

January 1986

## Criminal Procedure: Pretrial

Ed Kinkeade

---

### Recommended Citation

Ed Kinkeade, *Criminal Procedure: Pretrial*, 40 Sw L.J. 569 (1986)  
<https://scholar.smu.edu/smulr/vol40/iss1/20>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# CRIMINAL PROCEDURE: PRETRIAL

by  
*Ed Kinkeade\**

**T**HIS Article presents the significant Texas criminal cases involving pretrial procedure issues decided during the Survey period. Topics covered include bail, discovery, former jeopardy, grand jury, severance, speedy trial, and venue.

## I. BAIL

The court of criminal appeals decided two cases involving constitutional considerations in bail practices during the Survey period. In *Lee v. State*<sup>1</sup> the court considered the burden of proof required under the Texas Constitution<sup>2</sup> in order to deny bail. In *Lee* the only evidence presented to support the motion to deny bond was the prosecutor's testimony that a search of Lee's home resulted in seizure of heroin.<sup>3</sup> The court found the evidence insufficient to meet even the substantial showing of the guilt of the accused test,<sup>4</sup> which falls far below the trial evidence standard of proof which is beyond a reasonable doubt.<sup>5</sup> The evidence failed to show that the defendant was present at the time of the search and failed to establish any other affirmative link between the defendant and the heroin seized.<sup>6</sup>

The court of criminal appeals recently affirmed a decision by the San Antonio court of appeals by holding that Texas' mandatory ninety-five percent remittitur to bondsmen provision<sup>7</sup> is unconstitutional because it violates

---

\* B.A., J.D., Baylor University. Judge, 194th Judicial District Court, Dallas County, Texas.

1. 683 S.W.2d 8 (Tex. Crim. App. 1985).

2. TEX. CONST. art. I, provides in part that bail may be denied to an individual "accused of a felony . . . committed while on bail for a prior felony for which he has been indicted . . . after a hearing, and upon evidence substantially showing the guilt of the accused of the offense . . . committed while on bail . . ."

3. 683 S.W.2d at 9. The prosecutor stated:

There has been an additional charge filed, which the paperwork is being brought over. Terry William Lee, while out on bond for said offense, was arrested yesterday. A search warrant was executed at Terry William Lee's residence being at 404 East Huff, on a search warrant, at such time approximately one-half ounce of heroin, for which purpose the search warrant was executed, was confiscated.

*Id.*

4. See TEX. CONST. art. I, § 11a, discussed *supra* note 2.

5. 683 S.W.2d at 9.

6. *Id.*

7. TEX. REV. CIV. STAT. ANN. art. 2372p-3, § 13(b) (Vernon Supp. 1986) provides:

After a forfeiture, if the defendant is incarcerated within two years of a judgment nisi, the bondsman shall be entitled to a remittitur of at least 95 percent if

the separation of powers provision<sup>8</sup> of the Texas Constitution.<sup>9</sup> The case, *Williams v. State*<sup>10</sup> involved an individual, indicted for a felony and released on bond, who failed to appear at a scheduled probation hearing.<sup>11</sup> The trial court ordered the bond forfeited and later entered a judgment *nisi*. The court then entered summary judgment against Williams and his bondsman. When the judgment became final, the trial court no longer had plenary power with respect to the judgment.<sup>12</sup> Almost two months after the judgment became final, the bondsman filed a motion seeking a remittitur of at least ninety-five percent of the bond previously forfeited.<sup>13</sup> The state asserted that the trial court had lost its power to grant a remittitur after the judgment had become final. The state also asserted that the mandatory bond remittitur statute<sup>14</sup> was unconstitutional. The trial court rejected the state's contention that the statute was unconstitutional because it allowed a court to grant remittitur after final judgment. The trial court did find the statute unconstitutional, however, to the extent that it usurped the trial court's discretion to determine the amount of remittitur to be granted. The court then granted the bondsman an eighty-five percent remittitur.<sup>15</sup>

The court of appeals affirmed the trial court's decision.<sup>16</sup> The court of criminal appeals affirmed the trial court's decision as to the unconstitutionality of the statute but vacated the judgment of the trial court that eighty-five percent of the bond be remitted to the bondsman.<sup>17</sup> In affirming the decision of the trial court and the court of appeals, the court of criminal appeals commented on the dubious wisdom of the remittitur statute.<sup>18</sup> If the bondsman returned a defendant quickly before a final judgment was entered on the

---

he presents a sworn affidavit stating that the defendant was returned to custody, in part, as a result of money spent or information furnished by the bondsman.

The remittitur shall be credited against an unpaid judgment of forfeiture or if the judgment has been paid, the treasurer shall refund at least 95 percent.

*Id.*

8. TEX. CONST. art. II, § 1 (Vernon 1984) (providing for the division of governmental powers into three separate branches).

9. *Williams v. State*, No. 652-84 (Tex. Crim. App., Jan. 8, 1986) (per curiam) (not yet reported).

