In the Court of Criminal Appeals of Texas

No. PD-0677-21

HAROLD GENE JEFFERSON,

Appellant,

v.

THE STATE OF TEXAS

On Appellant's Petition for Discretionary Review
From the Eleventh Court of Appeals
Taylor County

YEARY, J., filed a concurring opinion.

I join the Court's opinion. I write further only to stress what the Court has *not* been called upon to decide today.

Appellant raised two issues on direct appeal, only one of which

did he perpetuate by his petition for discretionary review. In his first point of error on direct appeal, Appellant argued that his trial counsel was constitutionally ineffective for, among other things, failing to preserve error under Article 28.10(c) of the Texas Code of Criminal Procedure. *See Jefferson v. State*, No. 11-18-00184-CR, 2021 WL 2462155, at *6 (Tex. App.—Eastland June 17, 2021) (mem. op., not designated for publication); TEX. CODE CRIM. PROC. art. 28.10(c) ("An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced."). In his second point of error, he argued that his convictions under two counts of the indictment were invalid because the amendment by which those two counts were added to the indictment did not involve returning to the grand jury, which, he claimed, rendered the added counts "void." *Jefferson*, 2021 WL 2462155 at *2–3.

In his petition for discretionary review, Appellant raises two claims that implicate the court of appeals' holding with respect to his first point of error, raising ineffective assistance of counsel.[1] Because the Court properly disposes with these grounds for review, I join its opinion. Appellant does *not* bring a claim in his petition before this Court that

[1] The grounds for review are the following: 1) Whether "[t]he 11th Court of Appeals erred where it decided an important question of state law, specifically what constitutes an 'additional or different offense' in the context of Texas Penal Code section 22.011 (a)(2), based on erroneous statutory interpretation that conflicts with decisions of the Court of Criminal Appeals"; and 2) whether "[t]he 11th Court of Appeals erred when it applied an incomplete, and therefore wrong standard to dispose of Appellants ineffective assistance of counsel claim."

the court of appeals erred in its resolution of his second appellate claim. That is unfortunate.

I am troubled by the court of appeals' resolution of Appellant's second appellate claim. Had Appellant challenged the court of appeals' treatment of his second claim, it might even have mooted his ineffective assistance of counsel claim.

The court of appeals rejected Appellant's second point of error, claiming that he could not be convicted under the added counts of the indictment, on the ground that such a claim is in the nature of a "waiver only" right, and Appellant "waive[d] any error to an amended indictment by failing to object to it at trial" under Article 28.10(c) of the Code of Criminal Procedure. *Jefferson*, 2021 WL 2462155 at *2–3. Of course, this approach improperly conflates the concepts of waiver and forfeiture.[2] What is more, it undervalues Appellant's constitutional right to be charged by a grand jury for a felony offense under Article I, Section 10 of the Texas Constitution. TEX. CONST. art. I, § 10.

Article 28.10(c) prohibits the trial court from amending an indictment "with an additional or different offense"—but only, it seems, if the defendant objects to the amendment. TEX. CODE CRIM. PROC. art. 28.10(c). The Court today rightly regards the two offenses that were added to Appellant's indictment to be at least "additional" (if not "different") offenses for purposes of Article 28.10(c). Majority Opinion at

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[2] Waiver occurs when a known right is purposefully given up. Forfeiture is what occurs when a right that must be preserved by objection is not so preserved. *See Ex parte Beck*, 541 S.W.3d 846, 850 n. 6 (Tex. Crim. App. 2017) ("Whereas rights that are subject to forfeiture may be lost by inaction alone, rights that are subject to waiver cannot be lost by mere inaction and instead must be expressly waived by a defendant.").

6–7. On its face, then, it would seem that Article 28.10(c) would apply to require an objection to preserve the error. And, indeed, that is the assumption that underlies the Court's resolution of Appellant's ineffective assistance of counsel claim today—whether trial counsel properly preserved an objection to the added counts.

It is not clear to me, however, that the Legislature may constitutionally *require* an objection if the claim is that the added counts were for felony offenses, thus implicating the requirement of Article I, Section 10, of the Texas Constitution. *See* TEX. CONST. art. I, § 10 ("[N]o person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, other than in the penitentiary[.]"). This Court has observed that this grand jury screening requirement creates at least a "waiver-only" right, under the rubric of *Marin*. *See Woodard v. State*, 322 S.W.3d 648, 657 (Tex. Crim. App. 2010) ("The right to a grand jury indictment under state law is a waivable right, which 'must be implemented by the system unless expressly waived.' *See Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993); *Trejo* [*v. State*], 280 S.W.2d [258,] at 263 (Keller, P.J., concurring in the judgment) ('unless waived, an indictment is necessary to vest the trial court with personal jurisdiction in a felony case').").[3]

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[3] *See also* TEX. CODE CRIM. PROC. art. 1.141 ("A person represented by legal counsel may in open court or by written instrument voluntarily waive the right to be accused by indictment of any offense other than a capital felony."). This provision is consistent with *Woodard*'s characterization of the right for felony charges to be screened by a grand jury as a waiver-only right. *See King v. State*, 473 S.W.2d 43, 51 (Tex. Crim. App. 1971) (holding that the then-newly minted Article 1.141's waiver-of-indictment provision did not violate Article I, Section 10, of the Texas Constitution); *Duron v. State*, 956 S.W.2d 547, 550, n.2

What that means is that, absent a waiver of the right to grand jury screening that is spread upon the record, Appellant should be able to complain—even for the first time on appeal—that the addition of new offenses to his indictment violated his right to a grand jury screening of the charges against him. But the failure to object is a forfeiture, not a waiver. The court of appeals seems to have confused the two. And to the extent that Article 28.10(c) would render Appellant's claim subject to *forfeiture*, as opposed to waiver, it is at least arguably unconstitutional. Had Appellant actually re-raised this more-jurisprudentially-significant issue on discretionary review, this might very well have been the case in which to address it.

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(Tex. Crim. App. 1997) ("[W]e have held that a defendant's art. I, § 10 rights to a grand jury indictment are not forfeited by a failure to object.").