TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783
Austin, Texas 78767
Tel. 512-354-7823
Fax: 512-532-6282

Web Site: www.texindbar.org

Vol. 4, No.49, December 18, 1996

- APPELLANT'S NAME: Ex parte Freda S. Mowbray
- OFFENSE: Murder
- COURT OF APPEALS: Corpus Christi 1990
- CITATION: 788 S.W.2d 658
- RESULT: Conviction Affirmed
- COUNTY: Cameron
- CRIM. APPEALS NO. 72624
- DATE OF OPINION: December 18, 1996
- JUDGE: Baird, J.
- DISPOSITION: Relief Granted - New Trial Ordered

NEWLY DISCOVERED EVIDENCE / ACTUAL INNOCENCE: (The facts in this case are very ["way"] complicated) Applicant was convicted of murdering her husband and sentenced to life in the penitentiary. Three different "blood splatter" experts were involved in the case. Two testified, one did not. According to the two that testified, the expert who did not was the country's leading blood splatter expert. The testimony of the two experts was very incumbent inculpatory, indicating that Appellant had pulled the trigger, because of the "high velocity impact bloodstains" on her nightgown. Additionally, there was testimony that the deceased was found in a "normal" sleeping position, one can't hand under his pillow, and a second pillow wedged between his knees. Although Applicant had testified that she was laying next to the deceased at the time of the shooting and had seen the deceased's elbow raise up immediately before the shooting, and there was testimony that the deceased was depressed, even suicidal, and had attempted to kill himself before, including shooting himself once, the physical evidence showed no blood or brain matter on his hand, such as there would have been if he had shot himself. The missing blood expert, however, Dr. Herbert MacDonnell, had prepared a report that found there were no blood stains on the nightgown, and that the death was probably a suicide. The report was given to defense counsel two weeks before trial. In her habeas corpus application, she alleged (a) actual innocence; (b) that the State's main witness had given false and misleading testimony; (c) that the State had knowingly used false testimony; and (d) she had been denied the effective assistance of counsel. After the case was remanded for an evidentiary hearing, the trial court held that (a) Applicant was not "factually" innocent; (b) the State's evidence was "scientifically invalid," but was not perjurious; and (c) Applicant was not denied the effective assistance of counsel. Nevertheless, the trial court concluded that, because the State knew about MacDonnell's conclusions seven to eight months before trial but did not provide his report to defense counsel until two weeks before trial, and even then misled counsel into believing that MacDonnell would testify (presumably so he wouldn't be called to testify), Applicant was denied a fair trial. Additionally, the trial court found that, had the jury been able to hear or learn of MacDonnell's report, it would have found Applicant not guilty.

HOLDING: The trial court's factual determinations are supported by the record. Applicant's due process rights were violated, and she is entitled to relief (and a new trial is ordered).

NOTES: Judge McCormick filed a dissenting opinion in which he, once again, chastises the majority for their judicial activism ("Just to state the Court's holding is to refute it. The Court's holding as to this aspect of the case is absurd and represents another inane exercise in judicial activism--i.e., finding so called "rights" in the United States Constitution that just do not exist."). He states that McDonnell's report does not "in any way impeach the most important evidence in this case establishing applicant's guilt--the absence of blood and brain matter on the victim's right hand, the position of the victim's body, and the presence of gunshot residue on the right sleeve of applicant's nightgown, all of which were inconsistent with her defensive theory." Judge Keller also filed a dissenting opinion, arguing that the record does not support the trial court's findings.

COMMENT: (David A. Schulman) I tend to agree with the dissenters on this one, but I recognize that the Court's holding looks and sounds correct, but only because the most relevant facts were not included. Undermining the Court's decision is the fact that the trial court ruled against Applicant on each of her points. That Court determined that the State's witnesses testified and good faith, and that their testimony was not perjurious. Additionally, since trial counsel had received the report in question two weeks before trial, one of the main questions was why he didn't use it. Judge Keller notes that he offered to explain why to the trial court, but that Applicant would not "waive the privilege." In a footnote, her Honor remarked that "Apparently, no one recognized that applicant had waived the attorney/client privilege when she alleged ineffective assistance of counsel. [Counsel] should have been allowed to testify as to the reasons for his decision regarding MacDonnell." To me, this means that the Court should have remanded the case to the trial court a second time, so that defense counsel could explain why he chose not to utilize MacDonnell or his report. Maybe it wouldn't change anything, but it is clear that Applicant should not have been permitted to prevent defense counsel from explaining his strategy. Unlike Elizondo case, supra, it is not clear that this Applicant was entitled to relief under Holmes v. Third Court.