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CRIMINAL LAW

by

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I. JUDICIAL DECISIONS

A. Texas Penal Code—General Provisions

1. Burden of Proof in Competency Hearings

THE defendant in *Manning v. State*[1] was charged with and convicted of attempted murder and sentenced to life imprisonment. Previously, however, a Fort Worth court had adjudged the defendant incompetent to stand trial and ordered the defendant to be sent to Rusk State Hospital. At a pretrial competency hearing the defense relied on the unvacated prior judgment of incompetency to support the theory that the defendant was incompetent to stand trial.[2] The trial court instructed the jury that the state bore the burden of proof of competency and must satisfy that burden by proving the defendant's competency by a preponderance of the evidence.[3] The court of criminal appeals reversed the conviction, finding the instruction to be error so egregious that it deprived the defendant of a fair and impartial trial.[4] Relying on a long line of cases,[5] the court noted:

> The rule in Texas is also well settled that wherever insanity has been shown to exist, as by a prior judgment of the court, the presumption is that the insanity continues and the burden is upon the State to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.[6]

The court held that the unvacated prior adjudication of incompetency was sufficient to fulfill the defendant's burden of showing by a preponderance of the evidence that he was insane, thereby shifting to the state the more onerous burden of proof beyond a reasonable doubt.[7]

2. Voluntary Conduct

In *Joiner v. State*[8] the defendant was convicted of murder. The issue

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1. 730 S.W.2d 744 (Tex. Crim. App. 1987).
2. *Id.* at 745.
3. *Id.*
4. *Id.* at 750.
5. *Id.* at 746.
6. *Id.* (emphasis in original).
7. *Id.* at 749.
8. 727 S.W.2d 534 (Tex. Crim. App. 1987).

before the court of criminal appeals was whether the trial court erred by failing to submit a requested charge on whether the defendant's conduct was voluntary. Evidence reflected that the defendant, Joiner, and the deceased, Edith Smith, became involved in an altercation at a nightclub in San Antonio. During the altercation, Joiner pulled out a gun and shot Smith. Immediately after the shot, Joiner stated "Oh, my God, I done killed her," and "[i]t was an accident."[9]

The defendant argued on appeal that the statement "[i]t was an accident" raised an issue as to whether or not the defendant's conduct was voluntary. The appeals court disagreed, holding that "it" as used by the defendant was ambiguous.[10] In addition, relying on *George v. State*[11] the court found voluntary conduct in the defendant's carrying of a concealed gun, drawing the gun, pointing it at the deceased from a distance of two or three inches, and shooting her in the face.[12] On that basis the court held that the evidence did not raise the issue of voluntariness.[13]

The Corpus Christi court of appeals in *Gaona v. State*[14] also rejected an affirmative jury charge on involuntary conduct after finding sufficient evidence of surrounding voluntary conduct. In *Gaona* the defendant, Gaona, entered into a playful wrestling match with a friend and neighbor, Rodulfo. The wrestling match became too rough for Gaona, so he went into the house, got a .22 caliber rifle, went back outside, and killed Rodulfo. At trial Gaona testified that he had not intended to kill Rodulfo, in fact, he had not even intended to pull the trigger. According to Gaona, when the gun went off he was pointing it at the ground, not at Rodulfo. He also stated that the gun "just went off . . . I must have slipped or something."[15]

Gaona was charged with murder, involuntary manslaughter, and criminally negligent homicide. The jury convicted Gaona of involuntary manslaughter. Gaona, however, attempted to raise the "accidental death" theory by requesting a jury charge on voluntary conduct, or lack thereof.[16] The court held that Gaona's testimony was insufficient to raise the voluntariness issue,[17] stating that "I must have slipped" was "more in the nature of speculation rather than concrete evidence that an independent precipitating event was the real culprit,"[18] and that the voluntary acts of getting the gun, loading it, and holding his finger on the trigger were sufficient predicate acts to satisfy the requirements for voluntary conduct enumerated in *George v.*

9. *Id.* at 535.
10. *Id.* at 537.
11. 681 S.W.2d 43, 45-46 (Tex. Crim. App. 1984).
12. *Joiner*, 727 S.W.2d at 537.
13. *Id.*
14. 733 S.W.2d 611 (Tex. App.—Corpus Christi 1987, no pet.).
15. *Id.* at 616.
16. *Id.* at 615.
17. Note that both *Joiner*, and *Gaona* speak in terms of the evidence being "insufficient" to raise a jury issue. The standard for supporting a charge to the jury, however, should be a "no evidence" test. Query as to whether the proper standard was actually used in these cases.
18. 733 S.W.2d at 617.

State.[19]

B. Defenses—Duty to Retreat

The case of *Hughes v. State*[20] involved the court in an in-depth analysis of the duty to retreat under the self-defense[21] and defense of a third party[22] provisions of the Texas Penal Code. The defendant was indicted for murder and convicted of the lesser offense of voluntary manslaughter. The shooting was the result of a lovers' quarrel, and apparently began with an argument between John Hughes and the victim, Rodney Johnson, over Johnson's ex-girlfriend, Joan Goodwin. A few days after that quarrel, Hughes and Goodwin passed Johnson on the highway. Johnson turned around and began following them. Hughes and Goodwin pulled over to the side of the road and got out of the car to talk to Johnson. Goodwin testified that while she was talking to Johnson, he grabbed for her, pulled a gun, and threatened to kill both Hughes and Goodwin. Hughes, however, also had a gun and promptly shot and killed Johnson.

