



Friday, September 11, 2009

Juan Lizcano v. The State of Texas
Cause No. AP-75,879
Court of Criminal Appeals of Texas

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The Facts

Around 2 a.m. on November 13, 2005, an angry and intoxicated Juan Lizcano arrived at the home of his girlfriend, Marta Cruz. Once inside her home, Lizcano demanded to know why Cruz had not answered his phone calls and accused her of having someone else at her home earlier in the evening. Lizcano threatened Cruz with a gun and fired a shot into the ceiling. He warned Cruz that the next shot was for her and left the home. After Lizcano left, Cruz called 911. Dallas police officers responding to the call spoke with Cruz and then left to search for Lizcano.

Shortly after the police left Cruz's home, Lizcano returned, kicking the door and demanding to be let inside. Frightened, Cruz again called 911. Several uniformed officers responded to the second call, and a manhunt for Lizcano ensued. The search ultimately ended with an exchange of gunfire between Lizcano and the police officers. A shot fired by Lizcano struck Officer Brian Jackson in the chest, killing him instantly. Lizcano was arrested shortly thereafter, and on November 16, 2005, he was formally charged with one count of capital murder.

The District Court Proceeding

In October 2007, Lizcano was tried by a twelve-member jury in a trial presided over by the Honorable Judge Andy Chatham in the 282nd District Court of Dallas County, Texas. Criminal trials like Lizcano's consist of two phases. In the first phase, the jury determines whether the defendant is guilty. If the defendant is found guilty, the second phase, called the punishment phase, begins in which the jury makes decisions that determine the defendant's sentence.

Prior to the start of the trial, Lizcano alleged that he suffered from mental retardation, which, if true, would mean that Lizcano could not be sentenced to death. Lizcano requested that the trial court determine the issue before trial, but the court denied the request.

During the first phase of the trial, the jury found Lizcano guilty of one count of capital murder. During the punishment phase, the jury considered several issues, including whether Lizcano suffered from mental retardation. The jury determined that Lizcano was not mentally retarded, that he would be dangerous in the future, and that there were no mitigating circumstances (i.e., circumstances that suggest the death penalty would not be appropriate). After reviewing the jury's decisions, the trial judge sentenced Lizcano to death.

The Appeal

When a defendant is sentenced to death in the trial court, the defendant's appeal bypasses the Court of Appeals and proceeds directly to the Court of Criminal Appeals in Austin, the highest court for criminal cases. A death sentence is always appealed directly to the Court of Criminal Appeals. This is an exception to the general structure of the Texas judicial system. Generally, the appeals process requires a party in a criminal case to first appeal to the intermediate Courts of Appeals before seeking review by the Court of Criminal Appeals.

Because Lizcano is appealing the trial court's decision, he is the "Appellant." The State of Texas (the "State"), which prevailed at the trial, is the "Appellee."

After an appeal is filed, the Appellant submits a legal document called a "brief" that explains the party's legal arguments. Shortly after the Appellant submits his brief, the Appellee files its own brief that responds to and addresses the issues raised by the Appellant. Lizcano and the State have each filed briefs in this case with the court.

The Attorneys

Each party is represented by more than one highly experienced appellate attorney. The attorneys prepared the briefs and will present the party's arguments to the Court of Criminal Appeals. The State is represented on appeal by Dallas County District Attorney Craig Watkins, along with Assistant District Attorneys Christi Dean, Shelly O'Brien Yeatts, and Kimberly J. Pfannenstiel. Lizcano is represented on appeal by John Tatum and Brook Busbee, who are each criminal defense attorneys in private practice in Dallas.

The Oral Argument

The Court of Criminal Appeals will hear the appeal on September 11, 2009, at the Belo Mansion in Dallas, Texas. Lizcano and the State will each have 20 minutes to present their arguments. During this time, the attorneys will present their arguments and the judges will ask questions regarding the case and the applicable law. Lizcano's attorneys will argue first, followed by the attorneys for the State. Once the State has concluded its argument, Lizcano's attorney will have 5 minutes for a final rebuttal argument.

