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Parties to Crime in Texas - Principal or Accomplice

Tom J. Stollenwerck

The rationale of the instant case is clearly correct and in accord with most of the recent discussions and legislative adoptions. It maintains the simplicity of the Massachusetts rule and should be of vast precedential importance in jurisdictions not having the Uniform Revised Principal and Income Act. Other possible effects of this decision are (1) a decrease in frequency of investment by trustees in mutual funds[49] or (2) a reduction of trustee's management fees in accordance with the extent to which he delegates his management duties by investment in such funds.[50] Texas has adopted the Uniform Principal and Income Act, but it qualifies section 5, which states that "all dividends payable otherwise than in the shares of the corporation itself . . . shall be deemed income," by adding "unless the declaring corporation designates the source thereof as capital assets of the declaring corporation."[51] It remains to be seen whether designation as "capital gains divided" will be considered tantamount to a declaration of "capital asset" derivation.[52] It appears certain that the rule of the instant case will be employed almost uniformly, either statutorily or judicially, and the case itself should be highly influential in the latter respect.

David G. McLane

Parties to Crime in Texas — Principal or Accomplice

A Harris County probate judge authorized an administrator's fee of 10,000 dollars to be paid from the funds of the estate. Subsequent to the completion of this act and later on the same day, the administrator withdrew the money from the estate. The administrator retained 5,000 dollars and, pursuant to a prearranged conspiracy, deposited the remaining 5,000 dollars in the judge's private bank account. The probate judge was convicted as a *principal* to the crime of conversion of an estate. On rehearing, *held:* A party is a principal to a crime, even though he neither is present at the time of

[49] See note 41 *supra* and accompanying text.

[50] See note 40 *supra* and accompanying text.

[51] Tex. Rev. Civ. Stat. Ann. art. 7425b-29(A) (1960).

[52] Because Texas, by Tex. Rev. Civ. Stat. Ann. art. 7425b-48 (1960), allows investment in common trust funds even though not expressly authorized by the trust instrument, and because this modified version of the original Uniform Principal and Income Act was enacted, the *rationale* of the instant case in all probability will be accepted in this state. The latter enactment probably will be applied in the mutual fund situation, distributions being treated as the result of sales of capital assets. This rule also should be influential regarding the determination of community or separate property in mutual fund distributions, a situation in which an analogy is often drawn to trust allocations.

the execution of the criminal act nor does anything in furtherance of the offense at the time it is committed, if he authorized the *means* by which the crime is perpetrated.[1] *McClelland v. State*, — Tex. Crim. —, 373 S.W.2d 674 (1963).

The theory of principals and accomplices to a crime is an ancient one. It was established firmly in England by the reign of Henry VII, circa 1500.[2] Although the origin of the concept is shrouded in antiquity, apparently the distinction arose in an attempt to mitigate the harsh penalties of the old English criminal law.[3] Despite the hazy historical background surrounding the evolution of the doctrine, there is no doubt that the technical distinctions of the primitive English common law are the source of the Texas Penal Code provisions governing principals and accomplices.[4] The Texas law, contrary to the vast majority of the modern criminal codes,[5] still preserves this archaic concept.[6] In the landmark case of *Middleton v. State*,[7] the Texas Court of Criminal Appeals, cognizant that the decisive factor controlling the distinction between parties to crime is the acts of the accused at the time of the commission of the offense,[8] set forth six classic examples of parties who would be considered principal offenders.[9] The basic rule to be derived from these illustra-

[1] Although it was held on rehearing that the judge was a principal, the case was reversed because of the admission of prejudicial evidence concerning extraneous transactions which had no bearing upon the issues in the trial.

[2] 3 Holdsworth, A History of English Law 309 (1923).

[3] *Id.* at 308; 2 Stephen, A History of the Criminal Law of England 234 (1883).

[4] Morrison & Blackburn, *The Law of Principals, Accomplices, and Accessories Under the Texas Statutes*, 1 Tex. Pen. Code Ann. XIII (1952). The Texas statute, however, recognizes only one degree of principal and accomplice, whereas the traditional common law recognized two degrees of principals and an accessory before the fact (accomplice in Texas). The common law also developed the concept of an accessory after the fact, which in Texas is called simply an accessory. Tex. Pen. Code Ann. art. 65 (1952). See generally, Perkins, Criminal Law 555 (1957).

[5] Morrison & Blackburn, *supra* note 4.

[6] Tex. Pen. Code Ann. arts. 65-72 (1952).

[7] 86 Tex. Crim. 307, 217 S.W. 1046 (1919).

