
YEAR 2005 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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A diagnostic examination (for discretionary transfer to adult criminal court) which exceeded its intended purpose and became a source of incriminating evidence constituted a custodial interrogation to which Fifth Amendment protections apply. (05-4-22)

On October 31, 2005, the Tyler Court of Appeals held that a court ordered diagnostic examination was a "critical stage" of the adversarial proceedings and warranted the right of the juvenile to have counsel present where the examination served a "dual purpose" including being a source of incriminating evidence introduced at the juvenile's trial.

¶ 05-4-22. **Simpson v. State**, MEMORANDUM, No. 12-03-00379-CR, 2005 Tex.App.Lexis 9047 (Tex.App.— Tyler, 10/31/05).

Facts: After Geraldine Davidson, an eighty-three year old retired schoolteacher, was reported missing on January 26, 2000, her body was discovered in the Neches River. Appellant's brother, Danielle Simpson, immediately became a suspect in Davidson's disappearance and murder. On January 28, as the police searched a known drug house in an attempt to locate Danielle, they discovered Appellant. He was taken into custody because the officers had probable cause to believe that delinquent conduct was occurring in their presence or view. Because Appellant was a juvenile, he was taken to the juvenile detention center. The same day, Jennifer Simpson, an accomplice, made a voluntary statement to authorities implicating Appellant in Davidson's murder. At a detention hearing in juvenile court on January 31, the court ordered that Appellant remain detained because he was accused of committing a felony offense and/or might be dangerous to himself or others if released. After the State petitioned the juvenile court for a discretionary transfer to adult criminal court, n1 the court ordered a complete diagnostic study of Appellant. n2 As a result, Mary Cox, Ph.D., conducted a psychological examination of Appellant. Cox testified at the transfer hearing, and the examination was admitted into evidence. The juvenile court waived its exclusive original jurisdiction as to the felony offense alleged and ordered that the case be immediately transferred to the appropriate criminal district court. n3 Thereafter, Appellant was charged by indictment with the capital murder of Geraldine Davidson. Appellant pleaded "not guilty."

n1 *TEX. FAM. CODE ANN. § 54.02(a)*(Vernon 2002). The petition also alleged that Appellant committed a felony offense, i.e., the capital murder of Davidson.

n2 *TEX. FAM. CODE ANN. § 54.02(d)*(Vernon 2002).

n3 *TEX. FAM. CODE ANN. § 54.02(a),(c)*(Vernon 2002).

In his second issue, Appellant contends that the trial court erred in admitting a statement he made during a juvenile certification and competency examination. The State argues that Appellant waived any global statutory and state constitutional objections when he failed to clearly state these objections to the trial court and obtain rulings. Further, the State contends that Appellant's statement was not the result of a custodial interrogation because it was a volunteered, spontaneous, and unexpected answer to an innocuous question.

Held: Affirmed, the error was harmless under *Tex. R. App. P. 44.2(a)* because the psychologist's testimony was unnecessary to establish defendant's presence at the scene and the remaining evidence overwhelmingly supported a finding that defendant participated in the murder.

Opinion: A juvenile court may waive its exclusive original jurisdiction and transfer a child to the appropriate district court. *TEX. FAM. CODE ANN. § 54.02(a)*(Vernon 2002). Prior to the hearing to consider transfer of the child, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense. *TEX. FAM. CODE ANN. § 54.02(c),(d)*(Vernon 2002). The sole purpose of the examination is to provide evidence for the certification hearing. *Cantu v. State*, 994 S.W.2d 721, 734 (*Tex. App.-Austin 1999, pet. ref'd*). When used only for its intended purpose, the examination is not a custodial interrogation. *See id.*

Notwithstanding the neutral nature of the psychological examination, the statements a juvenile utters during the examination are not automatically removed from the reach of the *Fifth Amendment*. *Estelle v. Smith*, 451 U.S. 454, 465, 101 S. Ct. 1866, 1874, 68 L. Ed. 2d 359 (1981). If the examination exceeds its intended purpose and becomes a source of incriminating evidence against a defendant, the examination constitutes a custodial interrogation to which Fifth Amendment protections apply. *Cantu*, 994 S.W.2d at 734. If a juvenile is not adequately informed of his Fifth Amendment rights with respect to the diagnostic examination or that his testimony during that examination would be used against him in an adjudicatory proceeding, a waiver of his rights is ineffective. *Cantu*, 994 S.W.2d at 735; *see also Estelle*, 451 U.S. at 469, 101 S. Ct. at 1876.

The psychological examination, in itself, does not constitute a critical stage triggering Sixth Amendment protection. *Hidalgo v. State*, 983 S.W.2d 746, 755 (*Tex. Crim. App. 1999*). Nor does a juvenile have a right to have counsel present during the examination. *Cantu*, 994 S.W.2d at 736. However, when the psychological examination is used both as the basis of the psychologist's determination that the juvenile should be transferred and as a source of incriminating evidence introduced at trial, it serves a "dual purpose." *See Cantu*, 994 S.W.2d at 736. In that instance, the diagnostic examination is a "critical stage" of the adversarial proceedings against a juvenile defendant warranting Sixth Amendment protection. *Cantu*, 994 S.W.2d at 736-37.

