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CRIMINAL PROCEDURE: PRETRIAL

by

Robert Udashen*

THIS article details the major state and federal developments in the area of criminal pretrial procedure during the Survey period. No one case stands out as dramatically as *Meshell v. State*¹ did in 1987. The courts, however, did issue a number of important decisions this year. A discussion of the most significant decisions follows.

I. CHARGING INSTRUMENTS

In November of 1985, the Texas voters approved a constitutional amendment authorizing the legislature to establish new rules governing the use of indictments and informations.² Pursuant to the new constitutional provision, the legislature amended several articles of the Code of Criminal Procedure. It now appears that the legislature failed to consider a number of issues when it drafted the constitutional and statutory amendments.

One of the statutory amendments allows the state to amend matters of form or substance in charging instruments.³ The constitutionality of this statutory scheme was challenged in *Cuesta v. State*.⁴ The appellant in *Cuesta* claimed that the statute allowing for the amendment of charging instruments is unconstitutional because it violates article II, section 1,⁵ the separation of powers provision of the Texas Constitution, and article I, sec-

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1. 739 S.W.2d 246, 257-58 (Tex. Crim. App. 1987) (Texas Speedy Trial Act held to violate separation of powers doctrine in the Texas Constitution).

2. TEX. CONST. art. V, § 12(b) (1876, amended 1981, 1985) states:

An indictment is a written instrument presented to a court by a grand jury charging a person with the commission of an offense. An information is a written instrument presented to a court by an attorney for the State charging a person with the commission of an offense. The practice and procedure relating to the use of indictments and informations, including their contents, amendment, sufficiency, and requisites, are as provided by law. The presentment of an indictment or information to a court invests the court with jurisdiction of the cause.

3. TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989).

4. 763 S.W.2d 547 (Tex. App.—Amarillo 1988, no pet.).

5. TEX. CONST. art. II, § 1 states:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

tion 10⁶, the provision of the Texas Constitution addressing the right to grand jury screening of a criminal offense. The court of appeals upheld the constitutionality of the statute authorizing the amendment of charging instruments,⁷ but it did not adequately explain its reasoning. In particular, the court glossed over the fact that a substantive amendment of an indictment ostensibly denies a defendant the right to have a grand jury make specific findings in the indictment. Arguably, only an amendment to article I, section 10 of the Texas Constitution could authorize such substantive amendments of indictments.

Another statutory amendment enacted by the legislature pursuant to a constitutional mandate requires a defendant to object, prior to trial, to defects of form or substance in a charging instrument.⁸ A defendant who fails to object prior to trial forfeits the right to complain about any such defect.⁹ The question raised by this statute, as yet unanswered by the court of criminal appeals, is whether the statute applies to charging instruments that are insufficient to charge an offense. The Dallas court of appeals says that it does not. In *Murk v. State*¹⁰ the Dallas court drew a distinction between charging instruments that are jurisdictionally defective and charging instruments that simply provide insufficient notice of the offense charged. The court held that a defect in a charging instrument relating to jurisdictional requirements cannot be waived.¹¹ An indictment or information that does not contain all of the elements of an offense is fundamentally defective and may be challenged at any time.¹²

The statutory changes enacted by the legislature forbid the state from making amendments to a charging instrument that either allege an additional or different offense from the original instrument or prejudice the substantial rights of the accused.¹³ The questions that arise here are: (1) what constitutes an additional or different offense and (2) what prejudices the substantial rights of the accused. Several courts of appeals faced these questions during the Survey period.

In *Byrum v. State*¹⁴ the defendant was charged with public lewdness by engaging in sexual contact with the complainant's "groin area."¹⁵ The trial court allowed the state to amend the information, over the defendant's objec-

6. TEX. CONST. art. I, § 10 states in pertinent part:

"[N]o person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary. . . ."

7. 763 S.W.2d at 549-50.

8. TEX. CODE CRIM. PROC. ANN. art. 1.14(b) (Vernon Supp. 1990).

9. *Id.*

10. 775 S.W.2d 415 (Tex.App.—Dallas 1989, pet. granted).

11. *Id.* at 416.

12. *Id.*

13. TEX. CODE CRIM. PROC. ANN. art. 28.10(c) (Vernon 1989).

14. 762 S.W.2d 685 (Tex.App.—Houston [14th Dist.] 1988, no pet.).

