Opinion issued October 27, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00906-CR

MICHELLE ELAINE BEARNTH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1231845

CONCURRING OPINION

I join the majority opinion, but write separately to specifically explain why I join it in regard to the question of fact presented to this Court by appellant, Michelle Elaine Bearnth, in light of my recent concurring opinion in *Kiffe v. State*,

No. 01-10-00746-CR, 2011 WL 4925986 (Tex. App.—Houston [1st Dist.] Oct. 13, 2011, no pet. h.) (Jennings, J., concurring).

In *Kiffe*, the defendant argued that this Court, which has conclusive and final jurisdiction over his question of fact, should not have applied a legal-sufficiency standard of review to address his question of fact because doing so deprived him of his state constitutional and statutory right to have his question of fact addressed as a question of fact and his appellate remedy of a new trial. *See* TEX. CONST. art. V, § 6(a); TEX. CODE CRIM. PROC. ANN. art. 44.25 (Vernon 2006) (entitled, "Cases Remanded"). Kiffe asserted that applying the legal-sufficiency standard of review to his question of fact and depriving him of his appellate remedy of a new trial violated his federal and state rights to due process of law. *See* U.S. CONST. amends. V, XIV; TEX. CONST. art. I, § 19.

Given the express language of article V, section 6 of the Texas Constitution and article 44.25 of the Texas Code of Criminal Procedure, it is readily apparent that answering a defendant's question of fact as a purely legal question violates the United States Constitution's guarantee of due process of law, as well as its guarantee of the equal protection of the laws, because it, in fact, deprives the defendant of her well-established Texas appellate remedy of a new trial, recognized in the Texas Constitution and by the Texas Legislature in article 44.25. *See Kiffe*, 2011 WL 4925986, at *6 (Jennings, J., concurring); *see also* U.S. CONST.

amends. V, XIV; *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590 (1956) (concluding in states that provide for appellate review, criminal defendant is entitled to protections afforded under Due Process and Equal Protection Clauses of United States Constitution); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 111, 117 S. Ct. 555, 561 (1996) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S. Ct. 1497, 1500 (1966)) ("This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.").

Nevertheless, the majority in *Kiffe* did not agree and answered his question of fact as a question of law, overruling his constitutional issues. *Kiffe*, 2011 WL 4925986, at *2–5. Unless this Court subsequently overrules *Kiffe*, we must accept *Kiffe* as binding precedent. *Swilley v. McCain*, 374 S.W.2d 871, 875 (Tex. 1964).

Terry Jennings
Justice

Panel consists of Justice Jennings, Justice Sharp, and Justice Brown.

Justice Jennings, joining the majority opinion and concurring separately.

Justice Sharp, concurring without opinion.

Publish. TEX. R. APP. P. 47.2(b).