[8] Bean v. State, 17 Tex. Crim. 60 (1884).

[9] The situations set forth by the court arise when:

(1) A actually commits the offense, but B is present, knows the unlawful intent, and aids by acts or encourages by words.

(2) A actually commits the offense, but B keeps watch so as to prevent the interruption of A.

(3) A actually executes the unlawful act, and B engages in procuring aid, arms, or means of any kind to assist while A executes said unlawful act.

(4) A actually commits the offense, but B at the time of such commission is endeavoring to secure the safety or concealment of A, or of A and B.

(5) A employs an innocent agent, or by indirect means causes the injury, or brings about the commission of the offense.

(6) A advises or agrees to the commission of the offense and is present when the same is committed, whether actually participating or not.

Johnson v. State, 151 Tex. Crim. 192, 206 S.W.2d 605, 607 (1947) added one further situation. A party is a principal in a theft case if, pursuant to a prior agreement, his part in the conspiracy is to dispose of the property among the coconspirators after the property is stolen.

tions appears to be quite simple. A principal, whether present or not, does something in furtherance of the common design at the time the offense is committed;[10] an accomplice, on the other hand, though having advised or agreed to the commission of the crime, is not present at the time of the execution of the crime and is not acting in furtherance of a common design.[11] Application of this doctrine, however, is extremely difficult and often leads to perplexing problems.

Although principals and accomplices are subject to identical punishment in Texas,[12] the distinction between the two actually hinders the enforcement of justice because of the traditional rule that an accused may be convicted only of the crime for which he is indicted.[13] Therefore, in the instant case, if the court had held that the accused probate judge was an accomplice, the conviction would have been reversed on this ground and the state would have been required to bring charges under a fresh indictment. Thus, the technical distinction between principals and accomplices, far from being a moot historical point, presents an intricate problem to virtually every case involving multiple parties.

Application of the distinction between principals and accomplices involves generally two categories of cases. One group usually will include cases in which the time of the perpetration of the crime is easily identified, *e.g.*, robbery,[14] murder,[15] and other offenses in which a *single act* completes the offense; in the other category of cases the time of commission of the crime is pinpointed only with great difficulty, *e.g.*, swindling,[16] embezzlement,[17] and various types of continuing conspiracies.[18] The former class of cases is exemplified best by the situation in which the accused, in accordance with a previously formed design, waits in a getaway car while his companion commits the offense.[19] In such circumstances, the accused, although not phy-

[10] Serrato v. State, 74 Tex. Crim. 413, 171 S.W. 1133 (1914).

[11] *Ibid.* Another often quoted definition of an accomplice is found in Cook v. State, 14 Tex. Crim. 96, 101 (1883), where it is stated that "the acts constituting an accomplice are auxiliaries only, all of which may be and are performed by him anterior and as inducements to the crime about to be committed. . . ."

[12] Tex. Pen. Code Ann. art. 72 (1952).

[13] Simms v. State, 10 Tex. Crim. 131, 159 (1881). The case uses the following language: "[T]he rule [is] . . . well settled that when a party is charged as a principal offender he cannot, under the Code of this State, be convicted as an accomplice, nor *vice versa*." See McKeen v. State, 7 Tex. Crim. 631 (1880).

[14] Gonzales v. State, 171 Tex. Crim. 373, 350 S.W.2d 553 (1961); Stubblefield v. State, 169 Tex. Crim. 350, 334 S.W.2d 150 (1960); White v. State, 154 Tex. Crim. 489, 228 S.W.2d 165 (1950); Hill v. State, 135 Tex. Crim. 567, 121 S.W.2d 996 (1938).

[15] Gonzales v. State, note 14 *supra;* Stubblefield v. State, note 14 *supra;* White v. State, note 14 *supra.*

[16] West v. State, 140 Tex. Crim. 493, 145 S.W.2d 580 (1940).

[17] Parnell v. State, 170 Tex. Crim. 30, 339 S.W.2d 49 (1959).

[18] Holt v. State, 144 Tex. Crim. 62, 160 S.W.2d 944 (1942).

[19] See cases cited in note 15 *supra.*

sically present at the place where the crime is committed, is a principal offender since he acts in furtherance of a common design at the time of the commission of the offense. In these single act cases, however, if the accused completes all acts *prior* to the perpetration of the crime, and is not present at the commission of the crime, he is an accomplice to the offense.[20] Therefore, if it is clear what act constitutes the commission of the offense, attention is directed solely at the behavior of the accused at the time of the execution of *that* act in order to determine whether the accused is a principal or an accomplice.