10. *Id.*

11. *Williams v. State*, 670 S.W.2d 717, 719 (Tex. App.—San Antonio 1984), *aff'd*, No. 652-84 (Tex. Crim. App., Jan. 8, 1986) (not yet reported). The facts presented in this discussion are taken from the court of appeals decision, which provides more detail than does the court of criminal appeals decision.

12. 670 S.W.2d at 719. After the court entered summary judgment, the bondsman moved for a new trial. The motion was overruled by operation of law pursuant to TEX. R. CIV. P. 329b (c) (Vernon Supp. 1986) (motion for new trial not ruled on within seventy-five days of judgment signing is overruled by operation of law). Thirty days later the judgment became final. 670 S.W.2d at 719. See TEX. R. CIV. P. 329b (c) (Vernon Supp. 1986) (trial court has plenary power to grant new trial or vacate, modify, correct, or reform judgment for 30 days after motion for new trial is overruled).

13. The motion was filed pursuant to TEX. REV. CIV. STAT. ANN. art. 2372p-3, § 13(b) (Vernon Supp. 1986) (granting right to seek remittitur after final judgment entered).

14. *Id.*

15. 670 S.W.2d 719.

16. *Id.* at 727.

17. No. 652-84, slip op. at 13.

18. *Id.* at 7.

forfeiture, the bondsman would be subject to the trial court's discretion as to how much, if any, of the forfeited bond should be remitted.<sup>19</sup> If the bondsman waited until after final judgment, however, he would receive a mandatory ninety-five percent remittitur.<sup>20</sup> The lack of a necessary correspondence between the resources expended by the bondsman and the size of remittitur received by the bondsman is not, however, a constitutional ground for invalidating the statute.<sup>21</sup> Rather, the court of criminal appeals held the statute unconstitutional because it altered and undermined a trial court's final judgment and thereby presented a usurpation by the legislature of a judicial power.<sup>22</sup> The Texas Constitution clearly gives the power over bonds, and thus bond forfeitures, to the district court.<sup>23</sup> The legislature may not infringe upon this power. To permit otherwise would render judicial power "a mockery, subject to the whim of the Legislature. The finality of judgments would not exist and courts would be legislative forums."<sup>24</sup>

As a result of the holding in *Williams*, a trial court will no longer be required to remit at least ninety-five percent of the amount forfeited if the defendant is incarcerated within two years of the judgment *nisi*. In fact, the trial court will only be able to grant a remittitur during the period of time between the judicial declaration of forfeiture and the time the judgment becomes final.<sup>25</sup> Once the judgment becomes final, the trial court loses its plenary power over the judgment and therefore its jurisdiction to grant a remittitur.<sup>26</sup>

## II. DISCOVERY

In 1985 the Fort Worth court of appeals decided a case involving discovery under the controversial child videotape statute.<sup>27</sup> The statute allows the substitution at trial of videotaped testimony of a child who is an alleged victim of sexual misconduct for actual testimony.<sup>28</sup> The case, *Reynolds v.*

19. *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 22.16 (Vernon Pam. Supp. 1986) (bond remittitur subject to court's discretion prior to entry of judgment).

20. No. 652-84, slip op. at 7; see TEX. REV. CIV. STAT. ANN. art. 2372p-3, § 13(b) (Vernon Supp. 1986).

21. See No. 652-84, slip op. at 8 and cases cited therein.

22. *Id.* at 10.

23. The Texas Constitution provides:

The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Court, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

TEX. CONST. art. V, § 1. Furthermore, "the District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats . . ." *Id.* § 8.

24. No. 652-84, slip op. at 12.

25. See TEX. CODE CRIM. PROC. ANN. art. 22.02 (Vernon 1966) (manner of taking a forfeiture); art. 22.12(a), 22.16 (Vernon Pam. Supp. 1986) (defining power of court to proceed in forfeiture action and to remit before judgment).

26. See TEX. R. CIV. P. 329b.

27. TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1986).

28. The statute, TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon Supp. 1986), applies to testimony of children under the age of 13. The testimony must be obtained pursuant to criminal proceedings including, but not limited to, offenses under TEX. PENAL CODE ANN.

*Dickens*,<sup>29</sup> involved a petition by Reynolds to the court of appeals for a writ of mandamus ordering the trial court to vacate its denial of Reynolds's discovery motions. Reynolds, in a pre-trial motion, had requested that he, his attorney, and a psychologist employed as an expert witness be granted full access to the videotape.<sup>30</sup> The trial court denied Reynolds's motion but ruled that defense counsel would be permitted to view the videotape. Reynolds' petitioned for a writ of mandamus on the ground that the trial court abused its discretion by denying the discovery motion. The court of appeals agreed with Reynolds and granted the writ.<sup>31</sup> The Fort Worth court of appeals thus decided in *Reynolds* that a psychologist employed by an accused must be given an opportunity to view a child videotape made in compliance with the child videotape statute.<sup>32</sup> The correctness of this holding is questionable due to the extraordinary procedure employed by Reynolds to get relief. The discovery issue in this case is actually overshadowed by the procedural issue. Historically, the court of criminal appeals has held that a writ of mandamus will not issue to compel a discretionary act.<sup>33</sup> The court of appeals in *Reyn-*

---

§§ 21.01-.11 (sexual offenses); § 43.25 (Vernon Supp. 1986) (sexual performance by a child). TEX. CODE CRIM. PROC. ANN. art. 38.071 § 2(a) (Vernon Supp. 1986) provides:

The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:

- (1) no attorney for either party was present when the statement was made;
- (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
- (3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;
- (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;
- (5) every voice on the recording is identified;
- (6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;
- (7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and
- (8) the child is available to testify.

