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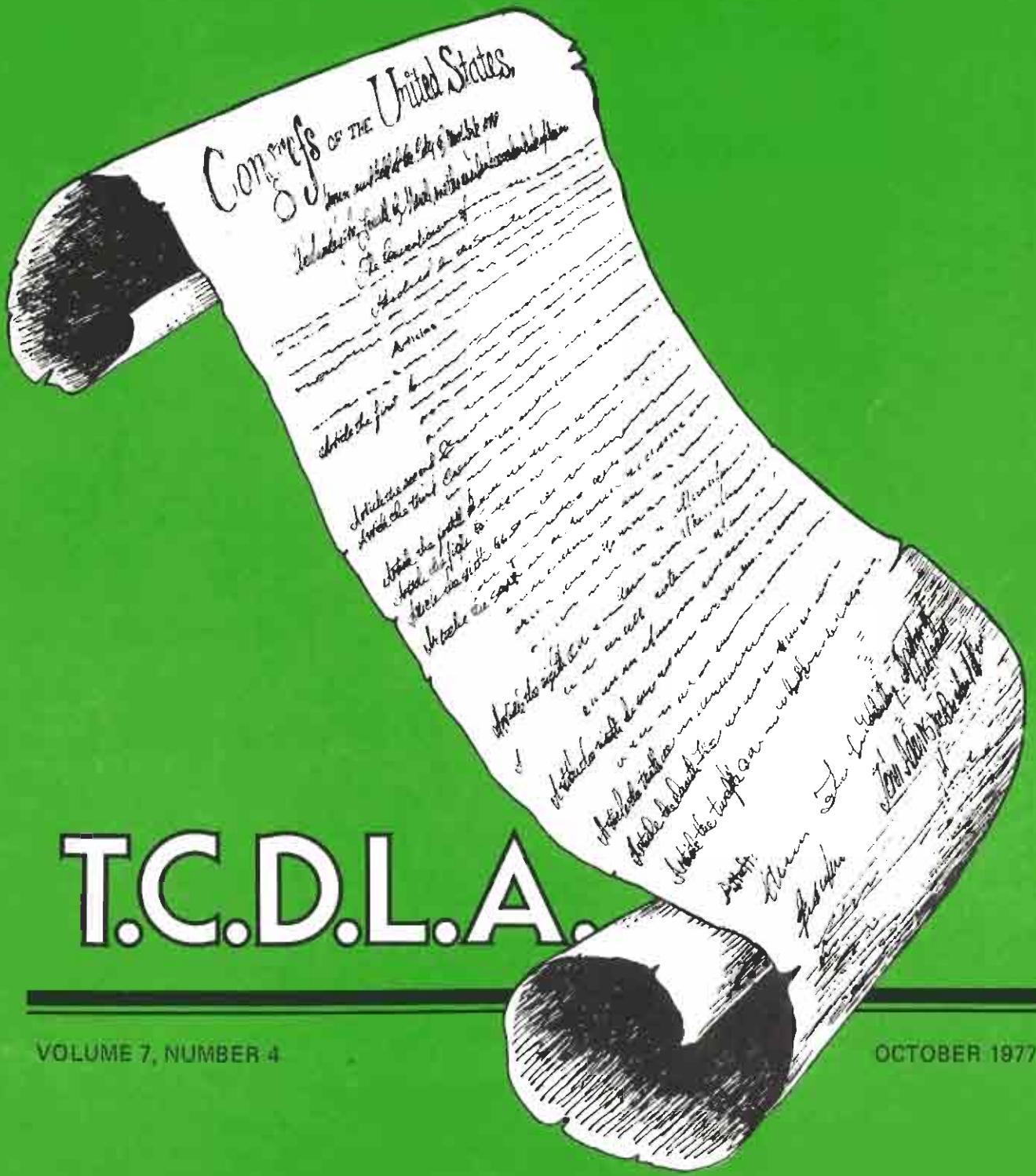

T.C.D.L.A.

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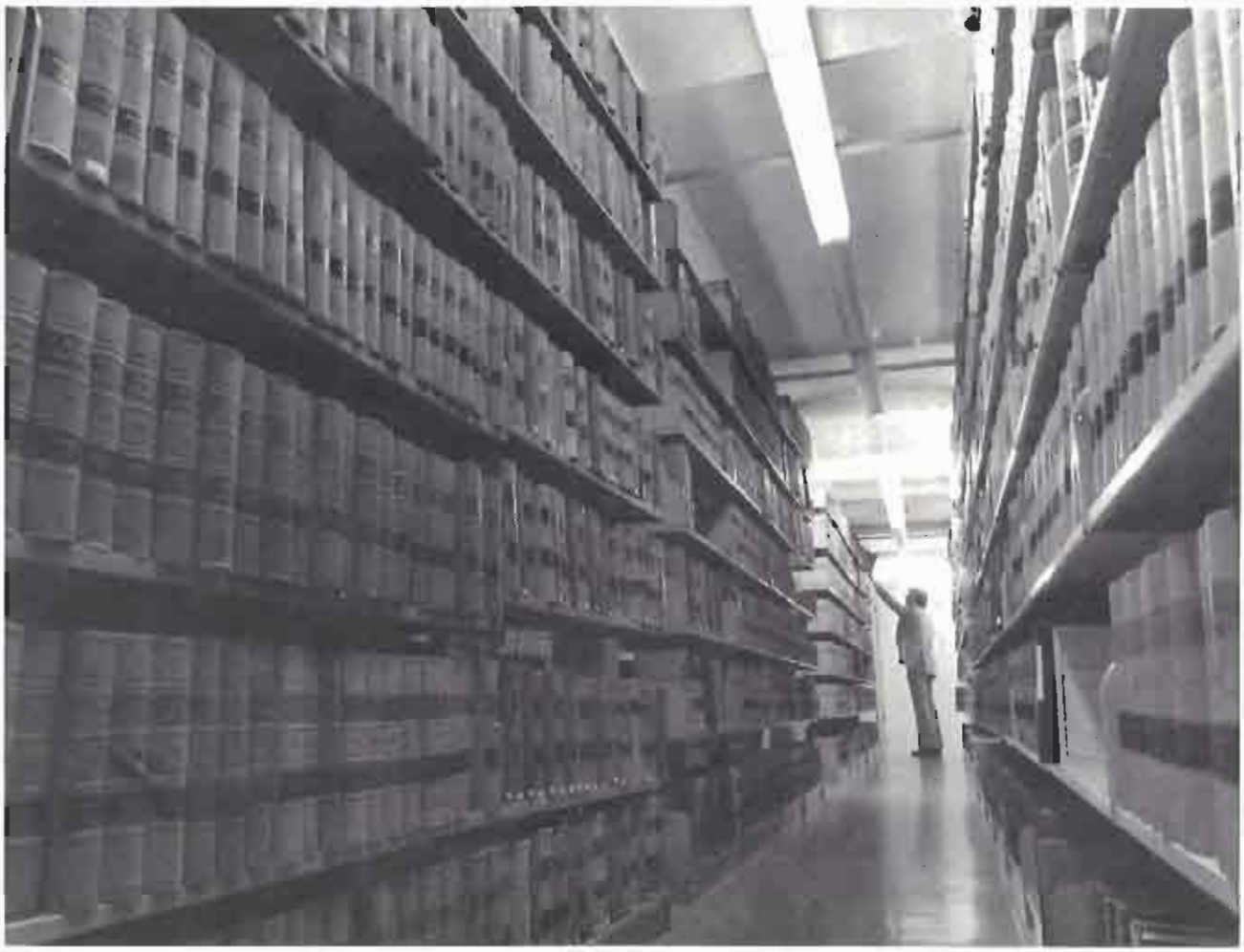

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1976 TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION.

Texas Criminal Defense Lawyers Association

OCTOBER 1977

In a recent conversation with some folks here in my local community (non-lawyers), the issue of professional responsibility to one's community was broached. I was shocked/disappointed at the "esteem" in which lawyers, generally, and criminal lawyers, particularly, are held. Thankfully, my ego was assuaged by something a high school counselor once told me after he'd caught me shootin' craps in the restroom: "Reputation is what people think you are. Character is what you really are." Now, I'm not saying that lawyers (again, particularly criminal lawyers) are candidates for burnished golden halos, but, by god, they do deserve a better shake than they're getting. Based on my own personal survey of the relative esteem in which various professions are held by the public, it seems that lawyers rate somewhere between pimps and prostitutes. There's got to be a reason. I'm inclined to believe it's got a lot to do with bad P.R.

