the Jasuta / Schulman report

Volume 32, Number 3 ~ Monday, January 22nd, 2024 (Report No. 1,498)

Case Name: ***The State of Texas v. Trenton Kyle Green***

- **OFFENSE**: Forgery
- **COUNTY**: Gregg
- **COURT OF APPEALS**: Texarkana 2020
- **C/A CITATION**: 613 S.W.3d 571
- **C/A RESULT**: Conviction Affirmed
- **CCA. CASE No**. PD-1182-20
- **TRIAL COURT**: 188th D/C;
  Hon. Scott Novy
- **LAWYERS**: Chris Botto (Defense);
  Brendan W. Guy (State)

(**Relevant Facts**): Appellee was indicted on one count of third-degree felony forgery under Penal Code Section 32.21(e) for forging currency. Nothing in the indictment addressed his purpose for the forgery or, specifically, whether he engaged in the forgery to obtain property or services. Green filed a pretrial motion to quash the indictment, noting that the facts would show he attempted to pass a counterfeit $20 bill in exchange for a $2 cigarette lighter. He asserted that the allegations that he "made" counterfeit currency and that he forged the writing with the "intent to defraud or harm another" would require showing that he committed the forgery to obtain property or services. Green further argued that the district court does not have misdemeanor jurisdiction, so it lacked jurisdiction over the case. The trial court agreed and granted a motion to quash. The State appealed but did not dispute the description of the underlying facts. Instead, it contended that Section 32.21 afforded it prosecutorial discretion to choose under which subsection to proceed -- either subsection (e-1)'s value ladder, or subsection (e) based on the type of writing involved. The Court of Appeals rejected the State's arguments, determining that, because the offense could in fact be a Class C misdemeanor, it was impossible to determine from the face of the indictment whether the offense was a felony over which the trial court had jurisdiction. The Court of Appeals upheld the trial court's ruling granting the motion to quash. ***State v. Green***, 613 S.W.3d 571 (Tex.App. - Texarkana 2020)(see ☙, Vol. 28, No. 47; 11/30/2020). It held that, whether the offense involved is a felony or misdemeanor under the statute, "the defendant's purpose in forging the writing is the element that increases the range of punishment and must be pled in the indictment and proven beyond a reasonable doubt" under ***Apprendi v. New Jersey***, 530 U.S. 466 (2000).

Case Name: ***Bobby Carl Lennox v. The State of Texas***

- **OFFENSE**: Forgery
- **COUNTY**: Lamar
- **COURT OF APPEALS**:
- **C/A CITATION**: 613 S.W.3d 597
- **C/A RESULT**: Punishment Reversed
- **CCA. CASE No**. PD-1213-20
- **TRIAL COURT**: 6th D/C;
  Hon. Wesley Tidwell
- **LAWYERS**: Troy Hornsby (Defense);
  Gary Young (State)

(**Relevant Facts**): Lennox did not file any pretrial motion to quash. Instead, he was tried and convicted on three counts of state-jail felony forgery under Section 32.21(d) for forging stolen checks in the amounts of $137, $130, and $150 and passing them at a convenience store. Each count of the indictment alleged that Lennox, "with intent to defraud or harm another, pass[ed] to Nima Sherpa, a forged writing, knowing such writing to be forged, and such writing had been so made or completed that it purported to be the act of James McKnight, who did not authorize the act, and the writing was a check of the following tenor." Following his conviction, and application of alleged enhancements, a sentence of seventeen years' imprisonment was imposed on each count. On direct appeal, Lennox argued for the first time that his seventeen-year sentences were illegal because, given the value ladder in Section 32.21(e-1) and the value of the checks passed, his offenses were Class B misdemeanors. Though not raised as a freestanding point of error, Lennox also argued that the jury charge was erroneous because it improperly charged the offenses as state-jail felonies when they instead should have been charged as Class B misdemeanors. The Court of Appeals ultimately treated this issue as one of unobjected-to jury-charge error. Relying on its reasoning in ***Green***, the court held that the guilt-phase jury charge contained error. It found that, given the allegations in the indictment and the evidence presented at trial, the jury charge "should have charged the offenses as class B misdemeanors" under the value ladder in subsection (e-1). Finding the error to be egregiously harmful, the Court of Appeals reformed the judgments of conviction to three Class B misdemeanors and remanded the case to the trial court to hold a new punishment trial. ***Lennox v. State***, 613 S.W.3d 597 (Tex.App. - Texarkana 2020)(see ☙, Vol. 28, No. 47; 11/30/2020).

