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## Criminal Law

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# CRIMINAL LAW

by

Trent Gaither\* and Stephanie McClure\*\*

## I. TEXAS PENAL CODE

### A. Offenses Against Property

#### 1. Burglary of a Building or Habitation

##### a. Intent to Commit a Felony or Theft.

IN *LaPoint v. State*<sup>1</sup> the defendant was convicted of burglary of a building.<sup>2</sup> The defendant argued that the trial court erred by instructing the jury that the act of breaking and entering a building at nighttime raises a presumption of intent to commit theft. The court of criminal appeals held that the charge was error because it constituted a comment on the weight of the evidence.<sup>3</sup> To obtain a conviction for burglary the prosecution must introduce evidence of both unlawful entry and specific intent to commit a theft or a felony.<sup>4</sup> As a question of fact, the jury may infer the requisite intent from surrounding circumstances.<sup>5</sup> The trial court, however, may not include this permissive inference in its instruction to the jury as a presumption provided by law; neither statute nor caselaw provide such a presumption.<sup>6</sup>

##### b. Distinction Between "Habitation" and "Building."

The Corpus Christi court of appeals in *Chandler v. State*<sup>7</sup> reversed a conviction of burglary of a habitation.<sup>8</sup> The court found insufficient evidence to support a jury finding that the burglarized structure was a habitation.<sup>9</sup> The structure in question was an apartment that was unleased, unfinished, and

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1. 750 S.W.2d 180 (Tex. Crim. App. 1988).

2. TEX. PENAL CODE ANN. § 30.02(a)(1) (Vernon 1974) provides: "(a) a person commits an offense if, without effective consent of the owner, he: (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft . . . ."

3. 750 S.W.2d at 183.

4. *Id.* at 182 (citing *Greer v. State*, 437 S.W.2d 558, 560 (Tex. Crim. App. 1969)).

5. *Id.* at 182.

6. *Id.*; see also *McDonald v. State*, 750 S.W.2d 285 (Tex. App.—Houston [14th Dist.] 1988, no pet.) (court of appeals reversed conviction due to similar instruction).

7. 743 S.W.2d 736 (Tex. App.—Corpus Christi 1987, no pet.).

8. *Id.* at 742.

9. See TEX. PENAL CODE ANN. § 30.01 (Vernon 1974) (habitation means structure or vehicle adapted for overnight accommodation of persons).

vacant at the time of the offense. The apartment contained built-in appliances and a refrigerator, and it remained connected to utilities. The court found that while the apartment may have been previously suitable for overnight accommodations, at the time the defendant entered the apartment it was not actually so adapted, thus the structure was not a habitation.<sup>10</sup> Concurring Justice Nye discussed the need to clarify the distinction between the terms "building" and "habitation." He asserted that an increased penalty for burglary of a habitation will not deter a criminal from entering a private residence because under the majority's definition the criminal cannot determine in advance whether a structure is a habitation.<sup>11</sup> Justice Nye concluded that the majority's hypertechnical, subjective test merely muddled the issue and asked the legislature to clarify this area of the law.<sup>12</sup>

## 2. *Burglary of Vehicles*

In *Love v. State*<sup>13</sup> the defendant was convicted for burglary of a vehicle. He challenged the sufficiency of the evidence to support that conviction. The evidence consisted of the complainant's wire wheel covers that police recovered from the trunk of the defendant's car.

The state argued that this circumstantial evidence was sufficient to sustain the conviction. The Houston court of appeals disagreed. Although the Texas Penal Code<sup>14</sup> permits conviction for entering "any part" of a vehicle, the court required proof that the accused actually penetrated the interior of the vehicle, or part of the vehicle to sustain a conviction.