I'd venture there's not another professional group in existence, the members of which contribute more *pro bono* time than do lawyers. And, we don't have Medicare, Medicaid, or "do-gooder" foundation grants to support those efforts. We don't, and shouldn't, begrudge those efforts—they represent a *real* professional responsibility. But, we ought to get credit (in a positive sense) for the contributions we make. An old East Texas Lawyer once explained his frustrations with fee collecting in terms of his professional responsbility *pro bono publico*. He allowed as how he didn't mind being charitable so long as he was permitted to feel that way; but when he performed services for which he expected a fee, and then found he would not be paid, he didn't feel charitable at all. Each of us experiences the same, and each time wonders how or why we continue. I believe the reason we continue, at least in part, is because we recognize the responsibility our profession puts upon us.

But how many "Man of the Year" ("Person of the Year"?) awards have been handed out to citizens for their activities in "defending, for little or no remuneration, countless individuals accused of crime"? We need a change in viewpoint. We need better P.R. Why can't we make the public understand that what we defend when we represent the criminally accused is more the system than the individual? Why can't we get credit for getting the government off the backs of the public rather than just for getting criminals off?

I'd like to see the public call to mind a different set of adjectives when "Lawyer" is mentioned: *concerned–diligent–vigilant*, rather than *slick, sharp,* or *sly*.

The ball has always been in our court. We just can't seem to get a racket on it. Perhaps we spend too much time with one another, recounting war stories and trading tactics, and not enough time unraveling, for the public, the esoterica in which we've wrapped our profession.

A good first step is available. We have a Speaker's Bureau. We need both "Speakees" and "Speakors." Ask around. Surely a service club president, a high school principal, or a sorority/fraternity officer in your community would like to hear some information on the impending Constitutional Amendments, criminal corrections, jury psychology, or a myriad of subjects which you are well qualified to discuss. An appearance before these groups will give us the opportunity to tell them what we *really* do, and to counter the images our "reputations" have created.

Call Steve at the Home Office. Get involved with our Speaker's Bureau.

Clif Holmes

BOARD APPROVES ANNUAL BILLING

The TCDLA Board of Directors met in Corpus Christi, Texas, on the 20th of August, 1977. This was the first meeting of the Board since the Annual Meeting at the State Bar Convention in Houston.

After much discussion and consideration over a number of years, the Directors voted to change the billing of members to an annual basis. All members will receive a bill on the 1st of February of each year and have thirty days in which to pay their dues or be dropped from the Association rolls.

All billings sent to members from September 1, 1977, till the annual billing commences will be prorated. On February 1, 1978, members will receive bills for their full dues for the 1978-1979 payment period. If you paid your "anniversary dues" prior to September 1, 1977, you will also be billed on February 1, 1978, but that bill will reflect a prorated allowance for the dues already sent to the Home Office.

The Board also authorized the publication of two short papers on the Code of Criminal Procedure and the Penal Code, to be distributed to the membership. (You should have received those at this time.)

The Board voted to extend the contract with Artforms Agency, Inc., the publishers of our monthly *Voice*, and voted to change the format of the Membership Directory by deleting all underlining and capitalization from the alphabetical roster.

BOARD OF DIRECTORS TO MEET

The Board of Directors of TCDLA will meet October 22nd at the Red Carpet Inn in Beaumont. Members are cordially invited to attend not only the meeting but the cocktail party on Friday, October 21, at 5:30 P.M. as well. We hope to see you there.

President's Report

In previous reports you have seen indications of my activity in behalf of the organization relating to our common concern for independent judges. I once told my good friend, Judge John F. Onion, that I consider a sound sense of humor to be a prerequisite to the judging process because wholesome humor has for its basis an understanding of human beings. Of course, I do not have reference to a stand-up comic. I speak of a man who can laugh at himself and use a gentle humor to ease tense situations and accept people for what they are–imperfect. In fact, I don't personally recall, in my own opinion, a good judge who was devoid of humor. This does not, of course, exclude a proper decorum, firm impartiality, and a fairly good knowledge of the law. I have again, as reflected in prior reports, been writing a good number of judges. Some I know well–some not so well. I am doing this for two basic reasons, remembering that truly independent judges are more often criticized than complimented. First, I want the judge to know that we admire him, not for any favor he can do for us, but because of his sheer independence. If his ego is enhanced, he is entitled to it. Second, I want him to remember our organization not only from a purely selfish standpoint, but to project an assurance that we stand ready to help, aid, and fight for independent judges.

Now, I am not writing form letters. They are, where possible, also personalized and, of course, meshed with my own peculiar brand of humor. I have had the good fortune to know many of these men for years, as you can readily see by the following reprint of my letter to Judge Andrew Campbell of Hamilton, Texas. Do not misunderstand, however; old friendships alone will not and should not meet the guidelines to which I speak.

I have discussed this matter with my officers and directors at the October meeting in Beaumont, asking for the submission of names to me of all judges from the Justice of Peace to the highest court from all areas of our state. I now ask all members to do the same as soon as possible in order that I may fulfill this objective before my term expires.

Hon. Andrew Campbell
Judge, 52nd District Court
Hamilton County Courthouse
Hamilton, Texas

Dear Judge:

In behalf of my organization it is my sincere and personal pleasure to commend you upon your judicial performance, reflecting an independence and intellect tempered with a sound understanding of human nature. Of course, as far as I am personally concerned I expect such a performance but it is a pleasure that so many of our members have expressed the same conclusion.

I would also like to add a personal note in thanking you for your recent flattering letter on my television performance in Dallas. With that, I feel that I am on my way to stardom.

Still in a personal vein I can't help but think, in writing you, of our dear deceased friend George Cockran. Remembering that you were one of his teachers of humor and law at Baylor, I cannot forget one of the last cases Cockran and I tried together in Fort Worth. I filed a Motion to Suppress before our old friend Judge "Dutch" Winters, and in argument I mentioned a Supreme Court Report (a case, of course) whereupon George stated in a stage whisper "Emmett, I didn't know they put out a report." Because of the fact at the time he was also performing a delightful soft shoe dance before the bench, we were successful in our motion.

Respectfully yours,

Emmett Colvin

EXECUTIVE DIRECTOR'S REPORT

At the Board of Directors meeting in Corpus Christi the present system of dues collection was scrapped by the Board. Anniversary billing, which TCDLA has used since its beginning, was easy to compute for new members but exceedingly difficult from an administrative standpoint. It necessitated a full-time membership secretary: to bill each member, send second notices, third notices, and unfortunately some drop letters. With the creation of an "annual billing," two weeks of intense work will be required to bill all members; the staff can then concentrate on membership drives, new publications, and seminars, which are the main areas that TCDLA should emphasize.

The other "plus" that will be apparent from an "annual billing" is in the annual budgetary procedure. Although the income of TCDLA has remained steady, and increased with the corresponding increase in membership, the annual budget involves some degree of estimation. With annual billing, the financial picture will be known, except of course for the "cream" of new members obtained throughout the year. Expenses can be programed exactly, with the knowledge that even late dues will not lead to temporary postponements.

I personally feel that the change to annual billing is a great step forward for TCDLA.

Another decision by the Board which will be a benefit to all members is the continuation of our contract with Artforms Agency for the publication of the monthly *VOICE*. It was approved originally on a four-month trial program, and will now be continued. I feel, along with the Board, that the monthly *VOICE* is the greatest step-up in service to you the membership that the Association has made. We hope that you take an interest in what we produce and that it helps you in some way. If you have suggestions as to additional areas you would like covered in the *VOICE*, or areas you think should be discontinued, please let us know. If this Association (or any association for that matter) is to remain active and respond to the ever-changing needs of the membership, it needs feedback from you.

raises a question of the identity of the offender, evidence of similar offenses by the defendant may be proved. *Cobb v. State*, 503 S.W.2d 249 (1974).

a. Identity must be placed in issue. *Hafti v. State*, 416 S.W.2d 824 (1967), *Hickenbottom v. State*, 486 S.W.2d 951 (1972), *Redd v. State*, 522 S.W.2d 890.

b. There must be some "distinguishing characteristics" making the offense similar. *Cameron v. State*, 530 S.W.2d 841 (1975).

1. The distinguishing characteristic must be a similarity peculiar to both of the crimes, and not just a similarity common to the type of crime. *Ford v. State*, 484 S.W.2d 727 (1972).

