
YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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In a motion to suppress a confession, the respondent has the burden to establish a causal connection and the state has the burden to disprove it or establish an attenuation-of-taint. [Pham/Gonzales v. State](05-3-08)

On June 8, 2005, the Court of Criminal Appeals held that when a statement is obtained in violation of TFC §52.02, it is the defendant's burden to produce evidence demonstrating the causal connection, the burden then shifts to the State to either disprove the evidence produced, or establish that the causal chain asserted by the defendant was in fact broken.

05-3-08; Pham/Gonzales v. State, ___ S.W.3d ___, Nos. 12-4 & 72-04, 2005 Tex. Crim. App. Lexis 832 (Tex.Crim.App., 6/8/05).

Background: Appellant John Tuy Pham was convicted by a jury of the offense of murder, and was assessed a punishment of life imprisonment in the TDCJ Institutional Division. Appellant Chance Derrick Gonzales pled guilty to the offense of murder in the 208th District Court of Harris County, Texas. He was sentenced to 45 years' confinement in the Texas Department of Criminal Justice ("TDCJ") institutional division pursuant to a plea bargain. In both cases the Court of Criminal Appeals held that law enforcement officers had obtained statements from Appellants' in violation of §52.02 of the Family Code and were remanded for a causal connection analysis.

The Court of Criminal Appeals consolidated Appellants' cases, as the same issues are raised in each of their appeals, and both cases are being appealed from the First Court of Appeals in Harris County.

Facts: Appellant Pham was sixteen years old at the time he became a suspect in the drive-by shooting that resulted in the death of the victim, Dung Van Ha. At 2:35 p.m. on September 9, 1998, Houston police officers arrested Appellant at Clear Brook High School. At 3:35 p.m., a magistrate gave Appellant legal warnings as required by *section 51.095 of the Texas Family Code*. Subsequently, Appellant was taken to the police station and questioned by an investigator. Appellant admitted to his involvement in the shooting at approximately 4:38 p.m. He was then taken to a juvenile facility for processing by the police officers. An officer from this processing facility first notified Appellant's family at about 8:15 p.m. when he spoke to Appellant's sister. No one from the police department spoke with Appellant's parents until 9:50 p.m. Appellant's parents did not come to see him until the following day.

Appellant Gonzales was arrested in connection with a shooting death during a robbery at a convenience store when he was 15 years old. Appellant was identified by two witnesses who confirmed that he shot the victim while attempting to steal beer from the store for a gang party. Police arrested Appellant at a party, sometime between midnight and 1:30 a.m. Before police officers took Gonzales to a juvenile processing office at approximately 2:30 a.m., the officers made a stop at a sheriff's station where they

left him for 20-30 minutes so they could pick up a surveillance tape from a convenience store. This tape showed Appellant committing a similar type of robbery the same night. Appellant was given his *Miranda* warnings in the car on the way to the processing facility. The officer's then took Appellant to a municipal judge at 3:35 a.m., where he was given the warnings required by *Texas Family Code section 51.095*. It was in the judge's chambers with the police officers that Appellant Gonzales then gave his written statement. The arresting officer testified that he did not notify Appellant's parents that their son had been arrested. Appellant Gonzales' parents did not know that he had been arrested until he was processed into the juvenile arresting facility five to six hours after he was arrested, and after he gave his statement to police.

II. Procedural History: Pham

Appellant Pham originally appealed his conviction to the First Court of Appeals. The court of appeals in *Pham v. State* n1 (*Pham I*), reversed the conviction based on the conclusion that the trial court erred in admitting Appellant's statement. The court held the statement inadmissible due to the State's violation of *Texas Family Code § 52.02(b)* n2, and remanded the case to the trial court. The State subsequently filed a petition for discretionary review with this court, which was granted. This court vacated *Pham I* in *Pham v. State* n3 (*Pham II*), and remanded the case to the court of appeals in light of the decision in *Gonzales v. State* (*Gonzales II*). n4 Upon reconsideration, the court of appeals decided *Pham v. State* (*Pham III*), on November 26, 2003. In this decision, the court held that the trial court had properly admitted Appellant's confession, and that Appellant was not entitled to a jury instruction on the admissibility of his confession. Appellant subsequently filed a petition for discretionary review to this Court.