The court refused to hold that the defendant necessarily removed the wheel covers by inserting an object between the covers and the wheel bases of the complainant's vehicle.<sup>15</sup> Thus the evidence failed to show burglarious entry to the complainant's vehicle and this was insufficient to support a burglary conviction.<sup>16</sup>

## 3. *Criminal Trespass*

In *Milton v. State*<sup>17</sup> the defendant was convicted of criminal trespass. The

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10. 743 S.W.2d at 739. The test established by the court of criminal appeals was that the structure "must at the time of the alleged offense have been actually 'adapted for the overnight accommodation of persons' or at least at some prior time used for the overnight accommodation of persons and still 'adapted for the overnight accommodations' of persons." *Id.* at 737 (quoting *Jones v. State*, 532 S.W.2d 596, 600 (Tex. Crim. App. 1976)). Note also that the court only considered whether a person could have actually inhabited the premises in the same condition as the burglar found them. The objective appearance of the structure was irrelevant. *Id.* at 738.

11. *Id.* at 744. Nye proposed that the test should be whether the structure objectively appears to be a private residence. *Id.*

12. *Id.*

13. 744 S.W.2d 247 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd).

14. TEX. PENAL CODE ANN. § 30.04(a) (Vernon 1974) provides: "A person commits an offense if, without the effective consent of the owner, he breaks into or enters a vehicle or any part of a vehicle with intent to commit any felony or theft."

15. 744 S.W.2d at 250.

16. *Id.*

17. 751 S.W.2d 908 (Tex. Crim. App. 1988).

defendant, while in a department store, entered an area marked "Stop No trespassing. Authorized Personnel Only." The defendant argued that he did not commit the offense of criminal trespass because he did not enter a "building" without authorization, but merely a prohibited "area" within that building.<sup>18</sup> In support of his argument defendant asserted that unlike the burglary statutes, the criminal trespass provision does not prohibit entrance to "any portion" of a building without consent of the owner.<sup>19</sup> Therefore, his entry into an unauthorized area of a building could not constitute a criminal trespass.

The court of appeals found the defendant's interpretation of legislative intent absurd<sup>20</sup> such an interpretation, for example, would prevent conviction of a person who entered a bank building and then walked behind the tellers' windows. The court held that it must promote the purpose of the statute when literal enforcement leads to obviously unintended consequences.<sup>21</sup>

#### 4. Theft

##### a. Intent to Deprive

*Rowland v. State*<sup>22</sup> involved a defendant convicted of theft of an automobile.<sup>23</sup> In overturning the conviction the court of appeals, found the evidence insufficient to support a conviction of theft.<sup>24</sup> The court of appeals held that to prove the accused intended to deprive the owner of his property, the state must show that the accused withheld the owner's property either permanently or for so long as to diminish a majority of the property's value or enjoyment.<sup>25</sup>

In reversing the court of appeals, the court of criminal appeals held that "[d]eprivation is not an element of intent to deprive; therefore, the State need not prove actual deprivation . . . . While evidence of actual deprivation may be evidence of intent to deprive, other evidence may also indicate whether intent to deprive exists."<sup>26</sup>

The court noted that the defendant obtained the owner's property deceit-

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18. See TEX. PENAL CODE ANN. § 30.05(a) (Vernon Supp. 1989) ("A person commits an offense if he enters or remains on property or in a building of another without effective consent and he: (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so.").

19. Compare TEX. PENAL CODE ANN. § 30.02 (Vernon 1974) ("A person commits an offense if, without consent of the owner, he enters a habitation, or a building or *any portion* of building not open to the public. . . .") with TEX. PENAL CODE ANN. § 30.05(a) (Vernon 1988) ("A person commits an offense if he enters . . . a *building* of another without effective consent. . . .") (emphasis added).

20. 751 S.W.2d at 911.

21. *Id.*

22. 744 S.W.2d 610 (Tex. Crim. App. 1988).

23. See TEX. PENAL CODE ANN. § 31.03 (Vernon 1988) (theft is the unlawful appropriation of property with intent to deprive the owner of the property).

24. *Rowland v. State*, 704 S.W.2d 150 (Tex. App.—El Paso 1986), *rev'd*, 744 S.W.2d 610 (Tex. Crim. App. 1988).

