Volume 21
Issue 1 *Annual Survey of Texas Law*

Article 18

January 1967

Criminal Law and Procedure

Saul W. Baernstein

CRIMINAL LAW AND PROCEDURE

by

*Saul W. Baernstein**

MOST of the significant developments in Texas criminal law this past year dealt with matters of procedure and the administration of justice rather than substantive law. In other jurisdictions there were some decisions indicating a coming scrutiny of the law of crimes by due process standards. Decisions holding that chronic alcoholism is a status, not an act, and cannot be prosecuted as criminal conduct,[1] should cause similar questioning in this jurisdiction in the near future. For the present, a number of legislative and court actions occurring in the state last year should be noted.

I. ENHANCEMENT OF PUNISHMENT

The law provides that in certain instances the punishment for second and third offenders shall be increased.[2] To obtain the increased sentence, proper information establishing the prior conviction must be presented to the jury or judge who will determine the sentence. The unresolved question has been whether a defendant's prior criminal record can be presented to the jury or court before the issue of guilt is determined in the case before them. Article 36.01(1) of the new Code of Criminal Procedure prohibits presentation of the prior record when the sole purpose is enhancement. Texas cases presenting this issue were heard in the Court of Criminal Appeals,[3] the Fifth Circuit,[4] and the United States Supreme Court.[5] It has been a general practice of prosecutors to read to the trial jury the indictment prior to trial. In cases involving enhanced punishment the indictments read to the jury included the defendant's past criminal record. Thus, prior to deciding whether the defendant was innocent or guilty in the present case, the jury was told that the defendant had been a criminal before.

The basis for this practice was the longtime Texas system of having one

---

* A.B., Dartmouth College; LL.B., University of Texas. Assistant Professor of Law, Southern Methodist University. The author acknowledges the able assistance of Larry Mathews.

[1] Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).

[2] TEX. PEN. CODE ANN. arts. 61-64 (1925).

[3] Hampton v. State, 402 S.W.2d 748 (Tex. Crim. App. 1966); Jackson v. State, 402 S.W.2d 742 (Tex. Crim. App. 1966); Young v. State, 401 S.W.2d 599 (Tex. Crim. App. 1966); Lee v. State, 400 S.W.2d 909 (Tex. Crim. App. 1966); Barlow v. State, 398 S.W.2d 933 (Tex. Crim. App. 1966); Taylor v. State, 398 S.W.2d 559 (Tex. Crim. App. 1966); Spencer v. State, 389 S.W.2d 304 (Tex. Crim. App. 1965).

[4] Moses v. Beto, 352 F.2d 88 (5th Cir. 1965); Reed v. Beto, 343 F.2d 723 (5th Cir. 1965).

[5] Reed v. Beto, 35 U.S.L. WEEK 4164 (U.S. Jan. 24, 1967); Bell v. Texas, 35 U.S.L. WEEK 4164 (U.S. Jan. 24, 1967); Spencer v. Texas, 35 U.S.L. WEEK 4164 (U.S. Jan. 24, 1967).

global hearing before the jury in which both the issue of guilt and the sentence to be imposed were decided at the same time.[6] Necessarily, under this global practice, if the prosecution wanted to have the punishment enhanced, this was their only opportunity to provide the jury with a basis for it.

The argument against the practice is that the jury is prejudiced in their decision of innocence or guilt in the pending case by knowing of the previous convictions. The opponents contend that the jury is more likely to find guilt this time because the accused person has been guilty before. While this argument has been pressed on the courts time and again, that the practice is so prejudicial as to violate the accused's right to a fair trial, it has continued to fail to impress the judges.[7] Both the Texas Court of Criminal Appeals[8] and the Fifth Circuit[9] have upheld the practice, on the rationale that this has been an accepted procedure over a long period of time. It should be noted that at least one court, the Fourth Circuit,[10] held, prior to the recent Supreme Court decisions,[11] that the practice was unconstitutional.

The question of constitutionality should not be the basis for the state's decision to keep or change this practice. Article 36.01(1) of the Code of Criminal Procedure states that prior convictions cannot be read to the jury when the sole purpose is enhancement of punishment. Realistically, the probabilities of jury prejudice are high and, on a more practical ground, with the new provisions in the Code of Criminal Procedure for separate hearings for guilt and sentencing,[12] the need for injecting these prior convictions into the main trial no longer exists.