15. TEX. PENAL CODE ANN. § 21.07 (Vernon 1989) defines public lewdness in pertinent part as knowingly engaging in sexual contact in a public place. Sexual contact means any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratifying the sexual desire of any person. *Id.* § 21.01 (Vernon 1989).

tion, and substitute "genitals" for "groin area." The court of appeals stated that since no Texas statute proscribes sexual contact with a person's "groin area," the original information did not charge an offense.¹⁶ The court, therefore, held that the statutory prohibition against amending an information to charge a different or additional offense was not violated, since no offense was alleged in the first place.¹⁷

The Beaumont court of appeals also addressed the question of what constitutes a different or additional offense. In *Sonnier v. State*¹⁸ the defendant was charged with aggravated robbery. Over the defendant's objection, the trial court permitted the state to amend the indictment to change the name of the victim of the robbery. The Beaumont court held that, since the amended indictment, like the original one, was for aggravated robbery, it did not charge the defendant with a different offense.¹⁹ In affirming *Sonnier's* conviction, the Beaumont court ignored the fact that each time a different person is robbed a separate offense is committed and thus, by changing the name of the victim of the robbery, the amended indictment alleged a different offense from the original indictment.

Another aspect of the problem of amended charging instruments is the amount of time given to the defendant to respond to the charges. Pursuant to article 28.10(a) of the Code of Criminal Procedure,²⁰ a defendant is entitled to ten days to respond to an amended indictment or information. The question thus arises as to when this ten days begins. Does it begin when the state files its motion requesting an amendment and gives notice of such request to the defendant? Does it begin when the trial court grants the state's motion? Does the time begin when the charging instrument is physically changed? According to the Dallas court of appeals, the time begins when the trial court either signs an order setting out the substance of the amendment or physically changes the charging instrument.²¹ The defendant must be specifically informed of the substance of the amendment by the trial court, rather than by the state's motion to amend, before the ten days to respond begins to run.

During the last Survey period, the court of criminal appeals held that defendants are entitled to notice when the state intends to seek an affirmative finding that the defendant used or exhibited a deadly weapon.²² The court recently loosened this notice requirement in *Ex parte Beck*.²³ In *Beck* the court held that any allegation that a death was caused by a named weapon or instrument necessarily includes an allegation that the named weapon or instrument is a deadly weapon since that weapon caused a death.²⁴

16. 762 S.W.2d at 690.

17. *Id.* at 690-91.

18. 764 S.W.2d 348 (Tex. App.—Beaumont 1989, no pet.).

19. *Id.* at 351-52.

20. TEX. CODE CRIM. PROC. ANN. art. 28.10(a) (Vernon 1989).

21. *Rent v. State*, 771 S.W.2d 723, 727 (Tex. App.—Dallas 1989, pet. granted).

22. *Ex parte Patterson*, 740 S.W.2d 766, 775 (Tex. Crim. App. 1987).

23. 769 S.W.2d 525 (Tex. Crim. App. 1989).

24. *Id.* at 526-27; see also *Ex parte Brown*, No. 70,700 (Tex. Crim. App. June 21, 1989)

II. FORMER JEOPARDY

Texas courts have long accepted that a defendant does not waive his right to raise a double jeopardy claim by failing to object at trial or by pleading guilty to an offense.²⁵ That is, courts have accepted this argument until now. In *United States v. Broce*²⁶ the United States Supreme Court modified this longstanding rule. The defendant in *Broce*, after entering guilty pleas to two separate indictments charging conspiracies in violation of the Sherman Act, was convicted and sentenced on both indictments. Subsequently, the defendant asked that the second conviction be set aside on double jeopardy grounds because there was only one conspiracy rather than two. The Supreme Court held that, by pleading guilty, the defendant relinquished the right to challenge the government's theory that there were two conspiracies.²⁷ Through his pleas, the defendant conceded that he committed two separate crimes.²⁸ The Supreme Court refused to go behind the face of the record to determine if the defendant was guilty of one or two conspiracies. The Supreme Court, however, did leave open the possibility of raising a double jeopardy challenge to a conviction based on a guilty plea if it can be done on the basis of the existing record without an evidentiary hearing.²⁹

Double jeopardy issues also arise from the interplay between civil and criminal actions concerning the same event. The United States Supreme Court considered whether a civil penalty may constitute punishment for purposes of the double jeopardy clause in *United States v. Halper*.³⁰ The defendant in *Halper* was convicted of submitting false claims to the government, sentenced to prison and fined. The government then brought suit against the defendant seeking up to \$130,000.00 in civil penalties for the same conduct. The Supreme Court held that a civil sanction that does not solely serve a remedial purpose, but instead serves a retributive or deterrent purpose, is punishment.³¹ A civil sanction that is extremely disproportionate to the government's actual damages is also punishment.³² As such, a defendant who has already been punished in a criminal prosecution may not be subjected to an additional civil sanction.³³ There is nothing in the double jeopardy clause, however, that prevents the government from bringing a civil suit in the same proceeding as a criminal suit, nor is there anything that bars a private individual from suing a person who has already been criminally punished.³⁴

(allegation that instrument was used in attempt to cause death is sufficient notice that state will seek affirmative finding that instrument is deadly weapon).