29. 685 S.W.2d at 479 (Tex. App.—Fort Worth 1985, no pet.).

30. *Id.* at 480. Reynolds' requested:

1. That he be permitted, at his own expense, to make a copy of the videotape, or;
2. That Relator's expert witness, a psychologist, be permitted to view the videotape along with defense counsel, or;
3. That the expert witness be permitted to view the tape simultaneously with the jury view and thereafter be excused from the witness rule [TEX. CODE CRIM. PROC. ANN. art. 36.03 (Vernon 1981)] so that he could testify.

*Id.*

The witness rule referred to in item number three of the above motion is TEX. CODE CRIM. PROC. ANN. art. 36.03 (Vernon 1981), which provides in part:

At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the cause. This is termed placing witnesses under the rule.

*Id.*

31. 685 S.W.2d at 486.

32. 685 S.W.2d at 483-86.

33. See *Texas Department of Corrections v. Dalehite*, 623 S.W.2d 420, 424 (Tex. Crim.

*olds* reached the discovery issue by finding that the trial court abused its discretion.<sup>34</sup> Judge Clinton warned against just such utilization of civil standards in the area of writs of mandamus in criminal cases in his concurring opinion in *Millsap v. Lozano*.<sup>35</sup>

The Fort Worth court of appeals found an abuse of discretion in order to permit discovery. The real crux of the problem is not discovery, but cross-examination and due process. The denial of the defense discovery request and the invocation of the witness rule, together with the defense attorney's interpretation<sup>36</sup> of the applicable law, worked to deny the accused any cross-examination of his accuser. The child videotape provision<sup>37</sup> will continue to spawn opinions such as *Reynolds* until the court of criminal appeals addresses the inherent constitutional dilemma created by the statute.

### III. FORMER JEOPARDY

The court of criminal appeals addressed the issue of double jeopardy in *Franklin v. State*.<sup>38</sup> A jury convicted Franklin of capital murder but the court of criminal appeals reversed the conviction because the prosecution had improperly introduced into evidence Franklin's refusal to testify at a pre-trial hearing.<sup>39</sup> Upon retrial, a jury again convicted Franklin of capital murder. Franklin successfully moved for a new trial on the ground of improper instruction to the jury. Once again a jury convicted Franklin. The instant case involved Franklin's appeal from the new trial on the ground that the double jeopardy clause of the fifth amendment to the United States Constitution<sup>40</sup> barred his retrial.<sup>41</sup>

The court of criminal appeals rejected Franklin's claim on two grounds. First, under article 40.08 of the Texas Code of Criminal Procedure, the effect of a new trial is to place the cause in the same position as it was in before any trial took place.<sup>42</sup> Thus jeopardy does not attach.<sup>43</sup> Second, double jeop-

---

App. 1981); *Orduzey v. Bean*, 579 S.W.2d 911, 913 (Tex. Crim. App. 1979); *Bradley v. Miller*, 458 S.W.2d 673, 675 (Tex. Crim. App. 1970).

34. 685 S.W.2d at 485-86.

35. 692 S.W.2d 470 (Tex. Crim. App. 1985) (Clinton, J., concurring). "While it is axiomatic that mandamus will not issue to compel a discretionary act as distinguished from a ministerial act, but may issue to compel entry of a judgment, the writ must not specify the kind or character of judgment." *Id.* at 485. Judge Clinton complains that the "[p]rotections afforded in the criminal law should not be abridged in the name of comity." *Id.*

36. Defense counsel commented "although the statute provides that we can call the child as a witness, the Court is also aware that you cannot impeach your own witness once you call them." 685 S.W.2d at 482. The child videotape statute does provide that "if the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child."

37. TEX. CODE CRIM. PROC. ANN. art. 38.071, § 2(b) (Vernon Supp. 1986). The prosecutor is unlikely, however, to call the child and give the defense a chance to cross when a videotape is available.

38. 693 S.W.2d 420 (Tex. Crim. App. 1985) (en banc).

39. *Franklin v. State*, 606 S.W.2d 818 (Tex. Crim. App. 1979).

40. U.S. CONST. amend. V.

41. 693 S.W.2d at 432.

42. *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 40.08 (Vernon 1979).

