IS THE COURT OF CRIMINAL APPEALS PREPARED TO LIMIT THE *DEGARMO* DOCTRINE?

By: Greg Westfall

On June 7, 1996, Michael John Short, in an effort reminiscent of a Robert Earl Keen, Jr. ballad, made a bold (and successful) escape from the Tarrant County Jail.[1] He was being housed in the "Green Bay" facility, a warehouse that had been purchased by the county from the Green Bay Packaging Company, and was awaiting transfer to the Institutional Division. On that day, however, as Mike's common-law wife waited with a friend outside in the getaway car, Mike slipped through one of the skylights and bolted to freedom.

Mike had been in jail since the previous March, when a jury convicted him of aggravated assault and gave him eight years for a highway shooting.[2] The Fort Worth Court of Appeals had

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[1]*See, e.g., "The road goes on forever (and the party never ends)"* and *"Jesse with the long hair,"* both by Robert Earl Keen, Jr.

[2]The "Statement of The Case" reads as follows (citations to the record omitted):

> On January 29, 1994, an altercation arose on the highway between two drivers. In one car, a 1988 GMC Jimmy, was Appellant and a friend. In the other, a 1993 Ford Escort GT, were Richard Cox (driver) and Angela Deragowski (passenger). The altercation apparently began at approximately the Norwood exit on State Highway 183 in Bedford, Texas, when Appellant began tailgating the Escort GT. Richard Cox tapped his brakes. At this point, there was a disagreement as to the events that followed.
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> According to Richard Cox, the Jimmy went around them and ahead for a short distance, but then slowed back down. Angela Deragowski testified that Appellant got beside them, began waving his hands and mouthing words and ultimately pointed a gun toward them or toward the car. According to Appellant, who testified at trial, the Escort GT changed lanes, got slightly ahead of him, and the driver threw a can, striking the Jimmy.
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> On cross-examination, Appellant stated that it is possible that he did point the gun. However, Appellant testified that he did not see the passenger (Deragowski) in the car because the windows of the Escort GT were so tinted. The dark tint on the windows was also testified to by Richard Cox. Appellant's inability to see into the car is also supported by the fact that the incident arose in the nighttime at approximately 9:15 to 9:30pm.

affirmed his conviction in February. Petition For Discretionary Review was filed in May and had not been ruled on at the time of his escape.

Essentially, the appeal was based on lesser-included offense issues; the trial court had denied the trial defense counsel's request for charges on reckless conduct.[3] However, since Mike testified during punishment, the inevitable issue of waiver was raised by the State on appeal. The court of appeals decided that Mike had indeed waived all error and never reached the merits of his appeal. *See Short v. State*, 918 S.W.2d 71 (Tex. App. -- Fort Worth 1996, pet. dism'd).

On August 28, 1996, the Court of Criminal Appeals granted PDR on Mike's case to

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This dispute continued for several minutes along Highways 183 and 121, proceeding into Fort Worth. At this point, Richard Cox decided he would slow down and let the Jimmy get beside him, then slam on his brakes and exit the highway, thereby losing Appellant. At this exact same time, Appellant decided that he would hang back, slightly behind the Escort, and shoot out one of its taillights. As it happened, these two events, Richard Cox slamming on his brakes and Appellant's attempting to shoot the taillight, occurred simultaneously. The bullet travelled through the passenger compartment of the car and lodged between the driver's side seat and Richard Cox's back, causing a superficial injury to his back.

Appellant was charged with two counts of attempted murder and two counts of aggravated assault in cause number 0546898R in Criminal District Court Number Four, Tarrant County, Texas.

[3]In the jury charge, issues were submitted on attempted murder and aggravated assault as to both complainants. The attempted murder charges were identical. However, the aggravated assault charges differed. Regarding Richard Cox, the submitted issue for aggravated assault was under TEX. PENAL CODE ANN. §§ 22.01(a)(1) and 22.02(a)(2) (assault causing bodily injury with a deadly weapon). However, as opposed to § 22.01(a)(1), which includes the culpable mental states of intent, knowledge and recklessness, in the jury charge, the jury was limited to the mental states of intent and knowledge. As to Angela Deragowski, the jury was instructed on aggravated assault as set forth in §§ 22.01(a)(2) and 22.02(a)(2) (assault by threats with a deadly weapon). Appellant properly requested charges on reckless conduct under TEX. PENAL CODE ANN. § 22.05 as to each complainant. These requests were refused by the trial judge. The jury convicted on both counts of aggravated assault and assessed punishment at eight years in prison with affirmative findings of a deadly weapon.

review the waiver issues (the only issues contained the the petition). Of course, the petition was dismissed very shortly thereafter by State's motion. *See Short v. State*, ___ S.W.2d ___, No. 793-96 (Tex. Cr. App. 1996)(not yet published). I thought it was important to write about this case, however, because of what I believe the Court of Criminal Appeals may be saying merely by granting the petition.