2. Distinguishing characteristics may be proximity in place and time. *Ransom v. State*, 484 S.W.2d 727 (1972).

2. Intent or Guilty Knowledge

"Texas follows the rule allowing extraneous offenses to show intent and such evidence can be offered as direct testimony, and in a case of circumstantial evidence when intent is an issue, but it more often is permitted to come in the form of rebuttal evidence after the Appellant has testified or offered a defense wherein he has stated he did not intend to do the act." *Crestfield v. State*, 471 S.W.2d 50 (1971).

a. Where the act itself does not support an inference of intent the State may offer extraneous crimes indicative of guilty knowledge or intent. *O'Brien v. State*, 376 S.W.2d 833 (1964), *Albrecht v. State*, 486 S.W.2d 97 (1972).

b. Clearly, where the Defendant denies the requisite knowledge or intent extraneous offenses are admissible if they are circumstantial evidence of that knowledge or intent. *Stewart v. State*, 398 S.W.2d 136, *Barefield v. State*, 331 S.W.2d 754, *Crestfield v. State, supra.*

c. Evidence of extraneous offenses committed during flight may be offered to show guilty knowledge or scienter. *Thames v. State*, 453 S.W.2d 495 (1970) (resisting arrest during flight).

d. *Intent* must be the contested issue. In a rape case where the only issue was consent of the Complainant the State may not show a prior rape. *Thompson v. State*, 327 S.W.2d 745, *Caldwell v. State*, 477 S.W.2d 877 (1972).

e. In an assault case where the necessary intent is presumed from the use of a deadly weapon, the State may not prove an extraneous offense for the purpose of proving that intent. *Rodriguez v. State, supra.*

3. Motive or Malice

a. State may always offer evidence of motive for commission of the offense. *Rodriguez v. State*, 486 S.W.2d 355.

1. The State may not, however, offer extraneous offenses to prove there was *no* motive for a shooting. (Ibid.)

b. In reference to motive, the extraneous offense must indicate an emotional condition in the defendant impelling him to commit the offense charged.

1. Illustrative cases:

a. *Harden v. State*, 417 S.W.2d 170 (1976). Defendant shot at victim just prior to the alleged arson of victim's house.

b. *Thames v. State*, 453 S.W.2d 495 (1970). Defendant pulled knife on deceased's employee two days before when he was not permitted to play pool out of turn.

c. *Hinkle v. State*, 442 S.W.2d 728 (1968). Evidence that defendant was driving a stolen car in case where he was charged with murder of police officer who stopped him.

c. The fact of remoteness of the extraneous offense may not affect its admissibility. *Washburn v. State*, 318 S.W.2d 627 (extortion attempt four years prior to murder).

d. The State must show an affirmative link between the charged and extraneous offenses. *Powell v. State*, 478 S.W.2d 95 (1972). (Evidence of use of narcotics is not admissible to show motive for theft based upon the inference that narcotics addicts often steal to support their habits.)

4. System or Plan

Evidence of other crimes may be admitted when it tends to establish a common scheme or plan embracing the commission of a series of crimes so related to each other that proof of one tends to prove the other, and to show the defendant's guilt of the crime charged. An extraneous offense under this exception is often also admissible to show identity or intent. *Hammonds v. State*, 500 S.W.2d 831 (1973).

(continued on p. 21)

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SIGNIFICANT DECISIONS Report

RECENT IMPORTANT DECISIONS FROM THE COURT OF CRIMINAL APPEALS

Marvin O. Teague: Editor

September, 1977
Volume IV, No. 1

Well, another year has come and gone and here we are once again in football season. A table of citations is attached hereto to enable you to get citations on the cases reported in the Newsletter. An index is being prepared and hopefully it will be out by Christmas if there aren't too many Christmas parties this year.

IF THE FIRST TWO WEEKS OF THE SEASON ARE AN INDICATION OF THINGS TO COME, IT LOOKS LIKE A LONG SEASON IS IN FOR RICE UNIVERSITY, T.C.U. AND MANY COACHES AND DEFENDANTS. FOR EXAMPLE, BY MY FIGURES, 196 CASES WERE DECIDED WITH ONLY 7 REVERSALS THE FIRST WEEK. BUT, LET US COMMENCE.

ALEJOS, SEE VOL. III, NO. 10, APRIL, 1977, S.D.R. DOESN'T MAKE THE CUT. STATE'S MRH GRANTED, 9-14-77, P.J. Onion, with Judges Roberts and Phillips dissenting without opinion.

> "On original submission we reversed the conviction holding that Art. 6701d, Sec. 186, V.A.C.S. (fleeing or attempting to elude a police officer) and said Sec. 38.04 of the New Penal Code were in pari materia and that the civil statute as a special statute controlled over the general statute (said Sec. 38.04) since the penalties varied."
>
> On Rehearing, the majority said: "From what has been said about both statutes above, we conclude while the same subject is treated they are in different acts having different objects, intended to cover different situations and were apparently not intended to be considered together." "The statutes thus are not in pari materia." CCA's majority then went off on doctrine of carving and held that "the prosecuting attorney may carve as large an offense out of a single transaction as he can, but he must cut only once." (Bexar County).
>
> Only thing else I got out of the opinion was the fact that with our citizens knowing about the additional penalty, "The section's intent is to deter flight from arrest by the threat of an additional penalty, thus discouraging forceful conflicts between the police and suspects," in Cities such as Houston, when a citizen is in the mood for a midnight swim in Buffalo Bayou, he will wear a pair of swiming trunks rather than shorts under his trousers.

THOUGH MOFFETT, SEE VOL. III, NO. 10, S.D.R., SURVIVED SPRING PRACTICE, HE ALSO DIDN'T MAKE THE CUT AS STATE'S MRH GRANTED, 9-14-77, J. Odom, with Judges Roberts and Phillips dissenting. (Dallas County).

Originally, asking the following question was held to be reversible error: "Have you heard that on September 18, 1973, that he robbed a woman by the name of Francis Tindall, at the Globe Cleaners at 2430 North Haskell Avenue with a firearm?" On rehearing, the majority of CCA held that: "In contrast to the questions in Webber, Pitcock, and Wharton, the one in the instant case did not inject an assertion of fact."

COMMENT: By this decision, you had better think twice before putting on character or reputation witnesses, for if you do and the State has some "have you heards" in their little "gift" bag, the defendant is going to be in a heap of trouble in my opinion.

DEFENSE ATTY SAYS APPEAL IS FRIVOLOUS. J. PHILLIPS, WRITING FOR A UNANIMOUS CCA, SAYS NO. TAYLOR, #55,723, 9-14-77, GETS REVERSAL WHEN CCA HOLDS THAT TJ SHOULD HAVE WITHDRAWN D'S PG. (Travis County).

FACTS: D signed another person's name to a check, misspelling the name so it wouldn't go through the bank. D testified that he intended to get to the bank before the check did and make it good. Held, "This testimony was a denial of an 'intent to defraud and harm' as alleged in the indictment and raised an issue of fact as to D's innocence." Irony here is that TJ was, at one time, going to change plea.

J. DALLY, IN HARRISON, #53,609, 9-14-77, WRITES BEAUTIFUL OPINION REGARDING JOINT POSSESSION OF HEROIN AND RULES THAT, CONTRARY TO THE STATE'S POSITION THAT "D WAS DISTINCTIVELY CONNECTED TO THE CRIME IS WITHOUT QUESTION," EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT FINDING D GUILTY OF POSSESSION OF HEROIN. (Harris County).

Though not stated in the opinion, the CCA may have been impressed with the D's "Coolness," as when the gendarmes came to her and her husband's home the evidence showed, in part, the following: "When the Officers came into the house the D was in the living room, seated on a sofa holding two dogs and talking to them."

COMMENT: As the husband's case was affirmed per curiam, it is not known if they just ran out of dogs and he didn't have any to talk to.

STATE BLOWS IT IN GUTIERREZ, #53,617, 9-14-77, P.J. Onion, AS STATE'S PROOF FAILED TO SHOW THAT A 1966 ROBBERY CONVICTION WAS FOR AN OFFENSE THAT WAS COMMITTED SUBSEQUENT TO THE ALLEGED 1963 CONVICTION HAVING BECOME FINAL. There was no evidence of the date of the commission of the robbery conviction. (Lubbock County).

COMMENT: As mentioned several times, if your client is indicted as a habitual criminal always elect to go to the jury for punishment as the D has virtually nothing to lose; i.e., if he goes to the trial judge he is going to get life and if he goes to the jury he is going to get life. However, the State may very well screw up, as here, and, if so, the D will get a new trial. If the D goes to the trial judge and the State screws up, you will only get a remand for another punishment hearing. If to a jury, gets a new trial.

DEFENSE ATTY READS THE LAW. PROPERLY PERFECTS HIS ERROR THAT RESULTS IN D MARTINEZ, #53,763, 9-14-77, J. Brown, GETTING A NEW TRIAL WHERE THERE WAS NO JURY WAIVER SIGNED AND FILED IN CAUSE. (El Paso County).