43. *Id.* Note that if the jury had convicted Franklin of the lesser included offense of murder and a new trial had been granted, the verdict upon the first trial would constitute an

ardy does not attach when, as here, a case is reversed because of trial error, such as improper jury instruction, as opposed to a reversal based on evidentiary insufficiency.<sup>44</sup>

#### IV. GRAND JURY

The Fifth Circuit decided an interesting constitutional question during the Survey period regarding the power of the grand jury to compel testimony from a recalcitrant witness. In *Port v. Heard*<sup>45</sup> the Fifth Circuit held that the people's right to hear a witness' testimony about a murder outweighed the witness' first amendment claim that his religion forbade him from giving testimony against his son.<sup>46</sup> David Port, the son of Bernard Port and stepson of Odette Port, was suspected of murder of a Houston mail carrier. Bernard and Odette refused to testify before the Harris county grand jury asserting, among other grounds, that their sincere adherence to the tenants of the Jewish religion prohibited them from testifying against David. The Ports invoked not only the general exhortation to honor one's child but the Talmudic proscription that forbids a parent from testifying against his child in a secular court.

The court applied a balancing test to the Port's first amendment claim and held that the state's compelling interest in investigating crime outweighed the parents' constitutional right to have their religious convictions protected by the court.<sup>47</sup> The court relied on the United States Supreme Court decision in *Branzburg v. Hayes*<sup>48</sup> which held that the public interest in securing complete grand jury investigation of crimes outweighed the free speech claims of journalists who wished to conceal the identities of their informants.<sup>49</sup>

The Texas Court of Criminal appeals addressed the issue of minority representation on grand juries in *Session v. State*.<sup>50</sup> In his appeal from a capital murder conviction, Session contended that the trial court had committed reversible error by refusing to allow the admission of historical statistical evidence regarding grand jury composition. The court of criminal appeals agreed with the defendant that statistical evidence of past under-representation of blacks was relevant to a showing of intentional discrimination in the selection of the grand jury that indicted him.<sup>51</sup> The effect of a showing of statistical under-representation is to shift the burden to the state to demon-

---

acquittal of the higher offense of capital murder. TEX. CODE CRIM. PROC. ANN. art. 37.14 (Vernon 1981). See *Ohio v. Johnson*, 104 S. Ct. 2536, 2541-42, 81 L. Ed. 2d 425, 434-35 (1984); *Whitehead v. State*, 286 S.W.2d 947, 948 (Tex. Crim. App. 1956).

44. 693 S.W.2d at 432 (citing *Burks v. United States*, 437 U.S. 1, 15 (1978); *Ex parte Duran*, 581 S.W.2d 683, 684 (Tex. Crim. App. 1979)).

45. 764 F.2d 423 (5th Cir. 1985).

46. *Id.* at 432.

47. *Id.* at 432-33.

48. 408 U.S. 665 (1972).

49. *Id.* at 690, 705-06.

50. 676 S.W.2d 364 (Tex. Crim. App. 1984) (en banc), *cert. denied*, 105 S. Ct. 1876, 85 L. Ed. 2d 169 (1985).

51. *Id.* at 367.

strate the absence of intentional exclusion of a minority.<sup>52</sup> Although the court agreed with *Session* that the evidence should have been admitted at trial, the court refused to reverse the conviction because the state had met its burden of rebutting any inference of intentional misrepresentation.<sup>53</sup> The state met this burden by calling to testify the commissioners who chose the grand jury in question, as well as commissioners who had recently chosen grand juries.<sup>54</sup> Each of the commissioners indicated that they based their selections on the quality and character of potential jurors.

The commissioners also testified that they had in the past chosen grand juries with as many as four blacks thirty-three percent of the total number selected in a county in which the black population was approximately twenty-five percent. Of the four commissioners responsible for having chosen the grand jury at issue in *Session*, one was black; other black commissioners were also called to testify as to the criteria that they used in selecting grand jurors. Each commissioner testified that he or she had been instructed by the court not to allow sex, national origin, race, religion, or color to affect the selection process and to try to assemble a representative cross section of the people living in the country. The court of criminal appeals found the testimony of the commissioners that they followed the instructions, combined with their testimony on the factors considered in the selection process, sufficient to rebut the inference of discrimination arising from past statistical under-representation of blacks on the grand jury.<sup>55</sup>

The Tyler court of appeals considered an allegation of improper influence on grand jurors in *Whittington v. State*.<sup>56</sup> The defendant in *Whittington* pleaded guilty to delivery of controlled substances. He then appealed, alleging among other grounds of error that the sheriff had unduly biased grand jurors prior to the time that the grand jury considered the charges against him. The sheriff had met with the grand jurors on an informal basis<sup>57</sup> and urged them to help "clean up the dope problem."<sup>58</sup> The sheriff did not mention *Whittington* by name to the grand jurors nor did he discuss the details of *Whittington's* alleged offense in front of them. The court refused to find that the sheriff's general comments were sufficient to warrant a finding that the indictment was a result of grand juror bias.<sup>59</sup>

---

52. *Id.* (citing *Castenada v. Partida*, 430 U.S. 482, 494 (1977)).

53. 676 S.W.2d at 367-68.