Along more traditional lines of Texas jurisprudential disputes is *Sellars v. State*.[13] The case involved a second offense burglary conviction and raised the question of what maximum enhanced punishment was legally permissible. Article 62 of the Code of Criminal Procedure fixes the enhanced sentence at the highest punishment allowed by statute for the primary offense. Article 13.91 of the Penal Code fixes the punishment for the primary offense at a term of years not less than five. In *Sellars*, the court of criminal appeals was prompted to restate its ruling that the maximum enhanced punishment possible is a term of ninety-nine years. In a terse dissenting opinion, Judge Woodley accuses the court of legislating rather than adjudicating, because the legislature would have stated a ninety-nine year

[6] TEX. CODE CRIM. PROC. ANN. art. 693 (1926).

[7] Generally, the courts, without really discussing the merits of the practice, have taken a legalistic approach, holding it not to be in violation of minimum standards of due process.

[8] See cases cited note 3 *supra*.

[9] See cases cited note 4 *supra*.

[10] Lane v. Warden, 320 F.2d 179 (4th Cir. 1963).

[11] See cases cited note 5 *supra*.

[12] TEX. CODE CRIM. PROC. ANN. art. 37.07 (1965).

[13] 401 S.W.2d 835 (Tex. Crim. App. 1966).

maximum if that is what they meant. Of course, neither the majority nor the dissent attempts to search for legislative intent beyond the "plain meaning" of the statutes involved. Nor do they attempt to interpret and apply the enhancement provisions so as to fulfill the sentencing and correction objectives of the criminal law. For example, does a ninety-nine year sentence lead to different penitentiary treatment of the offender than a life sentence? Would Judge Woodley's position lead to different parole treatment? In short, of what significance to the state and the criminal law is this controversy? It would appear that a dispute such as this—over the meaning of "a term of years"—could continue indefinitely.[14]

II. SENTENCING

The enactment of the revisions to the Code of Criminal Procedure brought a radical change in Texas sentencing procedures. As suggested above, until this year Texas has followed the rare practice of (a) having the jury determine the sentence as well as guilt, and (b) requiring the jury to determine guilt and sentence in one hearing based only on evidence pertinent to the guilt issue. The state took half a step forward by the revised code's call for a separate hearing, after the determination of guilt, on the issue of punishment. Still, however, the jury is the main sentencing agent in Texas. The code provides that the judge shall sentence except when the defendant requests the jury do so.[15] Nevertheless, the common practice encouraged in many courts is to place this responsibility on the jury, not the judge.

Just what the nuances of the new separate hearing sentencing procedure will be has yet to be fully revealed, but *Rojas v. State*[16] presented several major ones. The case raised the problem of proper sentencing procedures upon a plea of guilty. The trial court decided that article 37.07 of the Code of Criminal Procedure provided the proper procedure, and therefore the judge ruled that he could instruct the jury only on guilt, and not on punishment.[17] The defense argued this was not the proper statute, that article 26.14 of the Code of Criminal Procedure[18] applied and required the judge to charge the jury on punishment as well as guilt. Still acting under article 37.07 when the jury returned their finding of guilt, the judge asked

[14] At the time of publication, *Sellars* has been expressly overruled in an opinion that does not treat directly the legislative objectives.

[15] TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (1965).

[16] 404 S.W.2d 30 (Tex. Crim. App. 1966).

[17] Texas procedure has long required that some evidence establishing guilt be introduced even upon a guilty plea.

[18] "Where a defendant in a case of felony persists in pleading guilty or in entering a plea of *nolo contendere*, if the punishment is not absolutely fixed by law, a jury shall be impaneled to assess the punishment and evidence may be heard to enable them to decide thereupon, unless the defendant in accordance with Articles 1.13 or 37.07 shall have waived his right to trial by jury." TEX. CODE CRIM. PROC. ANN. art. 26.14 (1965).

whether the defendant elected to be sentenced by jury or judge. While maintaining their basic objection to article 37.07 being applied at all, the defense contended that the statute did not provide for an "election," but rather authorized sentencing by the judge unless defendant "requested" a jury. The trial court discharged the jury and assessed the punishment. The court of criminal appeals found reversible error in not following article 26.14 and in not charging the jury on punishment.

