

the Jasuta / Schulman report



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It is TIBA's policy that commentators do not summarize or comment on cases in which they were involved. Clicking on a hyperlink such as the name of the judge authoring an opinion will link you to the opinion or document in your browser.

Our next weekly meeting will be on ON-LINE Only (Zoom) on April 1st, 2021.

TIBA's Case of the Week

Eleventh Court of Appeals (Eastland)

Case Name: **[Eluid Lira v. The State of Texas](#)** AND

Case Name: **[Scott Huddleston v. The State of Texas](#)**

- **OFFENSE:** Assault on a Public Servant
- **COUNTY:** Jones
- **C/A CASE No.** 11-20-00148-CR (**[Lira](#)**); 11-20-00149-CR (**[Huddleston](#)**)
- **DATE OF OPINIONS:** March 25, 2021
- **DISPOSITION:** Conviction Reversed
- **TRIAL COURT:** 259th D/C; Hon. Brooks Hagler
- **LAWYERS:** **[John Moncure](#)** (Defense); **[Melinda Fletcher](#)** (State)

(8) 201 Trial Courts / Treatment of Defendant (Defendant not Present): Both Appellants were charged with assault on a correctional officer. Each entered into a plea bargain agreement with the State, but each objected to having the trial court conduct the plea hearing via Zoom. Both men filed motions to rescind the order setting his case on a Zoom videoconference plea docket.

Both indicated that they did not consent to the conducting of the plea hearing via Zoom or by other videoconferencing methods. They each requested a continuance until they could appear in court, in person, and in the physical presence of their attorneys. They asserted in their motions that requiring the plea hearing to be conducted via videoconference violated their rights to counsel and to a public trial and was contrary to state law, particularly Article 27.18, C.Cr.P. Both renewed their objections at the outset of their plea hearing. The trial court overruled Appellant's motion and objections and proceeded with the plea hearing via videoconference. In each case, before the guilty pleas, the trial court and the attorneys discussed the preservation of the right to appeal the matters presented in their pre-trial motions, and each Appellant pled guilty subject to the reservation of his right to appeal. Each raises a single issue on appeal, asserting that he had a statutory right to enter his guilty plea in open court and that his right to do so was a substantive right and was therefore not subject to the Texas Supreme Court's emergency orders authorizing a trial court to modify or suspend any and all procedures.

Ed Note (The Emergency Order): The above-referenced Seventeenth Emergency Order was in effect at the time of the plea hearing. That order provided in part as follows: "3. Subject only to constitutional limitations, all courts in Texas may in any case, civil or criminal -- and must to avoid risk to court staff, parties, attorneys, jurors, and the public -- without a participant's consent: a. except as provided in paragraph (b), modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order, for a stated period ending no later than September 30, 2020; *** c. Allow or require anyone involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror -- to participate remotely, such as by teleconferencing, videoconferencing, or other means[.] *** The order was enacted pursuant to the authority granted to the supreme court in Section 22.0035(b) of the Government Code, which provides: "Notwithstanding any other statute, the supreme court may modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor. . ." (emphasis in original).

Holding: Although Paragraph 3(c) appears on its face to authorize a trial court to require any party to participate in a proceeding via videoconferencing, we cannot hold that a defendant in a criminal case can be required, pursuant to the Seventeenth Emergency Order, to appear via videoconferencing over the defendant's objection. As asserted by Appellant and as recently determined by the Court of Criminal Appeals, neither Section 22.0035(b) nor the Seventeenth Emergency Order purports to authorize a court to modify substantive rights. *In re State ex rel. Ogg*, No. 91,936-01 (Tex.Cr.App.; 03/03/2021)(see [§8](#), [Vol. 29, No. 8](#); 03/08/2021). According to the court in *Ogg*, Section 22.0035(b) and the Seventeenth Emergency Order both "address procedural matters." *** In *Ogg*, the State refused to consent to the defendant's waiver of a jury trial, but the trial court, citing the Texas Supreme Court's COVID-19 emergency order, nonetheless set the case for a bench trial. *** The State sought mandamus relief, which the Court of Criminal Appeals conditionally granted. *** The Court of Criminal Appeals held that the emergency order did not "purport to authorize courts to modify substantive rights" and did not confer authority on

the trial court to conduct a bench trial in violation of Article 1.13 because the consent requirement of Article 1.13 was “not merely procedural.” *** A defendant’s right to appear in person and in open court is not merely a procedural matter but, rather, is a substantive right provided for by statute. The Texas Code of Criminal Procedure provides that a defendant in a criminal prosecution (other than one involving the possibility of the death penalty) has the right, upon entering a plea, to waive the right of trial by jury (1) if the waiver is made in person by the defendant in open court with the consent of the prosecutor and the trial court or (2) if the provisions of Article 27.19 have been met. *** Article 27.19, in turn, provides that a court shall accept a guilty plea from a defendant who is confined in a penal institution if the plea is made in accordance with Article 27.18. *** Article 27.18 permits a court to accept a defendant’s “plea or waiver by videoconference” if certain conditions are met. *** One such condition is that the defendant and the prosecutor “file with the court written consent to the use of videoconference.” *** In the case before us, that statutory condition was not met. Appellant did not consent to the use of videoconference. In fact, he specifically objected to its use and cited Article 27.18. Like the consent requirement involved in [Ogg](#), the consent requirement in Article 27.18 is not merely procedural. Therefore, the Seventeenth Emergency Order did not alter or affect Appellant’s statutory right to be personally present at his guilty-plea hearing, to enter his plea in person and in open court, and to refuse to consent to the disposition of his case via a videoconference hearing. *** Because the condition set forth in Article 27.18(a)(1) was not met, the trial court was not authorized to accept Appellant’s guilty plea.

([David A. Schulman](#)) Given the Court of Appeals’ reference to the very recent [Ogg](#) case, and incorporation of its rationale, there is a good chance that this holding will stand up on discretionary review. To the extent that it is an important case, it is only because, although the pandemic giving rise to several emergency orders appears to be ending, there is already a move afoot to continue the use of “remote” proceedings. See [SB 690](#) and [HB3611](#), bills currently pending in the Legislature. I have no problem with uncontested proceedings be conducted remotely, but am diametrically opposed to requiring anyone to participate in the litigation of a contested matter “via Zoom or by other videoconferencing methods.”

Ed Note: The two opinions are not identical, but are almost so.