The DeGarmo Doctrine:

At its essence, the *DeGarmo* doctrine is the "900 pound gorilla" cousin to the doctrine of curative admissibility. Called the *DeGarmo* doctrine because it was reaffirmed (if not reestablished) in the case of *DeGarmo v. State*,[4] the rule broadly mandates that where the defendant admits to the charged offense during his punishment stage of trial, all error in the guilt-innocence stage is waived.[5] The doctrine was again examined and again affirmed by the

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[4]691 S.W.2d 657, 660-61 (Tex. Cr. App. 1985).

[5]*Id*. The court in *DeGarmo* actually held:

> [I]f a defendant does not testify at the guilt stage of the trial, but does testify at the punishment stage of trial, and admits his guilt to the crime for which he has been found guilty, he has, for legal purposes, entered the equivalent of a plea of guilty. ... [S]uch a defendant not only waives a challenge to the sufficiency of the evidence, but he also waives any error that might have occurred during the guilt stage of trial.

Id., 691 S.W.2d at 661.

Of course, it makes no sense to say that the doctrine only applies when the defendant *does not* testify in guilt-innocence, and *does* testify at punishment. Any judicial confession at any stage of the trial will probably do. *See, e.g., Tullos v. State*, 698 S.W.2d 488, 490 (Tex. App. — Corpus Christi 1985, pet. ref'd)("Generally, if an accused testifies at either the guilt or punishment phase of trial and admits that he committed the acts alleged in the indictment, he is foreclosed from challenging the sufficiency of the evidence."). Nor is the rule confined to sufficiency of the evidence. *McGlothlin v. State*, 896 S.W.2d 183 (Tex. Cr. App. 1995),

Court of Criminal Appeals last year in *McGlothlin v. State*.[6]

Presently, the only limitation on the doctrine appears to be that the elements of the offense must be examined to determine whether a confession was actually given.[7] The court in *McGlothlin* observed that the confession in that case was clearly "intended" and "given."[8] However, the caselaw is woefully deficient in cases that actually give guidance as to the analysis of a "confession" *vis-a-vis* the elements of the "charged offense." There has also never been a case examining an ambiguous "confession" to determine whether a confession to the "charged offense" was intended.[9] These were the issues set out in Mike's Petition for Discretionary Review.

The "Judicial Confession:"

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reaffirmed *DeGarmo's* broad rule that extends not only to sufficiency review, but to *all* errors committed at the guilt phase of trial:

> Under this doctrine, error occurring at the guilt/innocence phase of the trial is deemed to be waived if the defendant admits his guilt to the charged offense. ... When the defendant testifies and judicially confesses to the charged offense, the purpose of the trial process has been served -- the truth has been determined ... .

Id. at 186-87.

[6]896 S.W.2d 183 (Tex. Cr. App. 1995).

[7]*See, e.g., Smyth v. State*, 634 S.W.2d 721 (Tex. Cr. App. 1982); *Thornton v. State*, 601 S.W.2d 340 (Tex. Cr. App. 1980); *Reid v. State*, 560 S.W.2d 99 (Tex. Cr. App. 1978); *Tullos v. State*, 698 S.W.2d 488 (Tex. App. -- Corpus Christi 1985, pet. ref'd).

[8]*Id*., 896 S.W.2d at 188.

[9]*But cf., Smyth*, 634 S.W.2d at 724; *Thornton v. State*, 601 S.W.2d 340 (Tex. Cr. App. 1980); *Reid v. State*, 560 S.W.2d 99 (Tex. Cr. App. 1978); *Tullos*, 698 S.W.2d at 490 (all cases holding that the accused did not admit to the elements of the "charged offense").

At trial, during the punishment phase of his case, Mike and his trial attorney had the following exchange:

Counsel:	Are you sorry or not for what happened?
Appellant:	Excuse me?
Counsel:	The incident that you are charged with here and been found guilty of aggravated assault, are you sorry for doing that?
Appellant:	Very sorry.
Counsel:	Whose fault was all of this?
Appellant:	It was mine.