n1 *John Tuy Pham v. State*, 36 S.W. 3d 199 (Tex. App.-Houston [1st Dist.] 2000).

n2 *Texas Family Code section 52.02(b)* states:

A person taking a child into custody shall *promptly* give notice of the person's action and a statement of the reason for taking the child into custody, to:

(1) the child's parent, guardian, or custodian; and (2) the office or official designated by the juvenile board. (emphasis added)

n3 *Pham v. State*, 72 S.W. 3d 346 (Tex. Crim. App. 2002).

n4 *Gonzales v. State*, 67 S.W. 3d 910 (Tex. Crim. App. 2002) (*Gonzales II*).

III. Procedural History: Gonzales

Appellant Gonzales appealed to the First Court of Appeals from a plea of guilty. The court of appeals handed down its original decision (*Gonzales I*) on November 4, 1999, holding that Appellant's confession was inadmissible because the State had not met its burden of proving that *Texas Family Code § 52.02(b)* had not been violated. n5 We granted the State's petition for discretionary review, and on February 13, 2002, vacated the decision of the court of appeals (*Gonzales II*). This Court held in *Gonzales II* that Appellant's statement was not inadmissible merely because the State failed to follow the requirements of *Texas Family Code § 52.02(b)*. We held that an exclusionary analysis under *Texas Code of Criminal Procedure Article 38.23*, including a causal connection analysis, had to be undertaken by the court, and had not been. n6 Therefore the case was remanded. Upon reconsideration of the case, the court of appeals handed down an opinion on November 26, 2003 (*Gonzales III*), n7 holding that, in an *article 38.23* exclusionary analysis, the initial burden was on the appellant to demonstrate a violation of a statutory requirement as well as a causal connection between the violation and his ensuing confession. n8 Finding that Appellant Gonzales presented no evidence to demonstrate this causal connection, the court of appeals affirmed the judgment of the trial court and held Appellant's statement admissible. n9

Appellant then filed a petition for discretionary review with this Court.

n5 *Gonzales v. State*, 9 S.W. 3d 267 (Tex. App.-Houston [1st Dist.] 1999) (*Gonzales I*).

n6 *Gonzales v. State*, 67 S.W. 3d 910 (Tex. Crim. App. 2002).

n7 *Gonzales v. State*, 125 S.W. 3d 616 (Tex. App.-Houston [1st Dist.] 2003) (*Gonzales III*).

n8 *Id.* at 618.

n9 *Id.* at 619.

IV. First Court of Appeals' Decisions and Grounds for Review

The court of appeals held in *Pham III* that the State did obtain Appellant Pham's confession in violation of *Texas Family Code section 52.02(b)*, however, in light of our opinion in *Gonzales II*, the court also held that the confession was not automatically inadmissible without first conducting an analysis under *Texas Code of Criminal Procedure article 38.23* to determine whether there was a causal connection between the illegal conduct and the acquisition of the evidence. n10 The court of appeals interpreted our remand in *Gonzales II* as implying that an attenuation-of-taint analysis was an insufficient analysis to satisfy the requirement that a causal connection be established. Therefore the court of appeals determined that the causal connection analysis required by this Court in *Gonzales II* must be separate from an attenuation-of-taint analysis. n11 The court of appeals further relied on our opinion in *Roquemore v. State*, 60 S.W. 3d 862 (Tex. Crim. App. 2001) for this conclusion, where this Court first conducted a causal connection analysis and found a causal connection between the recovery of stolen property and the illegality of police conduct, but failed to conduct an attenuation-of-taint analysis because the State did not raise the argument. n12

n10 *Pham III*, 125 S.W.3d 622 at 625.