[☙ **26 Charging Instruments / Requirements of Indictment or Information / Jurisdiction**]: On discretionary review, the State raises different arguments in each case in opposition to the Court of Appeals' holdings. In ***Green***, the State re-urges its position that Section 32.21(e-1)'s value ladder is a "discretionary provision which can be alleged or not at the discretion of the prosecution." It contends that this conclusion is supported by the statute's plain language and that, in holding otherwise, the Court of Appeals misconstrued the "[s]ubject to Subsection (e-1)" language in subsections (d) and (e). Alternatively, the State contends that even if the value ladder is mandatory when raised by the facts, any such facts would not arise until the evidence is presented at trial. Accordingly, because the felony provisions in subsections (d) and (e) remain facially valid offenses, the indictment in ***Green***'s case tracking the statutory language in subsection (e) "still alleged a valid offense under Section 32.21(e) and thus should not have been quashed." The State further asserts that neither ***Apprendi*** nor the language of subsections (d) or (e) requires the State

to allege the defendant's purpose for committing forgery in a prosecution under those subsections. Thus, there was "no justification for the Court of Appeals to write an additional element concerning a defendant's motive into Section 32.21(e)."By contrast, in ***Lennox***, the State takes the position that the Legislature intended for the value ladder in subsection (e-1) to operate as a punishment issue, rather than as an element of the offense of forgery. Under this proposed construction, the State could charge a forgery offense under the felony provisions in Section 32.21(d) or (e), and then, at the punishment phase, the defense could raise an issue under subsection (e-1) as a means of reducing the offense to a misdemeanor under the value ladder. Under this interpretation, the State contends that the Court of Appeals erred by finding jury-charge error in ***Lennox***'s case because the offenses were properly charged as state-jail felonies at the guilt phase, and Lennox did not raise any objection at the punishment phase asking for a defensive jury instruction under subsection (e-1)'s value ladder.

Holding (Judge Michelle Slaughter): At the outset, we reject the State's argument in ***Green*** that the value ladder is a discretionary provision that applies only when the State chooses to invoke it. The statutory language making subsections (d) and (e) "[s]ubject to Subsection (e-1)" plainly requires that, whenever the triggering clause of subsection (e-1) is satisfied (that is, when the facts show that the defendant engaged in the forgery "to obtain or attempt to obtain a property or service"), the offense classifications in subsection (e-1) control over those in subsections (d) or (e), and the offense level must be determined by the value of the property or services at issue. We also reject the State's argument in ***Lennox*** that subsection (e-1) constitutes a punishment issue rather than an element. Instead, after reviewing the approach outlined in our decision in ***Oliva v. State***, 548 S.W.3d 518 (Tex.Cr.App. 2018)(see ☙, Vol. 26, No. 21; 05/28/2018), we hold that subsection (e-1) sets forth an element of a distinct forgery-to-obtain-property-or-services offense. We do, however, agree with the State's alternative argument in ***Green*** that the Court of Appeals erred in its application of ***Apprendi*** principles to this situation, which resulted in it improperly applying a non-statutory "purpose" element in felony forgery cases brought under subsections (d) and (e). *** Pursuant to the foregoing conclusions, because the Court of Appeals' holdings were based on its erroneous understanding of the structure of Section 32.21 and due process requirements under ***Apprendi***, we vacate the Court of Appeals' judgments and remand these causes for further proceedings consistent with this opinion.

Sidebars

(**David A. Schulman**) To begin with, albeit absolutely correct, this is a very complicated and sometimes difficult to follow opinion. I'm reasonably certain that the late Rusty Duncan would have said that reading it was giving him a headache. In any event, the reason(s) for the Court's decision is well set-out and clear, and, as I read it, the Court's rationale (set out on pages 20-22), involves more than a few conclusions of law, the most important of which is that the "Subject to Subsection (e-1)" clause in subsections (d) and (e) "means the value ladder is not discretionary." Thus, if there is a rule as to forgery cases to be gleaned from this opinion, it's that the nature/level of the offense is defined by the value of the loss to the victim, and the offense is a misdemeanor unless ❶ the indictment alleges the value of the loss to the victim to be "$2,500 or more;" or ❷ pursuant to subsection e-2, the

allegation is that the value of the loss was "$750 or more but less than $2,500" AND the victim is alleged to be "an elderly individual" as defined by Section 22.04 of the Penal Code. In the ***Lennox*** case, the value of the three checks is less than $750 and the indictment did not allege the victim to be an elderly. The prosecution is clearly for a Class "B" misdemeanor and the Court of Appeals' resolution (new punishment hearing) is correct. In the ***Green*** case, however, the trial court and the Court of Appeals agreed that quashing the indictment was the correct procedure. Given that there appears to have been only a single counterfeit $20 bill involved and Mr. Green "spent five months in the Gregg County Jail" before the trial court "granted his motion to quash the indictment, and released Green from jail," the prosecution for the Class "C" misdemeanor case might just go away.