The *Rojas* case also raised an issue concerning what evidence was admissible in the new hearing on sentence. The defense objected to admitting into evidence a prior misdemeanor conviction of driving while intoxicated because it did not involve moral turpitude. The court, while overruling a motion for rehearing, held that such convictions, while still inadmissible in the hearing on guilt, were admissible in the sentencing hearing. The court stated that article 37.07, section 2(b), which allows evidence of the defendant's prior criminal record, general reputation, and character, applies to jury hearings on sentence under article 26.14.

It is desirable to admit all pertinent information, including prior convictions, when the sentence is being assessed. However, it appears somewhat questionable to have a strict reading of article 26.14 that excludes utilizing article 37.07 on whether jury or judge does the sentencing, and then a flexible reading that incorporates that part of article 37.07 on the matter of evidence for sentencing.

The separate hearing on sentence offers an excellent opportunity to develop sentencing procedures that would be fair and that would be based on all information pertinent to the purposes of sentencing. It could be an opportunity to remove the blindfold from the sentencing agent—jury or judge—by affording access to background information on the defendant which is inadmissible in the trial of the guilt issue. However, Texas has yet to require pre-sentence investigations and reports[19] which would develop the pertinent information; nor has the state allocated the resources to employ the number of competent probation officers that are needed to make the investigations. Of course, the attorneys—prosecution or defense—can present this information if they desire, but this is rarely done; and in Texas, unlike many jurisdictions, the sentencing agency cannot require it. It would be worthwhile also for Texas to join the majority of jurisdictions and to remove the sentencing function from the jury altogether. As a practical matter, if this were done, it would be desirable to provide training institutes on sentencing for trial judges and to establish a procedure for appellate review of sentences in order to effect more fully the legislature's objectives of penal corrections.

[19] TEX. CODE CRIM. PROC. ANN. art. 42.12, § 4 (1965) gives the judge power to require a report when considering the probating of a sentence.

Elsewhere, the legislature brought to Texas an important new development in sentencing by extending probation to misdemeanor offenses.[20] Previously available only to felony offenders,[21] the revised code now offers this important sentencing alternative in the less serious misdemeanor area.

III. Driving While Intoxicated

One of the most prevalent prosecutions in Texas, as elsewhere, is drunken driving. There were some significant developments in the law during the year that may allow more effective regulation of this conduct. Evidence of drunkenness or of being under the influence of alcohol is a requisite of a successful DWI prosecution. Several tests and examinations, from having the accused attempt to walk a straight line to measuring the alcohol in the accused's blood, have been devised to develop this evidence.[22] For many years police have been able to offer defendants a blood test immediately after arrest. If, however, the person did not consent to the test, it was general practice not to administer it. In *Schmerber v. California*[23] the United States Supreme Court held that consent was not a necessary condition for administering the blood test. In their opinion, which was well received by law enforcement, the Court said lack of consent did not violate constitutionally protected rights of due process, against self-incrimination, the right to counsel or prohibitions against unlawful search and seizure. The fact that the evidence would be destroyed by absorption into the person's system excepted the test from the ordinary requirements for search and seizure. In a situation unusual for Texas, the court of criminal appeals had faced this issue several years ago. They ruled that under Texas law, consent is required.[24] An Attorney General's opinion subsequent to *Schmerber* concluded that consent is still necessary in Texas.[25] What may be the proper plumb line for due process of law is always a difficult issue, but a state is not limited to establishing laws that meet only the minimum standards of protection of the constitution. It is difficult to fault the court of criminal appeals if it is truly attempting to interpret the law as a legal safeguard of a defendant's personal integrity as well as a safeguard for the community at large. This approach is more desirable than simply second-guessing future Supreme Court decisions.

Another change of importance to DWI cases (mentioned previously in the section on sentencing), is the new provision for misdemeanor proba-

[20] Tex. Code Crim. Proc. Ann. art. 42.13 (1965).
[21] Tex. Code Crim. Proc. Ann. art. 781b (1926).
[22] For a complete discussion of the various tests which have been developed see Erwin, Defense of Drunk Driving Cases (1963).
[23] 384 U.S. 757 (1966), 20 Sw. L.J. 869.
[24] Trammell v. State, 287 S.W.2d 487 (Tex. Crim. App. 1966).
[25] Tex. Att'y Gen. Op. No. C-766 (1966); 20 Sw. L.J. 686.

tion in the Code of Criminal Procedure.[26] Texas law for some time has allowed second offender, felony convictions to receive probation under proper circumstances,[27] but only with the recent amendments to the CCP is it permissible in misdemeanors. This provision allows better regulation of first offenders than the old system which was limited to fines, jail, or findings of not guilty.

