



THE
FORENSIC
VISUAL
EXPERT

BY HESTER DORNAN, ALISON AYREA, AND JUSTICE KERRY FITZGERALD

The Decision

Texas Court of Criminal Appeals Judge Lawrence E. Meyers authored a careful and thorough opinion in *Ex parte Spencer*, No. AP-76244, 2011 WL 1485448 (Tex. Crim. App. Apr. 20, 2011), which addressed a bare innocence (*Herrera*) claim based on what was described as forensic visual science. Judge Tom Price wrote a strong concurring opinion, joined by Judges Barbara Parker Hervey and Cathy Cochran, in which he enumerated the types of evidence that might qualify as affirmative evidence of innocence and then stressed that none of the evidence presented by the applicant satisfied the Herculean burden to show by clear and convincing evidence that he did not commit the offense. Judge Michael E. Keasler also concurred. The Court's orders seeking additional findings and legal briefing are impressive, because it demonstrates both judicial openness and fairness and genuine interest in resolving a novel issue on the most complete record possible and the most thorough briefing available. Only the forensic visual expert witness aspect of the case is reviewed below.

Procedural History

The applicant was tried twice. The first jury convicted him of murder and sentenced him to 35 years confinement in 1987. After his motion for new trial was granted, a second jury convicted him of aggravated robbery and sentenced him to life in prison in 1988. A co-defendant (now deceased, according to the State's pleadings) was also tried and convicted by a third jury. Thus, three separate juries heard evidence involving the applicant and co-defendant.

The applicant filed his application for writ of habeas corpus in September 2004, about 16 years after his conviction, and a hearing was conducted in July 2007. In April 2009, the Court of Criminal Appeals issued additional orders respecting findings to be made by the trial court and supplemental briefing to be submitted by the parties.

Evidence at Second Jury Trial in 1988

On a Sunday night in March 1987, the victim, a businessman, was kidnapped, severely beaten, and pushed out of his BMW in a residential area. Police and ambulance services responded to the scene, where the victim was found on the ground, still alive. His pockets were turned inside out. He was taken to a hospital, where he died. During this same time period, the victim's BMW was located in a nearby alley.

A subsequent police investigation revealed that the applicant, his co-defendant, and the eyewitnesses lived in the same general neighborhood. Witness One was walking in the neighborhood when he saw a BMW, which he thought unusual. He saw it again going about 10 or 15 miles per hour when a man was pushed out of the car. He next saw the BMW pull into an alley and recognized the occupants. The applicant's co-defendant got out of the driver's side and walked up the alley toward his house. The applicant got out of the passenger's side. Witness One saw the applicant jump Witness Two's chain link fence and go through Witness Two's backyard. He saw the applicant get into a Thunderbird parked in front of Witness Two's house. The next day, while Witness One and the applicant drove to a pawnshop, the applicant said "something about beat down something," but he did not understand. The applicant also said he picked "the dude up across the bridge and [was] giving him a ride."

At the time in question, Witness Two was in bed trying to go to sleep when she heard dogs barking in her next-door neighbor's yard. She looked out her back bedroom window and saw a car in the alley. She recognized the occupants as they got out. The applicant's co-defendant, the driver, walked toward the rear of the car. The applicant, the passenger, entered a yard on the opposite side of the alley, reappeared, and jumped Witness Two's fence. She put her dress on, went to her front door, and opened it slightly. She saw the applicant walk down her driveway and talk to her son, who was sitting with his girlfriend in a car parked in the driveway.

Witness Two further described her observations of the applicant in front of her house that evening. She testified:

When I cracked the [front] door Ben [applicant] never did see me, I see him come out of the driveway and he

spoke to my son. He said, what's up man, and my son say, hey nothing, man, and he went to go out of my driveway on the sidewalk over to the [next door neighbor's] house. I eased my door back up and when he went up on that porch ... and then he was knocking on that door or something, and when I eased the door back up, when I look back out again he wasn't at the door.

