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⌘ Vol. 17, No. 1, January 12, 2009

Case Name: [Amber Lovill v. The State of Texas](#)

- OFFENSE: Appeal from Order Modifying Probation
- COUNTY: Nueces
- C/A CASE No. 13-07-0529-CR and 13-07-0668-CR
- DATE OF OPINION: December 22, 2008
- DISPOSITION: Trial Court Reversed OPINION: Benavides, J.
- TRIAL COURT: 28th D/C; Hon. Nanette Hasette
- LAWYERS: [Brian Miller](#) (Defense); [Carlos Valdez](#) (State)

Ed Note: Amicus Curiae in this case included “29 leading organizational public health professionals” represented by five different civil lawyers.

Ed Note: (Background Facts) Appellant was indicted on two counts of felony forgery resulting from checks she forged. She entered into a plea bargain with the State and pleaded guilty. In accordance with the plea agreement, the trial court assessed a punishment of two years in state jail plus a fine, restitution, and costs; however, the court suspended the prison term and placed Appellant on community supervision for three years. As one of the conditions of Appellant's probation, she was required to “[a]void injurious or vicious habits and[/]or, avoid the use of alcoholic beverages, narcotics or any other controlled substances and submit to testing/blood analysis/urinalysis as directed for alcohol or controlled substances . . .” Appellant was also ordered to participate in a substance abuse program, report weekly to her probation officer, and to “satisfactorily participate in a screening/assessment for substance abuse and submit to any counseling, urinalysis, and/or diversionary program as determine [sic] within the [Community Supervision and Corrections Department (“CSCD”)] TREATMENT ALTERNATIVE TO INCARCERATION PROGRAM . . .”

At a hearing on the State’s motion to revoke, Appellant testified that she would like to go to CASA, which is an outpatient drug treatment facility. She requested that the court continue her on probation with a sanction of CASA or additional jail time added to the probated sentence. She claimed that she wanted to go to outpatient treatment so she could keep the baby with her. The trial court disagreed with Appellant's counsel that the State sought to revoke her probation because she was pregnant: “Well, I think the fact that she tested positive is the reason we are all here, right, not for the fact that she is pregnant.” On August 13, 2007, the trial court issued an “Order Imposing Sanctions on Defendant and Continuing or Modifying Probation.” The court extended Appellant's probation by one year so that it now expires on January 10, 2009. The court further ordered Appellant to serve an indeterminate term of three to twelve months confinement and treatment in SAFPF.

⌘ **410.02 Probation / Terms & Conditions:** Appellant then filed a petition for writ of habeas corpus seeking relief from the trial court's order increasing the term of probation and sentencing Appellant to a term of confinement in SAFPF. Appellant asked the court to take judicial notice of the prior hearings, and she argued that she was selectively prosecuted. On October 18, 2007, without holding a hearing, the trial court denied the petition. The trial court made a single finding of fact: “The prosecution of the motion to revoke

probation that was filed on or about July 17, 2007, in Cause No. 01-CR-3725-A did not occur because of Amber Lovill's pregnancy." The trial court also made a single conclusion of law: "Amber Lovill's selective prosecution defense required proof that the prosecution of the motion to revoke probation occurred because of her pregnancy." On appeal, Appellant argues that selectively prosecuted her, seeking to revoke her probation and to incarcerate her in a drug-treatment facility because she was using drugs during her pregnancy.

Holding: Appellant and the State both concede that under the United States Constitution, gender-based discrimination claims are evaluated under an intermediate scrutiny analysis. Appellant argues, however, that the ERA elevated gender to the same level of protection as race, color, creed, or national origin; therefore, according to Appellant, we must apply a strict scrutiny analysis to her state constitutional claim, rather than an intermediate scrutiny analysis. The State argues that the less restrictive "rational basis" test applies to gender-based claims. Our analysis of these arguments is hindered by the fact that the trial court never reached this issue. The trial court, in a habeas corpus proceeding, may review the applicant's petition without requesting a response from the State. If the State does not file an answer, all allegations in the application are deemed denied. As is apparent from its finding of fact and conclusion of law, the trial court determined that Appellant did not meet her burden to establish an Equal Protection violation. Had the trial court correctly determined that Appellant met her burden, the burden would have then shifted to the State to justify its conduct under the appropriate level of scrutiny. The record on this issue is wholly undeveloped and requires a hearing by the trial court. We are not in the position to decide these issues in the first instance. Accordingly, we reverse the trial court's denial of Appellant's petition for writ of habeas corpus and remand to the trial court.

Ed Note: The Court of Appeals dismissed Appellant's companion appeal which also challenged the trial court's actions in modifying the terms and conditions of probation.