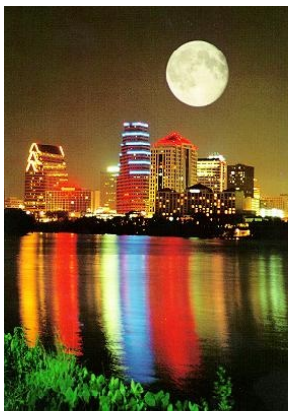

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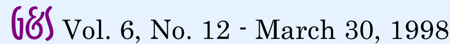
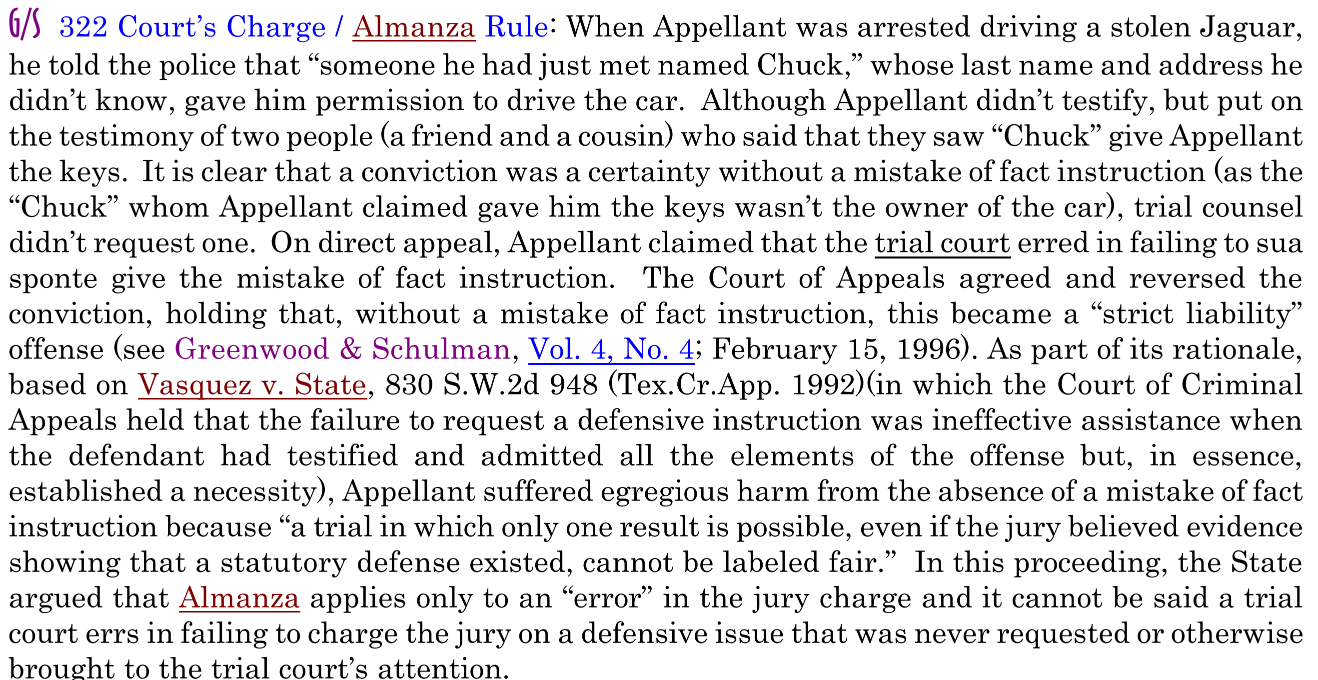


G&S Vol. 6, No. 12 - March 30, 1998

- APPELLANT'S NAME: Phillip Anthony Posey
- OFFENSE: Unauthorized Use of a Motor Vehicle
- COURT OF APPEALS: Houston [1st] 1996
- C/A CITATION: 916 S.W.2d 88
- C/A RESULT: Conviction Reversed
- COUNTY: Harris
- CRIM. APPEALS No. 427-96
- DATE OF OPINION: March 25, 1998
- JUDGE: McCormick, PJ.
- DISPOSITION: Court of Appeals Reversed - Case Remanded