"Appellant filed his objection to the record for the reason that the above-quoted recitation in the judgment was untrue in that no such waiver and consent had been executed." See Boening, 422 (2) 469.

Unquestionably, what really helped the D was the following: "The trial judge stated for the record that he not only did not have an independent recollection of D having signed a waiver or of the approval of the same by the prosecutor or the court, BUT THAT HE DID NOT EVEN HAVE ANY RECOLLECTION OF D'S CASE AT ALL.

PROSECUTOR IN VALDEZ, #53,811, 9-14-77, J. Green, BOO BOOS BY FAILING TO GET D TO SIGN THE "APPEARANCE, CONFRONTATION AND CROSS EXAMINATION OF THE WITNESSES AND TO THE INTRODUCTION OF DOCUMENTARY EVIDENCE" WAIVER FORM. THUS, D GETS REVERSAL. (Harris County).

THOUGH STATE HAD A "TON" OF EVIDENCE IN WYGAL, #54,812, 9-14-77, P.J. ONION, A MOTION TO REVOKE PROBATION CASE, CCA RULES THAT EVIDENCE WAS INSUFFICIENT TO SHOW THAT D, EITHER INDIVIDUALLY OR AS A PARTY, STOLE SOME AUTOMOBILES. (Harris County),

> "There is nothing in the evidence to show that D participated in any way in the taking of the yellow Dodge or other cars or in placing them on the parking lot of Liberty Savings Assn. on April 1, 1976, or at any other time."

CCA'S MAJORITY IN EX PARTE RAINS, #54,898, 9-14-77, P.J. Onion, with J. Douglas dissenting without opinion, RULES THAT D'S 1961 CONVICTION WAS VOID AS HE WAS DENIED AN APPELLATE REVIEW OF HIS CONVICTION. (Dallas County).

> The interesting thing here was that TJ found that neither D nor his mother were credible witnesses and, additionally, found that: "Based on this court's personal knowledge of the parties associated with this case as well as other factors, the court finds that the allegation is untrue."
>
> HELD, "The extent and nature of such personal knowledge is not disclosed, nor did the habeas corpus judge, who was not the sentencing judge in 1961, indicate to the parties he was going to rely upon personal knowledge." "It is well established that a judge's personal knowledge of matters not contained in official judicial records of the court is not a proper matter for judicial notice."
>
> What probably galled the TJ was the fact that "The judge, court reporter, D's attorney and some of the associates of D's attorney are all dead." "The State's attorney is unknown." Also, the D had been paroled and presently had a revocation hearing hanging over his head.
>
> COMMENT: As previously mentioned, regarding enhancement allegations, if the State merely alleges the cause number, the date and the county, but not the court, always file a written motion to quash. This question has not been answered. If you are in a metropolitan area, such as Houston, Dallas, Ft. Worth, etc., there are civil and criminal sections to the clerk's office as well as there is a Federal court in those cities. Thus, without the name of the court, A Defense attorney would never know where to find the papers to see if a prior conviction was valid. (When you don't have anything else to argue, sometimes arguing ignorance is a way out). See PRODON, #52,783, 9-14-77, J. Roberts. (Harris County).

CCA PUTS THE "PEN" TO D BRIGHT, #51,384, 9-14-77, J. Roberts, AND RULES THAT WIT TESTIFYING THAT D HAD HEROIN IN WIT' HOUSE ELIMINATED THE NEED TO CHARGE ON CIRCUMSTANTIAL EVIDENCE. (Tarrant County).

> CCA followed Curtis, 548 (2) 57, and said: "If an experienced narcotics officer may not testify in such a case that, in his opinion, the given substance is heroin, it follows that a lay wit like Ross Coulson may not present such opinion testimony either." "However, from the record before us, we cannot conclude that Coulson's testimony in this case is opinion testimony." "We can only view it as a statement of fact within the knowledge of the witness." . . . "Coulson may very well have been told by the D that the substance was heroin." . . . "We conclude that Coulson's statements that D possessed heroin constituted competent testimony of a fact, not an opinion." These statements amounted to direct evidence." "No circumstantial evidence charge was required."
>
> COMMENT: A lawyer friend of mine suggested that this be put under the "Now you see it, now you don't" rule.

DONNIE BOTELLO, SEE STATE OF TEXAS EX REL. WILSON, D.A., V. HARRIS, D.J., #55,315, 9-14-77, J. Odom, with P.J. Onion and J. Phillips dissenting, with opinions, CAN'T DO HIS SENTENCE AT NIGHT AS CCA HAD AFFIRMED HIS CASE. (Galveston County).

Here, TJ, after case affirmed, ordered that D could serve his sentence, at night, but permitted him to work from 4:00 P.M. until 12:00 midnight at the Knights of Columbus Hall.

MAJORITY OF CCA RULED THAT ART. 42.03, SEC. 5, C.C.P., APPLIED ONLY IF DONE AT TIME OF SENTENCING AND NOT AFTER MANDATE OF CCA ISSUED.

IF A NUN-CHUCK IS A CLUB, SEE SEC. 46.01(1), N.P.C., DOES IT NOT FOLLOW THAT ALL MAJOR, MINOR AND LITTLE LEAGUE BASEBALL PLAYERS ARE NOW VIOLATING THE LAW? TATOM, #53,718, 9-14-77, J. Douglas, (Dallas County).

My thought here is that if either the Houston Astros, (they are only 16 out of first place), or the Texas Rangers, (they are only 10 1/2 out), could get into the play-offs, with other teams, and the score is 1-1, bottom of the Ninth, two out, three on base, two strikes on the batter, stadium full of people who paid $20. per ticket, and some extremely conscientous law enforcement officer commenced to arrest every player who handled a bat during the game, that officer would truly gain immortality in the annals of law enforcement and we would then learn if a baseball bat is a club per Sec. 46.01(1).

BETTER WATCH OUT. IF YOU DESIRE TO PUT THE D ON AT THE GUILT-INNOCENCE STAGE, BUT NOT AT THE PUNISHMENT STAGE, YOU BETTER READ WALKER, #53,568, 9-14-77, J. Phillips, with J. Douglas concurring without opinion, AND STRATMAN, 436 (2) 144, AND BRUMFIELD, 445 (2) 732, (Dallas County).

STATE GOES DOWN TUBE. FORGETS TO PROVE UP ALLEGATION "THAT THE DECEASED WAS STRUCK AND STABBED WITH A BLUNT INSTRUMENT AND A SHARP INSTRUMENT 'WHICH WERE, TO THE GRAND JURORS, UNKNOWN.'" MC IVEER, #54,616, 9-21-77, J. Douglas. (San Patricio County).

HELD, "It is incumbent upon the State to prove that the Grand Jury, after efforts to do so, was unable to find out the kind and character of weapon or instrument used." "No such proof was offered in the instant case." Reversed.

CCA REVERSES JOHNSON, #54,058, 9-21-77, J. Odom, FOR FAILURE OF TJ TO CONDUCT A HEARING OUT OF THE PRESENCE OF THE JURY TO DETERMINE WHETHER OR NOT THERE WAS EVIDENCE TO SUPPORT A FINDING OF INCOMPENTENCY TO STAND TRIAL. (Jefferson County).

HELD, "Under the plain language of Sec. 46.02, Sec. 2(b), C.C.P., it is no longer necessary that the evidence be sufficient to create a reasonable doubt in the judge's mind before a hearing is required; it is sufficient to require such a hearing that any evidence of incompetency from any source is brought to the attention of the court during the trial."

Here, the evidence adduced, from D's atty, his brother, and himself, was sufficient to require a hearing.

COMMENT: It seems to me that a TJ, if a cause is called for trial, had better look the clerk's file over to see if any motions regarding competency are on file and should also make an inquiry regarding the D's competency to stand trial. Otherwise, he may be in the same boat as this trial judge was and find himself getting reversed.

CCA CONSTRUES THEFT OF SERVICES STATUTE, SEE SEC. 31.04(a)(1), N.P.C., IN KEY, #53,812, 9-21-77, J. Green, AND RULES THAT "IN THE INSTANT CASE THE INFORMATION ALLEGED THE VIOLATION "BY FALSE TOKEN, TO-WIT," ETC." "ALTHOUGH IT DID NOT ALLEGE A VIOLATION BY DECEPTION OR THREAT, THE COURT AUTHORIZED A CONVICTION IF THE JURY FOUND A VIOLATION BY EITHER OF THOSE MEANS, AS WELL AS FALSETOKEN, AND REQUIRED A REASONABLE DOUBT AS TO WHETHER D DID COMMIT THE OFFENSE BY FALSE TOKEN, DECEPTION, OR THREAT IN ORDER TO RETURN A VERDICT OF NOT GUILTY."