The trial court instructed the jury on the law of self-defense and the law of defense of a third party.[23] The self-defense charge was not disputed. As to the charge of defense of a third party, the trial court imposed a duty to retreat if a reasonable person in the defendant's situation would have done so.[24] This reference was in both the law and the application of law to the facts of the case. The court of criminal appeals held that the instruction was erroneous, but nonetheless found that there is a duty to retreat when acting in defense of a third person.[25] The court, however, determined that, in this context, it is not the perception of the actor alone that is significant. Rather, the actor must make an assessment, from his standpoint, that a reasonable person in the position of the third person would not have retreated prior to his lawfully acting with deadly force on the third person's behalf.[26]

The court was far from unanimous in its analysis. Judge Teague filed a concurring opinion in which he essentially stated that it is ridiculous to require an actor to make an independent assessment of whether or not the third person should or would retreat before taking action.[27] Judge Teague advocated the position that the law of retreat was not intended to pervade section 9.33.[28] Rather, section 9.33 was intended to encourage and provide protection for good samaritans.[29] Judge Miller, joined by Judge W.C. Davis,

19. *Id.*; *supra* note 11 and accompanying text.
20. 719 S.W.2d 560 (Tex. Crim. App. 1986).
21. TEX. PENAL CODE ANN. § 9.32 (Vernon Supp. 1988).
22. *Id.* § 9.33 (Vernon 1974).
23. *Hughes*, 719 S.W.2d at 562.
24. *Id.*
25. *Id.* at 564-65.
26. *Id.* at 565.
27. *Id.* at 568-69.
28. *Id.* at 568.
29. *Id.*; *see* TEX. PENAL CODE ANN. § 9.32 (Vernon Supp. 1988). Basically, this was the position taken by the Tyler court of appeals in reversing Hughes's conviction at that level. *See* Dobbs v. State, 51 Tex. Crim. 113, 100 S.W. 946, 949 (1907); Hughes v. State, 721 S.W.2d 356,

dissented, noting a conflict in the statutes regarding the retreat provision.[30] Judge Miller would resolve this conflict by applying the retreat requirement of section 9.32 to the provisions of section 9.33.[31]

Although stated in different terms, the four in the minority were arguably saying the same thing: the purpose in having a defense of defense of a third party is to encourage citizens to get involved in potentially violent situations for the purpose of protecting innocent people.[32] This purpose is undermined by requiring the good samaritan to put himself in the shoes of the third party to decide whether he should retreat or not. By doing so, if he makes the wrong judgment, the good samaritan is then punished for his chivalrous act. The diverging arguments of the court indicate that it is likely to revisit this area.

Bennett v. State[33] involved the propriety of charging the jury as to defense of a third person on behalf of the victim. The defendant, Bennett, was upset because of his daughter's relationship with one Mark Rattan, believing Rattan had spent the night with his daughter. Bennett confronted Rattan in the daughter's apartment, assaulted him, and ordered him to leave. The next day, Bennett took his .357 magnum handgun and went to Rattan's house, ostensibly to scare Rattan away from his daughter. Bennett and Rattan sat in Bennett's truck so they could talk. Rattan's father and his father's friend, Tom DeRushia, who knew of the altercation of the previous day, both got guns and approached Bennett's truck. DeRushia reached in and grabbed Bennett's shoulder, turning him around. Bennett saw the gun and fired at DeRushia, killing him.

Both parties agreed that the trial court gave a proper jury instruction on the law of self-defense. However, the trial court also gave an instruction on defense of a third person and in the application of law to facts essentially instructed that "if the jury believed that DeRushia was justified in using deadly force against [Bennett] in defense of Rattan, and that [Bennett] *himself* reasonably believed that DeRushia was so justified, it should find against [Bennett] in his claim of self-defense."[34] Before the court of criminal appeals, the defense argued that this instruction improperly restricted Bennett's right to self-defense because it hinged Bennett's right to self-defense to

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359 (Tex. App.—Tyler 1985, pet. granted)(citing Crawford v. State, 629 S.W.2d 165, 168 (Tex. App.—Waco 1982, no pet.).

30. *Hughes*, 719 S.W.2d at 571.

31. *Id.* at 571-72. As Judge Miller stated in his solution:

> [W]here the circumstances raise the possibility of use of deadly force in defense of a third party, and if the actor may retreat *and still preserve the safety of the third party he or she seeks to protect*, then the actor must retreat and not exercise deadly force against the attacker.

Id. (emphasis in original).

32. In his concurrence, Judge Teague stated: "Section 9.33 . . . was clearly intended to 'encourage and to afford protection to "good samaritans" by removing their legal doubts, which might impede crime prevention and deter those who witness violent assaults upon persons, but who otherwise would aid an apparent victim of criminal violence.' " *Id.* at 586 (citing Alexander v. State, 52 Md. App. 171, 447 A.2d 880, 884 (Md. Ct. Spec. App. 1982)).

33. 726 S.W.2d 32 (Tex. Crim. App. 1986).

34. *Id.* at 35 (emphasis in original).

DeRushia's, rather than Bennett's belief and the reasonableness of his conduct.[35] The state argued that the charge of defense of a third person was a "logical extension of the 'provoking the difficulty' limitation on self-defense" under section 9.31(b)(4) of the Texas Penal Code.[36]

Although the court rejected the state's theory, it nonetheless held that the charge was proper. In doing so, the court held that "[w]here the evidence raises some question whether the deceased's conduct was justified, . . . the deceased becomes 'a person whose criminal responsibility is in issue' in the case."[37] Consequently, DeRushia's conduct was at issue in the trial. Because the court's instruction allowed the jury to reject Bennett's self-defense theory only if it believed DeRushia's actions were lawful and if it found that Bennett himself, at the moment he acted, also reasonably believed DeRushia acted lawfully, the right to self-defense was not impaired.[38]

The defendant in *Dubose v. State*[39] was convicted of unauthorized use of a motor vehicle pursuant to section 31.07 of the Texas Penal Code.[40] The vehicle in question had been rented from Avis on July 21, 1985. The car was returned on July 26, 1985, and left outside the Avis office with the keys and rental contract over the visor. Dubose was arrested on August 13th for going the wrong way on a one-way street, and the arresting officer subsequently determined that the car was stolen.