25. *Ex parte McAfee*, 761 S.W.2d 771, 772 (Tex. Crim. App. 1988); *Tinney v. State*, 773 S.W.2d 364, 366 (Tex. App.—Fort Worth 1989, pet. ref'd).

26. 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989).

27. *Id.* at 763, 102 L. Ed. 2d at 936-37.

28. *Id.*

29. *Id.* at 766, 102 L. Ed. 2d at 939-40.

30. 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989).

31. *Id.* at 1902, 104 L. Ed. 2d at 502.

32. *Id.* at 1904, 104 L. Ed. 2d at 504.

33. *Id.* at 1902, 104 L. Ed. 2d at 502.

34. *Id.* at 1903, 104 L. Ed. 2d at 503.

The United States Supreme Court addressed the former jeopardy issue in the context of underlying offenses in *Jones v. Thomas*.³⁵ The defendant was convicted of felony murder and the underlying felony of attempted robbery. The lower court sentenced him to serve consecutive sentences on the two offenses. The Missouri Supreme Court held that the state legislature did not intend to authorize separate punishments for felony murder and the underlying felony.³⁶ The state court, therefore, vacated the shorter sentence, which the defendant had served, and credited the time on that sentence against his remaining sentence. The United States Supreme Court held that the state court's remedy provided suitable protection for the defendant's double jeopardy rights.³⁷ The Court stated that the double jeopardy clause protects against multiple punishments for the same offense.³⁸ As long as the defendant's total punishment does not exceed that authorized by the legislature, this aspect of the double jeopardy clause is not offended.³⁹

The court of criminal appeals also considered several double jeopardy issues during the Survey period. In *Neaves v. State*⁴⁰ the defendant asserted a plea of collateral estoppel prior to his trial for driving while intoxicated. Following his arrest for driving while intoxicated, Neaves refused to take a breath or blood test. At the municipal court hearing, the state attempted to suspend Neaves' driver's license because of this refusal.⁴¹ The municipal court refused to suspend the driver's license after finding that there was no probable cause to arrest Neaves for driving while intoxicated. This finding, however, did not bar Neaves' subsequent prosecution for driving while intoxicated. The court of criminal appeals stated that collateral estoppel bars the relitigation of an issue of ultimate fact previously determined by a valid and final judgment between the same parties.⁴² The court then held that the question of probable cause to arrest Neaves was not an issue of ultimate fact in the prosecution for driving while intoxicated.⁴³

*Spradling v. State*⁴⁴ raised the question of whether a person can be charged with two violations of the failure to stop and render aid statute⁴⁵ for striking and killing two pedestrians in one accident and then leaving the scene. The court of criminal appeals held that the double jeopardy clause

35. 109 S. Ct. 2522, 105 L. Ed. 2d at 322 (1989).

36. *Id.* at 2524, 105 L. Ed. 2d at 329.

37. *Id.* at 2528-29, 105 L. Ed. 2d at 335.

38. *Id.* at 2525, 105 L. Ed. 2d at 331.

39. *Id.*

40. 767 S.W.2d 784 (Tex. Crim. App. 1989).

41. TEX. REV. CIV. STAT. ANN. art. 67011-5 § 2(f) (Vernon 1989) states that a person's driver's license shall be suspended if the court finds:

(1) that probable cause existed that such person was driving or in actual physical control of a motor vehicle on the highway or upon a public beach while intoxicated, (2) that the person was placed under arrest by the officer and was offered an opportunity to give a specimen [of blood or breath]. . . , and (3) that such person refused to give a specimen. . . .

Id.

42. 767 S.W.2d at 786.

