in Cedar Park called Planet K. After Kleinman opened the store, code compliance officers for the City notified him over a period of several months that he allegedly committed seven types of Class C misdemeanor offenses proscribed by provisions of the City's Code of Ordinances and a provision of the Health and Safety Code and that he continued to violate some of those provisions over several months. Appellants were charged in separate complaints with fifteen instances of operating a so-called "head shop" in Class C misdemeanor violations of Cedar Park Code of Ordinances. Both Appellant and his business were convicted in municipal court. They then both appealed, seeking trial *de novo* in the Court at Law No. 5 of Williamson County. To effectuate their appeal to the county court at law, as required by statute, they both posted Appellate bonds, the sum of which totaled approximately $65k. They next filed pretrial applications for writs of *habeas corpus* in the County Court at Law challenging the constitutionality of the city ordinances on vagueness grounds. The County Court at Law denied relief on the merits of the constitutional challenges, having first concluded in its written findings and conclusions that Appellants were restrained in their liberty for purposes of pursuing pretrial *habeas* relief by virtue of the cash appeal bonds for their pending criminal charges filed in that court.

[114 ***Habeas Corpus* at Trial Court Level / Cognizability of Issues**]: Appellants then pursued an interlocutory appeal of the County Court at Law's denial of *habeas* relief on the merits. The Court of Appeals affirmed the county court at law's denial of relief, but it did not even reach the merits of Appellants' arguments at all. Instead, the Court of Appeals concluded "that pretrial *habeas* relief is not available to applicants who have been charged with a fine-only offense and are not in custody or have not been released from custody on bond." ***Kleinman v. State***, 706 S.W.3d 391 (Tex.App. - Austin 2024)(see , Vol. 32, No. 27; 07/15/2024). The Court of Appeals acknowledged that Appellants had filed appeal bonds to perfect their *de novo* trial in the County Court at Law, but it explained that any allusion in the conditions of the appeal bond to arrest for non-payment was merely "required to be included by statute and does not indicate that any type of arrest was currently looming" (citing Article 17.08, Section 6 of which alludes to the recovery of "reasonable expenses incurred" for "rearresting the principal in the event he fails to appear" as required by the bail bond). This potential for re-arrest, the Court of Appeals concluded, was too speculative to constitute "a restraint sufficient to justify [Appellants'] requested *habeas* relief," and on that basis, affirmed the County Court at Law's order denying pretrial *habeas corpus* relief. The Court of Criminal Appeals granted Appellants' petitions for discretionary review (see , Vol. 32, No. 40; 10/28/2024) to examine the Court of Appeals' conclusion regarding the "sufficiency" of the restraint.

Holding: This Court has explained that "[a] defendant may use a pretrial writ of *habeas corpus* only in very limited circumstances." ***Ex parte Smith***, 178 S.W.3d 797 (Tex.Cr.App. 2005)(see , Vol. 13, No. 40; 10/24/2005). As the Court of Appeals also noted, pretrial *habeas corpus* relief is an extraordinary remedy, subject to interlocutory appeal (citing ***Ex parte Ellis & Colyandro***, 309 S.W.3d 71 (Tex.Cr.App. 2010)(see , Vol. 18, No. 17; 05/03/2010)). *** Also, according to our law, the *habeas* remedy is predicated on the notion that it exists for the benefit of applicants who are "restrained in [their] liberty." Article 11.01, C.Cr.P. So, this Court has said that "[w]hether an applicant is being restrained within the meaning of the *habeas corpus* statutes is a threshold question." See ***Ex parte Schmidt***, 109 S.W.3d 480 (Tex.Cr.App. 2003)(see , Vol. 11, No. 26; 07/07/2003). *** This Court's decision in ***Ex parte Foster***, 71 S.W. 593 (Tex.Cr.App. 1903), is to the same effect as ***Ex parte Snodgrass***, 65 S.W. 1061 (Tex.Cr.App. 1901). Both ***Snodgrass*** and ***Foster*** involved *habeas* applicants who were admitted to bail following contempt judgments without ever having been incarcerated. Both applicants were nevertheless found to have been restrained. *** Although the Texas Supreme Court has appropriately concluded that "a mere judgment of contempt will not justify the granting of a writ of habeas corpus[,]" and that "[t]here must be some character of restraint[,]" still, the Supreme Court explained, "[i]t is not required that [an] applicant for a writ of habeas corpus be actually confined in a jail." ***Ex parte Calhoun***, 91 S.W. 1047 (1936). *** With this broad understanding of "restraint" in mind, we now turn to the issue at hand: whether Appellants in this case have "in any manner" suffered restraint so as to justify allowing them to proceed with their pretrial *habeas corpus* review. *** At the outset, we reject the notion, suggested by the Court of Appeals' opinion, that the restraint that gives rise to *habeas corpus* relief must be more than mere restraint -- that it must be sufficient restraint. Article

11.22's definition of "restraint" is a broad one, both on its face and as judicially construed over the years. Moreover, Article 11.23 ("Scope of the writ") makes explicit that "[t]he writ of *habeas corpus* is intended to be applicable to all such cases of confinement and restraint," not just those in which a reviewing court has concluded that the restraint is onerous enough to merit consideration. *** We conclude that, at least in combination, these circumstances have accrued to cause Appellants to fall under "the kind of control which one person exercises over another . . . to subject [them] to the general authority and power" of the State. Article 11.22. In short, Appellants have been "restrained" according to Articles 11.01, 11.09, and 11.23, C.Cr.P. The Court of Appeals erred to conclude otherwise.

Concurring / Dissenting Opinions: Judge David Newell concurred without note.

Sidebars

(**David A. Schulman**) Given that, more than 30 years ago, in ***Ex parte Hargett***, 819 S.W.2d 866 (Tex.Cr.App. 1991), the Court of Criminal Appeals found that a *habeas corpus* applicant was "restrained" by virtue of the effect a conviction had on his right to military retirement benefits, and also given that Appellant's are attacking their Class C misdemeanor convictions (which although different, would have a continuing effect on Appellants' ability to operate, this couldn't work out any other way. Nevertheless, this is great work by defense counsel persevering for their client.

(**John G. Jasuta**) I stand corrected, and by Judge Yeary no less. Did I out-Yeary the Judge?