25. *Id.*

26. 744 S.W.2d at 612.

fully.<sup>27</sup> Subsequently, the defendant did not return the property as promised and did not contact the owner to offer an explanation.<sup>28</sup> The court determined that from these facts a jury could infer that the defendant had an intent to deprive the owner of his truck.<sup>29</sup> Accordingly, the court found sufficient evidence to prove that the defendant intended to deprive the owner of his property.<sup>30</sup>

### 5. *Criminal Mischief*

In *Deas v. State*<sup>31</sup> the defendant was convicted of criminal mischief to property. The evidence showed that the defendant backed his truck into the garage door of the complainant and that the complainant replaced the door for \$590.00. The defendant contended that insufficient evidence supported the jury finding of a pecuniary loss in excess of \$200.<sup>32</sup>

Section 28.06(a) of the Texas Penal Code provides that if property is destroyed, the state must establish pecuniary loss by offering evidence of the fair market value of the property at the time and place of its destruction or if the fair market value cannot be ascertained, by offering evidence of the cost of replacing the property.<sup>33</sup> If the property is merely damaged the state may establish pecuniary loss by offering evidence of the cost to repair or restore the property.<sup>34</sup>

In *Deas* the state submitted only the replacement cost of the property to show the amount of loss. The defendant argued and the court agreed that to use replacement cost in calculating pecuniary loss requires proof of destroyed property.<sup>35</sup> The court also agreed with the defendant's alternative argument that even assuming the proof of destroyed property existed, to use replacement cost requires proof that the market value of the destroyed property is unascertainable.<sup>36</sup> Because the state failed in both instances, the court overturned the conviction.<sup>37</sup>

### B. *Offenses Against Public Administration*

#### 1. *Escape*

In *Harrell v. State*<sup>38</sup> the defendant was convicted of escape pursuant to section 38.07(a) of the Texas Penal Code.<sup>39</sup> The defendant, while incarcer-

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27. *Id.* at 613.

28. *Id.*

29. *Id.*

30. *Id.*

31. 752 S.W.2d 573 (Tex. Crim. App. 1988).

32. At the time of the offense TEX. PENAL CODE ANN. § 28.03(b)(4)(a) (Vernon 1974) provided that an offense is a third degree felony if "the amount of pecuniary loss is \$200 or more than \$10,000."

33. *Id.* § 28.06(a)(1), (2).

34. *Id.* § 28.06(b).

35. 752 S.W.2d at 575.

36. *Id.*

37. *Id.*

38. 743 S.W.2d 229 (Tex. Crim. App. 1987).

39. See TEX. PENAL CODE ANN. § 38.07 (Vernon 1974) ("A person arrested for, charged

ated in the Kerr County Jail, was hospitalized in the V.A. Hospital in Kerrville. Authorities told the defendant that he was still under arrest and that departure from the hospital constituted an escape from the county jail. Subsequently, the defendant left the hospital.

The San Antonio court of appeals found the evidence insufficient to show custody because the state did not physically restrain the defendant at the V.A. Hospital.<sup>40</sup> The court of criminal appeals reversed, holding that actual physical restraint is not a prerequisite to a showing of custody.<sup>41</sup> Rather legal status is the determinative factor.<sup>42</sup> Because the defendant remained under arrest while in the hospital, he was in custody at the time of his departure and his departure constituted an escape.<sup>43</sup>

### C. Inchoate Offenses

#### 1. Unlawful Use of a Criminal Instrument

In *Eodice v. State*<sup>44</sup> the defendant was convicted of use of a criminal instrument pursuant to section 16.01 of the Texas Penal Code.<sup>45</sup> Upon arrest, police found a steel pry bar, a bent cotter pin, a filtered lens flashlight, a gap-feeler gauge, and an electric circuit tester in the defendant's possession. The court of appeals found that these were not criminal instruments<sup>46</sup> but were ordinary, commonly available tools.<sup>47</sup> The court noted that while a person could use these items to commit burglary, the state did not show that any of these objects had been specially designed, made, or adapted for use in the commission of burglary.<sup>48</sup> Therefore, the state failed to prove that the defendant possessed a criminal instrument as that term is defined in section 16.01.<sup>49</sup>