IV. SEARCH—AFFIDAVITS FOR WARRANTS

The last several years have brought forth a series of notable decisions from the United States Supreme Court concerning police procedures and the issuance of warrants.[28] The thrust of these decisions is to require that real facts rather than personal beliefs be presented to a magistrate for his independent determination of probable cause for a warrant to issue. A number of these cases reversed by the Supreme Court have been from Texas.[29] Subsequent to these reversals, a number of nonpolicy questions concerning warrants have remained for decision by the court of criminal appeals. The issue of what constitutes an acceptable affidavit of probable cause showing adequate facts to the magistrate was raised this past year. In *Gonzales v. State*,[30] the court of criminal appeals approved the affidavit for a search warrant presented in *Acosta v. State*.[31] As Judge Morrison, writing for the court, points out, the affidavit must contain (1) affirmative allegations (2) from the personal knowledge of the affiant. The affidavit in *Acosta* stated:

> On the 14th day of May, 1965, affiants received reliable information from a credible person that heroin was being possessed by Jo Givos Acosta, at 7515 Force Street, Houston, Harris County, Texas. Although I do not desire to name this person, on about four prior occasions he has given information to me concerning narcotics being possessed by certain individuals, and on every occasion his information has proven to be true. Based upon the information he gave to me, affiants on the morning of the 14th day of May, 1965, set up surveillance on the house located at 7515 Force Street, and from approximately 7:00 a.m. to 10:00 a.m. of that day we observed several persons whom we know to be users of narcotics, enter the house, remain for approximately five minutes each, and then leave.[32]

In keeping with the policy to have the police present facts rather than conclusions and beliefs to the magistrate and to have the magistrate, rather

[26] TEX. CODE CRIM. PROC. ANN. art. 42.13 (1965).
[27] TEX. CODE CRIM. PROC. ANN. art. 42.12 (1965).
[28] See, *e.g.*, Stanford v. Texas, 379 U.S. 476 (1965); Rugendorf v. United States, 376 U.S. 528 (1964); Jones v. United States, 362 U.S. 257 (1960).
[29] See, *e.g.*, Aguilar v. Texas, 378 U.S. 108 (1964); Giondenello v. United States, 357 U.S. 480 (1958); *cf.*, Ward v. Texas, 316 U.S. 547 (1942); White v. Texas, 310 U.S. 530 (1940).
[30] 410 S.W.2d 435 (Tex. Crim. App. 1966).
[31] 403 S.W.2d 434 (Tex. Crim. App. 1966).
[32] Acosta v. State, 403 S.W.2d 434, 436 (Tex. Crim. App. 1966).

than the police, decide when a warrant should issue, the court of criminal appeals is making an effort to conform Texas law enforcement with sound practices under the standards of constitutional law.

V. ARREST—WARNING THE SUSPECT

Legal requisites for safeguarding the constitutional rights of a suspect or an accused were the subject of major change this year. Two far-reaching developments were the enactment of the revisions to the Code of Criminal Procedure and the Supreme Court decision in *Miranda v. Arizona*.[33] It is generally recognized today that protecting a person's rights can be meaningful only if the protection comes at the time when it is actually needed. To say that a person has a privilege against self-incrimination and a right to remain silent only after he has acted to his detriment makes his rights rather hollow. Texas law has long recognized this. For many years it has provided early protection of rights by the requirement that upon arrest the person be taken before a magistrate where probable cause for the arrest would be required and where other safeguards would be provided.[34] Unfortunately, this law was largely ignored.

The revised Code of Criminal Procedure reiterates the demand that a person be taken before a magistrate[35] and, with some sanctions added to enforce it, is bringing about compliance by arresting officers. In addition, the CCP now states specifically, in article 15.17, the warnings that a magistrate must give to the arrested person. Some magistrates have questioned their authority to provide these rights, saying that the CCP only tells them to inform the accused of his rights, but not to provide them. For example, the magistrate is to inform the person he has a right to bail, but the code does not explicitly say that the magistrate has authority to release the person on bail; he is to inform the person of his right to a lawyer but has no explicit authority to appoint a lawyer at that time. Most magistrates have not read the code this narrowly and have recognized their responsibility for fulfilling constitutional protections. However, it may be desirable to remove any ambiguity and state these responsibilities more explicitly in the CCP.