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Unpublished Opinions

Case Name: ***State v. Anthony Andrew Valle*** (PD-0653-20) Appellee was charged with aggravated sexual assault of a child in Harris County. He pled not guilty and elected to be tried by a jury. He also filed an election under to have the jury decide punishment. Appellee's election was file-stamped on November 9, 2021, the day after voir dire began, but the statute requires that an election be filed before voir dire begins. After the jury found Appellee guilty, during the punishment phase, he filed a motion to recuse the trial judge and a motion for mistrial. His motion to recuse was granted, and the new trial judge appointed to his case granted his motion for mistrial as to both guilt and punishment. On appeal, the State argued that Appellee was not entitled to a mistrial on guilt. The Court of Appeals agreed, finding that because Appellee's election was filed one day after voir dire began, Article 37.07, § 2(b) did not provide a valid basis for the trial court's decision to grant a mistrial on guilt. Appellee has filed a petition for discretionary review, points to other documents in the record that are clearly file-stamped with the wrong dates, and argues that the file-stamped date of November 9, 2021, on his election is a clerical error. On January 17, 2024, in an unpublished *per curiam* opinion, the Court of Criminal Appeals summarily granted Appellee's PDR, vacated the judgment of the Court of Appeals, and remanded the case with instructions for the Court of Appeals to abate the case so the trial court can determine whether the November 9, 2021 date is a clerical error and, if so, further determine when Appellee's election was filed.

Case Name: ***Tivirus D. Craft*** (WR-93,259-02) Applicant was convicted of one count of arson, one count of tampering with evidence, and one count of arson in Trinity County. He was sentenced to life, twenty years and two years imprisonment respectively and did not appeal his conviction. In this application for a writ of *habeas corpus*, Applicant contends that he was denied his right to an appeal because the district clerk failed to timely file the paperwork with the Court of Appeals, and failed to timely inform Appellate counsel of his appointment. On January 17, 2024, in an unpublished *per curiam* opinion, the Court of Criminal Appeals determined that, based on the record, Applicant is entitled to relief based on a breakdown in the system, and that an out-of-time appeal is authorized under ***Ex parte Riley***, 193 S.W.3d 900 (Tex.Cr.App. 2006)(see 🙞, Vol. 14, No. 22; 06/12/2006).

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- **PDR(s) GRANTED**: State's & Court's
- **COUNTY**: Maverick
- **OFFENSE**: Pre-Trial *Habeas Corpus*
- **CCA CASE NO**: PD-0461-23
- **COURT OF APPEALS CASE NO**: 04-22-00623-CR (see 🙞, Vol. 31, No. 30; 06/26/2023)

PDRs Granted / Writs Filed and Set

Case Name: ***Ex parte Luis Alfredo Aparicio***
ISSUE(s) GRANTED:

On the Court's Own Motion (GRANTED 01/17/2024): Whether the Court of Appeals erred in reversing the trial court's finding

that Appellant failed to establish a prima facie case of selective prosecution on the basis of sex discrimination.

State's (GRANTED 08/23/2023)(see §§, Vol. 31, No. 29; 08/29/2023): The Court of Appeals Erred in Holding That Appellant Raised a Cognizable Claim in a Pre-Trial Habeas Corpus Proceeding.

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Courts of Appeals

No Published Opinions this Week

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Workload of the Courts of Appeals - 2024

Criminal Cases & Civil Cases with Impact on Criminal Law

Courts of Appeals	Last Ops	Ops PTD	Imp PTD	Ops YTD	Imp YTD	% PUB'D	OutPut x Mem
1st (Houston)	01/18	2	0	12	1	8.3%	1.33
2nd (Ft. Worth)	01/18	3	0	8	0	0.0%	1.14
3rd (Austin)	01/18	2	0	5	0	0.0%	0.83
4th (San Antonio)	01/18	7	0	14	0	0.0%	2.00
5th (Dallas)	01/05	0	0	3	0	0.0%	0.23
6th (Texarkana)	01/18	3	0	8	1	12.5%	2.67
7th (Amarillo)	01/12	2	0	9	0	0.0%	3.00
8th (El Paso)	01/18	5	0	6	0	0.0%	2.00
9th (Beaumont)	01/18	5	0	6	0	0.0%	1.50
10th (Waco)	01/18	1	0	10	0	0.0%	3.33
11th (Eastland)	01/18	4	0	9	1	11.1%	3.00
12th (Tyler)	01/18	0	0	8	1	12.5%	2.67
13th (Corpus Christi)	01/18	6	0	11	1	9.1%	1.83
14th (Houston)	01/18	0	0	8	1	12.5%	0.89
		40	0	117	6	5.1%	