At trial, the defendant testified that he had borrowed the car from someone else, "Fast Eddie," and that he believed that Eddie had rented the car from Avis because he had seen some papers with "Avis" printed on them. The defendant further testified that Eddie had given him the keys to the car and given him permission to use it. The trial court refused the defendant's requested special instruction as to mistake of fact. The court held that Dubose's testimony was sufficient to raise the defense of mistake of fact because it was evidence that he was allowed to use the car by one who was apparently authorized to give consent.[41]

C. *Specific Offenses*

1. *Involuntary Manslaughter*

In the involuntary manslaughter case of *William v. State*[42] the issue

35. *Id.*

36. *Id.*; TEX. PENAL CODE ANN. § 9.31(b)(4) (Vernon 1974).

37. 726 S.W.2d at 36.

38. *Id.* at 38. The court also noted that the instruction, although proper, was not a model of clarity. If the defendant had objected to the charge as to third party defense on grounds of misleading and confusing the jury, perhaps the court would have proposed an appropriate instruction to use under similar circumstances.

39. 732 S.W.2d 382 (Tex. App.—Houston [14th Dist.] 1987, no pet.).

40. TEX. PENAL CODE ANN. § 31.07(a) (Vernon 1974) provides: "A person commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner."

41. 732 S.W.2d at 383-84 (relying on Lynch v. State, 643 S.W.2d 737, 738 (Tex. Crim. App. 1983); Bonner v. State, 426 S.W.2d 869, 870-71 (Tex. Crim. App. 1968); Abram v. State, 700 S.W.2d 708, 709 (Tex. App.—Houston [14th Dist.] 1985, pet. ref'd)).

42. 725 S.W.2d 258 (Tex. Crim. App. 1987).

before the court was whether courts should consider a motorboat a "motor vehicle" for purposes of section 19.05(a)(2) of the Texas Penal Code.[43] The defendant collided with a capsized sailboat, killing one of the occupants of the sailboat. Results of an intoxilyzer test indicated a 0.14% alcohol concentration in the defendant.

The state chose to charge the defendant with involuntary manslaughter pursuant to the "operating motor vehicle while intoxicated" provision of subsection (2), rather than with recklessly causing the death of an individual under section 19.05(a)(1).[44] Judge Campbell, writing for the majority, rejected the state's argument that the definition of "vehicle" found in other chapters of the Texas Penal Code should be extended to encompass the term "motor vehicle" that appears in section 19.05(a)(2).[45] Instead, Judge Campbell traced the history of section 19.05 and found that the statute was intended to apply only to a vehicle that travels on a public road or highway.[46] Because this provision did not encompass the situation involving a motorboat, the state had failed to charge an offense against the laws of the State of Texas, and the court of appeals' opinion reversing defendant's conviction was affirmed.[47]

In another involuntary manslaughter case, *Lopez v. State*,[48] the main issue before the court was whether the trial court and prosecutor erred in voir dire proceedings by injecting the per se definition of intoxication into their questioning. The indictment had charged that defendant's intoxication, his failure to keep a proper lookout, and his failure to maintain a single marked lane, were all factors leading to the accident. The court held that because the per se definition was not applicable to an involuntary manslaughter case, the action of the judge and the prosecutor was error.[49] Nevertheless, the error was deemed harmless because the court, prior to submitting the case to the jury, had instructed that the intoxication paragraph be abandoned and dismissed.[50] The major dispute in this case has been resolved because of recent legislative action concerning section 19.05 relating to involuntary manslaughter.[51]

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43. TEX. PENAL CODE ANN. § 19.05(a)(2) (Vernon 1974). At the time of this case, § 19.05(a)(2) provided: "A person commits an offense if he: . . . (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual." *Id.*

44. *Id.* § 19.05(a)(1) provides: "A person commits an offense if he: (1) recklessly causes the death of an individual . . . ."

45. 725 S.W.2d at 261.

46. *Id.*

47. *Id.* It should be noted that the legislature amended section 19.05 during the 1987 session to specifically incorporate airplanes, helicopters, and boats within the voluntary manslaughter provisions; *infra* notes 121-122 and accompanying text.

48. 731 S.W.2d 682 (Tex. App.—Houston [1st Dist.] 1987, no pet.).

49. *Id.* at 686.

50. *Id.* at 687.

51. *See infra* notes 121-123 and accompanying text.