The antithesis of the single act situation is the continuing conspiracy crime in which determination of whether one is a principal or an accomplice often produces complex issues. Here the area of inquiry is broader in scope because of the difficulties encountered in determining precisely when the offense was committed. Moreover, confusion has developed in the law as a result of the early case of *Smith v. State*, in which the Court of Criminal Appeals complicated the doctrine of parties to crime by holding that "they are all principals and acting together as long as any portion or object of the common design remains incomplete; in other words, until the full purpose and object of the conspiracy is consummated and accomplished."[21] This deviation has gained added thrust under the current "chain of causation" or "necessary part" theory.[22] The rationale of such a theory is that if the party charged does any act in the chain of causation which leads up to the offense and which is a necessary part of its accomplishment, he is a principal offender even though he is not present at the time the offense actually is committed.[23] Application of this theory in the instant case resulted in the holding on rehearing that the accused probate judge was guilty as a principal.

The task of determining whether a party is a principal or an accomplice is brought into acute focus by the instant case. Even a casual reading of the conflicting opinions of the various judges as to the disposition of the case reveals the disorder of the law in this area.[24]

[20] Such a condition exists, for example, when the accused furnishes a car and advises and encourages his coconspirators to steal, but does nothing in furtherance of the crime when the theft is actually committed. Anzualda v. State, 115 Tex. Crim. 509, 27 S.W.2d 231 (1930).

[21] 21 Tex. Crim. 107, 17 S.W. 552, 555 (1886).

[22] Holt v. State, 144 Tex. Crim. 62, 160 S.W.2d 944 (1942); Bass v. State, 59 Tex. Crim. 186, 127 S.W. 1020 (1910).

[23] Cases cited note 22 *supra*.

[24] In the original opinion the majority of the court viewed the accused judge as an accomplice because he was not present when the crime was committed and all of his acts had been performed prior to the commission of the offense. In a concurring opinion, Judge Morrison stated that the *Holt* case, *supra* note 22, had no application because the defendant in that case was actually doing something when the offense was committed. 373 S.W.2d at

As Judge Woodley observes in his dissent upon rehearing, the decision will be of little value as a legal precedent because of the disagreement among the judges. However, the case illustrates the confusion that has resulted from the application of the "chain of causation" doctrine. In order to clarify the concept of parties to crime in Texas law, three crucially important questions should be posed in each case to determine whether the accused is a principal or an accomplice: (1) What act constituted the crime? (2) What was the accused doing when the crime was committed? (3) Did the accused's act constitute part of the crime? If upon answering these questions, the accused fits into the traditional definitive requirements of a principal, he should be so held. Application of the above questions to the instant case results in the following analysis. A crime was not committed until the money was withdrawn from the estate's bank account. When the crime was committed the accused judge's act (signing the application) already had been completed, and he was not present when the offense was committed. Therefore, the accused's act was anterior to the execution of the crime. The conclusion should be that the accused judge was merely an accomplice rather than a principal offender. Thus, as long as Texas continues to maintain a distinction between principals and accomplices, utilization of such an analysis, and consequent exclusion of the "chain of causation" doctrine, should alleviate the existing disarray in this area of the law.

Actually, retention of the traditional common law doctrine governing principals and accomplices is completely unwarranted in Texas law primarily for the reason that both parties receive the same punishment.[25] This outmoded, antiquated theory has been under intermittent attack by Texas jurists for some time. Possibly the earliest assault upon the doctrine was Judge Hurt's realistic observation of more than a half-century ago that the distinction is "without foundation either in natural reason or the ordinary doctrine of law,"[26] and

678. In a strong dissent, Judge Woodley stated that the judge was "present" because the offense was not committed by a single act and the parties were acting together in the commission of the crime. To support this contention he relied upon Parnell v. State, 170 Tex. Crim. 30, 339 S.W.2d 49 (1959). He also indicated that the *Holt* case was applicable under the present facts. 373 S.W.2d at 678. On rehearing, Judge McDonald stated that the *Holt* case was controlling and that the accused judge was guilty as a principal. 373 S.W.2d at 681. Judge Morrison continued to view the judge as an accomplice, 373 S.W.2d at 685, and Judge Woodley evidently still believed the *Parnell* case to be controlling. 373 S.W.2d at 686.

[25] Tex. Pen. Code Ann. art. 72 (1952).

[26] Carlisle v. State, 31 Tex. Crim. 537, 21 S.W. 358, 359 (1893). In a detailed opinion, Judge Hurt stated the reasons why the doctrine of parties is useless to the enforcement of criminal law in Texas. The opinion is a succinctly stated legal analysis which calls for the abolishment of the doctrine.