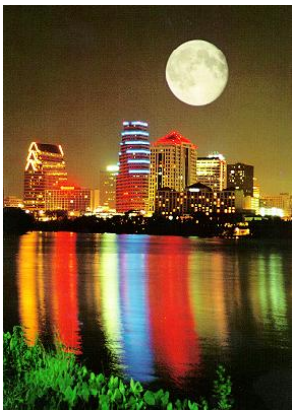
One Fabulous Skyline

TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-850-6544

Web Site: www.texindbar.org

Vol. 30, No. 46 - December 12, 2022

Case Name: ***Gustavo Tijerina Sandoval v. The State of Texas***

- **OFFENSE**: Capital Murder / Death Sentence
- **COUNTY**: Cameron
- **CCA. CASE No**. AP-77,081 **DATE OF OPINION**: December 7, 2022
- **DISPOSITION**: Conviction & Sentence Affirmed
- **OPINION**: Presiding Judge Sharon Keller **VOTE**: 5-4-0
- **TRIAL COURT**: 197th D/C; Hon. Migdalia Lopez
- **LAWYERS**: Jennae Swiergula & Jared Tyler (Defense); Rachel Patton (State)

(**Background Facts**): On Sunday, August 3, 2014, Harvey Vega, a border patrol agent, and his family and one of his son's friends went to Harvey's parents' house for a barbeque. Afterwards, Harvey and some of the others left to go target shooting. Later, they all decided to meet up again to go fishing. Harvey's parents drove their own truck. Harvey's father, Javier, always carried his gun for protection when he went somewhere, so along with their fishing gear, he brought his .40 caliber Sig Sauer, a .22 pistol, and a .22 rifle. As the two vehicles traveled to the fishing spot, they passed a red SUV parked on the side of the road with two men inside. Harvey's mother noticed that the SUV was parked on an upslope. That was unusual to her because, "No one ever parks on the upslope." Harvey's father got a good look at the two men, and his mother made eye contact with them. Both parents waved at the two men as they passed. The SUV started following them. After the Vega family arrived at and set up the fishing site, the SUV drove to within 30 yards but then reversed and drove away. Ten or fifteen minutes later, the SUV returned. Two men jumped out and began firing their guns at the Vega family. The driver shot Harvey point blank and the passenger shot at the parents. According to the parents, the driver shouted "Al suelo, cabron," meaning "Down to the ground, motherfucker." After Appellant shot Harvey, the passenger shot Javier. Javier fell to the ground, went for his gun, and shot at the passenger. When that happened, the two men got back into the SUV and drove away, with the passenger hanging on to the door. Harvey's parents identified Appellant as the driver and testified that Appellant shot Harvey. The friend, Aric Garcia, testified that the driver shot Harvey. Harvey's wife testified that Appellant was one of the men in the SUV. Harvey died,

never regaining consciousness. Around 2:00 the next morning, the SUV broke down and Appellant and his passenger were forced to walk. They went to a house and asked for help. The woman who lived there let them in, but she alerted border patrol agents after seeing a helicopter search light. Appellant and his passenger were arrested.

[§§ 552 **Sufficiency of the Evidence / Trial Court's Rulings / Change of Venue**]: Appellant complains that the trial court erred in refusing to grant a change of venue due to prejudicial publicity. Appellant was indicted in Willacy County, where Harvey was killed. Appellant initially sought and obtained an order restricting publicity. He later moved to change venue on the basis of prejudicial pretrial publicity, requesting that venue be changed to a county outside the Rio Grande Valley, towards Laredo, Nueces, or San Antonio. Defense counsel conducted an informal poll of prospective jurors in Willacy and Cameron counties. In Willacy County, 20 out of 69 respondents (29%) had not formed an opinion as to Appellant's guilt. In Cameron County, 87 out of 130 respondents (67%) had not formed an opinion as to Appellant's guilt. The trial court changed venue to Cameron County on the basis of the evidence and because Cameron County had adequate facilities for a capital murder prosecution while Willacy County did not. Nevertheless, Appellant later moved to change venue again. In support, he introduced testimony from two local criminal defense attorneys (one of whom served as a legal analyst for a news station) who thought Appellant could not get a fair trial. The trial court denied the motion.