Appellant's Objection and Cox's Testimony

Here, the State requested that Mary Cox, Ph.D., a psychologist, be allowed to testify at trial regarding a statement Appellant made during the court-ordered psychological examination. The State argued that the purpose of the examination was not to elicit incriminating evidence for trial and that Appellant made a spontaneous statement. According to the State, Cox's question was neutral and Appellant had been warned by a magistrate. Appellant argued that he was in custody and being interrogated by Cox. He could not waive his right to counsel because he did not have counsel when Cox began the examination. Further, Appellant contended he was not told that the diagnostic examination could be used against him at trial. The trial court found that Cox was not the police and that the examination was a neutral hearing for the purpose of evaluating Appellant in order to determine if he should be tried as an adult. Thus, the trial court overruled Appellant's objection. The trial court stated that if the purpose of the examination

were anything else, it would have sustained the objection.

Cox testified that she performed a psychological examination of Appellant on January 29, 2000. Although Cox informed Appellant of the purpose of the examination, she did not advise him that she could testify against him. At the first interview, Cox observed that Appellant was lucid, oriented, and of such intelligence that he understood what was happening. Cox then began questioning Appellant regarding his competency. Appellant stated that he did not know the charges against him. Cox asked Appellant, "Well, what do they tell you you're charged with[?]" According to Cox, Appellant said, "They say that they're going to charge me with capital murder, but they can't do that. I know I'm going to have to do some time because I was there. I went to the river with them, but I didn't get out of the car. I stayed in the back seat with Pete so they can't get me for capital murder." After Appellant's statement, Cox resumed her questions, asking him if he knew who his attorney was and what the attorney's job would be.

Analysis

At the outset, we note that Appellant does not separately argue his state and federal constitutional claims or argue that the Texas constitutional protections differ in any significant way from the *Fifth* and *Sixth Amendments to the United States Constitution*. To adequately brief a state constitutional issue, Appellant must proffer specific arguments and authorities supporting his contentions under the state constitution. *Moore v. State*, 935 S.W.2d 124, 128 (Tex. Crim. App. 1996); *Lawton v. State*, 913 S.W.2d 542, 558 (Tex. Crim. App. 1995). Because Appellant failed to do so, we consider the admission of Cox's testimony solely under the federal constitution. See *Jackson v. State*, 992 S.W.2d 469, 475 n.8 (Tex. Crim. App. 1999); *Johnson v. State*, 853 S.W.2d 527, 533 (Tex. Crim. App. 1992).

Did the trial court err?

We first examine Cox's testimony in light of Appellant's Fifth Amendment protections. As we noted in a previous opinion in this case, on January 28, Appellant was given two comprehensive magistrate's juvenile warnings, outside the presence of law enforcement officers, pursuant to *section 51.095 of the Texas Family Code*. See *State v. Simpson*, 105 S.W.3d 238, 239-40 (Tex. App.-Tyler 2003, no pet.); *TEX. FAM. CODE ANN. § 51.095(a)(1)* (Vernon 2002 & Supp. 2005). The next day, Cox conducted the diagnostic examination of Appellant during which he made the incriminating statement. There is no indication in the record that he was warned that statements he made during the diagnostic examination could be used against him at trial. See *Simpson*, 105 S.W.3d at 239-40; *Cantu*, 994 S.W.2d at 734. Additionally, Cox never informed Appellant that she could testify against him at trial using statements he made during the diagnostic examination.

The purpose of the examination was to provide evidence for the certification hearing. However, once the examination exceeded its intended purpose and became a source of incriminating evidence against Appellant, the diagnostic examination constituted a custodial interrogation to which Fifth Amendment protections applied. See *Cantu*, 994 S.W.2d at 734. Because there was no evidence that Appellant knew or reasonably should have known that his statements made during the diagnostic examination would be used against him at trial, he did not waive his Fifth Amendment rights by making the statement in question to Cox. See *id.* at 735. Therefore, the admission of Cox's testimony at trial violated Appellant's Fifth Amendment privilege against self-incrimination. See *id.* at 736.

We next consider Appellant's Sixth Amendment rights. At the time of the diagnostic examination, Appellant was not represented by counsel. Moreover, Appellant had no right to have counsel present during the diagnostic examination. See *id.* However, this rule is restricted to cases in which the only purpose of the examination was to provide a determination of whether a juvenile should be certified as

an adult. *Id.* Here, the use of Cox's examination was not so limited. Instead, her examination was also used as the basis of her testimony in the guilt/innocence phase of Appellant's trial. As such, the examination served a "dual purpose." *See id.* Thus, the examination was a "critical stage" of the adversarial proceedings against Appellant and warranted Sixth Amendment protections. *See id. at 736-37.* Therefore, the admission of Cox's testimony at trial also violated Appellant's Sixth Amendment right to counsel.