### D. Offenses Against Public Health, Safety, and Morals

#### 1. Unlawful Possession of Firearm by Felon

In *Ware v. State*<sup>50</sup> the defendant was convicted of violating section

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with, or convicted of an offense commits an offense if he escapes from custody.") Section 38.01(2) states: "Custody" means "detained or under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court." *Id.* § 38.01(2).

40. *Harrell v. State*, 699 S.W.2d 319 (Tex. App.—San Antonio 1985), *rev'd*, 743 S.W.2d 229 (Tex. Crim. App. 1987).

41. 743 S.W.2d at 231.

42. *Id.*

43. *Id.*

44. 742 S.W.2d 844 (Tex. App.—Austin 1987, no pet.).

45. TEX. PENAL CODE ANN. § 16.01(a) (Vernon Supp. 1989) provides: "A person commits an offense if: (1) he possesses a criminal instrument with intent to use it in the commission of an offense; or (2) with knowledge of its character and with intent to use or aid or permit another to use in the commission of the offense, he manufactures, adapts, sells, installs, or sets up a criminal instrument."

46. *Id.* § 16.01 (defines criminal instrument as "anything, the possession, manufacture, or sale of which in not otherwise an offense, that is specially designed, made, or adapted for use in the commission of an offense").

47. 742 S.W.2d at 847.

48. *Id.*

49. *Id.*

50. 749 S.W.2d 852 (Tex. Crim. App. 1988).

46.05(a) of the Texas Penal Code.<sup>51</sup> Section 46.05(a) prohibits a person from possessing a firearm away from where he lives if that person has been previously convicted of a violent felony.<sup>52</sup> The defendant argued that his prior conviction of involuntary manslaughter was not a violent felony as a matter of law. Furthermore, because the state failed to prove that the felony did in fact involve violence or the threat of violence to either persons or property the court should overturn his conviction.

The court agreed that involuntary manslaughter is not a violent felony as a matter of law, but affirmed the conviction.<sup>53</sup> The court stated that a person commits a violent act when he possesses a culpable mental state at the time of the act.<sup>54</sup> Accordingly a person cannot commit a violent act by accident or by mistake.<sup>55</sup> When, as an intoxicated driver, that person by accident or by mistake causes the death of another, every conviction does not, as a matter of law, involve an act of violence.<sup>56</sup> Thus, the court held that a prior conviction of involuntary manslaughter itself could not satisfy the state's burden of proof under section 46.05.<sup>57</sup> However, the prosecution, in this case, had proven that the defendant's prior conviction involved violence and therefore, the court affirmed the conviction.<sup>58</sup>

### E. Offenses Against the Person

#### 1. Attempted Capital Murder

In *Yalch v. State*<sup>59</sup> the defendant was convicted of attempted capital murder. The indictment alleged that the defendant attempted to kill a police officer by shooting him with a gun. The evidence at trial showed that the defendant fired three or four shots at the officer, but did not hit him. The court of appeals, relying on *Danford v. State*,<sup>60</sup> reversed the conviction, holding that when the state alleges attempted murder by "shooting" it must prove harm to the victim.<sup>61</sup>

On appeal the state argued that the *Danford* opinion, upon which the lower court relied, was an incorrect interpretation of *Windham v. State*.<sup>62</sup> In *Windham* the indictment alleged that the defendant attempted to cause the death of a person "by shooting at her with a gun." At trial, the state proved that the defendant pulled the trigger on the gun but that the gun failed to fire. The court determined that the definition of "shoot" required proof of a

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51. TEX. PENAL CODE ANN. § 46.05(a) (Vernon 1974) (a person convicted of a violent felony commits an offense if he possesses a firearm away from where he lives).