54. *Id.*

55. *Id.* at 368.

56. 680 S.W.2d 505 (Tex. App.—Tyler 1984, pet. ref'd).

57. *Id.* at 510. The meeting occurred after the grand jurors had been discharged by the trial judge and prior to the time the grand jurors were ordered to reassemble to consider additional cases. "Hence the meeting was nothing more than a free assembly of private citizens wholly without any official power or authority to investigate or accuse any person or persons suspected of committing criminal offenses." *Id.* at 511.

58. *Id.* at 510.

59. *Id.* at 512.



## V. SEVERANCE

*United States v. Davis*<sup>60</sup> involved a defendant who was tried and convicted on several counts of obstruction of justice and fraud. On appeal, Davis asserted that the trial court erred in denying his motion to sever the obstruction of justice counts from the fraud counts. Davis contended that this denial constituted reversible error because his defense counsel would have testified as a material witness to the obstruction counts had those counts been severed. The defendant argued that the trial court's exclusion of his defense counsel's testimony by refusing to sever the counts violated Federal Rule of Criminal Procedure 14.<sup>61</sup> The Fifth Circuit disagreed.<sup>62</sup> Rule 14 leaves the question of severance or other relief to the discretion of the trial court.<sup>63</sup> Abuse of discretion is the standard of review for a district court's denial of a rule 14 severance motion.<sup>64</sup> The Fifth Circuit refused to find that the district court had abused its discretion. The court held that Davis had failed to meet his burden of demonstrating that the missing testimony was essential and that the absence of such testimony resulted in substantial prejudice.<sup>65</sup>

## VI. SPEEDY TRIAL

A. *Constitutionality of the Speedy Trial Act*

The continuing debate as to the constitutionality of Texas' Speedy Trial Act<sup>66</sup> appears to be no closer to resolution this year than at the time of last year's Survey.<sup>67</sup> The issue under debate is whether the caption of the Act is sufficiently clear and precise to satisfy Texas' constitutional requirement that titles provide fair notice of an act's contents.<sup>68</sup> The court of criminal appeals has not addressed the issue since the 1984 case of *Noel v. State*.<sup>69</sup> In *Noel* the court refused to rule on the caption issue because the State failed to raise it

60. 752 F.2d 963 (5th Cir. 1985).

61. FED. R. CRIM. P. 14 provides: "If it appears that a defendant . . . is prejudiced by a joinder of offenses . . . in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts . . . or provide whatever other relief justice requires." *Id.*

62. 752 F.2d 963, 972-73 (5th Cir. 1985).

63. See FED. R. CIV. P. 14.

64. 752 F.2d at 974; see *United States v. Forrest*, 623 F.2d 1107, 1115 (5th Cir. 1980); *United States v. Cuesta*, 597 F.2d 903, 919 (5th Cir. 1979).

65. 752 F.2d at 972-73; see *United States v. Forrest*, 623 F.2d 1107, 1115 (5th Cir. 1980); *Alvarez v. Wainwright*, 607 F.2d 683, 686 (5th Cir. 1979) (movant must articulate and prove prejudice); *Baker v. United States*, 401 F.2d 958, 977 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970) (movant must show nature of testimony that would be given if severance is granted).

66. TEX. CODE CRIM. PROC. ANN. §§ 32A.01-.02 (Vernon Pam. Supp. 1986).

67. See Kinkeade, *Criminal Procedure: Pretrial, Annual Survey of Texas Law*, 39 Sw. L.J. 483, 485-86 (1985) [hereinafter cited as Kinkeade, 1985 *Annual Survey*].

68. TEX. CONST. art. III, § 35 (Vernon 1984) provides that "if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void . . . as to so much thereof, as shall not be so expressed." See *Ex parte Crisp*, 661 S.W.2d 944, 948 (Tex. Crim. App. 1983) (holding an act unconstitutional for failing to provide notice in its title).

69. No. 827-83 (Tex. Crim. App., March 14, 1984, *reh'g granted*) (not yet reported).

at the trial court level and failed to assign the issue as error on appeal.<sup>70</sup> The basis of the court's opinion was that the Texas constitution does not give the state a right to due process and as such no fundamental error can exist for the benefit of the state.<sup>71</sup> The court did, however, grant the state's motion for rehearing and has not yet entered an opinion.

Three lower appellate courts have recently addressed the caption issue. In *Beddoe v. State*<sup>72</sup> a burglary defendant appealed his conviction on the ground that his trial occurred in violation of the Speedy Trial Act.<sup>73</sup> The state contended that Beddoe's trial did not constitute a denial of a right because the Speedy Trial Act is unconstitutional for failure of its caption to provide fair notice. The Houston fourteenth district court of appeals disagreed with the state's argument and held that the caption was sufficiently clear to put readers on notice of the purposes of the Act.<sup>74</sup> During 1985 the Houston first district court of appeals<sup>75</sup> and the Fort Worth court of appeals<sup>76</sup> reached the same conclusion as the *Beddoe* court with respect to the constitutionality of the Act.