n11 *Id.*

n12 *Id.*

The court of appeals next addressed the issue of which party has the burden of proving a causal connection, noting that no direct authority establishes who takes on this burden. n13 The court pointed out that the issue is not who has the ultimate burden of persuasion as to the admissibility of a confession, as this clearly rests with the State in an attenuation-of-taint analysis, but rather who has the initial burden of production of proof of a causal connection between the violation of the statute and the ensuing confession. The court ultimately held that the defendant should shoulder this initial burden of proof, analogizing the situation to that of a violation of the statute requiring that a defendant promptly be taken before a magistrate. The court also based its conclusion upon more practical considerations, such as the fact that it is more "reasonable to place the burden on the defendant to produce evidence to which only the defendant has access." n14 The court concluded that the State has the burden to demonstrate attenuation of the taint once the defendant has satisfied the initial burden of production of some evidence that shows a causal connection between the police illegality and the recovery of the evidence. n15 The court found that Appellant Pham produced no evidence of a causal connection, and therefore did not meet his burden, making it unnecessary to conduct an attenuation-of-taint analysis, and rendering his confession admissible.

n13 *Id.* at 626.

n14 *Id.* at 627.

n15 *Id.*

In Appellant *Gonzales'* case, the court of appeals, citing its decision in *Pham III* (discussed above), again

held that when there is a violation of *section 52.02(b) of the Texas Family Code*, the initial burden is on the defendant to demonstrate a violation of the statutory requirement and a causal connection between that violation and the ensuing confession. Again, the court held that Appellant Gonzales produced no evidence that would demonstrate a causal connection between the police violation of the Family Code and his ensuing confession, therefore his statement was admissible.

Both Appellants argue that a causal-connection analysis is part and parcel of an attenuation-of-taint analysis, and that the burden of proof falls on the State to negate the causal connection between the violation and the confessions of the two Appellants. Appellants claim that the court of appeals ignored cases stating that when voluntariness is an issue, the burden of proof for admissibility of confessions lies with the State, and argue that this Court did not create a separate causal connection analysis in *Gonzales II*.

The State argues in these cases that the court of appeals did not err in placing the burden of *production* on Appellants to offer evidence to prove that violations of the Family Code occurred, and that they were causally connected to the ensuing confessions. The State contends that Appellants failed to meet the burden of production, i.e. they did not produce any evidence that their statements were obtained in violation of any laws. Additionally, the State argues that causal connection and attenuation-of-taint are two separate analyses by which a court will determine whether evidence was obtained in violation of the law as set out in *article 38.23*.

We granted review in both of these cases to clarify the causal connection analysis which must be undertaken in *article 38.23* suppression of evidence claims. In Appellant Pham's case, we granted the following two grounds for review: 1) did the court of appeals err in holding that causal connection and attenuation-of-taint constitute separate analyses, and 2) did the court of appeals err by requiring Appellant to prove a causal connection between the violation of *section 52.02(b) of the Texas Family Code* and Appellant's confession? In Appellant Gonzales' case, we granted the following ground for review: did the court of appeals adopt the wrong standard by which a causal connection must be established under *article 38.23* to justify suppression of evidence seized in violation of the Family Code?

Held: Affirm in both cases.

Opinion: Neither party argues with the settled law that the burden of proof is initially on the defendant to raise the exclusionary issue by producing evidence of a statutory violation, and that this burden then shifts to the State to prove compliance. The main issue we face here is whether the defendant has the burden of producing evidence that shows the violation is connected to the obtaining of the evidence sought to be suppressed.

Appellants argue that a causal connection analysis cannot be separated from an attenuation analysis, and thus, since it is well settled that the State bears the burden of proving attenuation of taint, the burden is also upon it to produce evidence of a causal connection. We disagree. If we follow this circular argument, anytime an appellant asserted a statutory violation of *Family Code section 52.02(b)*, a court would immediately have to conduct an attenuation-of-taint analysis because it is part of the causal connection analysis. This would further the assumption that once Appellant shows a violation of the statute under 52.02(b), the evidence is automatically assumed inadmissible unless the State demonstrates attenuation-of-taint, an assumption which we expressly rejected in *Gonzales II*.

We have held that the State may make an attenuation-of-taint argument which is included under an *Article 38.23* analysis. n16 However, this argument is discussed by a court only if the State raises it. n17 Analysis of causal connection and attenuation-of-taint are not the same. An attenuation-of-taint analysis is not always required and therefore need not always be conducted. We have expressly held that a causal

connection between a violation of *section 52.02(b)* and the obtaining of evidence *must be shown* before the evidence is rendered inadmissible. n18 If there is no causal connection shown in the first place, there is no reason for the State to argue that the taint of the violation is so far removed that the causal connection is broken. Attenuation-of-taint breaks this connection. It does not negate the existence of the causal connection.

n16 *Johnson v. State*, 871 S.W.2d 744 (Tex. Crim. App. 1994).

n17 *Roquemore v. State*, 60 S.W. 3d 862 (Tex. Crim. App. 2001).

n18 *Gonzales v. State*, 67 S. W. 3d 910 (Tex. Crim. App. 2002)(*Gonzales II*).