Court of Criminal Appeals

The Court of Criminal Appeals is the highest criminal court in Texas. The Court of Criminal Appeals consists of a Presiding Judge and eight other judges, all of whom are elected and hold their offices for a term of six years. In deciding capital cases like Mr. Lizcano's, all nine judges will meet to vote and ultimately render a decision. All will review the briefs and the trial record, although all nine may not actually be present to hear the oral arguments of the lawyers. To reach a final decision, at least five of the nine judges must agree. For additional information on the Court of Criminal Appeals and each of the nine judges, you can visit <http://www.cca.courts.state.tx.us/>.

The Legal Standard

The Court of Criminal Appeals reviews the decisions of lower appellate courts and, in some cases (like this case), the decisions of trial courts. The Court of Criminal Appeals does not preside over trials and the judges do not hear new witness testimony or any new evidence. Further, they do not decide guilt or innocence. Instead, the Court reviews the trial court record to see if any legal errors occurred, that require a new trial being ordered. The record consists of all the transcripts of the trial, including the entire jury selection process, all the trial testimony from

each witness, and all exhibits that were entered into evidence during the trial. Neither party can introduce new or additional evidence outside of the written trial record.

In this case, the Court of Criminal Appeals will review the case applying the standard of “abuse of discretion.” To establish an abuse of discretion, Lizcano must show that he was prejudiced by discretionary decisions of the trial court judge. The Court of Criminal Appeals may affirm or reverse (overturn) the trial court’s decision and/or remand the case (i.e., send the case back to the trial court for additional proceedings). The trial court judge’s rulings will be reversed only if the trial judge acted in an unreasonable manner or without reference to guiding legal principles.

The Disputed Issues

There are several issues on appeal in this case, and each issue is discussed at length in the briefs filed by Lizcano and the State. However, during the oral argument, the parties will focus on only a few issues, which can be grouped into the three categories discussed below.

1. Determination of Whether Lizcano Suffered from Mental Retardation

Following the decision of the United States Supreme Court in *Adkins v. Virginia*, a defendant suffering from mental retardation cannot be executed. During and prior to the trial, Lizcano alleged that he suffered from mental retardation and therefore could not be sentenced to death. Lizcano and the State each presented evidence on this issue, with the State arguing that Lizcano is not mentally retarded.

Lizcano argues that (1) he was entitled to have a separate jury (not the jury that found him guilty of capital murder) determine whether he could be sentenced to death due to his alleged mental retardation, and (2) he was entitled to have the jury determine whether he suffered from mental retardation prior to the trial. Lizcano asserts that the trial court erred by failing to provide a separate jury and by refusing to make a pretrial determination of mental retardation. Lizcano further argues that the determination of mental retardation should be governed by the same procedures used to determine whether a defendant is competent to stand trial.¹

The State responds to Lizcano’s arguments by asserting that no legal precedent (case law or statute) requires that a jury determine mental retardation, either before trial or otherwise. Moreover, the State argues that the law does not prohibit the same jury that finds the defendant guilty from also determining whether the defendant is mentally retarded. Additionally, the State claims that the procedures used to determine competence to stand trial do not govern the determination of mental retardation.

2. Determination of Whether to Grant Continuances

¹ Although the concepts are similar, the issues of competency to stand trial and of mental retardation are separate legal issues. If the Court determines that the defendant is not competent to stand trial, the trial cannot proceed. If the Court determines that the defendant is mentally retarded, the trial can proceed, but the defendant cannot be sentenced to death.

a. Defense Expert

During the trial, the defense planned to have an expert, Dr. Gilbert Martinez, testify regarding Lizcano's alleged mental retardation. Shortly before Martinez was scheduled to testify, the defense requested that the trial court continue (delay) the trial for a few days. The defense informed the trial judge that Martinez's wife was scheduled for surgery on the date Martinez was supposed to testify, and that as a result, Martinez could not testify that day. The defense explained to the trial judge that Martinez would be available to testify the day after his wife's surgery. The judge denied the request for a continuance and Martinez did not testify during the trial. On appeal, Lizcano argues that by failing to grant the continuance and allowing Martinez to testify, the trial court denied his right to present a complete and meaningful defense.

