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⚖ Vol. 22, No. 5, February 3, 2014

TIBA's Case of the Week

Case Name: [Randy Schmutz v. The State of Texas](#)

- OFFENSE: Hindering a Secured Creditor
- COUNTY: Titus
- COURT OF APPEALS: Texarkana 2013
- C/A CITATION: Unpublished
- C/A RESULT: Conviction Affirmed
- CCA. CASE No. PD-0530-13 DATE OF OPINION: January 29, 2014
- DISPOSITION: Court of Appeals Affirmed
- OPINION: [Alcala, J.](#) VOTE: 7-1-1
- TRIAL COURT: 76th D/C; Hon. Webb Biard
- LAWYERS: [Scrappy Holmes](#) (Defense); [David Colley](#) (State)

(Background Facts) Appellant signed an operating agreement with Priefert Manufacturing Co., Inc., the Complainant in this case, to sell Priefert's farm and ranch equipment on consignment. Appellant agreed to sell this equipment at his retail store in Stephenville, located in Erath County. Priefert delivered its equipment to Appellant's retail store from its headquarters in Mount Pleasant, located in Titus County. Appellant picked up inventory at Priefert's headquarters on several occasions and traveled back to his store. After making sales at his store, Appellant reported them daily to Priefert's headquarters, and Priefert then sent invoices to Appellant for the wholesale price of the equipment that had been sold and the cost of the freight. After the businesses operated under the agreement for over two years, the relationship dissolved by early 2003, when Appellant closed his store and admitted to using proceeds from the equipment sales to pay other financial obligations. Priefert filed civil and criminal complaints against Appellant in Titus County to recover the unpaid invoices that totaled nearly \$90,000. Appellant filed for bankruptcy and discharged his civil liability.

⚖ [511.05 Appellate Procedure / Policies & Presumptions / Standards of Review on Appeal \(Which Error Standard Applies\)](#): Appellant was indicted in Titus County for the offense of hindering a secured creditor by misappropriating the proceeds of secured property. The indictment alleged that venue lay in Titus County based on Appellant's "selling or disposing of secured property" there. The undisputed facts at trial, however, showed that Appellant sold property in Erath County, not Titus County. The property had been removed from Titus County, but the State's indictment did not allege that theory as a basis for venue. Appellant repeatedly challenged venue on the ground that he had not disposed of any property in Titus County, as the State had

alleged in the indictment. On this basis, he filed a pretrial motion to quash, requested a directed verdict after the State rested its case-in-chief, and requested a jury instruction on the special venue provisions in Article 13.09, C.Cr.P. The trial court denied these requests. Appellant challenged the trial court decision on appeal. In light of the record that conclusively showed no property was disposed in Titus County, the Court of Appeals held that the State “failed to prove the venue facts it alleged,” and that this constituted error. The central dispute on appeal concerned the appropriate harm analysis: Whether the State’s failure to prove venue required reversal without a harm analysis, as Appellant suggested, or whether it required a harm analysis as non-constitutional error and was harmless, as the State suggested.

Holding: Over thirty years ago in [Black v. State](#), 645 S.W.2d 789 (Tex.Cr.App. 1983). this Court held that “[w]hen venue is made an issue in the trial court, failure to prove venue in the county of prosecution constitutes reversible error.” Appellant argued that [Black](#) requires automatic acquittal when the State fails to prove venue as alleged. The State responded that, since [Black](#) was decided, the Texas Rules of Appellate Procedure were amended and that under the current appellate rules this error is subject to review for harm under the non-constitutional-error standard. *** In [Jackson v. Virginia](#), 443 U.S. 307 (1979), the Supreme Court held that, to be sufficient, the evidence must be adequate for a fact finder to rationally find “the essential elements of the crime beyond a reasonable doubt.” *** As it is not a “criminative fact,” venue is not an “element of the offense” under Texas law. *** Because venue is not an element of the offense, the court of appeals properly determined that failure to prove venue does not implicate sufficiency of the evidence, nor does it require acquittal under [Jackson](#). *** Other than sufficiency review under the Due Process Clause, which we have already decided is inapplicable to venue error, the only other federal constitutional right identified by appellant is the “vicinage” or “venue” clause of the Sixth Amendment to the federal Constitution. *** But the vicinage clause has never been included in those errors described as structural by the Supreme Court. *** Furthermore, we now expressly hold that the federal vicinage clause is inapplicable in Texas state courts. *** We conclude that venue error does not implicate the vicinage clause of the Sixth Amendment to the federal Constitution or the Due Process Clause of the Fourteenth Amendment, and that, given its statutory foundation in Article 13.09, C.Cr.P., the State’s failure to prove venue as alleged is not structural or constitutional error.

