the Jasuta / Schulman report

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TIBA's Case of the Week

Houston 1st Court Appeals

Case Name: ***James Michael Sotelo v. The State of Texas***

- **OFFENSE**: Murder / Deadly Conduct
- **COUNTY**: Harris
- **C/A CASE No**. 01-24-00562-CR and 01-24-00567-CR
- **DATE OF OPINION**: August 12, 2025 **OPINION**: Justice Clint Morgan
- **DISPOSITION**: Conviction Affirmed
- **TRIAL COURT**: 232nd D/C; Hon. Josh Hill
- **LAWYERS**: Fernanda Benavides (Defense); Shawna Reagin (State)

(**Background Facts**): For reasons that are unclear, the Appellant fired thirteen shots at his best friend, hitting him in the back eleven times. One bullet went through a wall and hit the Appellant's brother in the head. The brother survived but the best friend did not. Appellant was charged with murder (01-24-00562-CR) and aggravated assault (01-24-00567-CR). At trial, Appellant testified the shooting was in self-defense. A jury found him guilty as charged of murder, but acquitted him of aggravated assault and found him guilty of the lesser-included offense of deadly conduct.

[22 **Charging Instruments / Requirements of Indictment or Information (Signatures)**]: Appellant complains that his indictments indicate they were signed by the assistant foreman of the grand jury. Without "sufficient" indictments, he argues, the trial court's jurisdiction was never invoked and the judgments are void.

Holding: The Court of Criminal Appeals has rejected the argument that the lack of the foreman's signature renders an indictment invalid. See ***Riney v. State***, 28 S.W.3d 561 (Tex.Cr.App. 2000)(see , Vol. 8, No. 40; 10/09/2000); ***Tatmon v. State***, 815 S.W.2d 588 (Tex.Cr.App. 1991); ***Owens v. State***, 540 S.W.2d 324 (Tex.Cr.App. 1976). *** [Appellant] criticizes the Court of Criminal Appeals's reasoning on this subject. Specifically, he argues that the Court failed to consider statutory change in 1966. But ***Tatmon*** addresses the statutory change. Even if it did not, we are not free to disregard the direct holdings of the Court of Criminal Appeals merely because a litigant or even this Court thinks they're wrong.

(**John G. Jasuta**) An absolute waste of time even if you believe they were just setting up the issue for the Court of Criminal Appeals' ultimate consideration on PDR. ***Parkinson v. State***, 220 S.W. 774 (Tex.Cr.App. 1920), will be neither overruled nor distinguished and should live for another few decades.

(**David A. Schulman**) Let's see. The first cited CCA ruling ("***Owens***") was in 1976. The second ("***Tatmon***") was fifteen years later, in 1991. The third cited ruling ("***Riney***") was nine years after that. Additionally, reading the 1976 ***Owens*** case, one finds that the CCA cited ***Ex parte King***, 240 S.W.2d 777 (Tex.Cr.App. 1951) and the 1920 ***Parkinson*** case which John mentioned, for the same basic proposition: the "failure of the foreman of the grand jury to sign the indictment does not vitiate that instrument." Thus, that concept has been the law for more than 100 years. I understand the necessity to raise this claim in the Court of Appeals, but the entire concept of claiming this as reversible error and/or that anyone would believe that the current Court of Criminal Appeals would ultimately back away from that statement appears to be pure avoidance and laughable.

[**124 Right to Counsel / Ineffective Assistance of Counsel**]: Appellant claims he received ineffective assistance of counsel. In the statement of his point the Appellant alleges trial counsel "fail[ed] to know the range of punishment for murder." In the body of his point, Appellant's complaint that trial counsel requested community supervision during the punishment phase, but, as Appellant correctly notes, Texas law [Articles 42A.054(2) and 42A.056(3)] does not currently allow trial courts to suspend imposition of sentence for murder convictions.

Holding: Assuming, arguendo, trial counsel's performance was deficient, [Appellant] has failed to direct us to any evidence in the record showing he was harmed by trial counsel's request for an illegally lenient sentence. To prevail on a claim of ineffective assistance, a defendant must prove, by a preponderance of the evidence not just that counsel's actions fell below an objective standard of reasonableness, but that the result of the proceeding would have been different but for counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668 (1984). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." Ineffective-assistance claims, including the showing of prejudice, must be firmly founded in the record. ***Bone v. State***, 77 S.W.3d 828 (Tex.Cr.App. 2002)(see , Vol. 10, No. 25; 06/24/2002). *** In his brief, [Appellant] argues he was harmed because counsel led him to believe he was probation eligible for murder. As his only support for this, [Appellant] points to applications for community supervision he filed before trial. The State correctly notes, though, that motions for community supervision must be filed before trial, meaning that at the time [Appellant] filed his motions it was still a possibility for the jury to return verdicts that would make [Appellant] eligible for community supervision (e.g., acquitting him of murder but convicting of the aggravated assault, or convicting for a lesser included offense of murder). *** Nothing in the record supports [Appellant]'s claim that his counsel misinformed him regarding his community

supervision eligibility. *** In ***Swinney v. State***, 663 S.W.3d 87 (Tex.Cr.App. 2022)(see ☞, Vol. 30, No. 9; 03/07/2022), the defendant was eligible for community supervision only if he chose to have punishment assessed by the jury; he chose instead to have the trial court assess punishment and, as here, his attorney requested community supervision although it was not a possible punishment. *** The Court of Criminal Appeals rejected Swinney's ineffective-assistance claim, though, because, assuming trial counsel had given Sweeney incorrect advice before he made his punishment election, Sweeney did not produce evidence showing how, or even whether, the incorrect advice altered his decision-making. *** ***Swinney*** controls here. The record does not show that any incorrect advice from trial counsel altered any decision [Appellant] made. There is no record evidence that [Appellant]'s decision to go to trial or his election to have the trial court assess punishment was informed by an erroneous understanding of his eligibility for probation if convicted. We overrule [Appellant]'s second point because [Appellant] has not shown any prejudice from the allegedly ineffective assistance.

Ed Note: The judgment is reformed to reflect the proper court costs.