Holding: When a defendant seeks a change of venue based on publicity about the case, he must show that the publicity was "pervasive, prejudicial, and inflammatory." Widespread publicity is not by itself inherently prejudicial. The defendant must show an actual, identifiable prejudice attributable to pretrial publicity on the part of the community from which members of the jury will come. We review a trial court's ruling on a motion to change venue for abuse of discretion and will uphold the trial court's decision if it is within the zone of reasonable disagreement. The two primary methods of determining whether publicity is pervasive are a hearing on the motion to change venue and the testimony of prospective jurors at voir dire. *** Appellant points to the fact that, after an initial panel of 337 prospective jurors, the trial court called two supplemental panels, one of 115 and one of 113. Appellant further contends that nine of the people who actually served on the jury specifically recalled hearing about the case from local news sources around the time the crime occurred. The State responds that none of the twelve jurors indicated significant prior knowledge of the case and that all twelve said that they could render a verdict based solely on the evidence heard in court. *** After reviewing Appellant's nine record citations, we find that most involved jurors who had heard little if anything about the case. And as the State points out, all of the jurors said that they could base their decisions about the case solely on the evidence offered at trial. *** We conclude that the trial court was within its discretion to decide that Appellant could get a fair trial in Cameron County.

Sidebars

(**David A. Schulman**) As I read the opinion, the trial court did everything counsel requested by grant the motion for change of venue. Perhaps trial counsel should not have made the "informal poll of prospective jurors" part of the record/

(**John G. Jasuta**) As soon as you hear that all twelve of those selected said that they could render a verdict based solely on the evidence heard in court, the game was over. The problem is that many will say it because it makes them look correct. How many mean it? How do you know?

[230.01 **Jury Selection / Jury Selection Procedures**]: Appellant's jury was selected from three special venires called on three different days. The court reporter's record indicates that Appellant and his attorney were not present when the trial court conducted a general inquiry into the prospective jurors' qualifications, excuses, and exemptions but arrived afterwards. On appeal, Appellant complains that the trial court erred in hearing qualifications, excuses, and exemptions for three venire panels outside the presence of Appellant and his attorney. He claims that the trial court's conduct violated both constitution and statute.

Ed Note (**Procedural History / Remand**): The Court "initially perceived" a possible conflict in the record because the docket sheets seemed to suggest that Appellant and his attorney were present on these occasions. In a hearing on Appellant's motion for mistrial, the trial court suggested that Appellant and his attorney were present. Pursuant to the Court's authority to have an inaccuracy in the record corrected, it remanded the case to the trial court to determine if there was an inaccuracy in either the clerk's record or the reporter's record. On remand, the trial court concluded that neither record was inaccurate. Rather, the Clerk's Record simply denoted the date and general time period for when Appellant and counsel were present but did not pinpoint specific times they were present. The trial court found that Appellant's attorney observed, but did not participate in, a portion of the first qualifications, excuses, and exemptions proceeding. The trial court also found that the court's questioning of prospective jurors at this time was *sotto voce*, at a whisper, and that Appellant's attorney could not hear what was being said. The trial court further found the court reporter's record to "be the most reliable source for what occurred" and that Appellant, his attorney, and the interpreter were not present during the second and third hearings on qualifications, excuses, and exemptions. The trial court also found that all three hearings were held off the record.

Holding: [The] reasons we have given for permitting a judge to conduct this type of proceeding outside the presence of the defendant and his attorney apply with equal force to special venires. We have explained that the "process of hearing and granting juror exemptions and excuses of this type lack the traditional adversarial elements of most voir-dire proceedings." ***Black v. State***, 26 S.W.3d 895 (Tex.Cr.App. 2000)(see , Vol. 8, No. 37; 09/18/2000). Further, the "right to be excused from the venire belongs to each of its individual members, not to the defendant." ***Moore v. State***, 999 S.W.2d 385 (Tex.Cr.App. 1999)(see , Vol. 7, No. 16; 04/26/1999). And it seems nonsensical to suggest that a perfectly permissible procedure becomes a constitutional violation based on how or where the prospective juror is first summoned. Whether the prospective juror is assigned first to the central jury room or to a special venire, a preliminary inquiry into his general qualifications, excuses, and exemptions is not the sort of proceeding that needs to be conducted in the defendant's presence. And nothing in the statute authorizing a special venire for a capital case requires that an Article 35.03 proceeding be held in the presence of the defendant.

