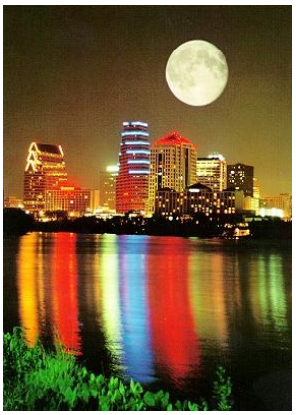

One Fabulous Skyline

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G&S Vol. 5, No. 36 - September 15, 1997

APPELLANT'S NAME: Urfan S. Malik
OFFENSE: Unlawfully Carrying a Weapon
COURT OF APPEALS: Houston [14th] 1994
CITATION: C14-92-01293-CR (Unpublished)
RESULT: Conviction Reversed
COUNTY: Harris
CRIM. APPEALS NO. 0472-96
DATE OF OPINION: September 10, 1997
JUDGE: Keller, J.
DISPOSITION: Court of Appeals Reversed

Case Note: This case wins Greenwood & Schulman's "Appellate Orbit" award of the week, as Appellant was convicted and placed on one year misdemeanor probation 3½ years ago.

G/S 530 Sufficiency of the Evidence (Standard of Review): Appellant was charged carrying a weapon which was discovered following a traffic stop. After he was convicted, the Court of Appeals found the evidence was insufficient, because the evidence demonstrated that the officer lack the "reasonable suspicion" necessary to justify a traffic stop. The Court of Appeals reversed appellant's conviction and ordered the trial court to enter a judgment of acquittal. The Court of Criminal Appeals subsequently vacated the Court of Appeals opinion in a 1995 unpublished opinion which held that the legality of the detention, an admissibility of evidence issue, was irrelevant to a sufficiency review. On remand (in yet another unpublished opinion) the Court of Appeals relied on Boozer v. State, 717 S.W.2d 608 (Tex.Cr.App. 1982) and Benson v. State, 661 S.W.2d 708 (Tex.Cr.App. 1982) [a/k/a "Benson/ Boozer"], and once again found the evidence insufficient, this time holding that "the legality of the detention was a proper part of the sufficiency review because a jury instruction concerning the issue was submitted.

Holding: A review of the relevant precedents shows that the federal constitutional cases that is the foundation for the Benson/Boozer Rule do not, in fact, support that rule that evidentiary sufficiency is measured by the application paragraph of the charge. Additionally, the Benson/Boozer Rule has been difficult to apply because, as Judge Onion complained, the rule produced different measurements for evidentiary sufficiency depending upon whether the State or the defendant benefitted from the instructions given. "Therefore, we overrule the Benson/Boozer line of cases and abolish the standard of sufficiency review that they formulated. No longer shall sufficiency of the evidence be measured by the jury charge actually given. ** * Hence, sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case."

Notes: Judge Meyers (joined by Judges Baird and Overstreet) concurred in the result, arguing that the Court's holding "overruling" Benson/Boozer" is just dicta, because the Rule only applied to cases where the State had, by failing to object to the court's charge, bound itself to prove what was set out in the application paragraph. In this case, he noted, the State did object to the charge as given. Further, he argues that the State did not request the Court to overrule Benson/Boozer, and that the State should be granted relief based on it's second ground for review, that since the State objected to the charge as given, the issue should be treated as trial error rather than a sufficiency problem.

Comment: (David A. Schulman) This is a very important case. As Judge Meyers notes (albeit, in a different context), this holding undermines our previously well protected adversarial system. Henceforth, attorneys for the State won't ever have to worry about whether the trial court has screwed up the application paragraph. If the State fails to ask for a parties charge but one was "hypothetically correct," the appellate court can just correct the problem by finding that the trial court should have included a parties charge and, although the evidence is insufficient to convict the defendant as the primary actor, it is sufficient to convict him as a party ... and the correct charge would have included a parties charge. What I find most surprising is that none of the concurring three had the intestinal fortitude to dissent.