### B. *The Effect of the Accused's Presence on Computation of Time*

The Speedy Trial Act requires that the state must be prepared to try a felony case within 120 days of the date on which a criminal action is commenced against the accused.<sup>77</sup> This requirement has generated controversy over the date that triggers the Act<sup>78</sup> and over what circumstances constitute reasonable delays excludable from the 120 day computation.<sup>79</sup> During the Survey period the court of criminal appeals twice addressed the issue of whether the state's failure to have the accused present<sup>80</sup> was excusable delay and therefore excludable from the 120 day time limitation.

70. *Id.*, slip op. at 2.

71. *Id.*; See Kinkeade, 1985 Annual Survey, *supra* note 67, at 486.

72. 681 S.W.2d 14 (Tex. App.—Houston [14th Dist.] 1984, pet. granted).

73. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 1(1) (Vernon Pam. Supp. 1986). The state was not ready for trial within the 120 days specified in the Act. 681 S.W.2d at 115.

74. 681 S.W.2d at 116. The court also held that the state had not diligently pursued the defendant and had thus violated the Speedy Trial Act. The defendant's conviction was reversed for failure of the state timely to prosecute the case. *Id.*

75. See *Morgan v. State*, 696 S.W.2d 465, 467 (Tex. App.—Houston [1st Dist.] 1985, no pet.). The defendant appealed from the trial court's denial of his motion to dismiss for lack of speedy trial. As in *Beddoe*, the state argued that the Speedy Trial Act was unconstitutional because its caption failed to give fair notice of the Act's contents. The court upheld the constitutionality of the Act and reversed *Morgan's* conviction. *Id.* at 467.

76. See *Wright v. State*, 696 S.W.2d 288, 296 (Tex. App.—Fort Worth, 1985, no pet.). The arguments and holding in this case are virtually identical to those in *Beddoe* and *Morgan*.

77. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 1(1) (Vernon Pam. Supp. 1986).

78. *Id.* § 2; see *infra* notes 91-99 and accompanying text; Kinkeade, 1985 Annual Survey, *supra* note 72, at 483-85.

79. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 4 (Vernon Pam. Supp. 1986); see Kinkeade, 1985 Annual Survey, *supra* note 72, at 483-85.

80. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 4 (Vernon Pam. Supp. 1986) provides in part:

In computing the time by which the state must be ready for trial, the following periods shall be excluded:

- (1) a reasonable period of delay resulting from other proceedings involving the defendant, including but not limited to proceedings for the determination of

The court of criminal appeals held in *Ex parte Powell*<sup>81</sup> that placing a detainer on a federal prisoner pursuant to the Interstate Agreement on Detainers Act,<sup>82</sup> coupled with the state's continuous attempts to secure the defendant's presence through numerous telephone conversations, constituted due diligence.<sup>83</sup> Since the state was diligent in attempting to obtain the defendant, the time that the defendant spent in the federal institution was excludable for the purpose of computing when the state must be ready for trial.<sup>84</sup> In *Ex parte Hilliard*,<sup>85</sup> however, the court held that the state's failure to attempt to secure the presence of a defendant from the Texas Department of Corrections, where he went voluntarily to attend a hearing on an alleged parole violation, was not excludable as a reasonable delay for other proceedings under the Speedy Trial Act.<sup>86</sup>

*C. Commencement of an Action Against an Accused for Purposes of the Speedy Trial Act*

The Speedy Trial Act deadline by which the state must be prepared for trial begins to run once a criminal action is commenced against the accused.<sup>87</sup> The Dallas court of appeals held in *Ellcey v. State*<sup>88</sup> that a criminal action does not necessarily commence upon arrest.<sup>89</sup> Ellcey's arrest and brief detention did not trigger the Speedy Trial Act because his initial arrest was for a different offense than the one for which he was later indicted.<sup>90</sup>

The Dallas court also decided *Dean v. State*<sup>91</sup> during the Survey period. The court held that the time between a no-bill after a defendant's arrest and a true-bill of indictment later for the same offense falls within the exceptional circumstance exclusion from the computation of time under the Speedy Trial

---

competence to stand trial, hearing on pretrial motions, appeals, and trials of other charges;

.....  
 (4) a period of delay resulting from the absence of the defendant because his location is unknown and;

(A) he is attempting to avoid apprehension or prosecution; or

(B) the state has been unable to determine his location by due diligence;

(5) a period of delay resulting from the unavailability of the defendant whose location is known to the state but whose presence cannot be obtained by due diligence or because he resists being returned to the state for trial;

.....  
 (10) any other reasonable period of delay that is justified by exceptional circumstances.

*Id.*

81. 699 S.W.2d 841 (Tex. Crim. App. 1985).

82. TEX. CODE CRIM. PROC. ANN. art. 51.14 (Vernon 1979).

83. 699 S.W.2d at 842-43.

84. *Id.*

85. 687 S.W.2d 316 (Tex. Crim. App. 1985) (en banc).