The *Miranda* case, in keeping with the policy of honoring rights before they become useless, moves beyond the CCP by requiring that the person be warned when he is taken into custody. *Miranda* provides that these warnings must be given prior to any police interrogation and that rights cannot be waived except by a knowing and intelligent affirmative state-

[33] 384 U.S. 436 (1966). See Comment, *Custodial Interrogation as a Tool of Law Enforcement: Miranda v. Arizona and the Texas Code of Criminal Procedure*, in this issue. For further discussion see Ray, *Evidence*, this survey at footnote 38.

[34] TEX. CODE CRIM. PROC. ANN. arts. 217, 233, 245 (1926).

[35] TEX. CODE CRIM. PROC. ANN. arts. 14.06, 15.16, 15.17 (1965).

ment of waiver, so, as a practical matter, it is necessary for the police to inform the detained suspect immediately upon his being placed in custody. However, arresting or detaining police agents can only inform the person of his legal rights—they do not have authority or responsibility to keep a person from voluntarily talking after informing him of his right to remain silent. Therefore, it is the CCP in conjunction with *Miranda* that affords the accused's constitutional safeguards from arbitrary and abusive government action. It is fair to predict, however, that if the state and local governing agencies fail to apply the CCP so as to fulfill these rights, other cases will be taken to the United States Supreme Court in hopes of filling the vacuum.

VI. Right to Counsel

Also stemming from the amended Code of Criminal Procedure and the *Miranda* decision are new questions concerning the right to counsel. When does the right to have a lawyer begin, and what is the lawyer supposed to do at that time? *Miranda* and the CCP pose these problems and only vaguely suggest answers. The CCP fortified the right to counsel by affording it at the first magistrate's hearing[36] and at examining trials,[37] much earlier than the old Texas law which delayed providing counsel until the arraignment hearing after indictment.[38] However, the CCP has not made clear who has authority to appoint counsel at the first hearing before the magistrate. Under the old code, the district court judge who presided at the arraignment exercised this authority. The revised CCP clearly states that at examining trials magistrates may appoint counsel, but what about at the first-warning hearing? It would seem clear, or at the worst clearly implied by the statements in article 15.17, that the accused has the right to retain counsel or to request appointment of counsel, and that the magistrate shall afford time and opportunity for the person to consult with counsel. Perhaps a clearer, explicit statement that magistrates shall appoint counsel is needed.

What the lawyer, appointed or retained, is supposed to do once he is admitted to the first-warning hearing is uncertain. This appearance before the magistrate, in addition to being the time of judicially informing the accused of his legal rights, is supposed to be a hearing on probable cause for arrest. If that function is carried out by the magistrate, the attorney certainly could play an important role by examining the arresting officer and evaluating other evidence offered to show probable cause. Also, since bail is supposed to be afforded at this time, the attorney could see that bail is set in a reasonable amount or that his client is released on personal bond (a

[36] Tex. Code Crim. Proc. Ann. art. 15.17 (1965).
[37] Tex. Code Crim. Proc. Ann. art. 16.01 (1965).
[38] Tex. Code Crim. Proc. Ann. art. 494 (1926).

new feature of the code).[39] Apparently, in a number of instances, magistrates are not releasing on bail at this stage. The code has been interpreted by some to the effect that after the warning is given, the accused may be left in police custody for interrogation and confinement in jail. Of course, these interpretations and practices vary from city to city, as each police force and each magistrate is left to devise their own rules for administration of the criminal justice system in Texas. The *Miranda* decision calls for counsel to be made available at these early stages of the criminal process, but the case does not attempt to offer a statutory procedure for getting the lawyer to the accused. Nor does the case offer an explanation of what functions the lawyer is to perform at this time.[40] It appears to remain in the hands of the state legislature, the state courts, local government, and the bar associations to develop a system for providing counsel.

There were further amplifications of the right to counsel by the revised CCP. The code extends the right to misdemeanor cases which may lead to imprisonment.[41] In light of case decisions in the Fifth Circuit,[42] this statutory provision, in addition to affording the accused a better day in court, may be mandatory under the Constitution.

