TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-850-6544

Web Site: www.texindbar.org

G&S Vol. 8, No. 15, April 17, 2000

Case Name: Tommie Collins Hughes v. The State of Texas

- OFFENSE: Capital Murder Death Sentence
- COUNTY: Dallas
- CRIM. APPEALS No. 73,129
- DATE OF OPINION: April 12, 2000
- JUDGE: Mansfield, J.
- DISPOSITION: Conviction and Sentence Affirmed

Case Note: Besides the points discussed below, Appellant raised issues which have been raised and rejected in other cases, or which the Court found error had not been preserved. Because they offer no insight into existing law and aren't new law, they aren't discussed here.

G/S 124 Right to Counsel / Ineffective Assistance: In his first point of error, Appellant argued that the trial court deprived him of qualified trial counsel by failing to "even remotely attempt to comply with the capital screening procedure required by Article 26.052." The administrative judge for the First Administrative Judicial Region of Texas declared, via affidavit, that a committee was convened and did promulgate the qualifications needed to represent a capital defendant in that region, but the committee never posted the criteria accompanied by a list of qualified counsel. Instead, it appears the administrative judge ordered that individual district judges develop any additional standards, beyond the minimum standards, then compile and publish the list of qualified attorneys in his or her individual district. In the district where appellant was tried, this list was never promulgated or published by the time counsel for appellant was declared indigent and counsel appointed. Not until March of 1999 was a proper order for appointment of qualified counsel promulgated in the First Administrative Judicial Region.

Holding: In those counties not served by a public defender's office, [Art. 26.052] ensures that indigent defendants accused of capital murder are appointed counsel who is qualified under standards adopted by a specially designated committee in each administrative judicial region. Based on the available information and by the State's own admission, there was a failure to completely comply with Article 26.052. However, we do not find harm in this case, especially harm so egregious as to affect a substantial right. Contrary to Appellant's assertion, the record reflects he was represented by fully qualified and capable counsel. Both men were trial attorneys possessing extensive experience in criminal matters, including capital murder litigation. Their actions at Appellant's trial capably demonstrate this experience. Additionally, the list of qualified counsel that was eventually posted in compliance with the statute contained the names of both Appellant's appointed counsel, and the trial judge, in his findings of fact and conclusions of law on this issue, asserted that, if the list had been available, he would have chosen both attorneys to represent Appellant in this case. Appellant suffered no harm and was not deprived of qualified trial counsel. The first point of error is overruled.

G/S 230 Jury Selection (Voir Dire Procedure): As the prosecutor concluded the examination of one member of the venire he announced that "State has no objection to this juror, Your Honor." The Court then turned to defense counsel and asked, "What says the defense," to which defense counsel stated, "The defense accepts this juror." The trial court then turned to the Prosecutor and said, "All right. What says the State?," to which he responded, "State will exercise a peremptory challenge on this juror." Relying on Bigby v. State, 892 S.W.2d 864 (Tex.Cr.App. 1994)(see Greenwood & Schulman, Vol. 2, No. 32; November 7, 1994), defense counsel promptly objected to the State exercising a peremptory challenge upon the veniremember after the Prosecutor already indicated the State would accept the juror, stating that he believed there had been a waiver of the State's right to exercise the peremptory challenge. The trial court overruled the objection and explained that he had taken the Prosecutor's statement to mean that he had no challenge for cause. There was a discussion about what procedure was supposed to be used and the trial court indicated that he thought the procedure was that the each side would announce whether there was a challenge for cause then each side would announce whether it was using a peremptory.

Holding: In Bigby, five members of this Court expressed their belief that the fairest and most objective interpretation of Article 35.13 provides trial judges the discretion during voir dire "to permit the exercise of challenges for cause by both sides before moving on to any use of peremptory challenges." In other words, a trial court has the discretion to decide (1) whether the State must voice both a challenge for cause or a peremptory challenge before the defendant, or (2) that both sides issue any challenges for cause before the State first lodges a peremptory challenge. The latter method appears to be what both the trial court and the State assumed was being followed. Defense counsel, on the other hand, assumed the alternative. Either method, however, is acceptable under Article 35.13, and no error can result if either is followed. [While] Appellant argues that "[h]ad defense counsel exercised a peremptory challenge to eliminate [this venire member], the prosecutors would not only have saved a strike but forced appellant to expend one unnecessarily." Such a situation, had it occurred, would have violated Article 35.13 and could have potentially resulted in error. However, these were not the circumstances in the case at bar, and appellant cannot now complain of an error that did not occur.

Comments: (David A. Schulman) While this discussion makes sense, it leaves out what I consider to be the most salient point in determining whose belief in what procedure was being used was more reasonable - whether this was the first veniremember to be examined. The Court did not compare the procedure used with this veniremember with that used on other veniremembers. Personally, I think it would have been very useful to know what procedures the trial court had employed at the conclusion of the examinations of previous members of the venire. With that discussion, we would have known whether either argument made sense. Without it, we're left to trust this opinion.