52. *Id.*

53. 749 S.W.2d at 854.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 855.

59. 743 S.W.2d 231 (Tex. Crim. App. 1988).

60. 653 S.W.2d 436 (Tex. Crim. App. 1983).

61. *Yalch v. State*, No. 3-85-189-CR (Tex. App.—Austin 1986).

62. 638 S.W.2d 486 (Tex. Crim. App. 1982).

discharged projectile and thus overturned the conviction.<sup>63</sup> The state argued that under *Windham*, if the state pleads attempted murder by "shooting," then the state must show only that a gun was actually fired. In comparison, the *Danford* court misplaced emphasis by holding that if the state alleges attempted murder by "shooting," then the state must show harm to the victim.<sup>64</sup>

The court of criminal appeals agreed with the state and held that harm, or lack of it, to the victim is not an element of attempted murder.<sup>65</sup> The allegation of attempted murder by "shooting" only requires evidence of a discharged projectile.<sup>66</sup> Whether the victim is struck by the bullet is merely descriptive of the result of an act that may constitute an attempted murder.<sup>67</sup>

## II. DRIVING WHILE INTOXICATED

### A. Definition of Intoxicated

In *Garcia v. State*<sup>68</sup> the defendant was convicted of driving while intoxicated. On appeal the defendant argued that the information should be quashed because it did not give adequate notice whether the intoxication was caused by alcohol, a controlled substance, a drug, or any combination thereof. Article 67011-1(b) provides that a person commits an offense if while driving or operating a motor vehicle in a public place the person is intoxicated.<sup>69</sup> The term "intoxicated" is defined in article 67011-1(a)(2) as either being under the influence of alcohol or a controlled substance or a combination of the two.

The court of criminal appeals noted that when a statute defines an act or omission and the definition provides more than one way to commit the act or omission, then upon timely request, the state must allege the manner and means it seeks to establish.<sup>70</sup> Accordingly, the type of intoxicant used in a prosecution under article 67011-1(b) becomes an element of the offense and critically necessary to the state's proof.<sup>71</sup>

### B. Implied Consent

The Houston court of appeals in *Howard v. State*<sup>72</sup> held that although the driving while intoxicated law applies to parking lots, the implied consent law

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63. *Id.* at 488.

64. 653 S.W.2d at 437.

65. 743 S.W.2d at 233.

66. *Id.*

67. *Id.*

68. 747 S.W.2d 379 (Tex. Crim. App. 1988).

69. TEX. REV. CIV. STAT. ANN. art. 67011-1(b) (Vernon Supp. 1989).

70. *Id.* at 380 (citing *Ferguson v. State*, 622 S.W.2d 846, 851 (Tex. Crim. App. 1981)).

71. See also *Solis v. State*, 742 S.W.2d 873 (Tex. App.—San Antonio 1987, no pet.) (defendant's driving while intoxicated conviction was reversed due to inadequate notice as to whether state was seeking conviction on "loss of faculties" or by "alcohol concentration").

72. 744 S.W.2d 640 (Tex. App.—Houston [14th Dist.] 1987, no pet.).



does not apply when driving on a parking lot.<sup>73</sup> Therefore, in the instant case the motorist's consent to take the blood alcohol test was involuntary, and the court should have suppressed the test results. The implied consent law applies to driving on a public highway or public beach but not to driving on a parking lot. Therefore, defendant's conviction was reversed.<sup>74</sup> The court noted that the defendant found a loophole that only legislative action could close.<sup>75</sup>