VII. Interrogations and Confessions

Further problems raised by the *Miranda* decision concern the right of the police to interrogate a person and how this police interrogation may be carried out. The Code of Criminal Procedure is silent on pre-trial interrogation by law enforcement officers. As mentioned above, article 15.17 provides for bail and for the right to counsel, leaving unanswered what the police may do after presenting the arrested person before the magistrate. *Miranda* answers the problem to some extent by its requirement of police warnings to the arrested party and by its requiring the presence of counsel at interrogation. Implicit is the conclusion that police interrogation is to be used quite sparingly and at best in a most restricted manner. But, police, in some cases, need to interrogate. Further revisions to the CCP ought to provide a lawful procedure for them to do so.

Overlapping with the interrogation problems are those of confessions. *Miranda* also has great impact in the area, although Texas law by and large already afforded confession safeguards now called for in the decision.[43] The issue of retroactive application of *Miranda* came before the court of crim-

[39] Tex. Code Crim. Proc. Ann. arts. 17.03-.04 (1965).

[40] Comment, note 33 *supra*.

[41] Tex. Code Crim. Proc. Ann. art. 26.04 (1965).

[42] See, *e.g.*, Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965).

[43] Tex. Code Crim. Proc. Ann. art. 38.22 (1965) (former Tex. Code Crim. Proc. Ann. art. 727 (1926)).

inal appeals in *Wilson v. State*.[44] The court, relying on United States Supreme Court decisions pertaining to retroactivity, held that only in cases coming to trial after June 13, 1966, did *Miranda* apply. Not yet resolved is the proper method for taking confessions. In addition to requirements under both Texas statutes and *Miranda* for warning the person before he confesses, must counsel be present at the taking of the confession? The Texas code does not address itself to this issue. *Miranda* calls for presence of counsel at interrogation—unless other means of protecting the accused from abuse are provided—and this may mean presence of counsel at the taking of a confession as well. Alternatively, it may be necessary only for counsel to have been provided by the court and consulted by the accused prior to the taking of a confession. Before an appeal is taken on this issue, it would be desirable for the state to work out procedures adequately protecting the accused and whose adequacy can be demonstrated in court when the time comes.

Procedures for taking oral confessions were the subject of attention during the year, both by the courts and the legislature. A decision handed down late in 1966, but based on old Texas law, was *Rubenstein v. State*,[45] involving the Jack Ruby trial. With many points of egregious error in the conduct of the trial, some of which are discussed in the three opinions of the members of the court of criminal appeals, the court ultimately reversed the conviction on the issue of the oral confession. They held that Ruby's confession to the police was not spontaneous as required to meet the principle of *res gestae*. Actually, the court has jumbled together two different sets of rules, the rules for admissibility of oral confessions and the rules for admissibility of spontaneous statements as part of the *res gestae*. Article 727 of the old Code of Criminal Procedure governed the admissibility of oral confessions and case law established the conditions for *res gestae* statements. In the *Rubenstein* opinion, the court said that Ruby's statements were not spontaneous. It constituted "an oral confession . . . while in police custody and therefore was not admissible."[46]

The warnings surrounding confessions as required by the Supreme Court are new for many jurisdictions but not for Texas. Old article 727 has required such warnings for many years. It is worth noting that these protections for the accused have not unduly hampered Texas law enforcement in obtaining confessions. There have been changes in the wording of article 727, now found in article 38.22 of the revised CCP, which has caused some confusion. The new wording requires that an oral confession be signed by a witness. How can you sign an oral confession? Some have

[44] 407 S.W.2d 508 (Tex. Crim. App. 1966).
[45] 407 S.W.2d 793 (Tex. Crim. App. 1966).
[46] *Id.* at 795.

said this may be accomplished simply by reducing the oral statement to writing and then having the document witnessed. Others have suggested that the whole problem is the result of a typographical error:

> This appears to be a typographical error in the re-draft for the phrase, in the last sentence of the old article, which reads: 'If the defendant is unable to sign his name, and signs his statement by making his mark . . . .' which immediately followed the provision relating to oral confession, was omitted probably by oversight while the remainder of the last sentence of the old article was added to the new provision pertaining to oral confession. Note that no provision is made in the new Code for those situations where the defendant cannot sign his name to the confession.[47]