G/S 322 Court's Charge / Almanza Rule: When Appellant was arrested driving a stolen Jaguar, he told the police that "someone he had just met named Chuck," whose last name and address he didn't know, gave him permission to drive the car. Although Appellant didn't testify, but put on the testimony of two people (a friend and a cousin) who said that they saw "Chuck" give Appellant the keys. It is clear that a conviction was a certainty without a mistake of fact instruction (as the "Chuck" whom Appellant claimed gave him the keys wasn't the owner of the car), trial counsel didn't request one. On direct appeal, Appellant claimed that the trial court erred in failing to sua sponte give the mistake of fact instruction. The Court of Appeals agreed and reversed the conviction, holding that, without a mistake of fact instruction, this became a "strict liability" offense (see Greenwood & Schulman, Vol. 4, No. 4; February 15, 1996). As part of its rationale, based on Vasquez v. State, 830 S.W.2d 948 (Tex.Cr.App. 1992)(in which the Court of Criminal Appeals held that the failure to request a defensive instruction was ineffective assistance when the defendant had testified and admitted all the elements of the offense but, in essence, established a necessity), Appellant suffered egregious harm from the absence of a mistake of fact instruction because "a trial in which only one result is possible, even if the jury believed evidence showing that a statutory defense existed, cannot be labeled fair." In this proceeding, the State argued that Almanza applies only to an "error" in the jury charge and it cannot be said a trial court errs in failing to charge the jury on a defensive issue that was never requested or otherwise brought to the trial court's attention.

Holding: A defensive issue is not "applicable to the case" for purposes of Article 36.14 unless the defendant timely requests the issue or objects to the omission of the issue in the jury charge. Thus, the it is not error to fail to give an defensive instruction not requested by the defense.

Notes: Judge Mansfield filed a concurring opinion in which he agreed that trial courts should not be required to give defensive instructions that are not requested. Interestingly, he stated unequivocally that Appellant "was denied a fair trial due to ineffective assistance of counsel" but, because that issue wasn't raised by appellate counsel, "we are not at liberty to address it." Judge Womack filed a concurring opinion in which he argued that the majority's resolution of the case

is faulty because it "makes Almanza not only wrong, but unnecessary." Judge Meyers filed a dissenting opinion, in which he is joined by Judges Baird and Overstreet, and in which he argued that the majority's opinion "stands in stark contrast" to Malik v. State, 953 S.W.2d 234 (Tex.Cr.App. 1997)(see Greenwood & Schulman, Vol. 5, No. 36; September 15, 1997), which held that the "parties are responsible for ensuring that the charge embodies their respective "theories of the case."

Comment: (David A. Schulman) Although its holding is undoubtedly correct, this case will stand as a monument to some real bad lawyering. The Court of Appeals reference to Vasquez and Judge Mansfield's concurrence are demonstrative of that point. This Appellant was represented by the same lawyer at trial and on appeal. Because the defense she put on effectively admitted every element of the charged offense, he client had to be convicted unless the jury bought his (highly improbable) story that he thought he had permission to drive the car. Nevertheless, trial counsel failed to request a mistake of fact instruction, thus making a conviction, as the Court of Appeals phrased it, "a foregone conclusion." Because trial counsel was also appellate counsel, nobody raised the Vasquez claim that counsel was ineffective. It is clear from this opinion and the opinion below that everybody knows this lawyer was ineffective. Because the Court of Appeals recognized this at the same time it recognized that it couldn't sua sponte raise the issue, it engaged in a very problematic application of Almanza in order to provide the relief which this Appellant will ultimately receive. To me it would be preferable for there to be a vehicle that the Court of Appeals, having recognized that appellate counsel was providing less than effective representation, could use to remand the case to the trial court for replacement of counsel. Perhaps the next time they revise the Appellate Rules.