Witness Two stated she "was close to him in my door," and that he wore a "jacket and cap." She saw the applicant's Thunderbird parked in front of her house and noticed about 15 minutes later that it was gone. After the police arrived, she went to the back where the police were and saw the co-defendant standing by the car in the alley.

Witness Three lived across the street from the mouth of the alley. At the time, he was cooking in his kitchen. He looked through his kitchen window and saw the BMW pull into the alley. Its lights were extinguished, and the occupants stayed in the car for a short time. Witness Three knew both occupants. He saw the applicant's co-defendant get out of the driver's side and the applicant get out of the passenger side. He saw the applicant walk to the right into a vacant yard beside a house, return, cross the alley, and climb Witness Two's back fence. When he threw some scraps out, he saw the applicant get into his Thunderbird and drive off.

The Writ Hearing

At the time of the hearing, Witness One was deceased. Witness Two remained steadfast in her identification of the applicant. Witness Three continued to identify the applicant based upon seeing him emerge from a yard on the right side of the alley, cross the alley, and jump over Witness Two's fence on the left side of the alley. When questioned by the trial court, however, Witness Three vacillated in that he testified "the person that got out of the car [could] have been some other tall African American male."

The applicant offered the testimony of a defense witness who presented himself as a doctor of optometry and an expert in forensic visual science. After briefly exploring his background, submitting his resume, and developing his knowledge of the function of a person's eye, the applicant tendered the witness as an expert in forensic visual science; the State made no objection. The witness's preparation included reading transcripts of the testimony of the State's witnesses, reviewing police reports, and visiting the scene. He "considered only distance, darkness, and motion" in formulating his opinion. Ultimately, the witness confirmed that the gist of his testimony was that the eyewitnesses could not have seen what they claimed to have seen. He acknowledged that he made assumptions regarding the level of illumination from the outside streetlight, the backyard floodlight, and the car's dome light. For example, as to the BMW, he admitted he did not know the model, the light sources within the car, or the level of illumination; and as to the street lamp, he did not know the level of illumination. He also did not factor into his opinion that eyewitnesses may have been

familiar with or known the applicant (“the fact that the witnesses knew Applicant ‘does not change the eyeball’s ability to resolve an image and send it back to the brain’”).

Schlup-type Claim

The Court determined that the record supported the trial court’s recommendation that relief be denied on applicant’s *Schlup*-type claim (*Schlup v. Delo*, 513 U.S. 298 (1995)) (“innocence is tied to showing of constitutional error at trial; applicant must show constitutional errors probably resulted in conviction of one who is actually innocent”). The applicant had alleged a *Brady* violation, knowing use of false testimony, and ineffective assistance of counsel. The Court held that absent constitutional error, this claim was without merit. The Court then focused upon the remaining *Herrera*-type claim, “a bare innocence claim based solely on newly discovered evidence.”

The Legal Standard to Establish a Bare Innocence Claim (*Herrera v. Collins*, 506 U.S. 390 (1993))

In *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005), the Court, citing *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), summarized the rules that apply to bare claims of actual innocence raised in a habeas proceeding. The Court described the applicant’s burden thusly: “[a]pplicant must show that the evidence he is presenting is newly available or newly discovered and that the new evidence unquestionably establishes his innocence.” As noted in *Elizondo*, the “unquestionably establish” language means the same thing as “clear and convincing.” Only upon such a showing must the court then “compare the new evidence with the evidence at trial in order to determine whether applicant has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence.” The reviewing court necessarily weighs the exculpatory evidence against the evidence of guilt adduced at trial. The reviewing court is not bound by findings, conclusions, or recommendations of the trial court, but may defer to such findings if they are supported by the record.