The State, in its brief to the court of appeals, argued that this constituted a "judicial confession" under the *DeGarmo* doctrine. The court of appeals agreed and held that Appellant had waived all of his points in guilt-innocence, all of which concerned the trial court's refusal to grant requests for lesser-included offenses.[10]

The Petition For Discretionary Review:

In reply to the State's brief on appeal, I had argued that the "judicial confession" shown above if it was a judicial confession at all, was ambiguous. Also, the error claimed in the appeal was refusal to grant a lesser-included charge, and that both the "charged offense" and the lesser-included offense arose from the same "incident" -- the thing that Mike said he was sorry for. Thus, in order to find waiver, the court had to specifically construe the statement for waiver when it had a choice to go either way. The court of appeals did not buy it, either at argument or on rehearing. Thus, the "Questions For Review" to the Court of Criminal Appeals were:

> **GROUND ONE**: The court of appeals erred in holding that Appellant had made a "judicial confession" in the punishment stage of his trial such that he waived all error in the guilt/innocence stage of his trial under the *DeGarmo* doctrine.

[10] *Short v. State*, 918 S.W.2d 71 (Tex. App. -- Fort Worth 1996, pet. dism'd).

GROUND TWO: The court of appeals erred to the extent that it resolved the ambiguity in Appellant's "judicial confession" against Appellant and for waiver.

GROUND THREE: The court of appeals erred to the extent it held that Appellant's "judicial confession" was not ambiguous.[11]

The Argument:

What follows is Appellant's argument, set forth verbatim (citations to the record omitted):

Appellant would ask this Court to review the court of appeals' holding that Appellant waived all non-jurisdictional error at the guilt-innocence stage of his trial through his testimony in the punishment stage of his trial. Appellant would argue that any "judicial confession" made by Appellant at the punishment stage of his trial was ambiguous, only one interpretation of which could embrace the "charged offense" as required by the *DeGarmo* doctrine, and that this ambiguity should be resolved *against* waiver rather than *for* waiver as the court of appeals did in its opinion.

In making its decision as to whether Appellant made a "judicial confession" such that error at the guilt-innocence stage of his trial would be waived, the court of appeals relied upon the recent case of *McGlothlin v. State*, 896 S.W.2d 183 (Tex. Cr. App. 1995). *McGlothlin* reaffirmed the waiver rule enunciated in *DeGarmo v. State*, 691 S.W.2d 657 (Tex. Cr. App. 1985). *Id*. at 189. However, *McGlothlin* also reaffirmed the rule employed in *Smyth v. State*, 634

[11]As for the "Reasons For Review," Appellant relied upon Rule 200(c)(2). The issue of how to treat an ambiguous "judicial confession" under the *DeGarmo* doctrine is an important question of state law and thus should be reviewed and decided by this Court. TEX. RULES APP. PRO. Rule 200(c)(2). This Court reaffirmed the *DeGarmo* doctrine last year in *McGlothlin v. State*, 896 S.W.2d 183 (Tex. Cr. App. 1995). The issue presented in this case is timely and important because it will clarify how that doctrine is applied. The *DeGarmo* doctrine has never been applied to a case where the error claimed was the refusal of the trial court to submit a requested lesser included offense charge. In addition, this Court has never addressed the issue of how an ambiguity in a "judicial confession" is to be resolved for purposes of the *DeGarmo* doctrine.

S.W.2d 721 (Tex. Cr. App. 1982), that a court should examine the elements of the offense charged to see if a waiver was, in fact, given. *Id*. at 188; *see also Stine v. State*, 908 S.W.2d 429, 433 (Tex. Cr. App. 1995); *Lopez v. State*, 852 S.W.2d 695, 697 (Tex. App. -- Corpus Christi 1993, pet ref'd); *Winter v. State*, 725 S.W.2d 728, 730 (Tex. App. -- Houston [1st Dist.] 1986, no pet.); *Tullos v. State*, 698 S.W.2d 488, 490 (Tex. App. -- Corpus Christi 1985, pet ref'd); *Thomas v. State*, ___ S.W.2d ___, 1995 WL 489126 at **5 (Tex. App. -- Houston [1st Dist.] 1995)(not yet reported).

In this case, in order to admit to the offense of aggravated assault against Richard Cox, Appellant would have had to confess that he:

(1) intentionally or knowingly;

(2) caused bodily injury to Richard Cox;

(3) by shooting him with a firearm.

In order to admit that he committed the offense of aggravated assault against Angela Deragowski, Appellant would have had to say that he:

(1) intentionally or knowingly;

(2) threatened Angela Deragowski with imminent bodily injury;

(3) with a firearm.

