the Jasuta / Schulman report

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Dallas Shane Curlee v. The State of Texas***

- **OFFENSE**: Possession of Controlled Substance in Drug Free Zone
- **COUNTY**: Jackson
- **COURT OF APPEALS**: Corpus Christi
- **C/A CITATION**: Unavailable
- **C/A RESULT**: Conviction Affirmed
- **CCA. CASE No.** PD-0624-20 **DATE OF OPINION**: April 14, 2021
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Scott Walker **VOTE**: 4-4-1
- **TRIAL COURT**: 24th D/C; Hon. Robert Bell
- **LAWYERS**: Luis Martinez (Defense); Doug Norman (State)

(**Background Facts**): Jailer Dave Thedford testified at trial that Hillary Hammond went to the Jackson County Jail on December 7, 2017, to visit inmate Anthony Havens. She brought with her a plastic Wal-Mart bag with five boxes of contact lenses. When Thedford searched the bag, he found four utility razor blades in one of the contact lenses boxes. Hammond claimed she did not intend to bring the razor blades into the jail; they were for the utility knife on her keychain. She explained she purchased them at the same time as some other items from Wal-Mart and the receipt was in her van which was parked out front. Razors are contraband in the jail and bringing them into the jail is a felony offense under section 38.11(a)(2), (g), of the Penal Code. Jackson County Sheriff's Investigator Gary Wayne Smejkal and Jail Captain Jim Omecinski accompanied Hammond to her van. When they

> approached the van, neither of the officers saw anyone sitting in the vehicle. Once Hammond opened the driver's door, they saw a man on the bench seat in the back who was later identified as Appellant. Hammond was under arrest for bringing contraband into the jail and she asked if the van could be released to Appellant. Smejkal provisionally agreed and asked Appellant for his driver's license. Smejkal checked to determine whether Appellant's license was valid and whether there were any warrants. Because there was a warrant for his arrest, Smejkal handcuffed Appellant and placed him under arrest as well.

533.05 Sufficiency of the Evidence / Drug Free Zone Findings: A church with a playground was on the next block across the street from the jail where Hammond's van was parked. Smejkal performed a Google Maps search which indicated the distance (Photographs of the gates were admitted into evidence, and are included in the opinion's "Appendix A"). Three of the gates were not locked. The first unlocked gate was between the main church building and the meeting hall or dining room. The second unlocked gate stood between the playground area and a storage building. The third unlocked gate was actually incapable of being locked; there was no post for the yoke on the gate. Instead, the yoke simply rested against the brick wall of the church building. This unlockable gate was accessible from a walkway between two of the church buildings. The walkway itself was accessible by a metal gate locked with a single cylinder deadbolt lock. The fourth gate in the fence surrounding the playground, between the playground and the street, was locked with a padlock between the van and the playground was 547.38 feet. Smejkal also used a rolling tape measure to determine the distance between the van and the playground, and he recorded a distance of 539.2 feet. A chain link fence surrounded the church playground, and the chain link fence included four gates. On appeal, Appellant challenged the sufficiency of the evidence of a drug-free zone. The Court of Appeals found the evidence sufficient based on evidence that the playground was either 547.38 feet away or 539.2 feet away from the van; "none of the various gates to the playground were locked except one;" "only one of [the entrances to the playground] is capable of being locked;" and the playground contained two slides, a playscape, a tube, and monkey bars. Accordingly, the Court of Appeals determined that the play area met the statutory definition of a "playground" and affirmed the conviction (see Vol. 28, No. 24; 06/15/2020). The Court of Criminal Appeals granted discretionary review to determine whether the playground was "open to the public."

