the Jasuta / Schulman report

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TIBA's Case of the Week

Fourteenth Court of Appeals (Houston)

Case Name: ***Darren Tramell Hughes v. The State of Texas***

- **OFFENSE**: Tampering w/ Government Record / Probation Revocation
- **COUNTY**: Harris
- **C/A CASE No**. 14-020-00628-CR
- **DATE OF OPINION**: March 15, 2022 **OPINION**: Justice Meagan Hassan
- **DISPOSITION**: Trial Court Reversed
- **TRIAL COURT**: 179th D/C; Hon. Randy Roll
- **LAWYERS**: Inger Chandler (Defense); Clint Morgan (State)

(**Background Facts**): Appellant was indicted for tampering with a government record in 2016. In March 2017, Appellant pleaded guilty without an agreed recommendation to punishment; the trial court deferred his adjudication of guilt and placed him on community supervision for three years. In January 2020, the State moved to adjudicate Appellant's guilt and alleged, among other things, that Appellant committed forgery.

535 Sufficiency of the Evidence / Forgery: Appellant contested the State's allegation that he committed forgery in January 2020. At the adjudication hearing, Detective Mezegabe testified that he set up a sting operation after he was contacted by a car dealership parts manager regarding a potential forgery scheme. He testified that Appellant had requested car parts and communicated with the manager via email under the name Jimmy Martin. The manager set up a meeting with Appellant at which Mezegabe would deliver the requested car parts instead of the manager. On January 10, 2020, Mezegabe waited for Appellant at the location Appellant chose. When Appellant arrived, he rolled down his car window and asked Mezegabe if he was "the parts guy." Mezegabe answered affirmatively and Appellant instructed Mezegabe "to meet him around the back." Mezegabe followed Appellant "around the back of the building." After Appellant exited

his car, Mezegabe asked him if he was "Jesse Martin" but Appellant corrected him saying: "No, I'm Jimmy Martin." Mezegabe identified Appellant during the hearing as the man who introduced himself as Jimmy Martin. Mezegabe testified that Appellant tried to pay for car parts giving Mezegabe a forged "check that was written out to Joe Meyers [sic] and it was from Tex Star Auto Repair" in the amount of $493.14. A copy of the forged check was admitted into evidence and identified by Mezegabe as "a copy of the check that was given to" him by Appellant. Mezegabe testified that his investigation showed the check Appellant gave him was fraudulent because the "account numbers, everything -- the company is fraudulent." Mezegabe testified that he did not see Appellant write the forged check and that several car dealerships sold parts to a person who identified himself as Jimmy Martin. On appeal, he claims the evidence is insufficient to sustain the trial court's revocation order. Appellant testified in his own defense. He claimed he did not write or sign the checks found in his car but that "[s]omewhere on the southwest side" "[a] guy met [him] and gave them to [him]." Appellant testified: "I was basically working for somebody. They told me they would pay me $150 to do a pickup. Once I dropped the parts off, whatever [the] situation may have been." Appellant denied sending e-mails to the car dealership under a specifically alleged email address; he claimed that "the same burner app [Mezegabe] said I have on my phone, half the world has it on their phone and he got it on his phone, Detective Mezegabe."

Holding: Appellant argues that although the trial court is the sole judge of the credibility of the witnesses, "here the inconsistencies and lack of evidence beyond the testimony of a sole police officer lead to the determination that no rational trier of fact could have found the essential elements of forgery by a preponderance of the evidence" and in particular that "Appellant knew the check was forged." *** Considering (1) the evidence shows that Appellant used a false name, used a spoof cell phone number to communicate with the dealership, lied to police about emailing the dealership, and had other forged and blank checks in his car; and (2) the trial court is the sole trier of fact and determines the credibility of the witnesses and the weight to be given their testimony at the hearing on a motion to adjudicate, the court could have determined that Appellant knew the check he gave Mezegabe was forged and Appellant intended to defraud the dealership by trying to pay for parts with the forged check. *** Based on the record before us, we conclude the evidence is sufficient to support the trial court's finding that Appellant committed the offense of forgery in violation of the terms and conditions of his community supervision.