"THE COURT ERRED TO THE PREJUDICE OF D IN AUTHORIZING A CONVICTION ON CONDUCT NOT ALLEGED IN THE INFORMATION." (Galveston County). Reversed.

NOTE: It appears the D got in a hassle with employees at the Balinese Room in Galveston when he was blessed with a $28.75 bill for drinks and then refused to pay. A jury in Galveston County assessed his punishment at $25.00. I suspect a civil suit, if not already, will be filed in this matter as this appears to be a case of principle and not money.

CCA DISAGREES WITH TJ IN TREVINO, #53,785, 9-21-77, J. Green, AND RULES THAT D DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL. J. Odom dissented without opinion.

It appears, by the opinion, that the TJ thought the D was "playing games" with the Court.

COMMENT: With the hue and cry, coming from various quarters, to accord the D a speedy trial, it is my belief we are going to see more cases like Trevino where the D is out on bail. Thus, TJs should be extremely careful when it comes to a D representing himself.

GREEN, SEE VOL. III, NO. 13, S.D.R., JULY, 1977, STILL GOES DOWN TUBE ON HIS CLAIM OF BEING DENIED RIGHT TO SPEEDY TRIAL. D'S MRH OVERRULED. 9-21-77, J. Brown. (Harris County).

ARAIZA, #53,661, 9-21-77, J. Odom, GETS REVERSAL WHEN STATE ALLEGED OWNERSHIP IN ONE NAME, (BURGLARY CASE), BUT FAILED TO CALL THAT PERSON OR TO OFFER OTHER EVIDENCE OF HIS LACK OF EFFECTIVE CONSENT. EVIDENCE HELD TO BE INSUFFICIENT. (CAMERON COUNTY).

HELD, "It was incumbent upon the State to prove ownership and lack of consent as alleged in the indictment." "The failure to call C.D. Loop or to offer other evidence of his lack of effective consent, and the variance between the testimony of Leonard and Mrs. Loop and the allegations in the indictment, rendered the evidence insufficient."

COMMENT: This case appears to hold that if the State is going to use a person other than the true owner, then it is incumbent that the indictment or information allege that person is a special owner. Compare Harris, 471 (2) 390, not cited in the opinion.

CCA RULES IN DRAGER, #53,182, 9-21-77, CATTLE THEFT CASE, J. Roberts,"THAT EVEN IF D IS PROBABLY GUILTY THAT IS NOT ENOUGH, AS EVIDENCE MUST POINT TO THE GUILT OF THE D WITH THE COGENCY WHICH THE LAW DEMANDS TO OVERCOME THE PRESUMPTION OF INNOCENCE AND TO EXCLUDE EVERY REASONABLE HYPOTHESIS EXCEPT THE GUILT OF THE D." (Parmer County).

IF YOU WANT TO READ HOW A LEGISLATIVE CONTINUANCE MAY HAVE SCREWED UP THE D'S PLAN, READ EX PARTE SMITH, #55,746 and 56,146, 9-21-77, J. Dally, with J. Phillips not participating. IF IT WERE NOT THAT, THEN IT WAS THAT THE D HAD TOO MANY LAWYERS AND, APPARENTLY, BY THE OPINION THEY DID NOT COORDINATE THEIR RESPECTIVE GAME PLANS. (Travis & Gillespie Counties).

IF YOU HAD A BAD DAY AT THE OFFICE AND YOU GET HOME AND THE LITTLE LADY OF THE HOUSE WANTS TO GIVE YOU A HARD TIME, TELL HER YOU HAVE BEEN WORKING ON THE LIKES OF SMITH, #53,779, 9-21-77, J. Green, RAPE OF A MENTALLY DISEASED WOMAN, (WHOSE MENTAL AGE WAS THAT OF A 2 OR 3 YEAR OLD BUT HER CHRONOLOGICAL AGE WAS 49 YEARS) AND THEN LET HER READ THE OPINION. ONE OR TWO THINGS WILL OCCUR. THINGS WILL GET BETTER OR SHE WILL SUE YOU FOR DIVORCE FOR REPRESENTING SUCH A PERSON. (Tarrant County).

Your Amicus Curiae Committee stands ready to serve you if it can. If you have a legal problem that you think the Association might be interested in that would benefit all of the members and would possibly be of statewide importance, write to me or Hon. Mel Bruder or Hon. Ron Zipp and we will try to assist you.

For those of you whose football teams did not fare too well last week, as well as those defendants who likewise did not do too well, always remember there is either next week or next year. If you don't think so, just ask your bookmaker or the Warden.

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ADMISSIBILITY OF EVIDENCE from p.7

a. Illustrative case: *Williams v. State*, 398 S.W.2d 931 (1966). There four defendants were alleged to have been principals in a shoplifting scheme and one defendant admitted the theft but testified that the other three did not know of or participate in the offense. Evidence of the participation of the four in other similar thefts was held admissible.

b. The two offenses must show more than a similarity of results, but must show a common plan and systematic course of action, not just systematic crime. *Jones v. State*, 376 S.W.2d 842 (1963).

5. To Controvert a Defensive Theory

Where the defendant advances a theory which places in issue an element of the State's case, the State may rebut that inference by proof of an extraneous crime if it is relevant to the contested issue. In addition to the basic issues of intent, identity, and guilty knowledge, the defenses of self-defense, alibi, entrapment, "frame-up," and even insanity may allow proof of other crimes.

III. Test for Admissibility

A. The Balancing Test

Assuming the existence of some basis for admissibility, *i.e.*, some arguable relevance, the test for determining the admissibility of such evidence is "whether the probative value of such evidence outweighs its inflammatory aspects." *Albrecht v. State*, 486 S.W.2d 97 (1972), *Powell v. State*, 478 S.W.2d 95 (1972). Apparently there exists a broad area of admissibility within the discretion of the trial court where reversal will only result from abuse of that discretion. See *Hernandez v. State*, 484 S.W.2d 754 (1972).

B. Sufficiency of Proof of Extraneous Crime

Evidence of an extraneous crime is not admissible unless 1) its commission is proved and 2) the defendant is shown to be its perpetrator. *Landers v. State*, 519 S.W.2d 115 (1974). Under *Landers* this is apparently still the law notwithstanding *Williams v. State*, 481 S.W.2d 815 seemingly holding otherwise.

IV. The Penalty Stage

Under Art. 37.07, Section 3, Code of Criminal Procedure, the "prior criminal record" of the defendant is admissible, as well as his general reputation and character.

A. "Criminal Record" is defined as "a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged."

B. Remoteness is not a bar to admissibility. *Nichols v. State*, 494 S.W.2d 830.

V. Factors Within the Control of Defense Counsel

A. "Opening the Door"

1. Bringing into contest issues upon which extraneous offenses may be admissible.

2. The issue of identity, or, presumably, any other issue, may be raised by cross-examination alone. *Ferrell v. State*, 429 S.W.2d 901. However, where the testimony of the witness remains unshaken and uncontroverted, the door is not opened. To hold otherwise "would be tantamount to holding that such testimony would be admissible in any case where the defendant's counsel exercises the constitutional right of cross-examination." *Caldwell v. State*, 477 S.W.2d 877.

3. The calling of character witnesses subject to cross-examination on the issue of their familiarity with the defendant's character. (*i.e.*, "Have you heard. . .?")

a. You may do this without asking the standard question. See *Childs v. State*, 491 S.W.2d 907 (1973). ■

NEW DISTRICT ATTORNEYS

The Governor has appointed Erwin Ernst, former General Counsel of TDC and Assistant District Attorney in Harris County, the Criminal District Attorney for Walker County. The Governor also appointed Quay F. Parker District Attorney for the 259th Judicial District, consisting of Jones and Shackelford Counties. Mr. Joe L. Price has been appointed District Attorney for the 258th Judicial District, Polk, San Jacinto, and Trinity Counties. James F. Hury, Jr. was appointed Criminal District Attorney for Galveston, replacing Ronald L. Wilson. Richard D. Davis replaces, by appointment of the Governor, W. E. Eblen as the Criminal District Attorney for Van Zandt County. Ronald L. Sutton has also been appointed District Attorney for the 198th Judicial District, consisting of Bandera, Concho, Kerr, Kimble, McCulloch, and Menard Counties.