Further, in a concurring opinion in *Ex parte Thompson*, 153 S.W.3d 416 (Tex. Crim. App. 2005), Judge Cochran noted that before the legal standard can be fully met, the applicant “must show that the ‘new’ evidence satisfactorily rebuts or nullifies all of the State’s primary inculpatory evidence from the ‘old’ trial.” Judge Cochran cited *Ex parte Franklin*, 72 S.W.3d 671 (Tex. Crim. App. 2002), a case in which failure to nullify the State’s primary inculpatory evidence led the court to deny relief. Thus, unless the new evidence addresses all of the primary inculpatory evidence, innocence is not unquestionably established. For example, if a child and another witness testify to primary inculpatory facts, but the applicant’s evidence only addresses the child’s testimony, relief must be denied if the applicant’s evidence only covers a portion of the State’s primary inculpatory evidence. In such a case, the “new” and “old” evidence would not be rationally irreconcilable.

Precedent for Legal Challenges to Admissibility?

Spencer does not discuss the legal admissibility of “visual” expert testimony because the State did not object when the witness was tendered as an expert witness, and the issue was not brought forward on appeal. Thus, the Court confined its analysis to whether the witness’s testimony constituted newly discovered evidence that unquestionably established the applicant’s innocence. The Court did not consider whether this type of evidence was admissible.

In this respect, this case is somewhat similar to *Winfrey v. State*, 323 S.W.3d 875 (Tex. Crim. App. 2010), wherein the Court addressed an officer’s testimony related to a dog-scent discrimination lineup. The Court held such evidence insufficient to support the conviction. The concurring opinion by Judge Cochran, in which Judges Paul Womack, Cheryl Johnson, and Charles Holcomb joined, noted that the appellant did not object at trial to a deputy’s dog scent line-up testimony. Thus, the concurrence stressed that “neither the court of appeals nor this Court has had an occasion to review or determine the admissibility of that evidence under either *Kelly v. State* [824 S.W.2d 568 (Tex. Crim. App. 1992) (setting out standards for admissibility of scientific expert testimony under Tex. R. Evid. 702)] or *Nenno v. State* [970 S.W.2d 549 (Tex. Crim. App. 1998) (setting out standards for admissibility of non-scientific expert testimony under Tex. R. Evid. 702)].”

The procedural posture of *Winfrey* and *Spencer* seems to invert the natural progression of a logical analysis. One might expect an examination of the admissibility of evidence to precede an analysis of the legal application of such evidence. Nevertheless, for similar reasons, neither decision is authority for the admission or exclusion of the testimony in question. A decision that does furnish an excellent discussion of the evidentiary predicate relating to expert witnesses and challenges based upon qualifications, reliability, relevance, and the availability of Rule 705(b) hearings is *Shaw v. State*, 329 S.W.3d 645 (Tex. App. — Houston [14th dist.] 2010, pet. denied). This decision emphasizes the care and caution necessary in laying proper legal predicates and in lodging proper objections when dealing with expert witness testimony.

Identification of Issues

The Court focused on whether the applicant’s evidence — forensic visual expert testimony — was newly available or newly discovered evidence that unquestionably established his innocence.

Court’s Analysis

While the science of forensic visual testing may be new, the applicant’s evidence is not newly discovered or newly available. In 1987, the parties investigated the scene while conditions were similar to the way they were on the night of the offense and fully litigated the issues of lighting, distance, and witnesses’ ability to identify the applicant. The applicant’s expert visited the scene about 15 years later, in 2003, when the conditions were unable to be replicated. For example, a house had been torn down, win-

dows replaced, and different tree growth and lighting were in place. Further, the location of the car in the alley was uncertain.

The Court stated that, unlike DNA, applicant's evidence "is not the sort of evidence that is capable of being preserved and tested at a later date. Forensic visual science may be new, but there is no way for the forensic visual expert to test the conditions as they existed at the time of the offense because there is no way to replicate the lighting conditions." The applicant does not affirmatively establish his innocence by offering evidence that "it was too dark and the car was too far away for the eyewitnesses to have seen Applicant." Such evidence only attempts to discredit the witnesses. Thus, even if the evidence was considered new, "it does not unquestionably establish applicant's innocence." The applicant, therefore, failed to meet the "threshold elucidated in *Franklin*." The Court concluded that the evidence standing alone was not dispositive of the claim of innocence and denied relief because the applicant had "not offered evidence that goes toward affirmatively proving his innocence."