VIII. Fair Trial and Fair Publicity

Also made embarrassingly clear by the Ruby trial was the need for new regulations for the release of news statements concerning a criminal case.[48] Whether it be a release of statements by police, attorneys, or courts, or reporting by news media, new restraints appear necessary. In his concurring opinion in *Rubenstein*,[49] Judge McDonald gives examples of the lack of self-restraint by the news media to halt news coverage that prejudiced the fairness of the trial. His opinion also indicates that Judge Brown, Sr., the trial judge, failed to exercise his judicial responsibility to insulate the trial from prejudicial publicity. The Ruby case, of course, is not the first time that the importance of guaranteeing a fair and nonprejudicial atmosphere for a trial has been subordinated to the lust for publicity and sensationalism. Last year's example was *Estes v. Texas*.[50] In that case, in contrast to the Ruby trial, the trial judge attemped to provide a fair hearing while still accommodating the press and television. After citing instances showing how the presence of transmitting equipment interfered with the neutral atmosphere needed for a trial, the United States Supreme Court concluded that television cameras must be excluded from the courtroom. The *Estes* decision, that a dispassionate forum is essential for important justice, was reinforced this year by the Supreme Court's decision in *Sheppard v. Maxwell*.[51] There, as in *Rubenstein*, neither the trial judge nor the news media exercised any restraint on publicity and news reporting that ultimately prejudiced the outcome of the case.

---

[47] Onion, *Special Commentary to Article 26.04*, 2 VERNON'S TEX. CODE CRIM. PROC. ANN. 267 (1966).

[48] The dilemmas were vividly presented earlier in the news releases concerning Lee Harvey Oswald. "The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial." REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 99 (Associated Press 1964).

[49] 407 S.W.2d 793 (Tex. Crim. App. 1966).

[50] 381 U.S. 532 (1965).

[51] 384 U.S. 333 (1966).

Recognizing the need for reasonable restraints on trial news and publicity, the Texas legislature attempted to include in the revised Code of Criminal Procedure some new regulations. Due to rather heavy pressure from the press, the legislature chose to replace the original "harsh" rules with what became the innocuous article 2.03(b) of the CCP.[52] It states that everyone should "conduct themselves as to insure to the defendant a fair trial upon the presumption of innocence and at the same time afford the public the benefits of a free press." Who could disagree with that? Thus, the questions of what can be said—by police, by attorneys, and by judges—and the proper scope of what may be reported by the news media remain unanswered in Texas. There are some efforts being made to seek solutions, such as the Governor's Interim Committee on Pre-Trial and Trial News Coverage[53] and the American Bar Association's Advisory Committee on Fair Trial and Free Press.[54] In light of the widespread public concern and judicial attention, it would seem highly desirable for the legislature to re-evaluate the effectiveness of the present wording of article 2.03(b).

IX. Other Developments

Insanity. In *Ex parte Morgan*[55] the court of criminal appeals was faced with the case of a person found mentally incompetent to stand trial. The jury reached this decision without having heard any competent medical or psychiatric testimony. The trial court, because of the lack of medical evidence, disregarded the jury's finding and adjudged the defendant sane—able to make a rational defense. The trial court found itself confronted with a dilemma because Texas law: (1) requires that a person cannot be tried if found presently insane;[56] (2) but provides commitment in a mental hospital only when based on competent medical testimony.[57] Other than recognizing the problem, in hopes that the legislature will correct it, the court of criminal appeals was unable to offer a solution. "The problem as to what shall be done with an accused person when he has been adjudged insane and not mentally competent to make a rational defense, and there is no specific provision in the Code of Criminal Procedure

[52] Tex. Code Crim. Proc. Ann. art. 2.03, § b (1965).

[53] 29 Texas B.J. 6 (1966); 29 Texas B.J. 615 (1966).

[54] "It is important both to the community and to the criminal process that the public be informed of the commission of crime, that corruption and misconduct, including the improper failure to arraign or to prosecute, be exposed whenever they are found, and that those accused of crime be apprehended. If, however, public statements and reporting with respect to these matters assume the truth of what may be only a belief or a suspicion, they may destroy the reputation of one who is innocent and may seriously endanger the right to a fair trial in the event that formal charges are filed." ABA, Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press 16 (1966).