§ 511.05 Appellate Procedure / Policies & Presumptions / Standards of Review on Appeal (Does Venue Error Require Automatic Reversal): The parties dispute whether the 1997 amendments to the Rules of Appellate Procedure implicitly abrogated [Black](#)’s analysis of venue error and whether this Court’s decision in [Jones v. State](#). 979 S.W.2d 652 (Tex.Cr.App. 1998)(see [§](#), [Vol. 6, No. 44](#); 11/09/1998), signifies that venue error is subject to automatic reversal even after the amendment to the Texas Rules of Appellate Procedure.

Holding: We agree with the State that this Court’s precedent necessarily overrules [Black](#) to the extent to which that case provides for automatic reversal based on venue error. *** Since [Black](#) was decided, however, Texas case law and the rules of appellate procedure, in accordance with decisions by the Supreme Court, have set forth three different harm standards applicable to various types of errors. First, this Court held in [Cain v. State](#), 947 S.W.2d 262 (Tex.Cr.App. 1997)(see [§](#), [Vol. 5, No. 24](#); 06/23/1997), that errors categorized by the Supreme Court as structural are reversed automatically without a harm analysis. *** Second, errors categorized as non-structural constitutional errors require reversal of a conviction unless the appellate court determines that the error did not contribute to the conviction or punishment. *** Third, an error that is non-constitutional that does not affect a defendant’s substantial rights must be disregarded. *** The harm standard applicable to non-constitutional errors was added in the 1997 amendment to the appellate rules in Texas. *** We are unpersuaded that [Jones](#) undermines this Court’s holding in [Cain](#) and its progeny and the rules of appellate procedure, as amended.

Concurring / Dissenting Opinions: [Judge Meyers](#) filed a dissenting opinion, arguing that “the longstanding rule of compelling acquittal for failure to prove venue should be maintained.”

Ed Note: (Harm Analysis) Under Rule 44.2(b), Tex.R.App.Pro., a non-constitutional error “that does not affect substantial rights must be disregarded.” The Court determined that Appellant’s substantial rights were not affected.

Concurring / Dissenting Opinions: Judge Keasler concurred without note.

Sidebars: ([David A. Schulman](#)) First of all, I think that the problem in this case is strictly because of a poorly pled indictment. I looked carefully at Penal Code sec. 32.33 (“Hindering Secured Creditors”), and I believe that the case could have been tried in either Erath or Titus counties . . . if it had been properly pled. Second, although this appears to be the first time the Court of Criminal Appeals has addressed this “venue” problem following the 1997 rule changes, the entire question seems a bit specious, because (as the opinion more or less recognizes) nobody could reasonably believe that [Jones](#) somehow “signifies” that [Black](#) survived the 1997 rule changes. In my mind, as the Court determined in [Cain](#), the appellate rules required that “all errors . . . are subject to the harmless error standard found in Texas Rule of Appellate Procedure . . .” [Cain](#), it should be noted, was published before the 1997 changes. Additionally, what the 1997 changes meant, in reality, was simply the decision on whether to reverse on a finding of error made a 180 degree change from error requiring reversal unless the reviewing court determined that the error had no effect, to not requiring reversal unless the reviewing court determined the error had a specific negative effect. Further, the Courts of Appeals have been for some time citing the 1997 changes as meaning exactly what this opinion says they meant as to venue errors. See, e.g., [Dewalt v. State](#), 307 S.W.3d 437 (Tex.App. - Austin 2010)(see [§8](#), [Vol. 18, No. 4](#); 02/01/2010).