Was Appellant harmed by the trial court's error?

Because the trial court's error was not "structural" and does not "defy analysis by harmless error standards," it is subject to a harmless error analysis. *Mendez v. State*, 138 S.W.3d 334, 339-40 (Tex. Crim. App. 2004)(quoting *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) and *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997)). Thus, having found that the admission of Cox's testimony constituted constitutional error, we must reverse unless we determine beyond a reasonable doubt that the error did not contribute to the conviction. *See TEX. R. APP. P. 44.2(a).*

In conducting our analysis, we first observe that Appellant's statement as recounted by Cox during the guilt/innocence phase simply placed Appellant in Davidson's vehicle at the river. His mere presence at the river was not an element of the charged offense, nor a criminal act. *See TEX. PEN. CODE ANN. § 19.03(a)(2)*(Vernon 2003)(defining "capital murder" as an offense if a person commits murder by intentionally or knowingly causing the death of an individual and intentionally commits the murder in the course of committing or attempting to commit one or more specified offenses); *Wooden v. State*, 101 S.W.3d 542, 546 (Tex. App.-Fort Worth 2003, *pet. ref'd*)(concluding that, standing alone, proof that an accused was present at the scene of the crime is insufficient for conviction as a party). However, the evidence presented at trial showed that Appellant's involvement went well beyond what he admitted to Cox. In fact, the following evidence showed that Appellant was an active participant in Davidson's murder.

Pete testified that he heard Appellant tell Danielle "let's go kill her." Jennifer testified that Appellant wrapped Davidson's head and hands with duct tape, and Pete testified that Appellant wrapped her head and legs. They both testified that Appellant beat Davidson when he put the cinder block in the trunk. Jennifer stated that, once at the river, she and Pete stayed in the car while Appellant and Danielle left the vehicle and "messed" with Davidson. According to Jennifer, she believed she saw Appellant's and Danielle's arms move as if they were throwing something. Pete testified that he left the vehicle and observed Appellant and Danielle swing Davidson into the river. According to Pete, Davidson was moaning and kicking when she was thrown in the river.

Officer Charles Floyd Lanier, Jr., an administrative captain with the Palestine Police Department, testified that Davidson was found in the Neches River with duct tape wrapped around her mouth and head, her hands behind her back with duct tape on them, and a large cinder block tied to her ankles. Charles Parker, a latent fingerprint examiner with the Texas Department of Public Safety at the time of Davidson's death, testified that he lifted fingerprints from the exterior, center, and left side of the trunk of Davidson's vehicle. He identified four fingerprints as Appellant's right ring finger, left middle finger, left little finger, and right thumb. These fingerprints were found in close proximity to Danielle's fingerprints.

Dr. Jeffrey Barnard, chief medical examiner for Dallas County, Texas and director of the Southwestern Institute of Forensic Sciences, testified that Davidson's hands were duct taped behind her back, her mouth was taped with duct tape, and each ankle was wrapped with a nylon-type rope cord and wrapped together, binding her legs. According to Barnard, Davidson suffered extensive blunt force injuries to her

face, head, and body that included bruises, abrasions, and lacerations. Barnard testified that Davidson may have drowned, smothered, or been rendered unconscious from her injuries and, thus, was unable to lift her head out of the water. Further, Barnard stated that the environmental effects of hypothermia may have played a role in her death. Barnard believed that Davidson was alive when she was thrown into the river and died either from hypothermia or from finally submerging into the shallow water.

Christina Walker, Pete's sister, testified that on January 26, 2000, Jennifer returned to their house and stated that they (Pete, Danielle, and Jennifer) took Davidson to the river and tied her up. Kenosha Walker testified that she was Pete's sister and Appellant's cousin. On January 26, Jennifer returned to their house before 9:45 p.m. Kenosha asked Jennifer what they did with the lady in the trunk. According to Kenosha, Jennifer said that they, meaning Appellant and Danielle, "killed the bitch."

Based upon this record, we cannot conclude that Appellant was harmed by the trial court's error. Appellant, in his interview with Cox, admitted his presence at the scene of Davidson's murder, but denied any involvement in the offense. Other evidence confirms his presence at the scene, but also portrays him as an active participant in the murder. Cox's testimony was unnecessary to establish Appellant's presence at the scene. The remaining evidence overwhelmingly supports a finding that Appellant participated in Davidson's murder.

Conclusion: Therefore, we conclude beyond a reasonable doubt that the trial court's error in admitting Cox's testimony did not contribute to Appellant's conviction. *See TEX. R. APP. P. 44.2(a)*. Accordingly, Appellant's second issue is overruled.