43. *Id.*

44. No. 1031-83 (Tex. Crim. App. June 21, 1989).

45. TEX. REV. CIV. STAT. ANN. art. 6701 d, § 38 (Vernon 1977).

does not bar separate prosecutions for each victim.⁴⁶ The court's decision was based on a perceived legislative intent to aid all victims in a hit-and-run accident and, accordingly, to enforce this intent through appropriate punishment for each victim not so aided.⁴⁷ In a well-reasoned dissent, Judge Clinton pointed out that the defendant was guilty of but a singular volition omission and should therefore be charged with only one offense.⁴⁸

III. JOINDER

The Texas Penal Code formerly permitted the joinder of offenses in a single charging instrument only when they arose out of the same criminal episode.⁴⁹ The code now allows offenses to be joined if they are committed pursuant to the same transaction, constitute a common scheme or plan, or are the repeated commission of the same or similar offenses.⁵⁰ The new definition of criminal episode will probably eliminate most of the errors that arise in connection with the joinder of offenses. For now, however, the courts continue to confront joinder issues that arose under the old definition.

In *Callins v. State*⁵¹ the defendant was convicted of capital murder and two aggravated robberies. The state joined the three offenses in one indictment. The lower court rendered a single judgment convicting the defendant of all three offenses. The court of criminal appeals held that it was error to join all of the offenses in one indictment.⁵² Instead of reversing all three convictions, however, the court reformed the judgment to delete the two robbery convictions.⁵³ The court then affirmed the capital murder conviction and the resulting death sentence.⁵⁴

Different joinder rules apply where two separate indictments are consolidated into a single proceeding for trial. A defendant may consent to consolidation of separate indictments either expressly or implicitly, by failure to object, and consequently authorize a single trial on separate offenses that do not meet the former definition of criminal episode.⁵⁵ In such a situation, the defendant may be convicted and punished separately for each offense.⁵⁶

An unusual joinder problem arose in *Washington, v. State*.⁵⁷ In that case, the appellant complained of the joinder of the offenses of capital murder and

46. No. 1031-83, slip op. at 7.

47. *Id.*

48. *Id.*, slip op. at 12-13 (Clinton, J. dissenting).

49. Former § 3.01 of the Texas Penal Code defined criminal episode as the repeated commission of any one offense found in title 7 of the code. TEX. PENAL CODE ANN. § 3.01 (Vernon 1974), amended by Acts 1987, 70th Leg., ch. 387, § 1, 1987 (Vernon Supp. 1990).

50. TEX. PENAL CODE ANN. § 3.01 (Vernon Supp. 1990).

51. No. 69,023 (Tex. Crim. App. Sept. 27, 1989).

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

53. *Id.*, slip op. at 3. The judgment was reformed pursuant to article 44.24(b) of the Texas Code of Criminal Procedure which authorizes the court of criminal appeals to reform judgments. TEX. CODE CRIM. PROC. ANN. art. 44.24(b) (Vernon 1979), repealed by TEX. R. APP. P. effective Sept. 1, 1986, acts 1985, 65th Leg., Ch. 685, § 4 (Vernon Supp. 1990).

54. No. 69,023, slip op. at 24.

55. Milligan v. State, 764 S.W.2d 802, 803 (Tex. Crim. App. 1989).

56. *See id.*

57. 771 S.W.2d 537 (Tex. Crim. App. 1989).

murder in a single indictment. The court of criminal appeals found no error in joining the two offenses because the alleged murder was a lesser included offense of the alleged capital murder.⁵⁸ The court held that two offenses may be joined in a single indictment where one offense is a lesser included offense of the other, even if the two offenses do not meet the former definition of criminal episode.⁵⁹

IV. SEVERANCE

The court of criminal appeals, in *Webb v. State*,⁶⁰ considered the circumstances under which evidence of and comment on a defendant's post-arrest silence by a co-defendant's attorney should result in separate trials for the co-defendants. According to the court, separate trials are required only when one defendant has the right to comment on the silence of a co-defendant and the co-defendant is entitled to be free of such comment.⁶¹ The court held that separate trials were not required in *Webb* because the attorney who commented on Webb's silence had no right to make the comment.⁶² Instead, the trial judge should have excluded the attorney's comment.⁶³

The Code of Criminal Procedure allows co-defendants who have been granted a severance to agree upon the order in which they will be tried.⁶⁴ In *Roberts v. State*⁶⁵ the trial court granted a severance and ordered three co-defendants tried separately. The co-defendants then filed an agreed order of trial stating that Roberts should be tried last. The trial court refused to follow the agreement because Roberts was in jail and the other two co-defendants were on bond. Roberts, therefore, was tried first over his objection. The court of appeals held that the trial court erred, although it also held that the error was harmless.⁶⁶ An important factor in finding the error harmless was the fact that one of Roberts' co-defendants testified for him at his trial without asserting his right against self-incrimination.⁶⁷

V. GRAND JURY

The 71st Legislature made several amendments to the statutes governing grand jury procedures. One potentially important change authorizes the at-

58. *Id.* at 546.

