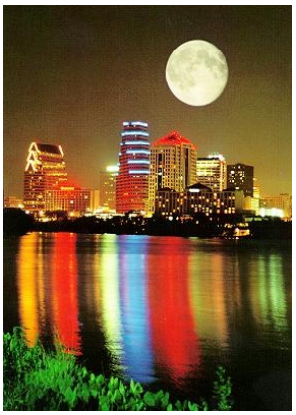

One Fabulous Skyline

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Ed Note: The following opinion was not in the Court's handdown on June 9, 1999, which is indicated as the date of delivery. It has been added to the Court's web site sometime since then. We discovered it when it reached the advanced sheets.

Case Name: Curvis Bell v. The State of Texas

- OFFENSE: Retaliation
- COURT OF APPEALS: Houston [14th] 1998
- C/A CITATION: Unpublished
- C/A RESULT: Conviction Affirmed as Reformed (Stacking Order Deleted)
- COUNTY: Walker
- CRIM. APPEALS No. 1414-98
- DATE OF OPINION: June 9, 1999
- JUDGE: McCormick, PJ.
- DISPOSITION: Court of Appeals Reversed

427 Judgments & Sentences / Consecutive Sentence: A jury convicted Appellant of retaliation committed against a jailer while Appellant was "an inmate in the institutional division of the Texas Department of Criminal Justice" serving a sentence for burglary of a habitation. The trial court assessed punishment for the retaliation offense, enhanced by two prior felony convictions, at confinement for 25 years. Pursuant to Article 42.08(b), V.A.C.C.P., the trial court then stacked the sentence for the retaliation offense onto the sentence for the burglary offense. Relying on Resanovich v. State, 906 S.W.2d 40 (Tex.Cr.App. 1995), and Turner v. State, 733 S.W.2d 218 (Tex.Cr.App. 1987), the Court of Appeals decided the trial court erred in stacking the sentences because there was no "record evidence of the prior [burglary] conviction and that [appellant] was the person convicted." constitutions.

Holding: Article 42.08(b) clearly and plainly does not require "record evidence of the prior conviction and that [appellant] was the person convicted" and our decision in Resanovich did not decide Article 42.08(b) required this. Moreover, our decision in Turner is distinguishable because it was decided under what is now Article 42.08(a), V.A.C.C.P. [not 42.08(b)].

Notes: Judge Johnson filed a concurring opinion in which she was joined by Judge Meyers. She agrees that "Article 42.08(b) does not specifically require record evidence of the prior conviction and that [appellant] was the person convicted," but notes that it does require "that the offense be committed while appellant was an inmate in the institutional division of the Texas Department of

Criminal Justice." She argued that whether TDCJ-ID will be aware that the defendant was an inmate at the time he committed the offense and of the specifics regarding the sentence for which the defendant was serving at the time is not important, because "it is not TDCJ-ID but the trial court who must be aware, at trial, of appellant's status as an inmate. The trial court does not somehow inherently know that appellant was an inmate at the time of the offense. Thus, some evidence of the defendant's status as an inmate must be adduced at trial."

Comment: (David A. Schulman) To my way of thinking, this entire "holding" is frivolous (maybe even obiter dicta), as the Court need not have reached the question of whether Art. 42.08(b) requires "evidence of the prior conviction." In this case, the indictment alleged that Appellant committed the offense while he was an inmate in the institutional division of the Texas Department of Criminal Justice and the jury so found. Thus, there had to be sufficient evidence of the prior in order for the State to get the conviction. Additionally, because Article 42.08(b) required that the new sentence be served after the conviction Appellant was already serving, one could argue that entering the cumulation order was a ministerial act not incumbent on the State proving anything at trial other than that the offense was committed while Appellant was an inmate in TDC. Finally, as the Court has gone to great lengths to distinguish 42.08(a) cumulation from 42.08(b) cumulation, this holding only applies to 42.08(b) cases (i.e., offenses committed in the penitentiary).

G/S 61.01 Challenges to Prosecution / Double Jeopardy / Actual Jeopardy: After the Court of Appeals decided that the trial court erred in stacking the sentences, the Court then ordered the cumulation order deleted and affirmed the conviction as reformed, holding that "allowing the State a second chance to present its proof of the prior burglary conviction" would violate the double jeopardy provisions of the state and federal constitutions.

Holding: The Court of Appeals erred to reform the trial court's judgment to delete the cumulation order. Under the United States Supreme Court's decision in Monge v. California, No. 97-6146, June 26, 1998, it would not violate federal double jeopardy principles to allow the State "a second chance to present its proof of the prior burglary conviction." Any of this Court's cases to the contrary must be and are overruled

Comment: (David A. Schulman) Presuming that this holding will pertain to all non-capital punishment proceedings in Texas, it is both very important and very problematic, as it is yet another holding that more or less tells trial judges that they don't have to follow the law. In this case, telling them that they don't have to hold the State to any burden of proof during punishment - if the case is reversed, they'll just have to do it right the next time. Further, the opinion is wholly lacking in discussion of comparison between Monge and this case. Monge pertained to California's "three-strikes" law and a judge only sentencing proceeding. Just the fact that we have truly bifurcated trials and jury sentencing would, in my mind, meriting a discussion of whether there is any difference between the proceedings. While I am getting used to conclusory statement of law rather than legal analysis, it is still disconcerting.