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TIBA's Case of the Week

Case Name: John Dennis Clayton Anthony v. The State of Texas

- OFFENSE: Aggravated Sexual Assault
- COUNTY: Bailey
- C/A CASE No. 07-13-00089-CR
- DATE OF OPINION: February 12, 2015
- DISPOSITION: Conviction Reversed OPINION: Pirtle, J.
- TRIAL COURT: 287th D/C; Hon. Gordon Green
- LAWYERS: Don Schofield (Defense); Kathryn Gurley (State)

(Background Facts) In 2007, the Legislature amended article 42.12 of the Texas Code of Criminal Procedure to provide that deferred adjudication community supervision is not available for defendants charged with certain crimes, including those punishable under section 22.021(f) of the Texas Penal Code. In January of 2009, Appellant entered a plea of guilty to the offense of aggravated sexual assault in exchange for a recommendation of deferred adjudication community supervision. At that time, the trial court accepted the plea agreement and, pursuant to the terms thereof, placed Appellant on deferred adjudication community supervision for a term of eight years. The Order of Deferred Adjudication found the age of the victim to be three years at the time of the offense. On February 15, 2013, the State moved to proceed with an adjudication of guilt alleging Appellant had violated the terms and conditions of his community supervision. At a hearing on the State's motion, Appellant entered pleas of true, and after hearing testimony, the trial court adjudicated him guilty of the offense charged and assessed punishment at confinement for life. The Judgment again found the age of the victim, at the time of the offense, to be three years.

124 Right to Counsel / Ineffective Assistance of Counsel (Involuntary Plea): The statute took effect on September 1, 2007, and applies to offenses committed after that date. Because the offense charged in this case is alleged to have been committed on September 11, 2008, it was punishable under subsection (f)(1) of section 22.021. As the

State concedes in its brief, placing Appellant on deferred adjudication community supervision "falls outside the applicable statutory range of punishment for Aggravated Sexual Assault, child younger than 6 years of age." Appellant contends his original plea was involuntary because it was based, in part, on the representation that he was eligible for deferred adjudication community supervision and, but for that representation, he would not have given up his right to a jury trial and entered a plea of guilty. He further contends that he was prejudiced by the ineffective assistance of his counsel in failing to correctly advise him.

Holding: In this case, every legally trained party involved, the trial court, the prosecutor and Appellant's own counsel, incorrectly believed Appellant was eligible for deferred adjudication community supervision. The voluntariness of Appellant's plea is crucial to this case, and Appellant cannot be said to have entered his plea knowingly and intelligently if he did so while operating under a misunderstanding of the law applicable to such a critical phase of his case. *** By inducing him to enter a plea of guilty through the false promise of community supervision, there is a reasonable probability Appellant waived valuable rights and entered a plea of guilty. Therefore, but for counsel's errors, there is also a reasonable probability the result of the proceeding would have been different.

Concurring / Dissenting Opinions: Chief Justice Quinn delivered a concurring opinion in which he stated that he was "concerned" about the application to this case of Wiley v. State, 410 S.W.3d 313 (Tex.Cr.App. 2013)(see ☙, Vol. 21, No. 39; 09/30/2013), which reaffirmed that "an appellant will not be permitted to raise on appeal from the revocation of his community supervision any claim that he could have brought on an appeal from the original imposition of that community supervision." He stated that, while "this is really not a case where the sentence was illegal (since a sentence requires a conviction and deferring the adjudication is not a conviction and, therefore, a sentence), the course of action undertaken by the trial court was prohibited by statute. Thus, it was void. Being void, it never occurred." Therefore, as this Court set out in Neugebauer v. State, 266 S.W.3d 137 (Tex.App. - Amarillo 2008)(see ☙, Vol. 16, No. 35; 09/08/2008), "since the original judgment deferring the adjudication of appellant's guilt and placing him on community supervision was void, the trial court had nothing before it to revoke. Thus, its judgment should be reversed, and the parties should begin anew as if the defendant had never been placed on deferred adjudication or agreed to a plea bargain that the law barred the trial court from enforcing."

Sidebars: (David A. Schulman) Chief Justice Quinn is correct in his sentiments, but there is a more simpler explanation regarding why Wiley does not bar litigation of this issue now. There are two ways to look at what went wrong here. First, the plea is involuntary, which the Court of Criminal Appeals has said cannot be raised on direct appeal ("Rule 25.2(b) does not permit the voluntariness of the plea to be raised on appeal"). See Cooper v. State, 45 S.W.3d 77 (Tex.Cr.App. 2001)(see ☙, Vol. 9, No. 14; 04/09/2001). Alternatively, Appellant was (as this court finds) denied the effective assistance of counsel, which the Court of Criminal Appeals has often said should not be raised on direct appeal (" A reviewing court will rarely be in a position on direct appeal to fairly evaluate the merits of an ineffective-assistance claim"). See Salinas v. State, 163 S.W.3d 734 (Tex.Cr.App. 2005)(see ☙, Vol. 13, No. 20; 05/23/2005). In either case, Appellant could not "have brought on an appeal from the original imposition of that community supervision," and may litigate the issue now.