59. *Id.*

60. 763 S.W.2d 773 (Tex. Crim. App. 1989).

61. *Id.* at 775. It does not matter that a defense attorney rather than the prosecutor commented on the silence of another defendant, under Texas law, the comments are treated the same regardless of their source. *Id.*

62. *Id.* at 775-76.

63. *Id.* at 775. The court does not explain why the comment was impermissible. From the opinion, the evidence appears to have been introduced and commented on in an effort to obtain a more lenient penalty because the commenter's client and not the codefendants cooperated with the police. It would seem to be entirely permissible to contrast co-defendants for punishment purposes by commenting on a defendant's post-arrest silence and lack of cooperation.

64. TEX. CODE CRIM. PROC. ANN. art. 36.10 (Vernon 1981).

65. 762 S.W.2d 708 (Tex. App.—Houston [1st Dist.] 1988, pet. granted).

66. *Id.* at 709-10.

67. *Id.* at 710.

torney for the accused, if approved by the prosecutor, to address the grand jury.⁶⁸ Prosecutors should act out of fairness and approve reasonable requests from defense attorneys to address the grand jury. Another amendment requires the state to furnish defendants with a written copy of the warnings required by the Code of Criminal Procedure prior to their testifying before the grand jury.⁶⁹ Legislation now also forbids close relatives from serving on the same grand jury.⁷⁰

The Texas Court of Criminal Appeals recently addressed the issue of grand jury selection in *Gentry v. State*.⁷¹ The defendant in *Gentry* moved to quash his indictment because the commissioners who selected the grand jury that indicted Gentry were not from different portions of Denton County. Four of the five grand jury commissioners were from the City of Denton. The court of criminal appeals held that the language in the Code of Criminal Procedure⁷² that requires grand jury commissioners to be selected from different portions of the county is directory rather than mandatory.⁷³ Further, because the record did not reflect the proportion of residents of Denton County who lived in the City of Denton, the court held that there was suffi-

68. TEX. CODE CRIM. PROC. ANN. art. 20.04 (Vernon Supp. 1990).

69. TEX. CODE CRIM. PROC. ANN. art. 20.17 (Vernon Supp. 1990) provides:

(a) The grand jury, in propounding questions to the person accused or suspect, shall first state the offense with which he is suspected or accused, the county where the offense is said to have been committed and as nearly as may be, the time of commission of the offense, and shall direct the examination to the offense under investigation.

(b) Prior to any questioning of an accused or suspected person who is subpoenaed to appear before the grand jury, the accused or suspected person shall be furnished a written copy of the warnings contained in Subsection (c) of this section and shall be given a reasonable opportunity to retain counsel or apply to the court for an appointed attorney and to consult with counsel prior to appearing before the grand jury.

(c) If an accused or suspected person is subpoenaed to appear before a grand jury prior to any questions before the grand jury, the person accused or suspected shall be orally warned as follows:

- (1) "Your testimony before this grand jury is under oath";
- (2) "Any material question that is answered falsely before this grand jury subjects you to being prosecuted for aggravated perjury";
- (3) "You have the right to refuse to make answers to any question, the answer to which would incriminate you in any manner";
- (4) "You have the right to have a lawyer present outside this chamber to advise you before making answers to questions you feel might incriminate you";
- (5) "Any testimony you give may be used against you at any subsequent proceeding";
- (6) "If you are unable to employ a lawyer, you have the right to have a lawyer appointed to advise you before making an answer to a question, the answer to which you feel might incriminate you."

70. TEX. CODE CRIM. PROC. ANN. art. 19.08(6) (Vernon Supp. 1990).

71. 770 S.W.2d 780 (Tex. Crim. App. 1988) (en banc).

72. TEX. CODE CRIM. PROC. ANN. art. 19.01(a)(4) (Vernon 1989) provides in pertinent part: "(a) The district judge, at or during the term of court, shall appoint not less than three, nor more than five persons to perform the duties of jury commissioners . . . , and they shall possess the following qualifications: . . . 4. Be residents of different portions of the county."

