Sandoval v. State, No. AP-77,081 (Tex. Crim. App.-Dec. 7, 2022)

Attorneys. Jennae Swiergula (Appeal), Jared Tyler (Appeal), Nathaniel Perez (trial), Alfredo Padilla (Trial)

Issue & Answer 1. 60 percent of county residents indicated an awareness of the underlying facts of the case in a pretrial change of venue poll. Was this sufficient to mandate a change of venue? **No.**

Issue & Answer 2. When the trial court conducts venire qualification on a special venire (one summoned for a particular case rather than summoned for jury duty generally) must the trial court permit the defendant and his attorneys to be present? **No.**

Issue & Answer 3. When a trial attorney presents a trial strategy to the trial court in an effort to make a record of that attorney's advice and the client's decision-making, has trial counsel placed his own interests in avoiding a writ above those of his client in having an attorney advance the best interests of the client at trial? **No.**

Facts. A jury convicted the defendant of capital murder, and the State is seeking to kill him. The defendant murdered a border patrol agent when the agent and his family were fishing. The murder was well-known to the citizens of Willacy County where it occurred and only 29 percent of those responding to the defendant's poll had not already formed an opinion as to his guilt. The trial court transferred venue to Cameron County. Once in Cameron County, the defendant moved to transfer venue again. He presented testimony from two local defense attorneys who stated their belief that the defendant could not receive a fair trial in Cameron County. Among those ultimately chosen to serve on the jury, nine had some knowledge of the case but had not rendered an opinion on guilt.

Because the trial court summoned a "special venire" (one summoned for a particular case instead of summoned for jury service generally), the trial court conducted the initial jury qualification which typically takes place in the central jury room. The qualification and excusal of jurors did not occur on the record and neither the defendant nor the defendant's attorney were allowed to participate.

During the course of the trial, the defendant's trial attorneys went to great lengths to explain on the record their strategies and the choices the defendant could make between competing strategies. In doing so, the trial attorneys divulged confidential information seemingly to protect themselves against a writ of habeas corpus for ineffective assistance of counsel.

Analysis 1. To change venue a defendant must show that pretrial publicity was "pervasive, prejudicial, and inflammatory." Publicity by itself is not enough. This showing can be made in a hearing on a motion to change venue or by the testimony of prospective jurors in voir dire. The defendant failed to establish any prejudice arising from the local knowledge of the basic facts of the case. The defendant's own polling in Cameron County showed that 60% of respondents had not yet formed an opinion as to guilt and the record reveals that most jurors had heard little if anything about the case.

Analysis 2. Generally, excuses, qualifications, and exemptions occur before a prospective juror is assigned to a panel and sent to a courtroom. Sometimes they can even be resolved before the date of jury service. Prior to being assigned to a panel, jurors are a general assembly, and "the general assembly portion of jury selection is not considered part of the trial and therefore the accused is not entitled to be present." This process "lack[s] the traditional adversarial elements of most voir-dire proceedings," and the right to be excused from the venire "belongs to each of its individual members, not to the defendant." Because the process is permissible when conducted before the general assembly, it would be "nonsensical" to make it impermissible simply because the trial court summoned a special venire and the qualification and exemption process occurred in the courtroom rather than the central jury room.

Analysis 3. "At least ordinarily, an attorney's own interests in protecting against an ineffective assistance claim will not conflict with the client's interest." Before an attorney's interest can be said to conflict with the client's "there has to be a showing that the *interest* itself is antithetical to the client." Here the jury was the factfinder, and the sentence was automatic upon the jury's finding of special issues. Making the trial court privy to defense strategy in the *ex parte* fashion it occurred could not have prejudiced the defendant. Nor did counsel's decision to delegate to the defendant the ability to choose among prospective witnesses rise to the level of abandoning the defendant or leaving him to his own devices at trial.

Comment. I've never been a big fan of making a lawyer's CYA record. I guess it can come in handy when an issue comes up on the fly and you haven't had an opportunity to memorialize legal advice in advance. But two things are always going to be true in a case like this: (1) In a capital murder case you *are just going to get a writ*, and (2) if you have to testify as the attorney, the trial court is going to believe you.