Appellant does not contend that a judicial confession would have to exactly track the charged offenses in order for the *DeGarmo* doctrine to apply, and the cases do not support such a proposition. However, Appellant would assert that that the "confession" must at least be intentional, reasonably unequivocal, and reasonably unambigous, especially in light of the important rights the defendant is waiving. This proposition is at least impliedly supported by the

caselaw, *see, e.g.*, *McGlothlin*, 896 S.W.2d at 188 ("Clearly, a confession was intended and given."); *DeGarmo*, 691 S.W.2d at 661 ("In this instance, appellant unequivocally admitted his guilt to the capital murder of Strickler"), and by examining the actual testimony outlined by courts that have applied *DeGarmo* in determining whether a confession occurred. *See, e.g.*, *McGlothlin*, 896 S.W.2d at 188 (in an aggravated sexual assault of a child case: "And do you tell the jury that you did, in fact, have sexual intercourse with this young lady?" to which the defendant answered, "Yes, sir."); *DeGarmo*, 691 S.W.2d at 660 (capital murder case, in which the defendant stated, among other things, "I was the one that was there and I was the one that did the crime."); *McWhorter v. State*, 911 S.W.2d 538, 539 (Tex. App. -- Beaumont 1995, no pet.)("Q: Mr. McWhorter, you're not denying that you had cocaine inside your pants pocket, are you? A: No."); *Barrett v. State*, 900 S.W.2d 748, 751 (Tex. App. -- Tyler 1995, pet. ref'd)("I knew I was guilty of a crime[, but] ... I don't feel like my crime was severe enough to, you know, receive the kind of punishment that [the State] was trying to give me."); *Taylor v. State*, 819 S.W.2d 248, 249-50 (Tex. App. -- Waco 1991, no pet.)("Q: Daniel Ray, why did you do this? A: I don't know. You know, I just messed up, you know. That's the first time I ever did it, burglary ... . Q: You admit to the jury that you're guilty of the charge? A: Yeah."); *Griffin v. State*, 850 S.W.2d 246, 251 n.7 (Tex. App. -- Houston [1st Dist.] 1993, pet. ref'd)(in this driving while intoxicated trial, after defendant admitted he was driving, the following exchange took place: "Mr. Griffin, were you intoxicated on May 3rd, 1991, at approximately 12:30a.m.? Appellant: Very mildly."); *Villareal v. State*, 811 S.W.2d 212, 216 (Tex. App. -- Houston [14th Dist.] 1991, no pet.)("Under cross-examination by the State, appellant freely admitted to having sex with his daughter."); *Daugereau v. State*, 778 S.W.2d 577, 578-79 (Tex. App. -- Corpus Christi 1989, no

pet.)("appellant not only testified ... that he took funds from the victim as accused, but he testified that his confession was true."); *Garcia v. State*, 704 S.W.2d 495, 497 (Tex. App. -- Corpus Christi 1986, no pet.)("Prosecutor: 'Isn't it a fact that you intentionally and knowingly shot Joe Flores?' Appellant: 'Yep, ...'"); *Schwede v. State*, 707 S.W.2d 731, 732 (Tex. App. -- Beaumont 1986, no pet.)("Q: Charles, on June 12th, 1984, did you shoot and kill Martha Schwede? A: Yes.").

Appellant would assert that in this case his testimony must be considered in light of the error being claimed at the trial court to determine whether waiver has actually occurred. All of Appellant's points of error concern the refusal of the trial court to grant requested lesser included offense instructions. In this regard, a defendant *may* admit to certain facts in order to raise the issue of whether a lesser included charge should be given. *E.g., Williams v. State*, 704 S.W.2d 156, 159 (Tex. App. -- Fort Worth 1986, no pet.)(the defendant's own testimony may raise the issue of a lesser included offense). In fact, if the defendant simply *denies* any involvement or culpability in the event leading to the charges, he may preclude the necessity for a lesser included offense instruction if no other evidence exists, as was the case here. *Cf., e.g., Bynum v. State*, 874 S.W.2d 903, 907 (Tex. App. -- Houston [1st. Dist.] 1994, pet. ref'd); *Redmon v. State*, 748 S.W.2d 531, 532 (Tex. App. -- Beaumont 1988, no pet.); *Tave v. State*, 899 S.W.2d 1, 4 (Tex. App. -- Tyler 1994, pet. ref'd)(all cases wherein the defendant denied culpability such that no lesser included offense instruction was required). The point is this: in a case where a lesser included offense charge is sought, it is entirely likely that a defendant will be admitting to *something*. *DeGarmo* waiver, however, applies only when the defendant admits to the *"charged offense." McGlothlin*, 896 S.W.2d at 188; *Smyth*, 634 S.W.2d at 724; *Stine*, 908 S.W.2d at 433;

Lopez, 852 S.W.2d at 697; *Winter*, 725 S.W.2d at 730; *Tullos*, 698 S.W.2d at 490; *Thomas*, S.W.2d at ___, 1995 WL 489126 at **5. Thus, in a case such as this, where a lesser included offense charge is requested, it is even more important for this court to discern exactly what the Appellant was *admitting to*.