### C. Sufficiency

In *McCafferty v. State*<sup>76</sup> the accused got her car stuck in a construction area in Houston. Testimony placed the time of driving at 2:30 a.m. A police officer arrived at 3:50 a.m. and determined the accused to be intoxicated. She was taken to the station and at 4:45 a.m. was given a breath test, resulting in a .18 reading.<sup>77</sup> The court reversed and rendered a judgment of acquittal, holding the evidence insufficient.<sup>78</sup> Relying on standards previously established in *Coleman v. State*<sup>79</sup> and *Weaver v. State*,<sup>80</sup> the court noted that indications that the accused is intoxicated at the time the police arrive does not of itself prove intoxication at the prohibited time, i.e., when the accused was driving.<sup>81</sup> The state fails to prove its case when it does not present testimony excluding the possibility that the accused did not have anything to drink prior to the officer's arrest.<sup>82</sup> Further, in the instant case there was no testimony explaining absorption that would connect a .18 breath test at 4:45 a.m. with the defendant's condition at 2:30 a.m.<sup>83</sup>

## III. CONTROLLED SUBSTANCES ACT

### A. Definition of Actual Delivery

In *Conway v. State*<sup>84</sup> the court of appeals defined the term "actual delivery" as contained in the Controlled Substances Act.<sup>85</sup> The defendant was charged with delivering a controlled substance by actual transfer. The defendant asserted the evidence was insufficient to support the indictment's allegation of actual transfer.

The evidence reflected that the defendant handed a paper sack containing marijuana to Wingard, a third person, who then handed it to Green, an undercover narcotics officer. The court of criminal appeals determined that

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73. *Id.* at 641.

74. *Id.*

75. *Id.*

76. 748 S.W.2d 489 (Tex. App.—Houston [1st Dist.] 1989, no pet.).

77. *Id.* at 489-90.

78. *Id.* at 492.

79. 704 S.W.2d 511 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd).

80. 721 S.W.2d 495 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd).

81. 748 S.W.2d at 491.

82. *Id.*

83. *Id.*

84. 738 S.W.2d 692 (Tex. Crim. App. 1987).

85. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 1.02(7) (Vernon Supp. 1989).

in the instant case two actual deliveries took place; the first delivery occurred when the defendant delivered the paper sack to Wingard and the second when Wingard delivered the paper sack to Green.<sup>86</sup> Thus, the court determined that the defendant never actually delivered any marijuana to Green.<sup>87</sup> The court defined "actual delivery" as completely transferring the real possession and control of a controlled substance from one person to another person.<sup>88</sup>

### B. Possession

The basis of the conviction in *Guiton v. State*<sup>89</sup> was possession of heroin. The heroin was found in a chair cushion in a hotel room rented by the defendant. The court noted that at least one other person had access to the room.<sup>90</sup> Therefore, it held the evidence insufficient to support a conviction.<sup>91</sup> Had the contraband been found in a personal item of the defendant, however, the decision would have been different.<sup>92</sup>

In *Branson v. State*<sup>93</sup> the defendant was convicted of possession of less than 28 grams of methamphetamine. The defendant lived in a two-story apartment with one other person. During the search, the defendant and two others were on the first floor of the apartment and at least four other individuals entered the apartment. The methamphetamine was found in an upstairs office area. The court of appeals found insufficient evidence to prove that the defendant possessed a controlled substance.<sup>94</sup> The court noted the defendant was merely an occupant of the apartment, had not signed the lease, and had no exclusive control of the apartment; furthermore, no evidence affirmatively linked him to the upstairs office.<sup>95</sup>

In *Watson v. State*<sup>96</sup> the defendant was convicted of aggravated possession of cocaine. The court of appeals held that the evidence was insufficient to prove the defendant, an owner/driver of a semi-truck, knowingly possessed cocaine found in the trailer of his truck.<sup>97</sup> Approximately 600 lbs of cocaine were found under a load of 800-900 bags of onions in defendant's truck.

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86. *Conaway v. State*, 738 S.W.2d 692, 694 (Tex. Crim. App. 1987).

87. 738 S.W.2d at 694. The court noted that the law of parties was neither invoked nor applied. If so, then defendant would be subject to being convicted of actual delivery of the substance.

