Affirmed as Modified and Majority and Concurring Opinions filed March 8, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00134-CR

DON WHATLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 30,731

CONCURRING OPINION

I agree with the result and reasoning of the majority opinion except in the following respects.

DeGarmo

The first two points of error contend that the former *DeGarmo* doctrine deprived appellant of a fair hearing and rendered his decision not to testify at the punishment phase involuntary. The majority opinion concludes that: (1) appellant's counsel was justified in his belief that *DeGarmo* was still viable during the punishment phase of trial; but (2) in order to predicate error on the issue, appellant was nevertheless required at trial to make an offer

of proof or bill of exception setting forth the substance of what his testimony would have been, *i.e.*, but for *DeGarmo*. At a minimum, the conclusion that appellant's counsel was justified in believing that *DeGarmo* was still viable is unnecessary to the disposition of the issue because the failure to make an offer of proof would be fatal to the challenge in any event, and the determination that error was not preserved could more narrowly be reached on that basis alone.

However, in addition to being unnecessary, the conclusion that appellant's counsel was justified in believing *DeGarmo* was still viable is at odds with the second conclusion. That is, to say that appellant was required to make an offer of proof on the testimony he would have given but for *DeGarmo* is, in effect, to say that he really couldn't rely on *DeGarmo* still being viable but instead had to make a record at trial in the event that *DeGarmo* later proved not to be viable. Under these circumstances, the conclusion that counsel was justified in relying on *DeGarmo* is at best unnecessary and likely misleading.

Cumulation Orders

I most strongly disagree with the majority's view, apparently shared by other courts, that courts of appeal retain inherent authority to selectively correct unassigned error in instances other than the most fundamental breakdowns in the constitutional or judicial process. As commonly as courts of appeals overrule convicted appellants' points of error for procedural default, our being any less willing to find procedural default by the State can only cause the impartiality of courts to be questioned.

I believe that the majority's modification of the judgment can instead be based on sustaining the State's challenge to the failure to include a cumulation order as a cross-appeal under Texas Code of Criminal Procedure 44.01(c).[1] Footnote 4 of the majority opinion

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[1] *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(c) (Vernon Supp. 2000) (entitling the State to appeal a ruling on a question of law if the defendant is convicted and appeals the judgment); *see also id.* art. 44.01(b) (allowing the State to appeal a sentence in a case on the ground that the sentence is illegal).

rejects this approach because there was no *ruling* on a question of law by the trial court. Although it might be debated semantically whether the trial court's exclusion from the judgment of a cumulation order was more in the nature of a ruling or a non-ruling, the fact remains that the trial court affirmatively considered the issue, as reflected by the reporter's record, and that the omission changes the legal effect of the judgment[2] and thereby has the effect of a ruling of law. To conclude that this is not such a ruling elevates form over substance.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed March 8, 2001.

Panel consists of Justices Fowler, Edelman, and Baird.[3]

Do not publish — TEX. R. APP. P. 47.3(b).

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[2] *See, e.g., Ex parte Armstrong*, 729 S.W.2d 706, 708 (Tex. Crim. App. 1987) (recognizing that unless the trial court, by order, expressly makes several punishments cumulative, they run concurrently).

[3] Former Justice Charles F. Baird sitting by assignment.