Trends in Court of Criminal Appeals Decisions From the Criminal Defense Perspective 2003

By: Greg Westfall

From the standpoint of criminal defense attorneys, the Court of Criminal Appeals had a fairly quiet and uneventful year. On the good side of the ledger, we saw the Court doing some much-needed tightening up on admissibility of scientific evidence and apparently settling once-and-for-all how factual sufficiency review will be conducted. Of course, there was some bad also. Here is what the Court has been up to.

Preserving the Sanctity of Jury Verdicts:

The last ten years or so have seen protecting jury verdicts in criminal cases become an institutional philosophy in the appellate courts. The massive expansion of the harmless error doctrine has served this purpose nicely, as has the strict enforcement of breathtakingly arcane rules for preserving error for review in the first place. The Court has also made it much harder to get a case reversed for legal insufficiency.

In this regard, *Gharbi v. State*, 131 S.W.3d 481 (Tex. Crim. App. 2003) basically caps off the work started seven years ago in *Malik v. State*, 953 S.W.3d 234 (Tex. Crim. App. 1997). *Malik*

was the "hypothetically correct jury charge" case which held that legal sufficiency is no longer going to be analyzed from the standpoint of the jury charge (what the jury actually considered), but essentially from the elements of the Penal Code offense. Ideally, the jury charge should be based upon what the state pled. With *Gharbi*, we now learn once and for all it does not really matter what the state pleads, so long as the defendant has notice generally of the charge and the jury charge does not present a completely different Penal Code offense than is in the indictment. The state in this case had pled an additional element then did not prove that element. No matter. For legal sufficiency, only the elements of the Penal Code offense matter. Not the indictment. Not the jury charge.

Taking the Fun (and Effectiveness) Out of Jury Selection:

With *Lydia v. State*, 109 S.W.3d 495 (Tex. Crim. App. 2003) the Court continued its mission to do away with meaningful voir dire B a quest it began with *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001). *Standefer* was the case where the Court held that a question such as "what circumstances in your opinion warrant the imposition of the death penalty?" is an improper Acommitment question@ because it asks a prospective juror "to define the parameters of his decision making." With *Lydia*, the

court adds to the list of verboten questions asking whether a potential juror could fairly consider a witness= testimony where that witness has a criminal record.

Completing the Framework for Factual Sufficiency Review:

Since the Court officially introduced it in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), factual sufficiency review has been as perplexing as it has been controversial. I believe that with the recent decision in *Zuniga v. State*, ____S.W.3d____, No. 539-02 (Tex. Crim. App., April 21, 2004) the framework for conducting factual sufficiency review is now complete. This opinion ties the level of review to the burden of proof and clearly sets out how it is to be done. Needless to say, reversals on factual sufficiency grounds are almost nonexistent. But it is nice to know it is at least theoretically possible.

Defining Mental Retardation:

In *Adkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the mentally retarded could not be executed. However, it left defining mental retardation, as well as developing the framework for handling and analyzing the claims, to the states. In *Ex Parte Briseno*, ___S.W.3d___, No.

29,819-03 (Tex. Crim. App., Feb. 11, 2004), the Court does that for Texas. After studying the opinion, I can assure all you death penalty fans out there you don=t have much to worry about.

Tightening the Belt on "Experts":

To prove a driving while intoxicated case in Texas, the state must show that the defendant was intoxicated *while driving*. And for years now there has been a class of experts who testify in cases where a person took the breath test and extrapolate the results at time of testing back to the time of driving. In *Bagheri v. State*, 119 S.W.3d 755 (Tex. Crim. App. 2003) the Court put some much needed limits on this practice. It used to be that the expert could come in and say that, based solely upon the results at the time of the test, at the time of driving the defendant=s blood alcohol level could have been higher or lower and then give a range based on average absorption rates and average elimination rates (the average rate at which all humans absorb and eliminate alcohol). No more. In *Bagheri*, the breath test was done one hour and fifteen minutes after the stop and no other facts were known. The Court held that the extrapolation testimony was not reliable under TEX. R. EVID. 702.

Taking this one step further, since the issue is

intoxication at time of driving, isn't it only natural to argue that without extrapolation facts, the breath test would be irrelevant and not be admissible at all? The Court moved swiftly to correct *that* misapprehension in *Stewart v. State*, 129 S.W.3d 93 (Tex. Crim. App. 2004), holding that since breath test results could make intoxication at the time of driving more probable, they are relevant even if they cannot be connected up.

Currently pending before the Court is *Mechler v. State*, 0075-04, which presents the issue of whether a breath test result without extrapolation is substantially more prejudicial than probative and thus inadmissible under TEX. R. EVID. 403. Stay tuned on that.