88. *Id.* at 695. Justice McCormick in his dissent urged that this definition restricts the term "actual delivery" to but one simple transaction. *Id.* at 699. The evidence must show that the defendant personally and manually possessed the contraband and that he physically handed the contraband directly to the transferee and that the transferee personally, manually, and physically received the counterband. *Id.* at 699.

89. 742 S.W.2d 5 (Tex. Crim. App. 1987).

90. *Id.* at 8.

91. *Id.* at 10.

92. *Id.*

93. 750 S.W.2d 277 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

94. *Id.* at 281.

95. Two writing tablet covers with a handwritten "T" at the top were also found in the office. The court found that the writing tablets did not provide a sufficient link to prove ownership or control. *Id.* at 280.

96. 752 S.W.2d 217 (Tex. App.—San Antonio 1988, pet. ref'd).

97. *Id.* at 223.

Although the defendant was both owner and driver of the truck, no evidence existed to show that the defendant entered the trailer once it was loaded with the onions. The court of appeals held that in the instant case, where a truck driver is commercial in nature, the fact that he owns and drives the truck does not automatically make him aware the drug is present.<sup>98</sup> Mere presence in the vicinity of the drug does not establish that the defendant knowingly possesses the cocaine.<sup>99</sup> While the evidence did cast some suspicion on the defendant, the affirmative links between him and the cocaine failed to eliminate the reasonable hypothesis that the defendant was entirely unaware of the cocaine's presence.<sup>100</sup>

### C. "Adulterant" and "Dilutant"

The court of criminal appeals in *McGlothlin v. State*<sup>101</sup> defined the terms "adulterant" and "dilutant" as used in the Controlled Substances Act. In *McGlothlin* the defendant was convicted of possession of amphetamine of an aggregate weight, including any adulterants or dilutants, of more than 400 grams under Controlled Substances Act.<sup>102</sup> The defendant argued that the quantity of amphetamine was not over 400 grams.

The facts reflected that the seized amphetamine solutions had a total gross weight of 3118 grams. The solutions were split in two layers, the larger layer being an aqueous layer. The aqueous layer, described as mostly water, contained only a residual amount of amphetamine. The issue before the court was whether the terms adulterant and dilutant as used in article 4476-15, § 4042(d)(2) meant to encompass aqueous solution.

After reviewing legislative intent and applying standard rules of statutory construction and interpretation, the court found that an adulterant or a dilutant is a compound, substance, or solution added to the controlled substance with the intent to increase the bulk or quantity of the final product.<sup>103</sup> The court found that there was no evidence pertaining to the reason or purpose for the presence of the water in the solution.<sup>104</sup> Therefore, it cannot be said that the water was an adulterant or a dilutant and the conviction was reversed.<sup>105</sup>

### D. Forfeiture

In *MBank Grand Prairie v. State*<sup>106</sup> a judgment was entered ordering forfeiture of a truck to the State of Texas free of any interest held by MBank. The Fort Worth court of appeals reversed the judgment, holding that

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98. *Id.* at 222-23.

99. *Id.* at 223.

100. *Id.* at 222.

101. 749 S.W.2d 856 (Tex. Crim. App. 1988).

102. TEX. REV. CIV. STAT. ANN. art. 4476-15, § 4.041(d)(2) (Vernon Supp. 1989).

103. 749 S.W.2d at 858-59.

104. *Id.* at 861.

105. See *Engleking v. State*, 750 S.W.2d 213 (Tex. Crim. App. 1988).

106. 737 S.W.2d 424 (Tex. App.—Fort Worth 1987, no pet.).

MBank held a bona fide interest.<sup>107</sup>

The appellant, MBank, entered into a finance agreement with Gary Gilbert for the financing of a 1984 Chevrolet truck. A promissory note was signed by Gilbert along with a security agreement. Subsequent to the signing, Gilbert was arrested, both for conspiracy to distribute a controlled substance and for theft. The state petitioned the trial court to forfeit the vehicle pursuant to the Controlled Substances Act.