2. *Negligent Homicide*

In *Miranda v. State*[52] the defendant was charged with murder and found guilty of the lesser offense of voluntary manslaughter. On appeal, the defendant argued that the trial court committed reversible error by excluding from the jury instructions a charge on criminally negligent homicide.[53] The court of appeals affirmed the conviction, finding no evidence to support an issue on criminally negligent homicide.[54]

While the *Miranda* opinion contains nothing particularly surprising, it provides an excellent synopsis of the law regarding criminally negligent homicide:

> The essence of criminal negligence is the failure of the actor to perceive the risk created by his conduct. Before a charge on this particular crime is required, the record must contain evidence that shows the defendant was unaware of the risk his conduct was creating. Evidence that raises the awareness issue includes a defendant's familiarity with a gun, its potential for injury, how the weapon was actually fired and other attendant circumstances. The credibility of the evidence, the source of the evidence, and whether it conflicts with other evidence is not considered.[55]

In *Miranda* the defendant testified that he shot at the victim to get the victim away from himself. The court concluded that this testimony was evidence that he perceived the risk of harm his conduct created.[56] The court, apparently, concluded that this evidence was sufficient to establish beyond a reasonable doubt that Miranda was aware of the risk; thus, a charge on criminal negligence was unnecessary.[57]

The defendant in *Gonzales v. State*[58] got into a fight with DeAnda outside a local bar. After being knocked down by DeAnda, the defendant ran to his truck, got a gun, and shot and killed DeAnda. At trial Gonzales testified that he did not intend either to kill or to injure DeAnda, but only to scare him. The judge instructed the jury on the offenses of voluntary manslaughter, involuntary manslaughter, and criminally negligent homicide.[59] The court of appeals reversed, holding that Gonzales's testimony was sufficient to raise the issue of lack of intent to kill and he was therefore entitled to a charge on the lesser included offense of aggravated assault.[60]

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52. 739 S.W.2d 473 (Tex App.—Corpus Christi 1987, no pet.).

53. *Id.* at 474.

54. Id. at 475.

55. *Id.* (citations omitted).

56. *Id.*

57. *Id.*

58. 733 S.W.2d 589 (Tex. App.—San Antonio 1987, no pet.).

59. *Id.* at 591 n.2. The facts of this case are similar to those recited in *Miranda v. State*, 739 S.W.2d 473, 475 (Tex. App.—Corpus Christi 1987, no pet.) (discussed *supra* at notes 52-57 and accompanying text), in which the Corpus Christi court held that the defendant was not entitled to a charge on criminally negligent homicide. Perhaps this case provides another example of proving the old adage "it never hurts to ask."

60. 733 S.W.2d at 591.

3. *Injury to an Elderly Individual*

A son living with his 94-year-old mother was the background for *Billingslea v. State*.[61] The mother became bed-ridden and ultimately died, allegedly because her son, the defendant, failed to provide or obtain medical treatment for her. The defendant was indicted and convicted pursuant to section 22.04(a)(10) of the Texas Penal Code based on his failure to act.[62] The court reversed the conviction, concluding that in order to sustain a conviction based on omission or failure to act, there must first be a statutory duty to act.[63] Although the defendant undoubtedly had a moral obligation or common law duty to care for his mother, and thereby seek medical attention for her, his breach of these duties was not a sufficient basis for criminal liability.[64]

4. *Enticing a Child*

Cunyus v. State[65] involved a defendant charged under Texas Penal Code section 25.04, which prohibits interfering with the lawful custody of a child.[66] The record reflected that Cunyus, the defendant, was playing games with several little boys and buying them refreshments. Cunyus told some of the children that he would buy them beer if they would go to a movie with him. One of the children called his parents to ask permission to go to the movie, but was told not to go with a stranger. As a result none of the boys went to the movie. Later, Cunyus took several of the boys home in the back of his pickup and enroute threw some dirty books back for them to look at. Otherwise, Cunyus took the boys straight home without incident.

While finding the defendant's conduct intolerable, the court held the evidence insufficient to sustain a conviction because the defendant had not interfered with the parents' ability to control or raise their child.[67] The court stated that "the mere offer of an activity to a child which would remove the child from where the parents or legal guardians have permitted the child to

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61. 734 S.W.2d 422 (Tex. App.—Dallas 1987, no pet.).

62. TEX. PENAL CODE ANN. § 22.04(a)(1) (Vernon Supp. 1988) provides: "A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that causes to a child who is 14 years of age or younger or to an individual who is 65 years of age or older: (1) Serious bodily injury . . . ."

63. *Billingslea*, 734 S.W.2d at 425.

64. *Id.* The facts of this case were horrible, including allegations of bedsores and rotting flesh. The issue, of course, presents quite a dilemma. Lack of a specific statutory duty sometimes leads to this kind of distasteful result. Creating such a duty, however, may well encourage others to abandon their parents entirely since it is unlikely that an absolute duty would be constitutional. Perhaps this is the kind of situation where we have to rely on the basic moral fiber of our society to act appropriately rather than risk collapse of the familial structure by expanding criminal responsibility.

65. 727 S.W.2d 561 (Tex. Crim. App. 1987).

66. TEX. PENAL CODE ANN. § 25.04(a) (Vernon 1974) provides:

> A person commits an offense if, with the intent to interfere with the lawful custody of a child younger than 18 years, he knowingly entices, persuades, or takes the child from the custody of the parent or guardian or person standing in the stead of the parent or guardian of such child.