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News & Notes

NEW DISTRICT JUDGES

With the passage of the Senate Bills during the last Legislative Session, the Governor appointed a large number of new District Judges. The following list consists of the remainder of the new judgeships and a number that opened by normal attrition:

NAME	JUDICIAL DISTRICT	COUNTY(IES)
Hon. Carol R. Haberman	45th	Bexar
Hon. Harley R. Clark, Jr.	250th	Travis
Hon. Peter M. Lowry	261st	Travis
Hon. V. Murray Jordan	198th	Bandera, Concho, Kerr, Kimble, McCulloch, Menard
Hon. Richard W. Millard	152nd	Harris
Hon. Joseph Connaly	224th	Ector
Hon. George Martinez	254th	Dallas
Hon. Donald D. Koons	255th	Dallas
Hon. Tony Williams	112th	Pecos, Upton, Crockett, Sutton
Hon. Jack R. King	136th	Jefferson
*Hon. Van C. Stovall	242nd	Hale, Swisher, Castro
Hon. Charles C. Cooke III	249th	Johnson, Somervell
Hon. Joe Ned Dean	258th	Polk, San Jacinto, Trinity
Hon. Tom Kenyon	300th	Brazoria
Hon. Annette Stewart	301st	Dallas
Hon. Greer Dowell	302nd	Dallas
Hon. Dan Gibbs	303rd	Dallas
Hon. Craig Penfold	304th	Dallas
Hon. Pat McClung	305th	Dallas
Hon. James A. Piperi	306th	Galveston
Hon. William C. Martin III	307th	Gregg
Hon. Wells Stewart	308th	Harris
Hon. Herman Mead	309th	Harris
Hon. Allen Daggett	310th	Harris
Hon. Bill Elliott	311th	Harris
Hon. Felix Salazar, Jr.	312th	Harris
Hon. Robert L. Lowry	313th	Harris
Hon. Wallace H. Miller	314th	Harris
Hon. Criss Cole	315th	Harris
Hon. Guy Hazlett	316th	Hutchinson
Hon. Ethridge R. Wright	317th	Jefferson
Hon. Joseph H. Mims	318th	Midland
Hon. Harold Thomas	319th	Nueces
Hon. Jerry Shackelford	320th	Potter
Hon. Harold B. Clapp	321st	Smith
Hon. Eva G. Barnes	322nd	Tarrant
Hon. Scott Moore	323rd	Tarrant
Hon. Joe H. Eidson, Jr.	324th	Tarrant
Hon. Robert L. Wright	325th	Tarrant
Hon. Henry J. Strauss	326th	Taylor
Hon. Enrique H. Pena	327th	El Paso
Hon. Sidney J. Brown	328th	Fort Bend
Hon. Lloyd G. Rust, Jr.	329th	Wharton
Hon. Perry O. Chrisman	330th	Dallas

*Member TCDLA

NEW PUBLICATION OFFER

TCDLA now has available to its members the supplement to the Criminal Defense Sourcebook by Ray Moses of Houston. The supplement may be purchased for $40.00 by either writing or calling TCDLA Home Office. ♦

RON JOHNSON HAS RETURNED

As you recall, Ron left TCDLA last summer to clerk in the office of Lytle, Wetzler, Winn and Martin in Kansas. But as all true Texans do. . .he has finally come home and is available to do research, Memorandums of Law, etc. So, if you need assistance, please give him a call; we know you will be pleased with the quality of his work. ♦

BRIEF BANK

The following **Opinions** and **Open Record Decisions** have recently been handed down by the Attorney General and are available through the Brief Bank.

OPINIONS

H-1051
RQ-1684

The Board of Pardons and Paroles is authorized to adopt a rule which requires a parole commissioner to accept a new duty station.

H-1053
RQ-1621

An in-state final conviction of driving while intoxicated automatically suspends the convict's driving license without the necessity of further official action.

H-1054
RQ-1665

The fee for service of citation by mail is governed by Article 3933a, V.T. C.S. A sheriff or constable may not recover the costs of postage in addition to the fees authorized by Article 3933a.

OPEN RECORDS DECISIONS

ORD-177
RQ-1542

The Criminal Justice Division of the Governor's Office has discretion to release information even if it is excepted from required disclosure by Section 3(a)(8) of the Open Records Act. ♦

NEW MEMBERS

The *Voice* of TCDLA is pleased to say "welcome" to the new members joining since the last issue of the magazine:

Herb Sucherman	Dallas
Robert J. Seerden	Victoria
Richard T. McConathy	Dallas
J.R. Davidson	Brownsville
James R. Pierce	Tyler
Bill Cornett	Amarillo
Robert G. Schleier, Jr.	Kilgore
Gene Storrs	Amarillo

There was a total of 4 student members in the same period. ♦

REVOCATION OF PROBATION

Charles D. Craig
Austin

I. **Changes in Law of Probation in Texas resulting from Acts of the 65th Legislature:**

C.C.P., Article 42.12 §3e expands the jurisdiction of the trial court after the Defendant has been sentenced to the Department of Corrections for a felony. The trial court continues to have jurisdiction for 120 days from the date of sentence. The trial court on its own motion, or on the motion of the Defendant, at any time after the expiration of 60 days but prior to the end of the 120-day period may suspend the execution of the sentence and place the Defendant on probation. The Defendant must be eligible for probation and never have served time in any prison for a felony case; and the trial court must find that the Defendant would not benefit from further incarceration. The Defendant is not eligible if he was sentenced for commission of Criminal Homicide, Rape, or Robbery.

C.C.P., Article 42.13 §3a expands the jurisdiction of the trial court's imposing incarceration for conviction of a misdemeanor by continuing jurisdiction for a period of 90 days from the date the execution of sentence begins. The court on its own motion, or on the Defendant's motion, any time after the expiration of 10 days and prior to the end of the 90-day period, may suspend the further execution of the sentence and place the Defendant on probation. The Defendant must never have been incarcerated in a penitentiary or jail serving a sentence for a felony or a misdemeanor.

C.C.P., Article 42.12 §3f limits the manner of obtaining probation for certain offenses. The provisions of Sections 3 and 3c of Article 42.12 do not apply to a Defendant found guilty of Capital Murder, Aggravated Kidnapping, Aggravated Rape, Aggravated Sexual Abuse, Aggravated Robbery or any felony where a deadly weapon was used or exhibited. If the Defendant is convicted of any felony where he used or exhibited a firearm, and receives probation, the trial court may commit the Defendant to the Department of Corrections for a period of 60 days to not more than 120 days.

C.C.P., Article 42.12 §4 was amended to provide that the Defendant, if not represented by counsel, the Defendant's attorney, and counsel for the State shall have an opportunity to see a copy of the pre-sentence report on request.

C.C.P., Article 42.12 §6 was amended by adding additional conditions that may be applied by the court when a Defendant is placed on probation. The new conditions include: participation in a community-based correctional program; obey all rules of the community-based program and pay his room and board; pay a percentage of his income to support his dependents; pay a percentage of his income to compensate the victim of the offense for any property damage or medical expense; and reimburse the county for compensation paid to appointed counsel for defending him in the case.

C.C.P., Article 42.13 §5b provides that a probationer in misdemeanor cases may be required to reimburse the county for compensation paid to an appointed attorney.

C.C.P., Article 42.12 §62a was amended to allow the trial court to fix the probation fee at a maximum of $15.00 per month, if the court so desires.

C.C.P., Article 42.12 §8c was added to provide that if the Motion to Revoke Probation relies on proof of nonpayment of any fee or restitution that is required as a condition of probation, the inability to pay is an affirmative defense that the probationer must prove by a preponderance of the evidence.

C.C.P., Article 42.13 §6c was added to provide the affirmative defense of inability to pay for misdemeanor probationers where the state relies on "nonpayment" as a grounds for revocation of probation.

II. **Motion to Revoke Probation**

At any time during the period of probation a prosecutor may file a motion to revoke probation alleging that the probationer has violated one or more of the conditions of his probation. After the filing of such a motion, the court may issue a warrant and cause the Defendant to be arrested.

Allegations in a motion to revoke probation need not strictly comply with the requirements of an indictment. (*Gonzales*, 456 S.W.2d 53).

Where the basis of the revocation is a violation of a penal law, the allegations must give fair notice and should allege a violation of the law. (*Jansson*, 473 S.W.2d 40). When the motion fails to so fully inform the probationer, he is denied the rudiments of due process. (*Kuentsler*, 486 S.W.2d 367).

When the allegations in a motion fail to fully inform a probationer, and the trial court refuses to sustain an exception timely filed, the probationer is denied the rudiments of due process. An accused is entitled to have the motion to revoke set forth in clear language the violation relied on. Reference to an indictment is not sufficient notice of the offense re-

lied on for revocation. (*Garner*, 545 S.W.2d 178).

