Affirmed and Dissenting Opinion filed November 16, 2000.

In The

Fourteenth Court of Appeals

NO. 14-97-00223-CR

BRIAN STEVEN PREJEAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 731,613

D I S S E N T I N G O P I N I O N

The single issue raised by Appellant on appeal is: "Defendant did not receive effective assistance of counsel." Since there was no motion for a new trial and no subsequent hearing on the motion to determine trial strategy, the majority overruled the point of error and affirmed the trial court.

That single issue is based on the failure of the defense attorney to object when the trial court told the jury they had to be sequestered because the ***defendant demanded it.*** The majority opinion deals only with the form, rather than the substance, of this appeal. However, if we look at the egregious action of the trial court that gave rise to the claim of "ineffective assistance of counsel," we come to the inescapable conclusion that the trial judge deprived this Appellant of a fair trial. The trial judge intentionally ignored Article 35.23 of the Texas Code of Criminal Procedure and told the jury they could not go home

to their families because the defendant demanded they be sequestered. The action of the trial judge was calculated to prejudice the jurors against the defendant.

"Any person who makes known to the jury which party made the motion not to allow separation of the jury shall be punished for contempt of court." TEX. CODE CRIM. PROC. ANN. Art. 35.23; *see, e.g., Hood v. State*, 828 S.W.2d 87, 93 (Tex. App.—Austin, 1992, no pet.) (holding article 35.23's severance provisions to be mandatory). In this case, the trial judge told the jury, not once but twice, that the defendant was to blame for separating them from their families for the night.

At 3:34 p.m., February 18, 1997, the jury retired to deliberate. The defendant made a motion that the jury not be separated. Later, the court called the jury into the courtroom and the following exchange occurred between the court and the jury:

> THE COURT: All right. Ladies and gentleman, it's 6 o'clock in the evening. Ordinarily what I would do is send you home and have you come back and deliberate tomorrow morning at 9 o' clock, but the defense wants you to -- well, first let me ask you: Is there any reasonable expectation of you reaching a verdict in the near future? Who is your foreman?
>
> FOREMAN: I am.
>
> THE COURT: Any reasonable expectation of a verdict in the near future?
>
> FOREMAN: I don't believe.
>
> THE COURT: All right. The defense will not let you – – allow you to separate in this case. The only alternative to you is I must sequester you for the night. You will be taken to a hotel. You are under the same admonishments. You are not to discuss the case . . . .

Indicating a desire to communicate with the court, the jury went back into the jury deliberation room and sent the following note to the judge: "We have some personal situations that would make overnight stays a major predicament. No supervision of children." The judge wrote the following answer on the jury note and returned it to the jury: "I am sorry - but I cannot legally allow you to separate without permission of the state, the

defendant and the defendant's lawyer. The latter two have refused to allow separation. I am thus prevented by law to allow you to go home and return."

This appeal presents a clear abuse of constitutional rights and fundamental fairness by the trial judge, who was supposed to be in charge of protecting those very sacred rights. However, this glaring

error has not been addressed by the majority opinion simply because it was brought to the courts' attention in an issue entitled "Appellant did not receive effective assistance of counsel at trial." I believe the majority has placed form over substance and has failed to deal with the real error that occurred in the trial court.

Unassigned error may be addressed and utilized to reverse a conviction when the interests of justice require it. *See State v. Shepard*, 920 S.W.2d 420,422 (Tex. App.– Houston[1st Dist.] 1996, pet. ref'd). The Court of Criminal Appeals permits the use of unassigned error to address errors that are apparent on the face of the record. *See Carter v. State*, 656 S.W.2d 468,469 (Tex. Crim. App. 1983) (en banc). A constitutional grant of appellate jurisdiction treats a right of appeal in criminal cases "as a remedy to revise the whole case upon the law and facts, as exhibited in the record." *Id*. at 468.

The state has alleged that Appellant has a duty to show harm, and he failed to do so. Therefore, the state argues, he has failed to satisfy the requirements of *Strickland*. However, even where testimony from Appellant's trial attorney would be helpful in determining whether the failure to object was the product of "trial strategy," such evidence in this case is not necessarily a prerequisite to an analysis of whether the error complained of met an "objective standard of reasonableness." *See Strickland v. Washington*, 466 U.S. 668, 688, 1014 S. Ct. 2052, 2064, 80 L. Ed.2d 674 (1984).

I fully recognize that the Court of Criminal Appeals has recently reversed this court's finding ineffective assistance of counsel where the attorney did not testify as to "trial strategy." *See Thompson v. State*, 981 S.W.2d. 319, 324 (Tex. App.—Houston [14th Dist.] 1998) *rev'd* 9 S.W.3d 808 (Tex. Crim. App. 1999). However, *Thompson* did not involve a violation of a constitutional right, and it did not destroy the reasonable expectation of "fairness and impartiality" by the trial judge. Some constitutional violations, "*by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." Satterwhite v. Texas,* 486 U.S. 249, 253, 108 S. Ct. 1792, 1794, 100 L. Ed.2d 284, 293 (1988) (emphasis added).

I sincerely believe it is the duty of the courts of appeals to vigorously defend the rights of all persons to **a fair trial by an unbiased jury and an impartial judge**. When we fail to protect those sacred rights, we make this appellant's constitutional guarantee of a fair trial, by an unbiased jury, a hollow promise. I further believe affirming this conviction undermines the right to fundamental fairness in our fact-finding process. *See Estelle v. Williams,* 425 U.S. 501,503, 96 S. Ct. 1691, 48 L. Ed.2d 126 (1976).

If this appeal was based on abuse of discretion, or violation by the trial judge of Article 35.23, Texas Code of Criminal Procedure, there is no doubt that any appellate court in this state would reverse the conviction. Should the results be different because the attorney on appeal "mis-labeled" the point of error?

I would reverse the conviction and remand for a new trial. No doubt Appellant will get a fair trial this time because the judge who blatantly ignored Article 35.23, Texas Code of Criminal Procedure, is no longer on the bench.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed November 16, 2000.
Panel consists of Justices Sears, Cannon, and Hutson-Dunn.*
Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon, and D. Camille Hutson-Dunn sitting by assignment.