If the defendant produces evidence that there is a causal connection, the State may either try to disprove this causal evidence, i.e. disproving that there is a causal connection in existence at all, or, the State may make an attenuation-of-taint argument. Attenuation-of-taint is evaluated under the four-step *Brown v. Illinois* n19 analysis, in which the State may argue that although the defendant has demonstrated evidence of a causal connection, the taint of the violation was so far removed from the obtaining of the evidence that the causal chain the defendant demonstrated is in fact broken. In short, without first establishing that there is a causal connection between the violation and the obtaining of the evidence, there can be nothing for the State to assert has been broken through the attenuation-of-taint factors. Thus, we uphold the court of appeals' conclusion that a causal connection analysis regarding *Family Code section 52.02(b)*, as required by this Court in *Gonzales II* before evidence may be deemed inadmissible, is a separate from an attenuation-of-taint analysis, which may be used by the State to rebut a defendant's causal connection argument.

n19 *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975).

We also uphold the court of appeals' distribution of the burdens of proof in both of these cases. We have long held that "the burden of persuasion is properly and permanently placed upon the shoulders of the moving party. When a criminal defendant claims the right to protection under an exclusionary rule of evidence, it is his task to prove his case." n20 In *Russell v. State*, we again cited this holding. Recognizing that this analysis was used for federal claims of illegal search and seizure under the *Fourth Amendment*, and because Texas statutory law is silent as to how the burden of proof is distributed on a motion to suppress, this Court adopted some of the rules followed by federal courts in distributing burdens of proof. n21

n20 *Mattei v. State*, 455 S.W.2d 761, 766 (Tex. Crim. App. 1970) (quoting *Rogers v. United States*, 330 F.2d 535 (5th Cir. 1964), cert. denied, 379 U.S. 916, 13 L. Ed. 2d 186 (1964)).

n21 *Russell v. State*, 717 S.W.2d 7, 9 (Tex. Crim. App. 1986).

Appellant argues that the burden should be on the State to show the causal connection, and analogizes this situation to the admissibility of confessions when issues of voluntariness are raised. Although the burden is on the State to prove that a defendant's confession was voluntary once the issue has been raised, that situation may be distinguished from the statutory violation of the Texas Family Code we have here. All a defendant must do on a claim of involuntary confession is to demonstrate there a cognizable violation, and the confession is immediately presumed inadmissible unless the State can prove by a preponderance of the evidence that it was made voluntarily. n22 There is no requirement that a defendant establish any causal connection between the illegal conduct and the ensuing confession; the defendant simply must raise the voluntariness issue. In this case, it is not enough for the defendant to merely establish a violation. Under Texas case law, it is required that a causal connection be established,

and we hold that the defendant, as the moving party wishing to exclude the evidence, is responsible for the burden of proving this connection.

n22 *United States v. Reynolds*, 367 F.3d 294 (5th Cir. 2004).

Thus, the court of appeals correctly held that the burden is on the defendant, as the moving party in a motion to suppress evidence obtained in violation of the law under *Art. 38.23*, to produce evidence demonstrating the causal connection which this court required in *Gonzales II*. The burden then shifts to the State to either disprove the evidence the defendant has produced, or bring an attenuation-of-taint argument to demonstrate that the causal chain asserted by the defendant was in fact broken.

Conclusion: In the case of Appellant Pham, we hold that the court of appeals conducted the appropriate analysis, and that the court did not err in requiring Appellant Pham to produce evidence to prove a causal connection between the violation of *section 52.02(b) of the Texas Family Code* and his ensuing confession. The decision of the court of appeals is affirmed.

In the case of Appellant Gonzales, we hold that the court of appeals adopted the correct standard by which a causal connection must be established under *Art. 38.23* to justify the suppression of evidence seized in violation of the Family Code. The decision of the court of appeals is affirmed.