86. *Id.* at 320; TEX. CODE CRIM. PROC. ANN. art. 32A.02 § 4(1) (Vernon Pam. Supp. 1986) (granting reasonable delay exclusion for certain other proceedings).

87. TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 2(a) (Vernon Pam. Supp. 1986).

88. 694 S.W.2d 201 (Tex. App.—Dallas 1985, no pet.).

89. *Id.* at 202.

90. *Id.*

91. 697 S.W.2d 683 (Tex. App.—Dallas 1985, no pet.).

Act.<sup>92</sup> The time commenced for purposes of the Speedy Trial Act when the defendant was arrested; the time was suspended when the grand jury returned a no-bill and the court released the defendant without bond.<sup>93</sup> When the grand jury returned a true-bill several months later, the time began to run again.<sup>94</sup> The intervening time between the no-bill and the true-bill tolled the running of the Speedy Trial Act.<sup>95</sup>

#### *D. The Obligation of the Judiciary Under the Speedy Trial Act*

The Speedy Trial Act places a responsibility on the judiciary as well as on the prosecutor to ensure an expeditious trial for the accused.<sup>96</sup> The court of criminal appeals recently reversed and dismissed *Hull v. State* due to a nineteen month trial delay.<sup>97</sup> The delay resulted from the trial judge's arbitrary refusal to set the case for trial despite the accused's repeated attempts to have his case docketed. In reaching its conclusion that the delay was grounds for dismissal, the court of criminal appeals used the balancing approach formulated by the United States Supreme Court in *Barker v. Wingo*.<sup>98</sup> In *Barker* the Court identified four factors that should be weighed by courts in balancing the defendant's right to a speedy trial against the state's interest in prosecuting the case.<sup>99</sup> Courts should consider how long the trial was delayed, why it was delayed, whether the defendant actively sought commencement of the trial, and the extent to which the delay prejudiced the defendant.<sup>100</sup> The Texas Court of Criminal Appeals held that the lengthy and unjustified delay prejudiced Hull to such an extent that the delay constituted a denial of his right to a speedy trial.<sup>101</sup>

### VII. VENUE

During the Survey period the court of criminal appeals considered two cases involving the sufficiency of evidence to prove venue. Neither of the decisions, however, altered the preponderance of the evidence standard of proof necessary to prove venue in criminal cases.<sup>102</sup> In *Moore v. State*<sup>103</sup> the court of criminal appeals rejected the defendant's challenge to the state's

---

92. *Id.* at 685; see TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 4(10) which allows exclusion of time when the period of delay is reasonable and justified by exceptional circumstances. See *supra* note 80 for the full text of the exclusion.

93. 697 S.W.2d at 684.

94. *Id.* at 684-85.

95. *Id.*

96. TEX. CODE CRIM. PROC. ANN. art. 32A.02 (Vernon Pam. Supp. 1986).

97. 699 S.W.2d 220, 224 (Tex. Crim. App. 1985).

98. 407 U.S. 514, 530-34 (1972).

99. *Id.* at 530.

100. *Id.*

101. 699 S.W.2d at 224.

102. See TEX. CODE CRIM. PROC. ANN. art. 13.17 (Vernon 1977) (to sustain allegation of venue, party need only prove by preponderance that facts in case support venue in county of prosecution); *Black v. State*, 645 S.W.2d 789, 790 (Tex. Crim. App. 1983) (en banc) (state must prove venue when defendant places it in question by pleading not guilty).

103. 694 S.W.2d 528 (Tex. Crim. App. 1985).

proof of venue.<sup>104</sup> The court held that testimony by two of the three eyewitnesses as to where the offense occurred was more than sufficient to prove venue.<sup>105</sup> In *Holdridge v. State*<sup>106</sup> the only evidence in the record as to venue was testimony that the defendant committed the offense outside the county in which the case was tried.<sup>107</sup> The court of criminal appeals interpreted article 44.24(a) of the Code of Criminal Procedure<sup>108</sup> to require that the sufficiency of venue proof be challenged in the trial court.<sup>109</sup> Since the defendant failed to object to or disprove venue at trial, the venue was presumed to be sufficiently proven.<sup>110</sup>

In *Ware v. State*<sup>111</sup> the Eastland court of appeals had an opportunity to decide a novel venue question.<sup>112</sup> The trial court convicted the defendant of retaliation based on a cross-county telephone call.<sup>113</sup> The defendant made the phone call from a telephone located in Tarrant County to his girlfriend in Nolan County. The court decided that the offense was committed partially in each county and thus venue was proper in either county.<sup>114</sup>

The court of criminal appeals decided three cases of interest concerning change of venue during the Survey period. *Phillips v. State*<sup>115</sup> raised the issue whether a large quantity of publicity surrounding a trial would constitute sufficient grounds for requiring a change of venue. To support his venue motion, the defendant introduced several dozen articles from local newspapers concerning the case. Several witnesses also testified that they did not believe that the defendant could receive a fair trial in Harris County. The state presented several witnesses who had reached the opposite conclusion concerning the defendant's chances for receiving a fair trial. The court of criminal appeals examined the newspaper articles and found them insufficient to support a change of venue.<sup>116</sup> In order to provide grounds for requiring a change of venue, publicity concerning a case must be inflammatory and prejudicial; fair and accurate articles designed to inform the public will not support a change of venue.<sup>117</sup>

---

104. *Id.* at 530.