The State responds to Lizcano's argument by asserting (1) that the defense had several opportunities to call Martinez to the stand during the course of the trial, but failed to do so, and (2) that Lizcano's attorney had informed the judge in a pre-trial hearing that she was unsure whether she would call Martinez. The State further argues that Martinez was not qualified to make a determination as to whether Lizcano was mentally retarded and that the defense was sufficiently able to address the issue of mental retardation through two other expert witnesses. As a result, the State argues that the denial of the continuance and the resulting exclusion of Martinez's testimony did not prejudice Lizcano, and therefore does not require a new trial.

b. Juror's Vacation

During the punishment phase of the trial, the court recessed the trial for a week and a half. Lizcano asserts that the trial judge improperly delayed the trial to allow a juror to go on vacation. Lizcano argues that the delay interrupted and prejudiced the defense's efforts to prove Lizcano's mental retardation and resulted in an unfair trial. Lizcano argues that the trial judge abused his discretion by refusing to delay the trial a few days to permit Martinez, the defense expert, to testify, while delaying the trial for over a week for a juror's vacation.

The State responds by asserting that according to the trial record, one juror indicated he had plans for travel in mid-October, but that the record contains no other indication as to why the trial was delayed. Thus, the State argues that as there is no evidence that the trial was delayed for the benefit of the juror, the trial judge's decision to delay the trial was within his discretion, and therefore, the trial judge did not commit any error which would require a new trial.

3. Exclusion of Evidence of Diminished Capacity

To obtain a conviction, the prosecution must prove beyond a reasonable doubt that the defendant performed the criminal act with the requisite mental state. Since Lizcano was accused of murder, the prosecution had to prove that he possessed the intent to kill Officer Jackson. During the trial, Lizcano attempted to offer evidence of his diminished mental capacity to prove that he did not possess the requisite intent to kill. To establish diminished capacity, the defense planned to call several witnesses, including a psychologist, a toxicologist, Marta Cruz, and a certain number of Lizcano's relatives. The State objected to the presentation of this evidence.

The trial judge sustained the State's objections, and did not allow testimony from a psychologist who planned to testify regarding Lizcano's below-average cognitive functioning or mental retardation. The trial judge also did not allow testimony from a toxicologist regarding Lizcano's mental state and diminished capacity resulting from Lizcano's consumption of alcohol prior to the shooting of Officer Jackson. Additionally, the trial judge did not allow testimony by Cruz and a certain number of Lizcano's relatives regarding Lizcano's diminished mental capacity. On appeal, Lizcano argues that he had the right to present evidence of his diminished capacity to the jury, and therefore he should be granted a new trial in order to do so.

In response, the State argues that the testimony regarding Lizcano's mental state would not have negated the requisite intent to kill. The State also argues that evidence of Lizcano's alleged mental retardation is generalized evidence, not linked to the requisite mental state, and is therefore improper evidence of diminished capacity. In other words, the State claims that even if Lizcano is mentally retarded, he could still possess the intent to kill necessary for a murder conviction. Additionally, the State argues that evidence of Lizcano's voluntary intoxication is excludable by law because voluntary intoxication cannot constitute a defense to a murder.

The Decision and Opinion

After the attorneys present their arguments, the Court of Criminal Appeals may take several months to decide the appeal. The Court of Criminal Appeals' decision and any opinions written by the judges will be made available for review at www.dallasbar.org/appealing. In addition, the opinions can be accessed using the case number and related information at www.cca.courts.state.tx.us. It is also possible to register your email address for updates on the case, including the issuance of the final opinion. To register for email updates go to "Case Mail" on the www.cca.courts.state.tx.us and add Case No. AP-75,879 to your "Watch List."

Questions and Additional Information

For additional information regarding these teaching materials or related information, please feel free to contact:

Amy E. Smith, Coordinator
Law-Related Education Programs
Dallas Bar Association
2101 Ross Ave.
Dallas, TX 75201
(214) 220-7484
(214) 220- 7465 Fax
asmith@dallasbar.org
www.dallasbar.org