IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. WR-91,197-01 & WR-91,197-02

Ex parte JONATHAN HOSS KIBLER, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
IN CAUSE NO. F-2002-1689-D & F-2002-1690-D
FROM THE 362ND DISTRICT COURT
DENTON COUNTY

KELLER, P.J., filed a dissenting opinion.

Under the sex-offender registration statute, Appellant's convictions subject him to lifetime registration only if one of the convictions is "before or after" the other. The Court concludes that one of the convictions can be "before or after" the other if the judge pronounced judgment on one of them before the other, even if both pronouncements occurred on the same day in the same proceeding. This holding is at odds with the general principle that judicial acts occurring on the same day are considered to have occurred at the same time. The Court contends that this case involves the "priority" exception to that general principle, but I think it does not. Moreover, the Court's holding imposes a burden on registration authorities that the legislature almost certainly did

not contemplate: the need to review a court-reporter's record to determine how long someone is required to register.

Lifetime registration is required for "a reportable conviction . . . for . . . an offense under Section 21.11(a)(2) . . . if before or after the person is convicted . . . for the offense under Section 21.11(a)(2), . . . the person receives or has received another reportable conviction . . . for an offense or conduct that requires registration under this chapter."[1] The question before us is: What does it mean to say that one conviction is "before or after" another conviction?

Ordinarily, when the law computes time, everything that happens on a particular day is considered to have happened at the same time. Lord Coke espoused the principle that "regularly the law maketh no fraction of a day."[2] The United States Supreme Court has explained: "For most purposes the law regards the entire day as an indivisible unit."[3] The Supreme Court also articulated the "priority" exception to that general principle: "But when the priority of one legal right over another, depending upon the order of events occurring on the same day, is involved, this rule is necessarily departed from."[4] In *Hyde v. White*, the Texas Supreme Court pointed out that, usually, when judicial interpretations are involved, a "day" is not considered a "measure of time" but is "a mere point of time," as long as "the priority of several acts, done on the same day, do not have to be

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[1] TEX. CODE CRIM. PROC. art. 62.101(a)(4).

[2] *Lagandaon v. Ashcroft*, 383 F.3d 983, 991 (9th Cir. 2004) (quoting 3 Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND 53 (photo. reprint 1986) (1797 ed.)).

[3] *Nat'l Bank v. Burkhardt*, 100 U.S. 686, 689 (1879).

[4] *Id.*

adjudged."[5]

The Court says that this case involves a "priority" issue so that the rule against fractions of a day does not apply. In doing so, the Court construes "priority" as referring simply to what act is prior in time. But as the Supreme Court has explained, the "priority" at issue here is "the priority of one legal right over another." This priority issue arises when two acts occur on the same day and the question is which act controls over the other.[6] For instance, if two liens are filed on the same day, we need to know which is first to determine which is the superior lien.[7] The present case does not involve an issue of the priority of legal rights. We are not trying to determine whether one sex-offense judgment has controlling effect over a different sex-offense judgment. There is no sense in which the judgments compete against each other, so as to require giving effect to one and not the other or preference to one over the other. To the contrary, it is the effect of the conjunction of the

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[5] 24 Tex. 137, 145 (1859). The appellant's attorney in the case cited the principle thusly, "[I]n the computation of time, (except where the priority of acts, done on the same day, is in question,) the law recognizes no fraction of a day." *Id.* at 138. Not being part of the opinion of the Texas Supreme Court, this statement was not authority but appears to be accurate.

[6] *Scoville v. Anderson*, 131 Cal. 590, 596, 63 P. 1013, 1015 (1901) ("But where the question before the court is one where the determination of private rights depends upon the order in point of time of the performance of two or more acts usually done upon the same day, the courts are, of necessity, required to find and fix the priority and sequence of these events, and to this end always, as of need they must, consider parts and fractions of days.").

[7] *Burkhardt*, 100 U.S. at 689 ("[W]here a mortgage[] took effect from the time it was deposited for record on a particular day, and a judgment became a lien upon the premises on the same day, proof was received to show that the mortgage was deposited before the court sat, and it was held that the mortgage must be first satisfied."); *Scoville*, *supra* ("[W]here the question is that of priority of time in the levy of two or more attachments, the recording of deeds, and the like, the actual time of performance becomes the essential question, and fractions of days are scrupulously regarded."); *German Sec. Bank v. Campbell*, 99 Ala. 249, 251, 12 So. 436, 436-37 (1892) (Courts give "controlling importance to the precise moment of time at which judgments are registered so that priority of registration, to the extent of any fraction of a day, will carry with it priority and superiority of the lien which arises and attaches upon registration.").

two judgments that is at issue in this case.

