Affirmed and Majority and Concurring and Dissenting Opinions filed September 13, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01396-CR

HARRY LOUIS BOWLES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 6
Harris County, Texas
Trial Court Cause No. 99-31039

M A J O R I T Y O P I N I O N

Harry Louis Bowles appeals a misdemeanor conviction for refusal to release a fraudulent lien[1] on the grounds that the trial court erred in: (1) failing to bar his prosecution in violation of the ex post facto clauses of the United States and Texas Constitutions; (2) failing to grant an instructed verdict of not guilty due to legal and factual insufficiency of the evidence; and (3) proceeding with a motion for new trial

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[1] Appellant was found guilty by a jury and sentenced by the judge to ten days confinement.

hearing after appellant filed a motion for mandatory constitutional disqualification of the judge.[2] We affirm.

Ex Post Facto

Appellant's first point of error contends that prosecuting him under the applicable statute violated the ex post facto clauses of the Texas and United States Constitutions because the filing of a fraudulent lien or claim is an essential element of the offense and because he filed his claim of lien in the real property records in February of 1997, prior to the applicable statute's effective date. He thus contends that the statute is penalizing him for an act, *i.e.*, the filing of a fraudulent lien, that was not a criminal offense at the time it was committed.

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[2] Appellant has also attempted in various supplemental briefs to raise one or more new points of error in addition to those asserted in his original brief. Texas Rule of Appellate Procedure 38.7 gives appeals courts discretion to allow briefs to be amended or supplemented "whenever justice requires," on whatever reasonable terms the court may prescribe. Although this court commonly permits briefs to be amended and supplemented with additional authorities and analysis, it rarely, if ever, addresses points of error raised for the first time in amended or supplemental briefs. This is because allowing new points of error to be raised outside the prescribed period for filing briefs would, in turn, require allowing additional opposing briefs to respond to the new points of error and thereby potentially extend indefinitely the period in which such briefs could continue to be filed. Not having a time certain at which new challenges could no longer be raised would correspondingly complicate the setting of cases for submission, presentation of oral argument, and the process of preparing opinions, and thereby disrupt the orderly and timely progression of cases through our court.

A chronology of appellant's repeated attempts to file supplemental briefs in this case (partly reflected in the dissent) would be too lengthy to even summarize in this opinion. Suffice to say, if anything, this case could hardly present a more compelling example of the potential for abuse in supplemental briefing and thus the need for courts to take steps necessary to curtail such abuse. We disagree with the dissent that the mere fact that an appeals court allows a supplement brief to be filed thereby obligates the court to address on the merits whatever issues are raised in the brief. On the contrary, new points of error in supplement briefs may be deemed waived just as points of error are deemed waived for other reasons in original briefs. Moreover, to the extent that grounds for allowing new issues to be raised in supplemental briefs could theoretically exist, they are clearly not presented in this case, either in terms of the magnitude of the criminal penalties at stake or the merits or compelling nature of the grounds supporting the supplemental points of error.

A person commits the offense of refusal to execute a release of a fraudulent lien or claim if: (1) he owns, holds, or is the beneficiary of a purported lien or claim asserted against an interest in real or personal property; (2) the purported lien or claim is fraudulent, as described by section 51.901(c) of the Texas Government Code; and (3) not later than the 21st day after the date of his receipt of actual or written notice requesting the execution of a release of the fraudulent lien or claim, the lienholder refuses to execute the release on the request of the obligor, debtor, or any person who owns any interest in the real or personal property described in the document or instrument that is the basis for the lien or claim. TEX. PEN. CODE ANN. § 32.49 (Vernon Supp. 2001).[3] A document or instrument is presumed to be fraudulent if it purports to create a lien or assert a claim against real or personal property and is not: (1) a document or instrument provided for by the constitution or laws of this State or the United States; (2) created by implied or express consent or agreement of the obligor, debtor, or owner of an interest in the real or personal property; or (3) an equitable, constructive, or other lien imposed by a court with proper jurisdiction. TEX. GOV'T CODE ANN. § 51.901(c) (Vernon 1998).

Under the Texas and United States Constitutions, an ex post facto law: (1) punishes as a crime an act previously committed which was innocent when done; (2) inflicts a greater punishment than the law attached to a criminal offense when it was committed; or (3) deprives a person charged with a crime of any defense that was available at the time the act was committed.[4] *Ex parte Davis*, 947 S.W.2d 216, 219-20 (Tex. Crim. App. 1996). Thus, to be ex post facto law, a law must be retroactive, that is, it must apply to events occurring before its enactment and must disadvantage the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

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[3] Section 32.49 became effective May 21, 1997. TEX. PEN. CODE ANN. § 32.49 historical note (Vernon Supp. 2001).