67. 727 S.W.2d at 565.

be will not alone constitute an offense."[68]

5. *Securing Execution of Document by Deception*

In *Mills v.State*,[69] an insurance fraud case, the court held that the defendant could have been charged under either section 31.03 (the general theft statute) or section 32.46 (securing by deception) of the Texas Penal Code.[70] Under section 31.03 the alleged offense was a second degree felony, while under section 32.46 the alleged offense was a third degree felony.[71] The state chose to charge the defendant with a second degree felony under section 31.03. On appeal the defendant argued that the two statutes were *in pari materia*, and thus the state was required to charge under the statute with the lesser punishment.[72] The court concluded that the two statutes were not *in pari materia* because the theft statute penalizes acquisitive conduct, while section 32.45 targets deceptive conduct.[73] Consequently, the court held both statutes to be broad and general statutes requiring different elements of proof and having different purposes and objectives, neither considered to control the other.[74] Because section 32.46 is not a more specialized version of theft, the state was allowed to charge under the offense that gave the greater punishment.[75]

6. *Offenses Against Public Administration*

In *Emerson v. State*[76] the defendant, a Houston police officer, was charged with "official oppression" for his act of detaining a female to coerce her to have sexual intercourse with him. Official oppression is a misdemeanor under section 39.02 of the Texas Penal Code.[77] The sole issue before the court was whether the district court had jurisdiction to try this misdemeanor offense.[78] Noting that article V, section 8 of the Texas Constitution[79] and

68. *Id.*
69. 722 S.W.2d 411 (Tex. Crim. App. 1986).
70. *Id.* at 416.
71. See TEX. PENAL CODE ANN. § 31.03(e)(5)(B) (Vernon Supp. 1988); *id.* § 32.46(b) (Vernon 1974).
72. 722 S.W.2d at 412.
73. *Id.* at 415.
74. *Id.* at 416.
75. *Id.*
76. 727 S.W.2d 267 (Tex. Crim. App. 1987).
77. TEX. PENAL CODE ANN. § 39.02 (Vernon 1974) provides:
> (a) A public servant acting under color of his office or employment commits an offense if he: (1) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful; or (2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.
> (b) For purposes of this section, a public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.
> (c) An offense under this section is a Class A misdemeanor.

78. 737 S.W.2d at 269.
79. TEX. CONST. art. V § 8 provides: "The District Court shall have original jurisdiction

article 4.05 of the Texas Code of Criminal Procedure[80] give district courts exclusive jurisdiction over all misdemeanors involving "official misconduct," the court held that the offense of official oppression fell within this provision.[81]

7. *Offenses Against Public Health, Safety, and Morals*

The court in *Adley v. State*,[82] a case involving a conviction for the felony offense of gambling promotion, struck down section 47.03(a)(2) of the Texas Penal Code[83] as unconstitutionally vague.[84] In doing so, the court agreed with the state's argument that an individual can make and receive a bet simultaneously.[85] The court, however, interpreted the legislative intent behind the passage of section 47.03 as targeting for prosecution only the professional, exploitive gambler.[86] Because the legislature failed to define the conduct of "receiving a bet" precisely enough to meet this intent, the statute was held to be unconstitutionally vague and unenforceable as a penal sanction.[87]

D. Controlled Substances Act

1. *Possession*

The basis of the conviction in *Humason v. State*[88] was possession of less than 28 grams of cocaine under sections 4.04(a), and 4.02(b)(3)(D) of the Controlled Substances Act.[89] The record reflected that the defendant was stopped for speeding and subsequently arrested for driving with a suspended driver's license. After the arrest, the police officer searched the defendant's vehicle. During that search, the officer discovered an unzipped cloth gym bag on the front passenger seat. The bag contained clothing, a towel, aspirin bottles, and a clear vial. Chemical analysis resulted in the finding that the vial contained .03 grams of cocaine. At the time of the arrest the defendant

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in all criminal cases of the grade of felony; . . . of all misdemeanors involving official misconduct . . . ."

80. TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon Supp. 1988) provides: "District courts and criminal district courts shall have original jurisdiction in criminal cases of the grade of felony, of all misdemeanors involving official misconduct, and of misdemeanor cases transferred to the district court under Article 4.17 of this code."

81. 737 S.W.2d at 268-69.

82. 718 S.W.2d 682 (Tex. Crim. App. 1985).

83. TEX. PENAL CODE ANN. § 47.03 (Vernon 1974) provided: "(a) A person commits an offense if he intentionally or knowingly does any of the following acts: . . . (2) receives, records, or forwards a bet or offer to bet. . . ."

84. 718 S.W.2d at 685.

85. *Id.* at 684.

86. *Id.* at 685.

87. *Id.*

88. 728 S.W.2d 363 (Tex. Crim. App. 1987).

89. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.04(a) (Vernon 1976) (repealed 1981) provided: "Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice." Section 4.02(b)(3)(D) of the Controlled Substances Act incorporated cocaine into penalty group 1. *Id.* art. 4476-15, § 4.02(b)(3)(D).

was the sole occupant of the vehicle. Citing the need to provide evidence of "affirmative links" between a defendant and a controlled substance, the court held the evidence insufficient to sustain the conviction.[90] The court held that while the particular circumstances could lead a trier-of-fact to conclude that "appellant knowingly exercised actual care, custody, control or management over the cocaine in the gym bag," the same circumstances could just as rationally lead to the opposite conclusion, that the appellant was oblivious of the cocaine amongst his possessions.[91]

2. *Court of Appeals Cases*

In *Saenz v. State*[92] the defendant was convicted of aggravated delivery of marijuana under section 4.05 of the Controlled Substances Act.[93] Seventy packages of marijuana, totaling 78.9 pounds, were confiscated. At trial, however, testimony revealed that the 78.9 pounds included seeds and stems in the calculation. The state's drug expert testified that he could not estimate the amount of marijuana without the seeds and stems. The court held the evidence insufficient to support a conviction since the statue specifically excludes mature stalks and sterilized seeds from weight calculation.[94] The court reversed and remanded the case for a new trial, finding the evidence sufficient to support a lesser included offense.[95]

In *Baty v. State*[96] Baty, the defendant, was convicted of intentionally and knowingly possessing more than 28 grams and less than 400 grams of amphetamines.[97] The Dallas court of appeals, however, held that the evidence presented at the trial was insufficient to support a possession offense when drugs found in the trunk of the car.[98] Baty was stopped by a police officer for a traffic violation and could not produce either a driver's license or proof of insurance. The officer arrested Baty for those offenses, as well as the traffic violations. In a search incident to the arrest, the officer found several vials on Baty's person that contained amphetamines. Pursuant to a search of the vehicle, the officer found a loaded .22 caliber pistol, and using a key in Baty's possession, found drug paraphernalia and four plastic containers in

90. 728 S.W.2d at 365-66.