73. 770 S.W.2d at 793-94.

cient compliance with the statute.⁷⁴

VI. SPEEDY TRIAL

In *Stewart v. State*⁷⁵ the grand jury no-billed a defendant, Stewart, arrested for murder and he was released from custody. Seven years later, a new witness came forward and the state indicted Stewart. Seven months after that indictment, Stewart was tried and convicted. On appeal, Stewart complained that the seven year delay violated his right to a speedy trial. The Dallas court of appeals disagreed and affirmed Stewart's conviction.⁷⁶ The court stated that the right to a speedy trial attaches from the time that the indictment is presented and, therefore, the seven month delay from indictment to trial did not violate Stewart's right to a speedy trial.⁷⁷

VII. VENUE

In *Johnson v. State*⁷⁸ the court of criminal appeals made it clear that the standard of review of a trial court's denial of a motion for a change of venue is abuse of discretion.⁷⁹ Whether the trial court abused its discretion must be determined in light of whether outside influences affecting the community climate concerning the defendant were inherently suspect.⁸⁰ Publicity alone is not a sufficient reason to change venue.⁸¹ Johnson's death sentence was affirmed because the evidence was not sufficient to show that such a pervasive feeling existed in the community as to preclude the movant from receiving a fair trial by an impartial jury.⁸²

The court of criminal appeals affirmed two other death sentences during the Survey period because of the failure of appellants to establish an abuse of discretion in the denial of motions for a change of venue.⁸³ The court of criminal appeals continues to make it exceedingly difficult to obtain a change of venue based on publicity alone. The best hope that a defendant has for obtaining a change of venue appears to be by paying strict attention to the statutory requirements concerning change of venue motions.⁸⁴ Yet, even in this area, defendants often fail due to their own negligence. For example, in *McGee v. State*⁸⁵ the defendant filed a proper motion for change of venue in compliance with the statutory requirements. The state did not file any controverting affidavits. The defendant then waived his right to a change of

74. *Id.* at 794.

75. 767 S.W.2d 455 (Tex.-App.—Dallas 1988, no pet.).

76. *Id.* at 456.

77. *Id.* at 457; accord *Spence v. State*, 758 S.W.2d 597, 598 n.1 (Tex. Crim. App. 1988) (pre-accusational delay does not trigger constitutional speedy trial protections).

78. No. 69,750 (Tex. Crim. App. June 21, 1989).

79. *Id.* slip op. at 2.

80. *Id.*

81. *Id.*

82. *Id.*, slip op. at 3.

83. *McGee v. State*, 774 S.W.2d 229, 242 (Tex. Crim. App. 1989); *Beets v. State*, 767 S.W.2d 711, 742 (Tex. Crim. App. 1988).

84. TEX. CODE CRIM. PROC. ANN. arts. 31.03, 31.04 (Vernon 1989).

85. 774 S.W.2d 229 (Tex. Crim. App. 1989).

venue, as a matter of law, by proceeding to a hearing on his motion for a change of venue instead of simply relying on his motion and objecting to any hearing on the motion.⁸⁶ The defendant then lost his request for a change of venue because he failed to establish in the hearing that prejudice in the community made the likelihood of obtaining a fair and impartial jury doubtful.⁸⁷

In *Wyle v. State*⁸⁸ the defendant tried to meet the heavy burden of showing the extent of prejudice against him in the community by retaining a pollster to prepare a statistical survey. The court of criminal appeals stated that a survey prepared by a pollster would arguably be admissible on a motion for a change of venue.⁸⁹ The court held, however, that there was no requirement that the expense of a pollster be paid for by the state.⁹⁰

VIII. BAIL

Article 1, section 11(a) of the Texas Constitution⁹¹ allows a defendant to be held in custody, without bail, if he is accused of committing a felony while on bail for a prior felony indictment. A court must issue an order denying bail within seven days of the defendant's arrest on the second felony.⁹²

The Court of Criminal Appeals considered the question of what constitutes the "issuance" of an order in *Westbrook v. State*.⁹³ The state in *Westbrook* timely filed a motion to hold the defendant in jail without bond following his arrest for a felony committed while he was free on an appeal bond for another offense. The trial court held a hearing on that motion and orally granted the state's motion to deny bail. The court's order, however, was never reduced to writing. The court of criminal appeals held that an order denying bail must be in writing and must be issued within seven days of arrest.⁹⁴ An oral order denying bail cannot be issued in the constitutional sense.⁹⁵ The court of criminal appeals remanded the case to the trial court to set bail.⁹⁶

The Code of Criminal Procedure requires that a defendant who is detained in jail more than 90 days pending trial of a felony offense be released from custody either on a personal bond or by reducing the amount of bail required.⁹⁷ The statute containing this requirement was enacted as part of the Speedy Trial Act and appellate courts are grappling with its applica-

86. *Id.* at 241.