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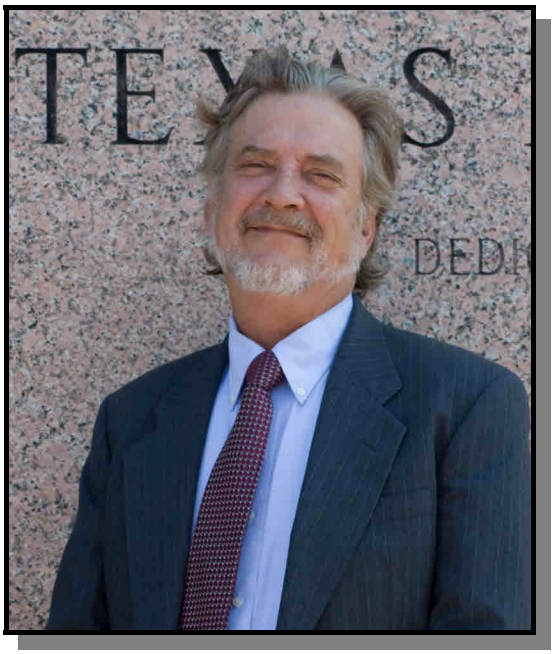
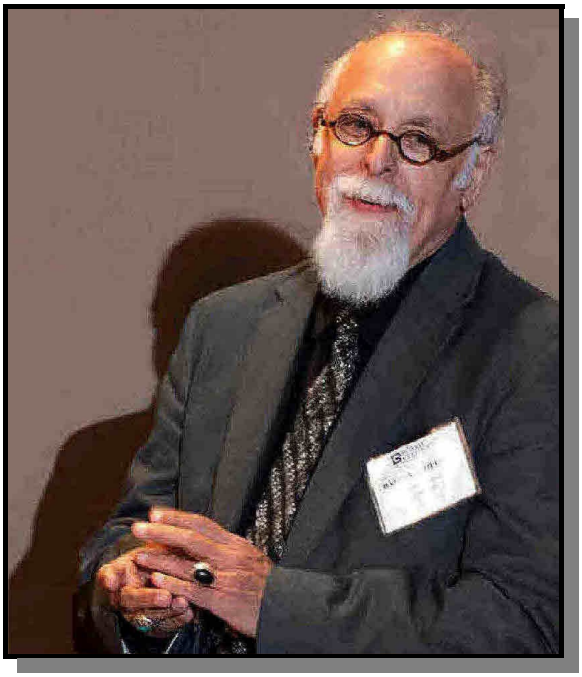
Jasuta and Schulman

The Texas Appeal Lawyers



John G. Jasuta holds a B.S.Ed. from the University of Texas at Austin and a JD from St. Mary's University School of Law in San Antonio. He has worked within the prison system as a member of the Staff Counsel for Inmates of the former Texas Department of Corrections, has served as General Counsel to the Texas Board of Pardons and Paroles and as a member of the central staff of the Texas Court of Criminal Appeals for over twenty-four years, rising to the position of Chief Staff Attorney and head of the writ section of that staff. He co-wrote Texas Criminal Writ Practice with Catherine Burnett and Rick Wetzel and has written other articles on *habeas corpus* and some of the more arcane aspects of that area including time computations under the law. He retired from the State of Texas in September 2003. Contact John at lawyer1@johnjasuta.com.

David A. Schulman is a graduate of the University of Nevada, Las Vegas, and Texas Tech University School of Law. One of the founders of TIBA, he has been a co-author of this report for many years. He was a member of the Court of Criminal Appeals' staff in 1991-1993, and has been lead counsel in hundreds of direct appeals and *habeas corpus* proceedings. David has appeared in all 14 of Texas' Courts of Appeals, on numerous occasions in the Court of Criminal Appeals, and at both the Fifth Circuit Court of Appeals in New Orleans and the Supreme Court of the United States in Washington, D.C. He reviews every published criminal case from the Court of Criminal Appeals and every Court of Appeals on a daily basis. David has been Board Certified in Criminal Law since 1991 and was one of the first attorneys to become Board Certified in both Criminal Law and Criminal Appellate law. In 2022, David was appointed to serve on the Texas Board of Legal Specialization. He continues to work to increase the skill level of the bench and bar. See his website at www.davidschulman.com.



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