297 Hearsay & Confrontation / Revocation Hearings: The trial court held a hearing on the State's motion to adjudicate on August 25, 2020. Although Appellant's counsel was present in the courtroom at the hearing, the State, the witnesses, and Appellant attended via Zoom. The trial court stated Appellant is on "video in the jail and the reason he is not here in court is because he has been exposed to COVID-19 and may have even tested positive for it, but those are people who are on the list not to come to court and are prohibited from coming to court for -- because the administration is afraid they could expose other people to the virus." At the hearing, Appellant tried to speak or interject during witness testimony and the State's closing argument, but the trial court instructed that Appellant be muted. Appellant was not given an opportunity to speak or

communicate during the hearing except for when he testified in his defense. On appeal, Appellant contends the trial court denied his right to be present in the courtroom during his community supervision revocation hearing and that, absent waiver by a defendant, a trial court has an independent duty to secure a defendant's presence in the courtroom for his revocation hearing. He also contends there was no waiver and that he was harmed by the trial court's denial of his right to be present in person at his revocation hearing because he was unable to communicate with his counsel in a meaningful way and "his attempts to interject during the hearing resulted in clear frustration on the part of the trial court." The State acknowledges that the Sixth Amendment right to confrontation encompasses a right to be present but claims "the right to confrontation does not apply at probation revocation proceedings."

Holding: The Texas Court of Criminal Appeals' opinion in ***Ex parte Doan***, 369 S.W.3d 205 (Tex.Cr.App. 2012)(see 🙾, Vol. 20, No. 25; 06/25/2012) controls. There, the Court of Criminal Appeals held that "[c]ommunity-supervision revocation proceedings are not administrative hearings; they are judicial proceedings, to be governed by the rules established to govern judicial proceedings." *** Although several intermediate Appellate court cases (decided both pre- and post-***Doan***) have concluded that the Confrontation Clause does not apply to community supervision revocation proceedings, we are not bound by cases that are contrary to high court pronouncements. These cases do not recognize the importance of ***Doan*** and, thus, neglect to give controlling weight to the Court of Criminal Appeals's pronouncements therein. *** Given the Texas Court of Criminal Appeals's holding in ***Doan***, we conclude that due process safeguards apply at a community supervision revocation hearing.

> **Concurring / Dissenting Opinions**: Justice Ken Wise dissented, arguing that it was unnecessary for the majority to undermine the Court's own holding in ***Trevino v. State***, 218 S.W.3d 234 (Tex.App. - (Tex.App. - Houston [14th] 2007)(see 🙾, Vol. 15, No. 7; 02/26/2007), and that the Court's holding is not supported by the record.

(**John G. Jasuta**) Not to be too obvious, or perhaps facetious, but wasn't Appellant denied his right to complain that his attorney wasn't doing the right thing by him and disrupt the court proceedings with those complaints under ***McCoy v. Louisiana***, No. 16-8255 (see 🙾, Vol. 26, No. 20; 05/21/2018), when he was muted and not allowed to be heard? Since disruption appears to be the only method of raising those complaints how can muting ever be allowed?

(**David A. Schulman**) First, John is absolutely correct. Second, while I personally think that, given its adversarial nature, all of an individual's constitutional rights are involved and apply in the revocation process, I'm not sure ***Doan*** supports that. The primary issue was that of collateral estoppel, and what the Court said pertaining to the difference in criminal trials and revocation proceedings ("aside from the burden of proof . . . there are few procedural differences between a Texas criminal trial and a Texas community-supervision revocation proceeding") is probably *dicta*. It is the law, nevertheless, and is binding. Finally, given that

Trevino was only mentioned in a footnote which distinguished ***Trevino*** and five other cases, and that ***Trevino*** predates ***Doan*** by nearly 8 years, I cannot agree that this opinion undermines ***Trevino***. ***Doan*** took care of that.