[§§ **515.04 Appellate Procedure / Appellate Record /Lost or Missing Records**]: Appellant contends that the failure to record the proceedings on qualifications, excuses, and exemptions requires a new trial. He relies on the Appellate rule regarding lost and destroyed records. His reliance on this rule is misplaced because the rule has historically applied only when a record was made and later lost or destroyed. Nevertheless, an error might be predicated on the failure to record proceedings, provided that the defendant lodged an objection to preserve that claim. The trial court's findings on remand suggest that defense counsel had no way of knowing that the proceedings were not being recorded. Assuming Appellant has not forfeited his complaint about the absence of a record, that complaint is without merit. If instead of being summoned for a special venire, the prospective jurors had first been summoned to a central jury room for such a proceeding, one would not expect that proceeding to be recorded. Because we have held that these proceedings should be viewed the same as proceedings conducted in a central jury room – not being a part of Appellant's trial and him generally having no right to be present – he would not have a right to have those proceedings recorded.

[§§ **124.01 Right to Counsel / Ineffective Assistance of Counsel / Conflicts of Interest**]: Appellant contends that he was denied his right to counsel and his right to a fair and impartial tribunal. He claims that his attorneys gave the trial court confidential information in *ex parte* hearings and improperly delegated decisions to Appellant in order to protect themselves against possible ineffective assistance claims. He claims that the attorneys improperly delegated to him the choice of what witnesses to call and what evidence to present. He talks about his attorneys complaining that he wanted to control which witnesses they investigated, about his attorneys affording him the decision on which witnesses would testify, and about the attorneys affording him the decision on whether to present evidence of his criminal past at the guilt stage of trial. Appellant claims that his attorneys' conduct on these matters constituted a conflict between Appellant's interest in a favorable outcome for his case and his attorneys' interests in protecting themselves. He also claims that the trial court was not impartial because it acted to protect the attorneys interests' in contravention to Appellant's own.

Holding: [In] ***Monreal v. State***, 947 S.W.2d 559 (Tex.Cr.App. 1997)(see §§, Vol. 5, No. 23; 06/16/1997), we held that this type of situation did not involve a conflict of interest. There, we said that the attorney was "not required to make a choice between advancing her client's interest in a fair trial or advancing her own interest in avoiding a future claim of ineffective assistance." So her personal interest did not actually conflict with the defendant's interest. This was true even if the attorney was "less than artful in executing her personal interest" and elicited unnecessary and potentially damaging information. So the claim that the attorney's action to protect herself from an ineffective assistance claim worked to the client's detriment had to be analyzed under the traditional ***Strickland*** framework for ineffective assistance claims. *** [Even] if we assume that the trial court was too deferential to Appellant's attorneys in their attempts to protect themselves, that does not establish that the trial court lacked impartiality. Judicial rulings and a judge's efforts at courtroom administration almost never constitute a valid basis for finding bias or partiality. Absent an extrajudicial source of bias, a judge's actions during trial can show bias only if they reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." That cannot be shown when the trial judge's manifest intent is to benefit the

defendant and protect his rights. *** Moreover, we have recognized that a trial judge is "obliged to respect the attorney-client relationship" and that "any potential disruption of the relationship is subject to careful scrutiny." ***Buntion v. Harmon***, 827 S.W.2d 945 (Tex.Cr.App. 1992). A trial court's refusal to inject itself into the attorney-client relationship is not by itself a sign of bias or partiality on the trial court's part.

Ed. Note: Besides the points discussed above, Appellant raised issues which have been raised and rejected in other cases, which the Court found error had not been preserved, or which are too fact specific to be of any importance to the bench and bar. Because they offer no insight into existing law and aren't new law, they aren't discussed here.