Undoubtedly, the most salient line from Appellant's purported "confession" is the rather inarticulate question presented by his trial defense counsel and his response thereto:

> [DEFENSE COUNSEL]: The incident that you are charged with here and been found guilty of aggravated assault, are you sorry for doing that?
>
> [SHORT]: Very sorry.

This testimony, however, is susceptible to at least two markedly different interpretations. Because of the way the sentence appears on paper; its grammatical structure, it is unknown whether the subject of the sentence is "incident" or "aggravated assault." If the subject of the sentence is "aggravated assault," then it would more accurately read as follows:

> [DEFENSE COUNSEL]: The incident that you are charged with here and been found guilty of**[, the]** aggravated assault, are you sorry for doing that?

If, however, the subject of the sentence is "incident," then a more accurate interpretation would be:

> [DEFENSE COUNSEL]: The incident that you are charged with here and been found guilty of aggravated assault **[for]**, are you sorry for doing that?

In the former, Appellant appears to admit to the aggravated assault, while in the latter, Appellant admits to the "incident." In many cases, if not most, this ambiguity would not matter, since admitting to the "incident" and admitting to the "charged offense" would be one in the same. However, in this case, how this ambiguity is to be resolved is vital to the *DeGarmo* analysis, for if Appellant has only admitted to the "incident," this is entirely consistent with his

quest for a lesser included charge based upon the same "incident," and he has not, *a fortiori,* admitted to the "charged offense." The ultimate question, then, is which way should we resolve such an ambiguity: *for* waiver or *against* waiver? Appellant would assert that given the nature of the rights involved, such an ambiguity should be resolved *against* waiver.

This Court discussed the policy behind *DeGarmo* waiver in *McGlothlin*:

> The *DeGarmo* doctrine has been described as a "common-sense rule of procedure," because "the function of trial is to sift out the truth from a mass of contradictory evidence ... . " Stated another way, "The basic purpose of a trial is the determination of truth." When the defendant testifies and judicially confesses to the charged offense, the purpose of the trial process has been served -- the truth has been determined and the purpose of the guilt/innocence phase of the trial has been satisfied.

McGlothlin, 896 S.W.2d at 187 (citations omitted).

The ambiguous testimony in this case brings us no closer to determining whether Appellant committed the "charged offense" of aggravated assault or the lesser offense of reckless conduct. To resolve the ambiguity against Appellant perverts the policy behind the *DeGarmo* doctrine, reducing it merely to a trap for the unwary. While the *DeGarmo* doctrine is admittedly harsh, Appellant does not believe this Court intended for it to be unprincipled.

In a case such as this, where a purported judicial confession is ambiguous and this ambiguity is important to the question of whether the defendant admitted to the "charged offense" or not, Appellant believes that such ambiguities should be resolved against waiver.

So, Why In The Hell Did You Publish This?

Anyone who has been *DeGarmo*ed can attest to the dilemma that faces counsel a lot of times at punishment -- do I put my client on the stand, have him show that he can take some sort of responsibility, and hope for probation (while at the same time waiving all error on appeal), or

do we deny the offense (or not testify at all) and get slammed (and hope like hell that we can get a reversal)? There are times when our clients are guilty of "some of it, but not all of it." When the client makes a partial admission or admits to anything that cannot strictly be construed as the "charged offense," should he nonetheless waive all error? By granting this petition, the Court of Criminal Appeals has indicated its willingness to reexamine the *DeGarmo* doctrine, only one year after handing down *McGlothlin*, to answer this question. It is my hope that there is someone out there with a similar issue (and a more sedentary client) who can give them another chance.

The Road Goes On Forever.

The day of Mike's escape, the television stations interrupted broadcasting with the news. It was on the front page of the paper for a couple of days. Big manhunt -- dogs, helicopters, the FBI. I have heard soon Mike will even earn a segment on *Unsolved Mysteries*. The girl who was with them that day got caught, but Mike and the wife are still on the run. As Robert Earl says, "The road goes on forever and the party never ends."