91. *Id.* at 366.

92. 733 S.W.2d 265 (Tex. App.—Tyler 1987, no pet.)

93. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.05 (Vernon Supp. 1988) provides: "(a) Except as authorized by this Act, a person commits an offense if he knowingly or intentionally delivers marijuana. . . . (c) A person commits an aggravated offense if the person commits an offense under Subsection (a) of this section and the amount of marijuana delivered is more than 50 pounds."

94. 733 S.W.2d at 267.

95. *Id.* at 267-68. Given that the state chose to proceed on the aggravated offense, rather than the lesser included offense, retrial may be precluded as violative of double jeopardy.

96. 734 S.W.2d 62 (Tex. App.—Dallas 1987, no pet.).

97. *Id.* at 62. The cause was brought pursuant to § 4.04(a) of the Controlled Substances Act. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.04(a) (Vernon 1976) (repealed 1981); *see supra* note 89. Section 4.02(c)(3) incorporates amphetamines into penalty group 2. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.02(c)(3) (Vernon 1976) (repealed 1981).

98. 734 S.W.2d at 65.

the vehicle's trunk. The substance in the containers were later identified as 257.7 grams of amphetamines.

At the time of the arrest, Baty was the sole occupant of the vehicle, but the trial record did not reflect the identity of the owner of the vehicle. The court held that the presence of a gun in the vehicle, the fact that Baty was the sole occupant at the time of the arrest, and the finding of the vials on the defendant's person, were insufficient to exclude the hypothesis that he was unaware of the items found in the trunk of the car.[99] Additionally, the evidence showed that the amphetamines found on his person were of a different purity level from the amphetamines found in the trunk, and this discrepancy also weakened the affirmative links between the defendant and the amphetamines in the trunk of the vehicle. Because the state chose to prosecute Baty for the larger amount of amphetamines in the vehicle's trunk, rather than those found only on Baty's person, the court reversed the judgement and ordered an acquittal.[100]

Two recent court of appeals opinions have addressed the evidence necessary to establish the affirmative link requirement in drug cases. In *Leija v. State*[101] the defendant was convicted of aggravated possession of methamphetamine. The San Antonio court of appeals affirmed the conviction.[102] The court determined that the evidence sufficiently linked Leija to the drugs because: (1) at the time of the arrest, he told one of the arresting officers that all the "stuff" in the bedroom was his; (2) evidence tended to showed that Leija seemed relaxed and "at home" in the bedroom; (3) the drugs were easily accessible to Leija; (4) the suspected drug paraphernalia was in the bedroom and in clear view; (5) the house smelled of methamphetamine and (6) Leija admitted at the time of arrest that he had been "staying" in the bedroom with the drugs and alluded to that room as "my room."[103]

Of these factors, the court found Leija's admission that the "stuff" in the bedroom was his to be the most damaging.[104] At trial, Leija testified that he made the admission only because he wanted to protect a woman present at the time of arrest. Judge Chapa noted that this explanation was obviously rejected by the jury as the trier-of-fact and the other factors were sufficient to support a finding that defendant was aware of the methamphetamines.[105]

In *Behring v. State*[106] the defendant was also charged and convicted of unlawful possession of methamphetamine. The record reflected that the arresting officers found the defendant and others on the property in question near a mobile home and another small house. The officers also found a

99. *Id.* at 64-65.
100. *Id.* at 65-66.
101. 738 S.W.2d 749 (Tex. App.—San Antonio 1987, no pet.)
102. *Id.* at 751.
103. *Id.* (citing Hahn v. State, 502 S.W.2d 175 (Tex. Crim. App. 1973); Herrera v. State, 561 S.W.2d 175 (Tex. Crim. App. 1978); Duff v. State, 546 S.W.2d 283 (Tex. Crim. App. 1977)).
104. *Id.*
105. *Id.*
106. 739 S.W.2d 504 (Tex. App—Corpus Christi 1987, no pet.).

trailer concealed from the road apparently set up as a methamphetamine lab. In addition, the officers found a number of guns, which Behring testified were hers, two radio scanners, flare gun primers, and in Behring's purse receipts for the purchase of ammunition. Police officers also testified to a heavy odor that they recognized as methamphetamine in the mobile home and to discovering women's clothing that also smelled of methamphetamine. The court held this evidence sufficient to affirmatively link the defendant to the drugs.[107]

3. *Miscellaneous*

Thomas v. State[108] was an action brought pursuant to Texas Revised Civil Statutes article 6184m.[109] The defendant, Thomas, while an inmate of the Texas Department of Corrections, was convicted of the offense of furnishing marijuana to an inmate,[110] that inmate being himself. The Tyler court of appeals clarified the definition of "furnish" as used in the statute to refer to the act of furnishing a controlled substance to another party who is an inmate at a Texas penal institution.[111] The court ordered Thomas's conviction dismissed, holding that the definition does not cover mere possession.[112] One may not be convicted, therefore, of furnishing a controlled substance to oneself under article 6184m.[113]

II. LEGISLATIVE ACTION

1987 marked the convening of the seventieth Texas State Legislature. During the regular session the legislature passed a number of bills affecting the Texas Penal Code and penal statutes in other codes. The changes and additions discussed here are those that will have the greatest impact on the day-to-day practice of criminal law.