297 Hearsay & Confrontation / Remote Appearance (Zoom): On appeal, Appellant contends the trial court denied his right to be present in the courtroom during his community supervision revocation hearing and that, absent waiver by a defendant, a trial court has an independent duty to secure a defendant's presence in the courtroom for his revocation hearing. Appellant contends that his constitutional complaint is not subject to procedural default under ordinary preservation of error rules because a defendant's right to be present at his revocation hearing cannot be forfeited; instead, absent waiver by a defendant, a trial court has an independent duty to secure a defendant's presence in the courtroom (regardless of whether his trial counsel requests same). Appellant argues that because he did not waive his right to proceed with his revocation hearing via Zoom, he was denied his Sixth Amendment right to be present at this critical proceeding to confront witnesses. The State claims that Appellant was not harmed.

Holding: The First Court of Appeals has already addressed this question. See ***Hayes v. State***, 516 S.W.3d 649 (Tex.App. - Houston [1st] 2017)(see , Vol. 25, No. 9; 03/13/2017). There, the defendant "was not 'brought up' from the jail on the day that his co-defendant, Amos, testified and presented his own punishment defense." Relying on the Court of Criminal Appeals' opinion in ***Garcia v. State***, 149 S.W.3d 135 (Tex.Cr.App. 2004)(see , Vol. 12, No. 12; 03/29/2004), the court in ***Hayes*** concluded that the Sixth Amendment right to be present for trial to confront witnesses is a category two ***Marin*** right and cannot be forfeited by counsel's failure to assert it on a defendant's behalf. *** The court also stated that "[t]his conclusion is supported by the U.S. Supreme Court's language in ***Illinois v. Allen***, 397 U.S. 337, 338 (1970), wherein it stated that 'the privilege (of personally confronting witnesses) may be lost by consent or at times even by misconduct.'" *** We agree with the ***Hayes*** court's holding and conclude that the Sixth Amendment right to be present to confront and cross-examine witnesses is a category two ***Marin*** right that, absent a waiver by the defendant, must be implemented by a trial court and that failure to do so can be challenged on appeal regardless of whether it was first urged in the trial court. Here, Appellant did not waive his right to be present; therefore, he can challenge on appeal whether the trial court erred in securing his presence via Zoom (as opposed to securing his physical presence in the courtroom). However, we are neither prepared to make blanket pronouncements in this case nor conclude that a defendant is not present at a proceeding under the Sixth Amendment if he is present via video-conferencing. *** In this case, Appellant's counsel appeared in the courtroom, but the trial court only allowed Appellant to attend his revocation hearing via video-conferencing "because he has been exposed to COVID-19 and may have even tested positive." Appellant was in a separate break-out room with no possibility to communicate with his counsel in private regarding how to confront and cross-examine Mezegabe -- the sole witness the State called to prove its forgery allegations. Without the possibility to speak to his counsel in confidence during witness testimony, Appellant was not truly present during his hearing. Instead, he was relegated to being a distant observer with no opportunity to confront or

cross-examine as envisioned by the Confrontation Clause. We conclude that Appellant was not present at his hearing for Sixth Amendment purposes when he could not interact with his counsel regarding confrontation and cross-examination of the witness. Therefore, under the circumstances of this particular case, the trial court violated Appellant's Sixth Amendment right to be present to confront and cross-examine witnesses.

Ed Note: The Court of Appeals also held that "This error is of constitutional magnitude" and that, it could not be determined beyond a reasonable doubt that the trial court's violation of Appellant's Sixth Amendment rights did not contribute to the trial court's judgment revoking Appellant's community supervision.

(**David A. Schulman**) I absolutely hate Zoom hearings in contested matters. That not withstanding, arrangements could have been made to keep Appellant at the jail yet still put him in constant communication with his attorney.