A motion to quash the prosecution's motion for revocation of probation must be timely filed. The motion should be urged prior to an announcement of ready or entry of a plea of "untrue," or the Court of Criminal Appeals may find that the error, if any, was waived. (*Dempsey*, 496 S.W.2d 49; *Ausborne*, 499 S.W.2d 179).

III. **Right to Bail in Revocation Proceedings**

A probationer in misdemeanor cases is entitled to reasonable bail pending revocation proceedings. (*Smith*, 493 S.W.2d 958).

The Court of Criminal Appeals continues to leave the decision to grant or deny bail in felony cases to the discretion of the trial judge. (*Ex Parte Ainsworth*, 532 S.W.2d 640).

IV. **Trial**

The Defendant has no right to trial by jury in a revocation proceeding. (*Harris*, 486 S.W.2d 317).

A revocation hearing is not a criminal trial. (*Munoz*, 485 S.W.2d 782).

A Defendant is entitled to the benefit of assistance of counsel at the hearing. (*C.C.P.*, Article 42.12 §3b; *Campbell*, 456 S.W.2d 968; *Ex Parte Shivers*, 501 S.W.2d 898).

C.C.P., Article 42.12 §8a provides that "if the Defendant has not been released on bail, on motion by the Defendant the court shall cause the Defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The Court of Criminal Appeals interprets this provision to mean that if the court fails to hold the hearing in the specified time, the motion to revoke will be dismissed, and that such failure may be challenged by a Writ of Habeas Corpus. (*Ex Parte Trillo*, 540 S.W.2d 728).

V. **Burden of Proof and Evidentiary Rules**

Proof beyond a reasonable doubt is not required in probation revocation hearings, and the Court of Criminal Appeals has declared that the standard of proof necessary to revoke probation should not be as stringent as the one necessary to support the initial conviction. (*Kelly*, 483 S.W.2d 467).

The Court of Criminal Appeals has not delineated definitively the quantum of evidence necessary to support an order of revocation of probation. It has been held by a majority of the Court that the evidence does not need to show proof beyond a reasonable doubt, although probation may not be terminated without an affirmative finding of a violation of the condition of probation. (*Scamardo*, 517 S.W.2d 293). The court in *Scamardo* cited *United States v. Garza*, 484 F.2d.88 (5th Cir., 1973), which held, "[a]ll that is required is enough evidence, within a sound judicial discretion, to satisfy the district judge that the conduct of the probationer has not met the conditions of the probation." Presiding Judge Onion dissented saying, "I remain convinced that the proper burden of proof is 'Beyond a Reasonable Doubt' for the reasons stated in my dissenting opinion in *Kelly v. State*, 482 S.W.2d 473."

In *Johnson*, 537 S.W.2d 16, the court stated "an order revoking probation need only be supported by a preponderance of the evidence."

Generally, evidentiary rules will be followed as in all other criminal matters. In *French*, 546 S.W.2d 612, evidence of marijuana seized in a search where it was determined that the search warrant was issued by a "Temporary Municipal Judge" was held to have been improperly admitted because the supporting affidavit was not sworn to before an officer authorized to administer oaths, and the warrant was issued by an individual who was not a magistrate. Evidence obtained after a search without probable cause could not be considered by a trial court in revocation of probation. (*McDougald*, 547 S.W.2d 40).

There are some areas, however, where evidentiary rules are relaxed. An admission to a crime in the nature of a confession made to a probation officer is admissible, even if the Defendant was not warned of his rights by the probation officer prior to the statement, so long as the Defendant is not under arrest or in custody at the time the statement is made. A Defendant is not in custody when making a monthly report. (*Cunningham*, 488 S.W.2d 117). For instance, if a Defendant tells his probation officer he left the county without permission, this is sufficient proof to revoke his probation. (*Bustamante*, 493 S.W.2d 921).

When the probationer makes a legally admissible voluntary confession to the commission of the subsequent offense, the introduction of such confession into evidence, even though uncorroborated, "constitutes sufficient evidence for a court to revoke probation." (*Hicks*, 476 S.W.2d 670; *DeLeon*, 466 S.W.2d 573). But, when a "confession" is relied upon by the State in revocation proceedings, it is error for the court to deny the probationer the privilege of testifying solely on the issue of voluntariness of the confession, without subjecting himself to unlimited cross-examination by the prosecution on other issues. (*Master*, 545 S.W.2d 180).

A revocation can also be based on the uncorroborated testimony of an accomplice witness. (*Regaldo*, 494 S.W.2d 185; *Mann*, 490 S.W.2d 545).

If a Defendant on probation is tried for committing a new crime which also forms the basis for the motion to revoke probation, at the revocation hearing the judge who heard the facts of the trial could take judicial notice of them, and no additional

evidence need be produced. (*Barrientez*, 500 S.W.2d 474; *Stevenson*, 500 S.W.2d 855).

VI. Fundamental Defects in Primary Conviction

A. *Where indictment is fundamentally defective*

If the indictment in the primary conviction is defective, the probation may not be revoked. The Court of Criminal Appeals held that an indictment for assault with intent to rob was defective for failing to aver ownership of the property taken and the conviction based on the indictment is therefore invalid. (*Adams*, 540 S.W.2d 733).

Indictment for criminal mischief failed to allege that the offense was committed without the effective consent of the owner. (*Timms*, 542 S.W.2d 424).

Chapter 15 of the *Texas Penal Code*, which covers preparatory offenses, is not applicable to the Controlled Substances Act; therefore, an indictment for conspiracy to sell marijuana does not allege a crime against the laws of this state. (*Baker*, 547 S.W.2d 627).

A defense attorney should pay particular attention to these problems of defective indictments in the primary offense. Many people now on probation were convicted on indictments with verbiage and new offenses under the "New" Penal Code prior to determinations of the proper allegations by the Court of Criminal Appeals. Also, many persons are still on probation for offenses which occurred prior to the changes in the Penal Code.

B. *Where the judgment entered is defective*

Where an indictment charged the offense of burglary of a private residence at nighttime, and the judgment and sentence recited a conviction for burglary, a conviction for burglary could not be supported by the indictment. (*Kasper*, 547 S.W.2d 633).

Where the Defendant received a three year term in the Department of Corrections, and the trial judge granted a new trial and later assessed a five year probated sentence, the Court of Criminal Appeals reversed saying: "Because the record contains neither reasons for the increase in punishment, nor factual data upon which such an increase could have been based, the Judgment of the Court assessing punishment must be vacated." (*Lechuga*, 532 S.W. 2d 581).

Where the judgment recites a punishment which is not within the range of punishment provided by law, same is defective. (*Gonzales*, 527 S.W.2d 540).

C. *Because the primary conviction was under a general statute, when there was a special statute which governed the general*

Where conviction was had under *Texas Penal Code*, Article 16.01, alleging possession of a criminal instrument, when a special statute, *Texas Penal Code*, Article 32.21 (a)(1), Forgery, also covered the act for which the Defendant was convicted, the primary conviction was held defective. (*Ex Parte Harrell*, 542 S.W.2d 169).

This principle is particularly important in the area of probation revocation when the general statute describes a felony offense and the special statute is only a misdemeanor, since the District Court would not have jurisdiction over the subject matter.

VII. Abuse of Discretion—Sufficiency of the Evidence

A. *Commit no offense against the laws of this State or of any other State or of the United States*

Revocation based on Possession of Marijuana seized in illegal search was held to be an abuse of discretion. (*Rushing*, 500 S.W.2d 667).

"Mere presence at the scene of a crime does not of itself justify drawing an inference that he participated therein." (*Vela*, 491 S.W.2d 435).

Evidence that Appellant possessed pills seized in a legal search without a warrant is insufficient when there is no testimony as to the chemical makeup of the pills. (*Cano*, 450 S.W.2d 646).

Where there is no evidence that the violation committed occurred after the date the appellant was placed on probation, revocation cannot be supported. (*Mason*, 438 S.W.2d 556).

B. *Avoid injurious or vicious habits*

The allegation that "subject has been drinking excessively" was not established by mother-in-law's testimony that she had observed appellant drink "a few beers, but not to excess around the house," and that on the occasion of his birthday, in her opinion, he was drunk. (*Kubat*, 503 S.W. 2d 258).

Appellant presented exceptions to State's motion stating that the failure to allege what injurious or vicious habits in which Appellant was engaged did not give Appellant fair notice as to what terms he allegedly violated, thereby depriving him of a fair opportunity to prepare his defense thereto. The trial court overruled the Appellant's motion and failed to require the State to amend its motion. The insufficiency was raised in time for the State to amend. The Court of Criminal Appeals held reversal

was required. (*Burkett*, 485 S.W.2d 578).

