the Jasuta / Schulman report

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Larry Eugene Strickland II v. The State of Texas***

- **OFFENSE**: Possession of Controlled Substance
- **COUNTY**: Hood
- **COURT OF APPEALS**: Amarillo 2023
- **C/A CITATION**: Unpublished
- **C/A RESULT**: Conviction Affirmed
- **CCA. CASE No**. PD-0616-23 **DATE OF OPINION**: October 23, 2024
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Jesse McClure **VOTE**: 8-1-0
- **TRIAL COURT**: 355th D/C
- **LAWYERS**: Jeffrey Shearer, Ethan Pelletier, & Mark Bennett (Defense); John Messinger (SPA); Kristin Brown, Kyle Therrian, John Smith, & Aaron Diaz (TCDLA *Amicus Curae*)

[&& **427 Judgments & Sentences / Consecutive Sentences (Information Required)**]: After pronouncing Appellant's sentence, the trial court said: "In this Court's discretion, I will order that sentence not begin until the sentences in Cause No. CR14643—and if that's not the correct number, the -- the cause number involving the possession of child pornography and those counts cease. So, I'm ordering that this sentence not begin until your prior prison sentences have ceased to operate and so this would be considered consecutive to those." The judgment adjudicating guilt says Appellant's sentence shall run "consecutive with CR 14643 Count 1, CR 14643 Count 2, CR 14643 Count 3, and CR 14643 Count 4." On appeal, Appellant argued that the evidence supporting the trial court's decision to stack his sentences under Article 42.08(a), C.Cr.P., was insufficient. The Court of Appeals agreed in an unpublished opinion, noting that a record must contain some evidence connecting the defendant with the prior conviction to cumulate sentences containing the following information: the cause number, the court of conviction, the date of conviction, the term assessed, and the nature of the conviction. Because the cumulation order includes four counts in one cause number without any other details or special findings in the judgment providing further information, the court below found the evidence insufficient. After concluding that the cumulation order was not supported by the record, the Court of Appeals reformed the judgment adjudicating guilt to reflect "THIS SENTENCE SHALL RUN CONCURRENTLY." On

discretionary review, that The Prosecuting Attorney ("SPA") argues that the Court of Appeals erred in deleting the cumulation order. Instead, the SPA argues that when there is a lack of specificity of a prior conviction in a cumulation order, the remedy should be a remand to the trial court for further development.

Holding: A cumulation order must be specific enough "to enable the prison authorities to know just how long to detain the prisoner under the sentence." ***Stokes v. State***, 688 S.W.2d 539 (Tex.Cr.App. 1985). A cumulation order that lacks specificity may be reformed on appeal if the record contains the necessary information to allow reformation. See ***Banks v. State***, 708 S.W.2d 460 (Tex.Cr.App. 1986)(stating that the sentencing proceeding contained the trial judge's oral sentence which met the five recommended elements for a cumulation order, so the proper remedy is to reform the judgment to reflect the sentence actually imposed by the trial court). *** The issue of the propriety of cumulation has been before this Court before, but we have not reached the question presented in this case: When there is insufficient evidence to support a cumulation order, is the proper remedy remand or deletion? The closest we have come to this issue was in ***Beedy v. State***, 250 S.W.3d 107 (Tex.Cr.App. 2008)(see ☙, Vol. 16, No. 13; 04/07/2008), in which this Court held that the trial judge did not have the authority to stack the deferred adjudication community supervision term onto his prison sentence. *** Ultimately, the ***Beedy*** Court did not need to determine what the proper remedy would be when a lawful cumulation order lacked the requisite specificity. Which brings us to the case at hand. Here, the trial judge had the authority to cumulate at his discretion under Article 42.08(a) and entered a lawful cumulation order, but the order lacks the requisite specificity. In this circumstance, this Court has not foreclosed the possibility of remanding the case to the trial judge so the judge could obtain the information required to support the cumulation order. See, e.g., ***Bell v. State***, 994 S.W.2d 173 (Tex.Cr.App. 1999)(see ☙, Vol. 7, No. 34; 08/30/1999). In fact, in dicta in ***Beedy***, the Court wrote, "*In upholding the court of appeals's decision to delete the cumulation order in this case, we do not mean to suggest that we would reach the same conclusion in a case where the trial judge had the authority to cumulate but entered, at his discretion under Article 42.08(a), Texas Code of Criminal Procedure, a cumulation order that lacked the requisite specificity*." *** We hold that the remand principle should not be limited only to restitution cases. We agree with the State that this is not a true sufficiency review, and therefore, there is no reason to make an evidentiary deficiency permanently fatal to cumulation. This Court's continued practice of setting aside an unlawful cumulation order was based on the notion that an unlawful cumulation order does not constitute "reversible error" as provided in Article 44.29, C.Cr.P. This Court has held that "unauthorized" or "illegal" cumulation orders should be deleted, and in so doing, the Court has applied one part of ***Beedy***'s remedy principle. *** We now apply the other part of ***Beedy***'s remedy principle and order a remand where the cumulation order is proper, but the evidentiary basis of the cumulation order is lacking.

Ed Note: **Judge Mary Lou Keel** concurred without note.

(**Troy McKinney**) This decision is a bailout of the State for it not knowing the law and-or providing the necessary proof. It sounds like procedural default to me. If only the Court did so for defendants. The rule ought to be do it right or lose it.

(**John G. Jasuta**) I would normally say this was just another apology to the State but the State didn't ask for the stack. So I guess we're apologizing to the trial court for the law getting in the way of his discretion.

(**David A. Schulman**) Although I agree with Troy completely, this decision was 100% predictable. According to ***DeLeon v. State***, 294 S.W.3d 742 (Tex.App. - Amarillo 2009)(see §§, Vol. 17, No. 28; 07/20/1999), ***Beedy*** stands for the proposition that "*when a trial judge lawfully exercises the option to cumulate a defendant's sentences, that decision is unassailable on appeal*." In any case where the trial court has the authority to stack sentences and attempts to do so but doesn't "dot" all the "I"s and cross all the "T"s that are required, the only way not to "assail" the trial court's actions is to remand so the necessary information can be obtained. It seems a little too obvious to me . . . and I question why it took 16 years to find a case worthy of remanding rather than reversing.