Holding: Appellant argues that the only evidence mentioned by the court of appeals relating to the "open to the public" element was the fact that all but one of the gates in the fence surrounding the playground were not locked. *** [A] a fence, in and of itself, will not decide the matter of "open to the public." But neither is a fence irrelevant. Absent other evidence, the presence of a fence tends to show that the playground is closed to the public. If other evidence is presented showing, directly or circumstantially, that the fence serves a purpose other than keeping the public out, the fence may be probative evidence tending to show that the playground is "open to the public." *** The evidence relating to the fence shows that multiple entrances were effectively locked, and all of the gates could be locked, either directly or indirectly. The locked entrances indicate that the church intended to assert some level of control over access to the

playground. *** The fact that the church's attempt to secure the playground area was inadequate does not mean that the church's playground was therefore "open to the public." Instead, the exhibits tend to show that the playground was closed to the public. We disagree with the Court of Appeals's determination that the evidence that some of the gates in the fence were not locked is evidence from which a rational jury could infer that the playground was "open to the public. *** [W]here the offense is a drug offense within proximity of a playground, the State must prove that the playground is "open to the public" -- in other words, the State must prove that it was not closed. Evidence that the playground was obviously or clearly restricted would be strong defensive evidence that the State would have to overcome. The lack of such evidence -- that is, where it is not obviously or clearly restricted -- however, does not relieve the State of its burden to prove "open to the public." *** [The] evidence in the record that the fence was not completely locked and that Smejkal was able to access the playground is not evidence from which a rational jury could conclude that the playground was "open to the public," especially in light of evidence that one gate was locked with a padlock and another gate was behind a walkway secured by a deadbolt locked gate. *** Smejkal testified, without objection, that . . . "It is open to the public." *** The State argues that Smejkal's testimony amounted to a laywitness opinion, and the State contends that a lay witness opinion can constitute sufficient evidence to establish that the playground was "open to the public." *** A playground is not necessarily "open to the public" due to the lack of a fence, and, absent other evidence, a fence, even an unlocked one, tends to show that a playground is closed to the public. Smejkal's factually unsupported opinion that the playground was "open to the public" does not change that. *** We have no doubt that many churches would gladly allow members of the public, especially children, onto their grounds to enjoy playgrounds. But we cannot presume that every church has as broad of an open nature as suggested by the State, and we cannot presume that every church will welcome all members of the public to use their playgrounds without restriction. We decline to hold that a playground is "open to the public" for the purposes of [Health and Safety Code] § 481.134(a)(3)(B) whenever the playground is found on the property of a church. Whether a particular church has this open nature and whether that church welcomes the public to use its playground must be shown by evidence. The evidence shows that although the church did not lock two of the gates in the fence, it attempted to restrict access to the playground by locking one of the gates with a padlock and another gate with a deadbolt. *** [In] order to support a conviction for a drug offense committed within a drug-free zone, where the drug-free zone is alleged to be a playground, there must be sufficient evidence to show each of the elements of the statute's definition of "playground." None of the elements, including the "open to the public" element, may be presumed. The evidence in this case -- the fact that the fence around the playground was not completely secure, an officer's conclusory statement that the playground was open to the public, the fact that the playground was on the grounds of a church, and the fact that the playground could be seen through the chain link fence -- is insufficient to show that the playground was "open to the public."

Concurring / Dissenting Opinions: Presiding Judge Sharon Keller concurred. She was joined by **Judge Burt Richardson**, **Judge Michelle Slaughter**, and **Judge Jesse**

McClure, and would hold that "playgrounds that are privately owned are not 'open to the public' within the meaning of the drug-free zone statute." Judge Kevin Yeary filed a dissenting opinion in which he argued that because there was no testimony that they accurately reflected whether the gates to the playground were locked or unlocked on the day of the offense, the evidence is sufficient.

(**John G. Jasuta**) I think that both the majority and the concurring opinions are correct and that they can be reconciled by proper evidence. That there wasn't such evidence in this case was the problem. Wonder why the church people weren't called. Maybe they would have said the playground was closed to the general public. Seems to me the pastor, and not the officer, was the correct witness on this issue, and that makes me a bit suspicious.

(**David A. Schulman**) On this one, the majority is partially correct, **Presiding Judge Keller** and the concurring judges are totally correct, and **Judge Yeary** is off way base. Whether I ever lock the gate on the side of my house or not, the playground in the back yard is private and not open to the public.