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68 Vol. 8, No. 49, December 18, 2000

**Case Name:** Benjamin Leon Blue v. The State of Texas

- OFFENSE: Aggravated Assault on a Public Servant
- COURT OF APPEALS: Houston [1<sup>st</sup>] 1998
- C/A CITATION: 983 S.W.2d 711
- C/A RESULT: Conviction Affirmed
- COUNTY: Harris
- CRIM. APPEALS No. 1254-99
- DATE OF OPINION: December 13, 2000
- JUDGE: Johnson, J.
- DISPOSITION: Court of Appeals Reversed

68 205 Trial Courts / Improper Comments (Fundamental Error v. Harmless Error): During his introduction to the voir dire, the trial court apologized to the venire for the long delay in getting the proceedings going and told the jurors that Appellant had been considering pleading guilty, and indicated that Appellant's delays in making his decision was very frustrating to the court. Appellant was convicted. On direct appeal, he complained about the trial judge's comments. In an unpublished opinion, a divided panel of the Court of Appeals affirmed. A rehearing en banc was granted on the court's own motion. The panel opinion was withdrawn, and a divided Court of Appeals again affirmed the conviction, this time issuing five opinions. *Blue v. State*, 983 S.W.2d 811 (Tex.App. - Houston [1st] 1998)(see *Greenwood & Schulman Vol. 6, No. 26*; July 6, 1998). The Court of Criminal Appeals granted Appellant's petition for discretionary review to determine whether the Court of Appeals erred in determining that error regarding admonishment of the jury was not properly preserved because no objection was made at trial.

**Holding:** The trial judge's comments imparted information to the venire that tainted the presumption of innocence. A juror who knows at the outset that the defendant seriously considered entering into a plea agreement no longer begins with a presumption that the defendant is innocent. A juror who hears the judge say that he would have preferred that the defendant plead guilty might assume that the judge knows something about the guilt of the defendant that the juror does not. While the judge himself might have been able to maintain impartiality in presiding over the trial, despite his apparent hostility toward the defendant for causing delay, his comments "vitiating the presumption of innocence" before the venire, adversely affecting Appellant's right to a fair trial. The comments of the trial judge, which tainted Appellant's presumption of innocence in front of the venire, were fundamental error of constitutional dimension and required no objection. [Thus] Appellant's failure to object to the trial judge's comments did not waive error.

**Notes:** Judge Mansfield delivered a concurring opinion in which he said that he believed the comments were so fundamentally prejudicial that Appellant's right to a fair trial was denied.

Judge Keasler delivered a concurring opinion in which he stated that he doesn't think that the right to an impartial judge should be a right that the defendant can forfeit ("This right should be included in the very select class of absolute rights"). Judge Keller, however, delivered a dissenting opinion in which she was joined by Presiding Judge McCormick and Judge Womack. She argued that the error wasn't fundamental or "plain" error, and that, by not objecting, defense counsel waived the error. She noted that this could be raised as ineffective assistance.

**Comments:** ([David A. Schulman](#)) I absolutely have to agree with the majority. The trial court's comments were totally out of line, and there was no instruction that could have ever "cured" this error. Once they heard that they had been waiting around all morning because Appellant had been thinking about pleading guilty, it was all over but reading the verdict. Personally, I think that it would be improper for the trial judge to ever lay any of the blame for a delay like this on either of the parties. All it could do would be to prejudice the jury against them.