Exculpatory-Inculpatory Analysis

The Court ultimately held that the applicant did not show that the evidence was newly available or newly discovered that unquestionably established his innocence. Only upon such a showing must the court reach the third step: "Compare the new evidence with the evidence at trial in order to determine whether applicant has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence." This step requires the Court to weigh the exculpatory evidence against the evidence of guilt adduced at trial.

Had the Court been required to reach the next step in the analysis, the applicant might face more than just a slippery slope. During the writ proceeding, the applicant focused his attention solely upon one location — where the car was supposed to be parked in the alley. While the events began there, they continued into Witness Two's front yard, and therein lies the rub. The applicant was seen leaving the car, momentarily entering an adjoining lot, then reemerging, jumping Witness Two's fence, and walking down the driveway. Witness Two testified she saw the applicant approach the car parked in the driveway and talk to her son. She repeated some of the conversation she heard between the two. She saw the applicant walk

in front of her house and proceed to the next-door neighbor's house, where he knocked on the front door. According to Witness Two, she could see and hear the applicant and was close to him during this time. Within a short time, she noticed that the applicant's car was no longer parked in front of her home.

The applicant's witness testified he could venture no professional opinion as to the events that transpired in the front of this house because it had been torn down. Thus, the applicant's expert witness never addressed what Witness Two saw and heard in front of her house.

Mindful of Judge Cochran's analysis in *Thompson* and the principles outlined in *Spencer*, before the legal standard can be met, the applicant "must show that the 'new' evidence satisfactorily rebuts or nullifies all of the State's primary inculpatory evidence from the 'old' trial." The record shows two juries heard evidence that Witness Two saw the applicant get out of the vehicle in the alley and tracked the applicant to the front of her home, where she continued to observe him. The applicant's quandary is whether Witness Two's testimony constituted primary inculpatory evidence, and, if so, whether his expert witness rebutted or nullified it.

Credit Where Credit is Due

Trial and appellate work are all about choices, what position to take, and when to argue, "when to hold 'em and when to fold 'em," so to speak, and in this situation, one simply cannot argue with success. The State waived challenges to the admissibility of the proffered testimony in favor of arguing the applicant "did not properly raise a free-standing actual innocence claim; that the evidence is not newly discovered; and that advances in technology should be considered, but only when the advances are reliable and are able to test the evidence as it existed at the time of the crime." The persistent legal work and strategic decisions made by the State in this case prevailed. The State was represented by very capable lawyers who contributed to this case over the years, including Christina O'Neil, Charles Patrick Reynolds, and Kevin Brooks. The primary architect of the State's position before the Court of Criminal Appeals was Karen Wise, a knowledgeable and experienced attorney in the appellate section, a product of Rice University and the University of Texas School of Law, and the supervisor of the non-capital writs section of the Dallas County District Attorney's Office. And of utmost importance, her reputation for honesty, integrity, and good judgment is impeccable.

HESTER DORNAN

an intern with the 5th District Court of Appeals in Dallas, is a third-year law student at Louisiana State University Paul M. Hebert Law Center.

ALISON AYREA

an intern with the 5th District Court of Appeals, is a second-year law student at Southern Methodist University Dedman School of Law in Dallas.

JUSTICE KERRY FITZGERALD

serves on the 5th District Court of Appeals in Dallas. He is a member of the *Texas Bar Journal* Board of Editors.

EMPLOYMENT LAW

RACE, AGE, & SEX DISCRIMINATION
SEXUAL HARASSMENT
OVERTIME PAY

THE GBENJO LAW GROUP

8449 West Bellfort Ave., Ste. 100, Houston, TX 7707

713-771-4775

Don't Discard Your Employment Cases, Call
ANNE GBENJO

Practicing Law in MD, D.C., GA & TX