Admission by Appellant that he took a barbiturate on one occasion did not support proof of a "habit." The Court of Criminal Appeals held the trial court abused his discretion. (*Campbell*, 456 S.W.2d 918).

C. *Avoid persons or places of disreputable or harmful character*

The State's Motion to Revoke Probation failed to allege what persons or places the Defendant associated with or frequented, or the date and time said conditions were supposed to have been violated, and exception was timely made. The Court of Criminal Appeals held this practice not to provide fair notice. (*Burkett*, 485 S.W.2d 578).

Even if the person with whom the Defendant was associating was of disreputable or harmful character, it must be shown that the Defendant knew of such harmful character. (*Jackson*, 464 S.W.2d 153; *Shortnacy*, 474 S.W. 2d 713; *Prince*, 477 S.W.2d 542).

Where the conditions of probation required the Defendant to "avoid injurious habits, specifically alcoholic beverages, harmful drugs or narcotics" and the evidence showed that the Defendant was "sniffing paint fumes," the Court ruled that such evidence was insufficient to revoke the probation. (*Allen*, 509 S.W.2d 348).

D. *Report to probation officer as directed*

Defendant was ordered to "report as directed." The Court held that this term was not enforceable because it did not specify when he was to report, and was an unlawful delegation of authority to the probation officer to direct him to report. (*Parsons*, 513 S.W. 2d 554).

In *Brown*, 508 S.W.2d 366, the Court ruled as it did in *Parsons*, but further stated:

> "[A]lthough on different facts, where the parties over a period of time have accepted such delegation of authority as shown by the course of conduct between them, a probationer may be estopped from objecting to being held to the duty he assumed."

E. *Work faithfully at suitable employment as far as possible*

It was error to revoke probation on a showing that Appellant had sought employment at eight different companies and had worked at two others for short periods. (*Butler*, 486 S.W. 2d 311).

Evidence that a Defendant had applied for a number of jobs, had secured employment four times, and had a job to go to when he was arrested on the motion to revoke was not sufficient to justify revocation. (*Gormany*, 486 S.W. 2d 324).

Evidence that the Defendant showed up for work late at least four days during his seven days of employment, once did not show up at all but called in sick, and was fired after not showing up for two more days and not calling in failed to show that he did not work faithfully at suitable employment as far as possible. (*Rehwalt*, 489 S.W.2d 884).

F. *Remain within a specified place*

Prohibition against "changing place of residence" was not shown by Defendant's travelling to a distant city, spending one or two nights in a motel, with intent to seek employment without any expressed intent to make that locale his "residence." (*Whitney*, 472 S.W.2d 524).

It is proper to revoke probation where the order required the Defendant to stay within a certain county and not leave without the permission of the probation officer and the Defendant left without obtaining permission. (*Winters*, 504 S.W.2d 322).

G. *Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the court shall determine.*

The addition of *C.C.P.*, Article 42.12 §8c and *C.C.P.*, Article 42.13 §6(6) will change the law as it has related to this provision in the past. In the past it has been held that the prosecution must prove that the Defendant failed to pay, that he had the ability to pay, and that his failure was willful.

It is now an affirmative defense that the Defendant was unable to pay. However, suppose the Defendant presents evidence of his inability and the Court revokes him anyway. Can it be reversed? The judge is the trier of fact and may believe or disbelieve any witness.

H. *Support his dependants*

It appears that the defense of inability to support dependants will be available here, and will alter the law as in the area of failure to make other payments.

VIII. **Miscellaneous considerations**

A. When a subsequent offense is charged as the reason for revocation, "no necessity exists for there first to be a trial and a valid conviction" of such offense. (*Mason*, 473 S.W.2d 15).

REVOCATION OF PROBATION

B. A Defendant is not entitled to a preliminary probable cause hearing prior to the final hearing on the Motion to Revoke. (*Grant*, 505 S.W.2d 259).

C. After revocation and imposition of sentence, the Court may cumulate or "stack" that sentence on another received for the commission of a crime committed by the Defendant while on probation. (*Spencer*, 503 S.W.2d 557).

D. A Defendant who has had probation revoked is not entitled to credit on his sentence for the time served on probation. (*Quintero*, 469 S.W.2d 189).

E. A Defendant may appeal the revocation of his probation in both felony and misdemeanor cases. (*C.C.P.*, Article 42.12 §8b; and *C.C.P.*, Article 42.13 §8a).

F. The Court, in felony cases, may reduce the term of imprisonment after an order of revocation to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted. (*C.C.P.*, Article 42.12 §8a).

G. Upon request by a Defendant the Court must state the findings upon which probation was revoked. A probationer is entitled to know why his probation is being revoked as a matter of due process. (*Garcia*, 488 S.W.2d 448). ■

THE LAW AND THE DEAF

A professional development program on The Law and the Deaf will be held in the Texas Law Center at 201 W. 15th Street on Friday, November 4, 1977. This legal clinic will focus on the rights of deaf clients in legal proceedings as these apply to current State-Federal Statutes and Executive Orders. Client-attorney relations, inherent communication problems, and court accessibility and discrimination will be covered during this one-day seminar. The clinic is being jointly sponsored by the Texas Deaf Community (Coalition of Texas Organizations Serving the Deaf) and the Texas Commission for the Deaf.

Registration will be held from 8:00 to 8:45 a.m. in the Conference Room of the Texas Law Center, Austin. The Seminar begins at 8:45 with introductions by Larry Evans, President of the Texas Association of the Deaf, and welcoming speeches by The Honorable Joe Greenhill, Chief Justice of the Texas Supreme Court, and Dr. Michael Moore, President of Coalition of Texas Organizations Serving the Deaf.

The subject of the first panel is Existing Federal Laws and Implications. Chairperson will be Dr. Mervin Garretson, President of the National Association of the Deaf. Presentors will be Glenn Goldberg, Executive Director of The National Center for Law and the Deaf, and Sy DuBow, Legal Director of the same organization, whose headquarters are in Washington, D.C.

From 10:30 to noon there will be a Federal Panel, with The Honorable Sherman Finesilver, U.S. District Judge from Denver, Colorado, representing the judiciary. From Washington, D.C., Dr. Boyce Williams, Director for Deafness and Communicative Disorders in the Office of Human Development, HEW, will represent rehabilitation services for the deaf. There will also be representatives of the deaf, interpreters for the deaf, and parents of the deaf. Time is provided for audience response at the end of the panel.

At one o'clock, after a buffet lunch, Judge Finesilver will be introduced by Mrs. Texana Conn, Coordinator, Travis County Services for the Deaf, Austin. The judge is scheduled for a one-hour special presentation.

The first panel of the afternoon session will be concerned with Existing State Statutes and Services regarding the Deaf. Ralph White, President-Elect of National Association of the Deaf and a resident of Austin, will serve as chairperson for this session. Presentors will be Messrs. Goldberg and DuBow of Washington.

The final panel relates to Texas law. Panel members will be: The Honorable Craig Washington of the Texas House of Representatives; The Honorable Leon Douglas, Judge, Court of Criminal Appeals; Dr. B.J. George, Jr., President, Southwest Legal Foundation; Andres Menchu, President, Parent Professional Section of the Texas Association of the Deaf; Helen Ross Sewell, Registry of Interpreters for the Deaf; and Lil Browning, RID Legal Specialist. The panel will close with an audience response and summary led by Ralph White.

PUBLISHER'S NOTE: Credit for attendance at "The Law and the Deaf" seminar may be utilized toward the total continuing legal education requirements for the Certification and Re-certification of Legal Specialists by the Texas Board of Legal Specialization in the fields of Civil Trial Law, Family Law, Criminal Law, and Personal Injury Trial Law. ■

SPEEDY TRIAL TASK FORCE

By Executive Order on the 9th of September, 1977, the Governor appointed a "Task Force on Speedy Trial in Criminal Cases." The Task Force is to provide assistance and coordination in the transition to and implementation of the Speedy Trial Act passed by the 65th Legislature. Appointed to the Task Force was President Emmett Colvin; he is the only representative of the defense bar on the Task Force. The other members are:

The Hon. Joe Greenhill, Austin
The Hon. John F. Onion, Austin
The Hon. Paul W. Nye, Corpus Christi
The Hon. Tully Shahan, Del Rio
The Hon. Martin Dies, Jr., Beaumont
The Hon. C. Raymond Judice, Austin
The Hon. Alton Griffin, Lubbock
The Hon. Lewis Dickson, Houston
Major Burch Biggerstaff, Austin
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