87. *Id.* at 242; accord *McNiel v. State*, 757 S.W.2d 129, 132-33 (Tex. App.—Houston [1st Dist.] 1988, no pet.).

88. No. 69,295 (Tex. Crim. App. Sept. 20, 1989).

89. *Id.*, slip op. at 6.

90. *Id.*

91. TEX. CONST. art. I, § 11(a) (1956, amended 1977).

92. *Id.*

93. 753 S.W.2d 158 (Tex. Crim. App. 1988).

94. *Id.* at 159.

95. *Id.*

96. *Id.* at 160.

97. TEX. CODE CRIM. PROC. ANN. art. 17.151 (Vernon Supp. 1990).

tion.⁹⁸ That act was declared unconstitutional in *Meshell v. State*.⁹⁹ The Austin court of appeals, therefore, held the provisions of the Speedy Trial Act dealing with bail to be void.¹⁰⁰ The Austin court differed with the Tyler court of appeals on the continued viability of the bail provisions of the Speedy Trial Act.¹⁰¹ The Houston first district court of appeals refused to consider the constitutionality of the bail provisions of the Speedy Trial Act because the question of the constitutionality had not been raised in the trial court.¹⁰² On the other hand, the Fort Worth court of appeals considered the merits of a request under this statute for a personal bond or a reduction in the amount of bail without ever commenting on the constitutionality of the statute.¹⁰³ It thus appears that the court of criminal appeals needs to clear up the confusion in this area.

X. CONTINUANCE

In *Gentry v. State*¹⁰⁴ the defendant was convicted of capital murder and sentenced to death. During the course of his trial, Gentry orally sought a continuance because a witness that he desired to have testify for him was unavailable. The court of criminal appeals upheld the trial court's refusal to grant a continuance.¹⁰⁵ The court based its holding on three reasons. First, the defendant did not file a written, sworn motion for continuance.¹⁰⁶ Second, Gentry did not show that he acted diligently in attempting to obtain the witness' presence in court.¹⁰⁷ Third, he did not prove that the expected testimony of the absent witness would have been material.¹⁰⁸

While *Gentry* illustrates the need for defendants to strictly comply with statutory requirements when requesting continuances, *Beebe v. State*¹⁰⁹ shows the need for trial courts to strictly comply with statutory requirements as well. In *Beebe* the defendant requested additional time to prepare for trial following the amendment of the information. The trial court denied

98. TEX. CODE CRIM. PROC. ANN. art. 32a.01-.02 (Vernon 1989).

99. 739 S.W.2d 246, 248 (Tex. Crim. App. 1987).

100. *Ex parte* Danziger, 775 S.W.2d 475, 476 (Tex. App.—Austin 1989, pet. granted).

101. *Ex parte* Delk, 750 S.W.2d 816, 817 (Tex. App.—Tyler 1988, no pet.).

102. *Ex parte* McNeil, 772 S.W.2d 488, 489 (Tex. App.—Houston [1st Dist.] 1989, no pet.).

103. *Balawajder v. State*, 759 S.W.2d 504 (Tex. App.—Fort Worth 1988, pet. ref'd).

104. 770 S.W.2d 780 (Tex. Crim. App. 1988).

105. *Id.* at 786.

106. *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 29.03 (Vernon 1989) (criminal action may be continued on written motion of defendant); TEX. CODE CRIM. PROC. ANN. art. 29.08 (Vernon 1989). “[A]ll motions for continuance must be sworn to by a person having personal knowledge of the facts relied on for the continuance.” TEX. CODE CRIM. PROC. ANN. art. 29.08 (Vernon 1989).

107. 770 S.W.2d at 787 (Gentry claimed diligence because of his reliance on the State's subpoena of the witness. The court of criminal appeals found no diligence. Gentry's trial was continued to a date beyond the date on which the witness was instructed to appear; Gentry, therefore, should have issued a new subpoena for the witness).