[55] 403 S.W.2d 803 (Tex. Crim. App. 1966); see 20 Sw. L.J. 933.

[56] Tex. Pen. Code Ann. art. 34 (1925).

[57] Tex. Const. art. 1, § 15a; Tex. Code Crim. Proc. Ann. art. 932b, § 8 (1926).

for his commitment to a mental hospital, is not new and has not been eliminated by the 1965 Code."[58] [revised CCP].

The court granted the application for habeas corpus and ordered the petitioner released from confinement. But the court could, for example, have interpreted the requirement of competent medical testimony to mean that a trial judge should not allow the case to go to the jury if such evidence has not been introduced.

Principal and Accomplice. Harris v. State[59] held that a husband who encourages his wife to injure another person is criminally liable as a principal under article 66 of the Penal Code. In this case, the couple had been arguing with the injured party, and the husband said to his wife, "Don't argue with her, blow her God damn head off,"[60] which the wife did, destroying the victim's eye, the bullet lodging in her brain. Apparently, the court decision is consistent with Texas law which distinguishes between principals and accomplices.[61] The soundness of this distinction is seriously questionable, since the consequences of being found guilty in either capacity leads to exactly the same potential punishment. It is frequently a tricky question whether a person has acted as a principal or an accomplice. Defense attorneys find it desirable to keep this in the law, as it offers one more means of trapping the state in a technical error which will lead to a reversal by the court of criminal appeals. Most jurisdictions have abandoned this distinction,[62] and so should Texas.

Juveniles. There was an important development concerning the jurisdiction of criminal courts over juvenile offenders. The legislature in 1965 attempted to delineate which juveniles adjudged delinquent should be eligible for subsequent transfer out of juvenile court jurisdiction for adult criminal prosecution.[63] In *Foster v. State*,[64] the court of criminal appeals declared this statute unconstitutional, concluded that it was vague, and held that the caption failed to give notice of the legislative intent. The court does not attempt to determine whether the defendant in the case was given fair treatment by the law. The case involved a Negro boy who at age fifteen had been adjudged a juvenile delinquent. Upon reaching age seventeen he was transferred to adult court and was tried for a murder arising out of the same circumstances as his earlier juvenile offense. Whether such treatment achieves any desirable objectives of the criminal law process is not discussed by the court. In a forceful dissent, Judge Morrison argues that

[58] *Ex parte* Morgan, 403 S.W.2d 803, 805 (1966).
[59] 398 S.W.2d 773 (Tex. Crim. App. 1966).
[60] *Id.* at 774.
[61] TEX. PEN. CODE ANN. art. 66-76 (1925).
[62] Morrison & Blackburn, *Commentary on Principals and Accomplices*, 1 VERNON'S TEX. PEN. CODE ANN. XIII, XXVII (1952).
[63] TEX. REV. CIV. STAT. ANN. art. 2338-1, § 6 (Supp. 1965).
[64] 400 S.W.2d 552 (Tex. Crim. App. 1966).

since the boy had already been tried by the juvenile court for an offense out of the same transaction, he could not be tried again by the adult court. Judge Morrison's position has merit when viewed in terms of what the criminal law seeks to accomplish with juvenile offenders. The legislature apparently saw the need for a separate system for juveniles due to their age at the time of the offense, not the time of trial. There may be some who feel the reason for treating offenders under seventeen differently is because they are too young to feel the full sting of punishment, and therefore upon reaching seventeen it was time to unleash the full force of the penal laws. The legislature, surely, had a sounder basis for enacting the Juvenile Code, and the transfer provision.

X. Conclusion

There were many other decisions during the year, but overall little occurred that affected the basic jurisprudence of the state's criminal law. This may change in the near future as the membership of the court of criminal appeals was altered by the election of Judge Onion, and the status of the two Commissioners was changed to that of judges.[65] Also, the Texas State Bar has embarked on a project to revise the Penal Code. An observer, therefore, may be cautiously optimistic that the Texas system of criminal justice is soon to be updated and made more in tune with contemporary social needs for fairness to the accused and security for the community at large.

[65] See, *e.g.*, *Ex Parte* Davis, No. 39935, Tex. Crim. App., Feb. 15, 1967.

Southwestern Law Journal

VOLUME 21 | Spring 1967 | NUMBER 1