If the legislature wanted to allow the two convictions to trigger lifetime registration when they occurred on the same day, it had a number of options. If the legislature really intended the mere presence of an extra conviction to be determinative, it could have simply omitted the "before or after" language from the sex-offender statute. The statute could have provided that lifetime registration occurs for "a reportable conviction . . . for . . . an offense under Section 21.11(a)(2) . . . if . . . the person has another reportable conviction . . . for an offense or conduct that requires registration under this chapter." Or the legislature could have added "on" to the "before or after" phrase, which, as Applicant points out, is how the legislature phrased the savings clause for the enacting act that added this provision.[8]

Given the rule that fractions of a day are not generally recognized, it is unlikely that the legislature intended to impose lifetime registration for two convictions that occur on the same day, but not if those two convictions were received in the same proceeding. In the unlikely event that the legislature did intend such a thing, it could have added a phrase to clarify that ("if . . . the person has another reportable conviction . . . for an offense or conduct that requires registration under this chapter unless both convictions are received in the same proceeding"). The joinder statute shows that the legislature knows how to attach consequences to trying or not trying cases in the same proceeding.[9] And I think it is unlikely that the legislature intended to impose lifetime registration

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[8] *See* Acts 2005, 79th Leg., ch. 1008, § 4.01(a) (" . . . the changes in law made by this Act in amending Chapter 62 . . . apply to a person subject to Chapter 62 . . . for an offense or conduct committed or engaged in before, on, or after the effective date of this Act.").

[9] *See* TEX. PENAL CODE § 3.03(a) (concurrent sentencing for convictions of offenses arising out of a single criminal episode and prosecuted in a single criminal action).

for a defendant sentenced on the same day in the same proceeding but not if the judge simultaneously pronounces judgment on both offenses. But if the legislature did intend such a thing, it could have added a phrase to clarify that ("if . . . the person has another reportable conviction . . . for an offense or conduct that requires registration under this chapter unless both convictions are pronounced simultaneously").

And the Court's holding places an unexpected burden on the authorities. At some point, local law enforcement or the Department of Public Safety has to verify whether a convicted person's duty to register has expired.[10] The obvious, relatively easy, way to verify whether one conviction is before or after another, so as to determine whether lifetime or ten-year registration applies, is to look at the judgments in both convictions. Even without the actual judgment, authorities will likely be able to determine what the offenses were and the dates of the convictions. But if "before or after" means something other than different days, then authorities will have to review court records to determine whether the registration period has expired. If "before or after" can include separate proceedings on the same day, then authorities might have to look at a docket sheet or a court reporter's record to get the pertinent information. And if "before or after" means what the Court says it means—everything other than a simultaneous pronouncement of judgment—then, whenever two of these types of convictions occur on the same day, authorities will have to scrutinize a court reporter's record just to eliminate the extremely unlikely possibility of a simultaneous pronouncement. I think it unlikely in the extreme that the legislature intended this.[11]

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[10] *See* TEX. CODE CRIM. PROC. art. 62.251.

[11] And should we really penalize the failure to make a record, or have one transcribed, that might have documented a simultaneous pronouncement?

To support its claim that "before or after" does not impose a sequential requirement regarding the dates of conviction, the Court points to our construction of two statutes that specified two prior convictions enhancing a third offense in some way. Neither of these examples supports the Court's position, and in fact, both are contrary to it. First, the Court points to a state-jail-felony enhancement provision stating that if the defendant has "previously been finally convicted of two state jail felonies," the defendant would be punished for a third-degree felony.[12] Second, the Court points to a statute providing that DWI is a felony offense if "the person has previously been convicted two times" of an offense relating to the operating of a motor vehicle while intoxicated.[13] In both cases, the Court points out that we held that the two prior convictions did not have to be final or sequential with respect to each other.[14]

But that is because there is no language in either of these enhancement statutes suggesting that one of the two prior convictions had to occur before the other. So, when a particular part of statute specifies *no time requirement at all*, then the relevant acts can occur on the same day. For example, because the felony DWI statute does not require either of the two prior convictions to precede the other, they can occur on the same day. But the sex-offender registration statute does contain a time requirement with respect to the two convictions to which it refers—one conviction must be "before or after" the other.

Pointedly, the two enhancement statutes discussed by the Court do contain temporal language—the prior convictions were in fact *prior* convictions, having to be prior to the *primary*

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[12] *See Campbell v. State*, 49 S.W.3d 874, 875 (Tex. Crim. App. 2001).

[13] *See Gibson v. State*, 995 S.W.2d 693, 695 (Tex. Crim. App. 1999).