[4] *See* U.S. CONST. art. I, § 10 ("No State shall . . pass any . . . ex post facto law . . . ."); TEX. CONST. art. I, § 16 ("No . . . ex post facto law . . . shall be made.").

The central question in this point of error is whether section 32.49 changes the legal consequences of any acts performed before its effective date. Section 32.49 provides no authority to prosecute a citizen merely for having previously filed or for currently holding a fraudulent lien. TEX. PEN. CODE ANN. § 32.49 (Vernon Supp. 2001). Instead, a crime is only committed if the holder of such a lien is asked but refuses to execute a release of the lien. *Id*. In this case, it is undisputed that the claim of lien in question was filed in the property records before section 32.49 went into effect but that the judicial determinations giving rise to the presumption that the lien was fraudulent and the request and refusal to release the lien occurred after section 32.49 became effective. Under these circumstances, section 32.49 did not punish an act that was not punishable at the time it was committed, nor did it otherwise disadvantage appellant with regard to events occurring before its enactment. Rather than penalizing past conduct, section 32.49 gave appellant an opportunity, if asked, to "undo" that conduct before it could lead to any criminal liability. Because appellant's first point of error does not therefore demonstrate that section 32.49 violates the ex post facto clauses of the United States or Texas Constitutions, it is overruled.

Sufficiency of the Evidence

Appellant's second and third points of error claim that the evidence was legally and factually insufficient to prove that: (1) he received the notice requesting a release of the lien; (2) the lien was asserted against real or personal property; (3) the claim of lien was fraudulent; or (4) the certified letter requesting release of the lien was from an obligor, debtor, or person who owned an interest in the real or personal property made the basis of this claim.[5]

Standard of Review

[5] Appellant does not challenge the sufficiency of the evidence to prove that he refused to execute a release of the lien.

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Cardenas v. State*, 30 S.W.3d 384, 389 (Tex. Crim. App. 2000). In reviewing factual sufficiency, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is either so obviously weak as to undermine confidence in the jury's determination, or, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000).

Sufficiency Review

State's trial exhibit 1 in this case is a copy of a "claim of lien" (the "claim of lien") filed in the Harris County property records. Reflected on the face of the claim of lien, among other things are: (1) a reference number, S321633; (2) "recording requested by: Harry L. Bowles"; (3) that Charles N. Schwarz, Jr. is the lien debtor; and (4) that it is a consensual lien arising out of a settlement agreement and certain Uniform Commercial Code financing statements, copies of which are attached to it. The four financing statements[6] indicate that Bowles was a secured party in various items of real and personal property held by, among others, Charles N. Schwarz, Jr.

State's exhibit 6 is a set of findings of fact and conclusions of law from the 190th (civil) District Court of Harris County in an action styled "In re: An Alleged Judgment Lien in Favor of [appellant] and Against Charles N. Schwarz, Jr. . . . ." Dated January of 1998, these findings and conclusions state that, pursuant to Chapter 51 of the Government Code,

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[6] The purpose of filing such a financing statement is to give notice to all creditors that a security interest may have been perfected in certain collateral. TEX. BUS. & COM. CODE ANN. § 9.402 cmt. 2 (Vernon 1991).

documentation filed by appellant that purported to create a lien did not "refer to nor was it issued by, authorized by, nor is it the act of a legally constituted court, judicial entity, or judicial officer created by or established under the Constitution or laws of this State or the United States." In April of 1998, the 333rd (civil) District Court of Harris County entered findings and conclusions which, among other things, refer to the documentation recorded under file number S321633 in the real property records of Harris County and state "there is no valid lien or claim created by this documentation or instrument."