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107. *Id.* at 505. The court's rationale is set out in the following excerpt:

> [s]he also had the strong odor of methamphetamine on her clothing and provided several of the guns, ammunition and flare primers which were clearly designed to protect the illegal lab from possible intrusion. No other plausible explanation except the appellant was part of the operation was given for this evidence at trial and it is not the responsibility of this Court to entertain vague and unsubstantiated speculation not raised by credible evidence as to what the appellant might have been doing so heavily armed at the site of the lab. *Id.*

The opinion, however, cites no evidence to support the propositions that the clothing was in fact that of the defendant, or that the guns, ammunition, and flare primers were "clearly designed to protect the illegal lab from possible intrusion." *Id.* If a petition for discretionary review is requested and granted in case, it will be interesting to see how the court of criminal appeals deals with these unsubstantiated assertions in light of *Humason*. *See supra* notes 90-94 and accompanying text.

108. 733 S.W.2d 675 (Tex. App.—Tyler 1987, no pet.).

109. TEX. REV. CIV. STAT. ANN. art. 6184m (Vernon Supp 1988): "It shall be unlawful for any person to furnish, attempt to furnish, or assist in furnishing to any inmate of . . . the Texas Department of Corrections any . . . controlled substance, or dangerous drug except from the prescription of a physician."

110. 733 S.W.2d at 677.

111. *Id.*

112. *Id.*

113. *Id.* at 676-77.

A. Penal Code—Miscellaneous Provisions[114]

1. Joinder of Offenses

The legislature expanded section 3.01 to allow the state to join in the same indictment two or more offenses committed during the same transaction, or a common scheme or plan, as well as the repeated commission of the same or similar offenses.[115] The limitation that joinder applies only to Title 7, Property Offenses, was eliminated.[116]

2. Use of Force

The legislature amended section 9.53 to allow peace officers acting as jailers or guards to use such force against a person in custody as the officer reasonably believes is necessary to maintain the security of the institution that the officer is guarding.[117] "Security" as used in the amendment is broad enough to include a third-party defense provision. Thus, the guard can act for the purpose of protecting other persons in custody or employees of the institution.

3. Corporate Punishment

A fourth punishment category was added to section 12.51 dealing with corporations.[118] The new category provides for a $50,000 fine if the offense was a felony or a class A misdemeanor and an individual suffered serious bodily injury or death through the actions of the corporation or association.[119] The term "association" was also inserted into subsection (c), expanding coverage to include some groups that arguably did not fall within the old statute.[120]

B. Specific Offenses

1. Involuntary Manslaughter

In the light of the court of criminal appeals opinion in *Williams v. State*,[121] the legislature expanded section 19.05, relating to voluntary manslaughter, to include death resulting from operation of an airplane, helicopter, or boat while intoxicated.[122] Additionally, the definition of intoxication was changed to incorporate the per se definition of intoxication as well as the impairment definition.[123]

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114. The following section references will be to the Texas Penal Code unless otherwise indicated.
115. Tex. H.B. 846, 70th Leg. (1987).
116. *Id.*
117. Tex. H.B. 527, 70th Leg. (1987).
118. Tex. S.B. 1277, 70th Leg. (1987).
119. *Id.*
120. *Id.*
121. *See supra* notes 42-47 and accompanying text.
122. Tex. S.B. 120, 70th Leg. (1987).
123. *Id.*, *see supra* notes 42-50 and accompanying text.

2. *Aggravated Sexual Assault*

Through two bills, one in the regular session and one in the called session, the legislature amended section 22.021 to make it possible for an individual to commit aggravated sexual assault on a spouse.[124] Basically, this was accomplished by deleting the reference to section 22.011, the sexual assault statute.[125]

3. *Child Custody*

Several changes were made to the Texas Penal Code in regard to the provisions relating to child custody and orders entered from family law courts. Section 25.03 was expanded to include an individual who takes a child out of the ordering court's jurisdiction without permission of the court and with the intent to deprive the court of authority over that child, or a noncustodial parent who entices or persuades a child to leave the custody of the custodial parent or guardian.[126] Additionally, an amendment to subsection (c) relating to defenses now makes it actionable for a person to take a child out of the court's jurisdiction, rather than requiring that the child be taken out of the state.[127] The legislature also created a new offense by the adoption of section 25.031, making it a third degree felony to agree, for remuneration or the promise of remuneration, to abduct a child knowing that the child is under the care or control of another pursuant to court order.[128]

The legislature changed section 25.08, dealing with the violation of court orders, by expanding the locations that are protected under a protective order.[129] Two new subsections were also added.[130] Subsection (e) makes the violation provisions inapplicable to the applicant for the order or a person that the order is intended to protect.[131] Subsection (f) precludes a defense to information excluded from the order pursuant to section 71.11 of the Texas Family Code.[132]

4. *Gift to Public Servant*

The legislature also amended the gift provision of section 36.10. Section 36.10 now provides that an item received by a public servant, regardless of value, is not characterized as a "gift" if it is listed on a financial statement filed pursuant to the Election Code.[133] Previously, the acceptance of an item

124. Tex. H.B. 161, 70th Leg. (1987); Tex. S.B. 35, 70th Leg. 2d Called Sess. (1987).

125. TEX. PENAL CODE ANN. § 22.021 (repealed 1987) provided: "(a) A person commits an offense if the person commits sexual assault as defined in § 22.011 of this Code and: . . . ." *Id.* § 22.011 (Vernon Supp. 1988) provides an exception to the offense if the victim was the actor's spouse. New § 22.021 deletes the reference to § 22.011 and states simply: "(a) A person commits an offense: . . . ." *Id.* § 22.021.