108. *Id.* The materiality of the testimony of the missing witness can be established by a sworn affidavit from the missing witness or through some other showing, under oath, of the expected testimony. *Id.*

109. 756 S.W.2d 759 (Tex. App.—Corpus Christi 1988, pet. granted).

the defendant's request although the Code of Criminal Procedure mandates that a defendant, upon request, be given ten days to respond to an amended information.¹¹⁰ The court of appeals held that refusal to give the defendant ten days to prepare for trial was reversible error, even without a showing of harm or prejudice on the part of the defendant.¹¹¹

XI. DISCOVERY

In *Arizona v. Youngblood*¹¹² the United States Supreme Court held that the failure of the state to preserve potentially useful evidentiary material does not constitute a denial of due process. Youngblood was charged with the sexual assault of a child. He argued at trial that the victim erred in identifying him as his attacker. While investigating this offense, the police gathered semen samples from the child victim's body and clothing using a sexual assault kit. The state conducted certain laboratory tests on these samples that proved to be inconclusive. The state gave Youngblood access to the lab results and all of the police reports. The state, however, did not preserve the evidentiary material in such a way that additional tests could be performed on the material. Youngblood, therefore, lost an opportunity to demonstrate scientifically that he was not the person who assaulted the child.

The Supreme Court wrote that the due process clause makes the good faith or bad faith of the state irrelevant when the state fails to disclose material exculpatory evidence.¹¹³ According to the Court, however, a different result is called for when the state fails to preserve evidentiary material of which no more can be said than that the material could have been subjected to tests that might have exonerated the defendant.¹¹⁴ Unless the defendant can show bad faith on the part of the police, the failure to preserve potentially useful evidence does not constitute a denial of due process of law.¹¹⁵ Further, the state has no constitutional duty to perform certain tests on physical evidence.¹¹⁶

The Fifth Circuit, in a case discussed in the last Survey,¹¹⁷ *Garrett v. Lynaugh*,¹¹⁸ reached the same conclusion as the Supreme Court in *Youngblood*. It thus appears that the courts will not get involved in directing the manner in which law enforcement authorities investigate a crime. There is apparently a willingness to sacrifice accuracy in the truth seeking functions

110. TEX. CODE CRIM. PROC. ANN. art. 28.10(a) (Vernon 1989) reads in pertinent parts as follows: "On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information."

111. 756 S.W.2d at 761.

112. 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988).

113. *Id.*, 102 L. Ed. 2d at 289.

114. *Id.*, 102 L. Ed. 2d at 289.

115. *Id.*, 102 L. Ed. 2d at 289.

116. *Id.* at 338, 102 L. Ed. 2d at 290.

117. Udashen, *Criminal Procedure: Pretrial, Annual Survey of Texas Law* 43 Sw. L.J. 535, 543 (1989).

118. 842 F.2d 113 (5th Cir. 1988).

of a trial for the expedient and politically popular goal of arresting and convicting criminals.

XII. COMPETENCY

In *Manning v. State*¹¹⁹ the Dallas court of appeals considered the role of the attorney-client privilege in a competency hearing. Manning was tried and convicted of murder, attempted murder and three counts of aggravated robbery. Manning raised the issue of his competency to stand trial at a hearing prior to trial. On appeal, Manning claimed that the trial court committed error at his competency hearing. The court of criminal appeals agreed and remanded Manning's case to the trial court for a new competency hearing.¹²⁰ New counsel represented Manning at his second competency hearing. Manning's attorney from the previous trial on the merits testified at the second competency hearing that Manning had a rational, as well as a factual, understanding of the proceedings against him during his trial. In a case of first impression, Manning claimed that his former attorney's testimony violated the attorney-client privilege.

Manning's argument was based on that portion of rule 503 of the Rules of Criminal Evidence that prevents a lawyer from disclosing any fact which came to the lawyer's knowledge by reason of the attorney-client relationship.¹²¹ This aspect of the rule is broader than the traditional notion of the attorney-client privilege that simply prevents an attorney from revealing confidential communications with his client. Manning, therefore, argued that his attorney would not have been in a position to express an opinion concerning his competency if there had not been an attorney-client relationship. The court, however, disagreed and held that the testimony of Manning's attorney did not violate the attorney-client privilege.¹²² The court reasoned that because of the nonadversarial nature of competency hearings and because of the constitutional implications of the competency inquiry, the testimony of a defendant's attorney during a competency hearing is appropriate as long as confidential communications are not revealed.¹²³

119. 766 S.W.2d 551 (Tex. App.—Dallas 1989), *aff'd*, 773 S.W.2d 568 (Tex. Crim. App. 1989) (en banc).

120. *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App. 1987).

121. TEX. R. CRIM. EVID. 503(b).

122. 766 S.W.2d at 558.

123. *Id.*