Grant Cook, Schwarz's attorney, testified that, on behalf of Schwarz, he mailed Defendant's exhibit 10, a certified letter dated April 27, 1998, requesting appellant to execute a release of, among other things, the claim of lien recorded under file number S321633, informing appellant that a failure to release the lien would be a violation of the Penal Code, and referencing and attaching the 333rd District Court's findings and conclusions noted above. Appellant's affidavit, presented at trial, acknowledged that he received a letter from Cook dated April 27, 1998, demanding him to sign a release pursuant to section 32.49. Cook further testified that the lien was asserted against real property owned by Schwarz and could thus complicate Schwarz's ability to sell any real property. Because a rational trier of fact could have found from this evidence, when viewed in the light most favorable to the verdict, that the lien was asserted against real and personal property, the lien was fraudulent as described by section 51.901(c) of the Government Code, the request to release the lien was from an obligor, debtor, or person who owned an interest in the real or personal property made the basis of the claim, and appellant received notice of the request to release the lien, the evidence is legally sufficient to support his conviction.

With regard to factual sufficiency, appellant cites no evidence to controvert the foregoing evidence presented by the State. Accordingly, we have no basis to conclude that the supporting evidence is so weak, or the contrary evidence so strong, as to render the

verdict so contrary to the weight of the evidence as to be clearly wrong or unjust.[7] Because appellant's second and third points of error therefore do not establish that the evidence is legally or factually insufficient to support his conviction, they are overruled.

Motion to Disqualify Judge

Appellant's fourth point of error contends that the trial court erred by proceeding with a hearing on his motion for new trial after appellant filed a purported motion for mandatory constitutional disqualification of the presiding judge.

On November 10, 1999, appellant filed a motion for new trial, requesting a hearing. The hearing was originally set for November 19 but was reset to December 17.[8] On December 16, the day before the hearing was to be held, appellant filed a purported motion for mandatory constitutional disqualification of the trial judge. On December 17, the trial court held a hearing on, and denied, appellant's motion for new trial. Appellant contends that the trial court had no authority to proceed with that hearing while appellant's purported motion for mandatory constitutional disqualification was pending.

Although appellant's purported motion for mandatory constitutional disqualification states that it is filed pursuant to constitutional law, it requests disqualification based on the judge's alleged partiality toward the State and personal bias and prejudice against appellant. However, these would be grounds for *recusal* under Texas Rule of Civil Procedure18b, not for constitutional disqualification. *Compare* TEX. CONST. art. V, § 11 (prohibiting a judge from sitting in any case in which: he may be interested, a party is related to the judge by consanguinity or affinity in degree prescribed by law, or the judge shall have been counsel in the case), *with* TEX. R. CIV. P. 18b(2)(a), (b) (requiring a judge to recuse himself in any proceeding in which his impartiality might

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[7] In addition, contrary to appellant's second point of error, factual insufficiency would not have been a valid ground for an instructed verdict. *See Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996) (holding that a challenge to the trial court's denial of a motion for directed verdict is a challenge to the legal sufficiency of the evidence).

[8] Appellant acknowledged this change by his signature on the case reset form.

reasonably be questioned or he has a personal bias or prejudice concerning a party).[9] Therefore, despite that appellant's motion was titled a motion for constitutional disqualification, its substance was instead a motion to recuse under rule 18b.

In order to recuse a judge under rule 18b, appellant was required to follow the procedures set forth in Texas Rule of Civil Procedure 18a. *See Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993) (holding that rule 18a applies to criminal cases). A rule 18b motion for recusal or disqualification of a judge must be filed at least ten days before the date set for trial or other hearing. TEX. R. CIV. P. 18a(a);[10] *DeBlanc v. State*, 799 S.W.2d 701, 705 (holding that a failure to comply with the rule 18b ten day notice provision bars complaint on appeal that denial of a separate hearing before another judge on the motion to recuse entitled appellant to a new trial). In this case, because appellant's December 16 motion for disqualification was filed less than ten days before the December 17 hearing date on the motion for new trial, appellant waived any right to have his motion for recusal decided before a hearing on his motion for new trial could proceed. *Arnold*, 853 S.W.2d at 544. Accordingly, appellant's fourth point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed September 13, 2001.

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9 Although bias or prejudice not based on an interest in the case is not a ground for constitutional disqualification under Article 5, Section 11, it can constitute a denial of due process of law. *See McClenan v. State*, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983). However, even as a due process complaint, it remains subject to the procedural requirements for a recusal. *See id*. at 110.

10 Rule 18a obviously presupposes that litigants should not be able to halt judicial proceedings at will simply by invocation of the mandatory recusal provisions. *DeBlanc*, 799 S.W.2d at 705.

Panel consists of Justices Edelman, Frost, and Murphy.[11]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[11] Senior Chief Justice Paul C. Murphy sitting by assignment.