



One Fabulous Skyline

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APPELLANT'S NAME: Jimmy Don Cain  
OFFENSE: Aggravated Robbery  
COURT OF APPEALS: Ft. Worth 1995  
CITATION: 893 S.W.2d 681  
RESULT: Conviction Affirmed  
COUNTY: Tarrant  
CRIM. APPEALS NO. 0317-95  
DATE OF OPINION: June 18, 1997  
JUDGE: Keller, J.  
DISPOSITION: Court of Appeals Affirmed

¶ 212 Admonishments by Trial Court: Appellant pled "guilty" and elected to have the jury assess punishment. When it was admonishing Appellant prior to his plea, the trial court failed to admonish Appellant as required by Article 26.13(a)(4), "that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law." The Court of Appeals held that "the substantial compliance provision of article 26.13(c) can apply when the record affirmatively proves a defendant is a United States citizen . . ." Because State's Exhibit 1 (a pen packet) demonstrated that Appellant was born in Parker County, Texas, the Court of Appeals affirmed the conviction.

Holding: Pursuant to Matchett, all errors, including a failure to admonish under Article 26.13(a)(4), are subject to the harmless error standard found in Texas Rule of Appellate Procedure 81(b)(2). See Greenwood & Schulman, Vol. 4, No. 43: November 11, 1996. In the present case, the trial court's failure to admonish the defendant concerning the deportation consequences of his plea is harmless because the record reflects that he is a U.S. citizen and is therefore not subject to deportation.

Notes: Judge Baird, joined by Judge Price, filed a concurring opinion in which he argued that the Court's opinions in Cervantes (762 S.W.2d 577) and Morales (872 S.W.2d 753) may be "harmonized" with case by holding that "reversal is required" when a trial judge fails to admonish a defendant pursuant to Art. 26.13(a)(4) if the defendant is not a United States citizen as in Cervantes, or, if the defendant's citizenship is unknown, as in Morales. He concluded with an argument that "Another construction of art. 26.13 would either reject the literal text of the statute or lead to an absurd result." Judge Mansfield filed a concurring opinion in which he distinguished this case from Morales, and stated that "interpreting the plain language of § 26.13(a)(4) of the admonishment statute to mandate automatic reversal of a conviction for failing to give it to appellant — a United States

citizen to whom it is legally inapplicable — would lead to an absurd result.” Judge Overstreet filed a “concurring and dissenting” opinion in which he argued that “the majority does not clearly and fully address the issue for review and misrepresents this Court’s opinion in Matchett . . .” He stated that, as the author of Matchett, “I can confidently assert that we did not hold that ‘all’ errors were subject to the harmless error standard in Rule 81(b)(2) . . .,” but rather that certain types of errors are not foreclosed to the application of the 81(b)(2) harm analysis and that harm is presumed in those instances “[w]here the effects of a particular error are not discernable with reasonable certainty . . .” Further, he argued that there cannot be “substantial compliance” when the trial court wholly failed to give the required admonishments.

Comments: ([David A. Schulman](#)) Vindication! When Morales was delivered, I commented that it was the stupidest opinion in many years, and predicted that it would lead to absurd results (which it did). At that time I suggested, similar to what Judge Keller holds here, that the better way to look at a total failure to admonish under Art. 26.13 was to say that it was always error, but that such error was nevertheless subject to a Rule 81(b)(2) analysis. Judge Keller is right on the money and her opinion is simply applied. The substantial compliance analysis of Art. 26.13(c) is not used when the trial court wholly fails to admonish as required but, rather, is to be used when the court gives an incomplete or incorrect admonishment. When the Court wholly fails to admonish as required by Article 26.13(a), as in this case, Cervantes and Morales, the reviewing court should apply a Rule 81(b)(2) analysis - not the “substantial compliance” analysis. Morales was an unwise departure from then established precedent, and it encouraged the Courts of Appeals to make some very bad holdings in order to get around its rule. In his “concurring” opinion, Judge Baird states that “an affirmance is in order if the record affirmatively establishes the defendant is a United States citizen.” At the end of the 1994-1995 term, the Court handed down two opinions which left the efficacy of Morales in doubt. See Ex parte Tovar, 901 S.W.2d 484 (Tex.Cr.App. 1995) and Ex parte Akhtab, 901 S.W.2d 388 (Tex.Cr.App. 1995). At that time I noted that Judge Baird didn’t defend his Morales opinion and was strangely silent on the issue. See Greenwood & Schulman, Vol. 3, No. 23; June 26, 1995. Now, strangely enough, he joins in putting the proverbial final nail in the coffin. If Judge Baird had originally said in Morales what he said in this opinion, none of the controversy over Morales would have ever occurred. By now saying that Morales can be “harmonized” with this opinion is to say that this is really what he meant all along with Morales. Those of us who were watching at that time, however, know differently.