105. *Id.*

106. No. 0181-85 (Tex. Crim. App., Jan. 8, 1986) (not yet reported).

107. *Id.* at 768.

108. TEX. CODE CRIM. PROC. ANN. art. 44.24(a) (Vernon Supp. 1986) provides for a presumption that venue was proven unless it was made an issue at the trial court level or unless the impropriety of venue is otherwise demonstrated in the record.

109. No. 0181-85, slip op. at 5; TEX. CODE CRIM. PROC. ANN. art. 13.04 (Vernon Supp. 1986) (if an offense is committed within 400 yards of a county's boundary, the offense may be prosecuted in that county).

110. No. 0181-85, slip. op. at 9.

111. 697 S.W.2d 72, 73 (Tex. App.—Eastland 1985, no pet.).

112. Finding no Texas cases directly on point, the court relied in part on the Fifth Circuit case of *United States v. Strickland*, 493 F.2d 187, 187 (5th Cir. 1974), *cert. dismissed*, 419 U.S. 801 (1974).

113. TEX. PENAL CODE ANN. § 36.06 (Vernon Supp. 1986).

114. 697 S.W.2d at 73.

115. 701 S.W.2d 875 (Tex. Crim. App. 1985).

116. *Id.* at 880.

117. *Id.*; see *Bell v. State*, 582 S.W.2d 800, 810-11 (Tex. Crim. App. 1979) (en banc); TEX. CODE CRIM. PROC. ANN. art. 31.03(a)(1) (Vernon Pam. Supp. 1986); see also *Whittington v. State*, 680 S.W.2d 505, 508-09 (Tex. App.—Tyler 1984, pet. ref'd) (trial court did not abuse its

In *Bird v. State*<sup>118</sup> the court of criminal appeals considered the circumstances under which a defendant is deemed to have waived his right to the automatic granting of a change of venue motion that is unopposed by the state. The court had previously interpreted the state's venue statute<sup>119</sup> to mean that courts must, as a matter of law, grant a proper motion for change of venue unless the state files an affidavit in opposition, the defendant waives the requirement of such an affidavit, or the court holds a hearing on the motion.<sup>120</sup> The court found that the trial court had not deprived Bird of his right to a change of venue.<sup>121</sup> Bird's motion for the change was incomplete and thus provided no basis on which the state could file a controverting affidavit.<sup>122</sup> In addition, Bird's defense counsel waived his objection to the lack of affidavits when he stated: "I don't have any objection to the court considering the Motion for Change of Venue as though a controverting affidavit has been filed by the District Attorney's Office."<sup>123</sup> The court deemed this sufficient for the defendant to waive his per se right to a change of venue when no controverting affidavit is filed.<sup>124</sup>

The defendant in *Franklin v. State*<sup>125</sup> was convicted in Harris County of capital murder. The trial court granted a new trial and transferred the case to Bexar County. The defendant moved for change of venue and the trial was transferred from Bexar to Cameron County. On appeal, the defendant contended that venue in Cameron County was improper because the trial court failed to follow the requirements of article 31.01 of the Code of Criminal Procedure<sup>126</sup> when the case was originally transferred from Harris to Bexar County.<sup>127</sup> The court of criminal appeals held that the defendant waived any error in the transfer by failing to object at the time.<sup>128</sup> The defendant also waived any objection to the original transfer by consenting to the transfer from Bexar to Cameron County.<sup>129</sup> Venue was thus properly laid in Cameron County.<sup>130</sup>

---

discretion by refusing to grant defendant's motion for change of venue when bulk of the publicity was informative rather than inflammatory and occurred several months before the trial).

118. 692 S.W.2d 65 (Tex. Crim. App. 1985) (en banc).

119. TEX. CODE CRIM. PROC. ANN. art. 31.04 (Vernon 1966).

120. 692 S.W.2d at 68 (citing *McManus v. State*, 591 S.W.2d 505, 516 (Tex. Crim. App. 1979)).

121. 692 S.W.2d at 68.

122. *Id.*

123. *Id.*

124. *Id.*

125. 693 S.W.2d 420 (Tex. Crim. App. 1985) (en banc).

126. TEX. CODE CRIM. PROC. ANN. art. 31.01 (Vernon 1966).

127. 693 S.W.2d at 431.

128. *Id.*

129. *Id.* at 432; see TEX. CODE CRIM. PROC. ANN. art. 13.20 (Vernon 1977) (providing that venue may be acquired by consent).

130. 693 S.W.2d at 432; see *Ex parte Watson*, 601 S.W.2d 350, 352-53 (Tex. Crim. App. 1980) (trial court can have jurisdiction over the defendant even though venue is improper).