The issue before the court of appeals was whether a party holding an unperfected security interest has a "bona fide" security interest under section 5.03(c) of the Controlled Substances Act. Section 5.03(c) provides in part: "A forfeiture of property encumbered by a bona fide security interest is subject to the interest of the second party if he neither had knowledge of or consented to the act which caused the property to be subject to forfeiture."<sup>108</sup> The court of appeals, after reviewing the relevant provisions of the Controlled Substances Act, the Business and Commerce Code, and the Certificate of Title Act, held that MBank held a bona fide security interest.<sup>109</sup>

#### IV. MISCELLANEOUS

In *Ex Parte Rutlege*<sup>110</sup> the court of criminal appeals declared an amendment to the Prison Management Act (PMA)<sup>111</sup> unconstitutional.<sup>112</sup> The PMA was passed to control prison overcrowding. According to the Act, when the Texas Department of Corrections reaches an occupancy level of ninety-five percent, certain classes of inmates automatically become eligible for a grant of thirty days administrative good time.<sup>113</sup> The grant has the effect of advancing the inmates' parole eligibility and parole review date.<sup>114</sup> Eligibility for the grant is based solely upon the statutory classification of the inmates' offense.<sup>115</sup>

The applicant<sup>116</sup> was convicted of possession of a controlled substance. Under the version of the PMA in effect at the time of the commission of his offense, the applicant would have been eligible for the grant of good time on each occasion the PMA was triggered. Subsequent to the applicant's being incarcerated, the PMA was amended. The result was that a number of offenses were statutorily designated as being ineligible for the grant of good time. The applicant's offense was one of these.

The court held that retrospective application of the amendment violated both state and federal prohibitions against ex post facto laws.<sup>117</sup> Accord-

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107. *Id.* at 427.

108. TEX. REV. CIV. STAT. ANN. art 4476-15, § 5.03(c) (Vernon 1976).

109. 737 S.W.2d at 427.

110. 741 S.W.2d 460 (Tex. Crim. App. 1987).

111. TEX. REV. CIV. STAT. ANN. art. 6184o (Vernon Supp. 1989).

112. 741 S.W.2d at 462.

113. *Id.* at 460.

114. *Id.*

115. *Id.*

116. This issue reached the court of criminal appeals by way of an application for a writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon 1977).

117. *Ex parte Rutledge*, 741 S.W.2d 460, 462 (Tex. Crim App. 1987).

ingly, the applicant's eligibility for parole was to be determined in accordance with the version of article 6184o in effect at the time of the offense for which he was convicted.<sup>118</sup>

In *Dougherty v. State*<sup>119</sup> the court of appeals held that a statute that precludes an officer from making an arrest unless dressed in specific attire is unconstitutional.<sup>120</sup> The statute in part, reads as follows:

No Sheriff, Constable, or Deputy or either, shall have authority to arrest or accost any person for driving a motor vehicle over the highways of this State in violation of the law . . . unless he is at the time wearing on his left breast on the outside of his garment . . . a badge showing his title, and . . . a cap, coat, or blouse and trousers of dark grey color or dark blue, which cap and other uniform shall be of the same color.<sup>121</sup>

The court relied on *Scoggins v. State*,<sup>122</sup> a 1931 case that held a similar statute unconstitutional. In *Scoggins* the court held that article 6701d-8 of the Texas Revised Civil Statutes was unconstitutional.<sup>123</sup> The statute forbade an officer to make an arrest for violation of automobile speed laws "unless he wear a diamond-shaped badge and a cap, coat, and trousers of blue or dark grey."<sup>124</sup>

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118. *Id.* at 462-63.

119. 745 S.W.2d 107 (Tex. App.—Amarillo 1988, pet. granted).

120. *Id.* at 109.

121. TEX. REV. CIV. STAT. ANN. art. 6701-d (Vernon 1977).

122. 117 Tex. Crim. 294, 38 S.W.2d 592 (1931).

123. 38 S.W.2d at 593.

124. *Id.*