126. Tex. H.B. 113, 70th Leg. (1987).

127. *Id.*

128. *Id.*

129. Tex. S.B. 1111, 70th Leg. (1987).

130. Tex. S.B. 887, 70th Leg. (1987).

131. *Id.*

132. *Id.*

133. Tex. H.B. 612, 70th Leg. (1987).

of benefit by a public servant would have been punishable under sections 36.08 or 36.09 as a class A misdemeanor.[134]

5. *Failure to Identify*

Under amended section 38.02 a person commits an offense if he refuses to report or give his name, residence address, or date of birth to a police officer who has lawfully arrested the person and requested the information.[135] Previously, section 38.02 applied only to witnesses. That application is maintained, but the legislature has expanded it to make it an offense if a potential witness gives false or fictitious information to the peace officer.[136]

6. *Presumptions Relating to Evading Arrest*

Changes to section 38.04 elevate the class of the offense of evading arrest in certain circumstances from a class "B" misdemeanor to a class "A" misdemeanor.[137] The offense will be a class "A" misdemeanor if the actor, in evading arrest, engages in conduct placing another in eminent danger of serious bodily injury by operating a motor vehicle while intoxicated while evading arrest.[138]

7. *Judicial Officers*

Amendments to section 30.03 make it an offense for a public servant to reveal intentionally the results or contents of a proposed or actual appellate judicial decision prior to its release as a public record or its announcement to all parties of interest on an equal basis.[139] The amendment makes both the person who released the information and the person who requested the information liable.[140] As originally drafted, the amendments precluded appellate judges from talking among themselves or their staffs about pending cases, which would have effectively shut down the appellate courts of the state. During the second call session, the original draft was amended to create an exception for communications within the same court.[141] Nevertheless, the law ultimately adopted makes no exception for an individual who merely calls the court to check on the status of a pending case.[142]

8. *Gambling*

Under changes to section 47.01 the definition of "bet" does not include an offer of merchandise with a value of $25 or less at carnival games.[143] Fol-

134. TEX. PENAL CODE ANN. §§ 36.08 (Vernon Supp. 1988) & 36.09 (Vernon 1974).
135. Tex. H.B. 826, 70th Leg. (1987).
136. *Id.*
137. Tex. H.B. 280, 70th Leg. (1987).
138. *Id.*
139. Tex. H.B. 288, 70th Leg. (1987).
140. *Id.*
141. Tex. H.B. 123, 70th Leg. (1987).
142. *Id.*
143. Tex. S.B. 342, 70th Leg. (1987).

lowing the court of appeals opinion in *Adley v. State*,[144] the legislature sought to clarify the definition of "book-making." Under the new section 47.03 "book-making" is defined as:

> (1) the receiving and recording of or the forwarding of more than five bets or offers to bet in one 24-hour period; (2) the receiving and recording of or the forwarding of bets or offers to bet totalling more than $1,000 in one 24-hour period; or (3) a scheme by three or more persons to receive, record, or forward bets or offers to bet.[145]

9. Open Container Provision

In one of the more publicized acts of the legislature, article 6701(d), section 107(E) of the revised civil statutes was amended to make it unlawful for a person to consume an alcoholic beverage while operating a motor vehicle in a public place.[146] The offense must be observed by a peace officer and is a class "C" misdemeanor.[147] Note that an open container may still by used to enhance a DWI conviction pursuant to section 67011(1)(f).[148]

10. Drugs

Several provisions of the Controlled Substances Act were amended to target specific abuses. Article 4476-13(a), dealing with glues and aerosol paints, now incorporates a culpable mental state of recklessness in the delivery of a volatile chemical to a minor.[149] Additionally, a new offense of possessing "inhalant paraphernalia" is created.[150] Inhalant paraphernalia is defined as any possible contrivance that might be used by an individual to ingest any type of volatile chemical.[151] It will be interesting to see if this definition survives a constitutional attack for vagueness.

The legislature amended article 4476-14 relating to anabolic steroids and growth hormones, to enumerate sixteen various hormones to be controlled.[152] New provisions make it a third degree felony for an individual to prescribe, dispense, deliver, or administer these drugs without a valid medical purpose.[153]

The legislature also amended article 4476-15 to target controlled substance "analogues."[154] An "analogue" is a substance, the chemical structure

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144. *See supra* notes 82-87 and accompanying text.
145. Tex. S.B. 342, 70th Leg. (1987).
146. Tex. S.B. 521, 70th Leg (1987).
147. *Id.*
148. TEX. REV. CIV. STAT. ANN. art. 67011-1(f) (Vernon Supp. 1988) provides:
> If it is shown on the trial of a person punished for an offense under this article that the person committed the offense and at the time of the offense the person operating the motor vehicle had an open container of an alcoholic beverage in his immediate possession, the minimum term of confinement for the offense is increased by: . . . .

149. Tex. H.B. 173, 70th Leg. (1987).
150. *Id.*
151. *Id.*
152. Tex. S.B. 1035, 70th Leg. (1987).
153. *Id.*
154. Tex. H.B. 685, 70th Leg. (1987).

of which is substantially similar to the chemical structure of a controlled substance in penalty groups 1 and 2 or a substance that has been specifically designed to produce an affect substantially similar to or greater than the effect of such a controlled substance.[155] Generally, the penalties for an analogue carry the same penalty as the substance it attempts to imitate.[156]

155. *Id.*
156. *Id.*