



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-15-00199-CR

THOMAS CRAIG SELL

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM CRIMINAL DISTRICT COURT NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 1376549D

CONCURRING AND DISSENTING OPINION

The Texas Court of Criminal Appeals, relying on statements by the Supreme Court of the United States, has held that the PSI statute trumps both the Texas Constitution and the Constitution of the United States:

The plain language of Section 3(d), on its face, continues to place no condition on the trial court in considering the contents of a PSI. . . . We therefore hold that Section 3(a)(1) of Article 37.07 does not prohibit a trial court, as a sentencing entity, from considering extraneous misconduct evidence in assessing punishment just because the extraneous misconduct has not been shown to have

been committed by the defendant beyond a reasonable doubt, if that extraneous misconduct is contained in a PSI.¹

The *Stringer* court also acknowledged that it had held in *Fryer v. State*² that the PSI likewise trumps the rules of evidence by concluding that the PSI could include the complainant's opinion regarding whether the defendant should receive a probated sentence.³ And what is the justification employed by both the Supreme Court and the Texas Court of Criminal Appeals? They claim that it is inefficient to force witnesses to be brought to court for confrontation and cross-examination. The *Stringer* court quoted the Supreme Court's rationalizing language from *Williams v. New York*:

We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.⁴

¹*Stringer v. State*, 309 S.W.3d 42, 46 (Tex. Crim. App. 2010) (quoting *Smith v. State*, 227 S.W.3d 753, 763 (Tex. Crim. App. 2007) (internal quotation marks omitted)).

²68 S.W.3d 628, 633 (Tex. Crim. App. 2002).

³*Stringer*, 309 S.W.3d at 46 (citing *Fryer*, 68 S.W.3d at 631).

⁴*Id.* at 47 (quoting *Williams v. New York*, 337 U.S. 241, 250, 69 S. Ct. 1079, 1084–85 (1949) (internal quotation marks and footnote omitted)).

But it must be noted that the *Williams* court dealt with a criminal case out of the State of New York. In New York, the judge always determines the sentence.⁵ The *Williams* court cited the very careful procedures created in the New York probation department involving officers who are trained only to help defendants and in no way to assist in their prosecution.⁶ The New York probation reports provide information beneficial to the defendant, as well as information of misconduct. So carefully have these procedures been developed over the many years they have been employed that the “reports have been given a high value by conscientious judges who want to sentence persons [based] on the best available information rather than on guesswork and inadequate information.”⁷

I understand that the majority is governed by precedent of the Texas Court of Criminal Appeals. I would suggest that the New York system is tennis balls to our oranges. But I cannot agree that a statute can supplant a specific, unequivocal constitutional right essential to due process. Consequently, I am compelled to express my dissent.

In Texas, a trial judge determines the punishment of a defendant found guilty who has not previously timely elected to have his punishment determined

⁵See *Williams*, 337 U.S. at 251, 69 S. Ct. at 1085.

⁶*Id.* at 249, 69 S. Ct. at 1084.

⁷*Id.*

by a jury.⁸ When the State of Texas decided that a judge determining punishment can hear evidence of extraneous acts of misconduct and of unadjudicated offenses, the State of Texas validated accusations in the sentencing phase of the trial that go beyond and are in addition to the accusations considered by the trier of fact in the guilt phase. PSIs contain third-hand gossip, speculation, suspicions, unproved statements of prior offenses, and punishment recommendations. Essentially, PSIs constitute an ex parte attempt to influence the decision of the trial judge. The PSI is considered by the trial judge as evidence with no sponsoring witness. It presents to the trial judge as fact, and there is no way to cross-examine the document.

The Confrontation Clause bars the admission of out-of-court testimonial statements of a witness unless (1) the witness is unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the witness.⁹ Post-*Crawford*, the threshold question in any Confrontation Clause analysis is whether the statements at issue are testimonial or nontestimonial in nature.¹⁰ A statement is testimonial if it was “made under circumstances which would lead an

⁸See Tex. Code Crim. Proc. Ann. art. 37.07, § 2(b) (West Supp. 2015).

⁹*Crawford v. Washington*, 541 U.S. 36, 53–54, 124 S. Ct. 1354, 1365 (2004); *Render v. State*, 347 S.W.3d 905, 917 (Tex. App.—Eastland 2011, pet. ref’d).

¹⁰*Woods v. State*, 152 S.W.3d 105, 113 (Tex. Crim. App. 2004), *cert. denied*, 544 U.S. 1050 (2005); *Render*, 347 S.W.3d at 917.

objective witness reasonably to believe that [it] would be available for use at a later trial.”¹¹

A defendant in a criminal case has both a constitutional and a statutory right to confront and cross-examine the witnesses against him.¹² But the right to confront witnesses must be invoked by the defendant.¹³

Appellant had the right to confront the persons who accused him of misconduct. But Appellant not only did not invoke the right or object to the denial of his right to confront the witness against him in the trial court; he affirmatively told the trial court that he had no objection to the trial court’s considering the PSI. A defendant cannot affirmatively assure the trial court that he is willing for the trial court to consider the PSI in determining the appropriate punishment without confronting live witnesses but then complain on appeal that the trial court considered it without allowing confrontation.¹⁴ That is, a defendant may not affirmatively waive his right to confrontation but then complain on appeal of the denial of confrontation.

¹¹*Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013) (quoting *Crawford*, 541 U.S. at 52, 124 S. Ct. at 1364 (internal quotation marks omitted)).

¹²U.S. Const. amend. VI; Tex. Const. art. 1, § 10; Tex. Code of Crim. Proc. Ann. art. 1.25 (West 2005).

¹³*See Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004).

¹⁴*See Swain v. State*, 181 S.W.3d 359, 368 (Tex. Crim. App. 2005) (discussing the “affirmative acceptance” rule of error preservation).

For the reasons given above, I dissent from the majority's holding abrogating Appellant's right to confrontation, but I concur in the outcome because Appellant affirmatively represented to the trial court that he had no objection to the trial court's admitting the PSI with no sponsoring witnesses.

/s/ Lee Ann Dauphinot
LEE ANN DAUPHINOT
JUSTICE

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