[14] *See Campbell*, 49 S.W.3d at 876; *Gibson*, 995 S.W.2d at 696.

offense. And it would not be possible under either statute for the third conviction (for the primary offense) to occur on the same day as the two prior convictions. The state-jail enhancement statute specified that the two prior convictions had to be final at the time of the trial of the third offense. The DWI enhancement statute simply specified that the two prior convictions had to be "previous," but a different subsection of the statute references the finality of prior convictions,[15] and because the prior convictions are elements of the offense of felony DWI, they would have to be "final" before the commission of the third DWI, or else an indictment for felony DWI could be undone by a reversal of a non-final prior conviction on direct appeal. We have said that our construction of a statute should avoid "the potential for making an indictment's enhancement allegations untrue."[16]

The Court says that the legislature knew how to impose a sequential finality requirement because it has done so in some statutory provisions but not others. The Court's contention in that regard is not entirely accurate. In *Arbuckle v. State*, we held that, when a prior conviction was used to enhance the punishment of a subsequent offense, the term "conviction" in the statute meant "final conviction."[17] More recently, with respect to the general prior-conviction enhancement statute, Penal Code § 12.42, we said about the principle articulated in *Arbuckle*, "[W]e have always held that prior

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[15] TEX. PENAL CODE § 49.09(d) ("For the purpose of this section, a conviction for an offense under Section 49.04 . . . that occurs on or after September 1, 1994, is a final conviction, whether the sentence for the conviction is imposed or probated.").

[16] *Beal v. State*, 91 S.W.3d 794, 796 (Tex. Crim. App. 2002). As noted above, the DWI enhancement scheme allows for a conviction to be "final" for its purposes even if the sentence is probated. What exactly "finality" means can vary from one context to another, and while a probated sentence is not final for some purposes, it is final for other purposes so long as no appeal was taken or the trial court's judgment was affirmed on appeal and mandate has issued. *Jordan v. State*, 36 S.W.3d 871, 875-76 (Tex. Crim. App. 2001).

[17] *Arbuckle v. State*, 132 Tex. Crim. 371, 377, 105 S.W.2d 219, 222 (1937).

convictions must be final under the statute, *even for those provisions that did not contain the word 'final.'*"[18] So, this Court has regularly construed a finality requirement when the statute merely specified that a conviction must occur before another offense. For those statutes, the construed finality requirement means that it is never possible for a prior conviction to occur on the same day as the primary conviction that is being enhanced.

So when the issue is the relationship between a prior offense and the *primary* offense, we have construed a finality requirement as to the prior offense regardless of whether one is explicitly in the statute. But when the issue is the relationship of prior offenses with *each other*, we have seen two situations: (1) the legislature expressly imposing a sequential finality requirement, and (2) the legislature declining to impose a sequential requirement of any kind. What we have not seen is a middle ground in which the legislature imposes a sequential requirement for prior offenses with each other without also imposing a finality requirement. That is probably because, if the legislature were to draft language saying that prior offenses must be sequential with each other, we would likely impose a finality requirement under the *Arbuckle* rule of construction.

The sex-offender registration chapter contains a provision that might eliminate any requirement of finality. Article 62.002 provides that the duty to register is not affected by an appeal of the conviction.[19] Assuming this means that there is no finality requirement attaching to a "conviction" occurring "before or after" another "conviction," under the registration statute, that still does not mean that the convictions can occur on the same day. The Court sets up a false choice when it says that the words "before or after" must either incorporate notions of finality or else be

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[18] *Jordan*, 36 S.W.3d at 873.

[19] TEX. CODE CRIM. PROC. art. 62.002(b)(1).

broad enough to encompass actions that may be mere seconds apart. A middle ground between those positions is obvious: Article 62.002 might supersede the usual rule that the word "conviction" means "final conviction" but it does not displace the usual rule that actions occurring on the same day are treated as occurring at the same time. Under that middle ground, neither conviction would have to be final as to each other, but each conviction would have to occur on a different day, even if they were only a day apart.

To summarize: The general rule is that events occurring on the same day are treated as occurring at the same time. The case before us is not a "priority" case where we have to decide which of two events takes precedence over the other. The legislature could have crafted the language of the statute to avoid the result Applicant is arguing for, but it did not, despite the fact that the savings provision of the enacting statute contains the type of language it could have used. The Court's construction of the statute allows for an exception to lifetime registration in the two-conviction scenario that is so limited that it is hard to believe that was the intent of the legislature. And the Court's construction imposes a burden on law enforcement to scrutinize a court reporter's record just in case the trial judge's pronouncement of judgment fits that limited exception.

I agree with Applicant. His convictions, occurring on the same day, were not "before or after" each other. I respectfully dissent.

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