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RAISING PRELIMINARY DEFENSES AND OBJECTIONS: SOME SUGGESTIONS FOR TEXAS FROM FEDERAL CRIMINAL RULE 12

PERHAPS no recent reform in criminal procedure has involved so extensive a departure from ancient moorings as the provision of Rule 12 of the Federal Rules of Criminal Procedure governing the raising of preliminary defenses and objections.[1] Unique in favoring neither the prosecutor nor the defense attorney, the new Rule makes no material change in the substantial rights of either party and draws attention primarily to the form of preliminary objections and defenses. Defects in Texas criminal procedure with regard to the raising of preliminary defenses and objections point to the desirability of considering the various aspects of Rule 12 and also applicable proposals from other sources which would be of value in improving the Texas procedure. The time in which

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[1] See Holtzoff, *The New Federal Rules of Criminal Procedure* (1946) 37 J. CRIM. L. 111, 115; Strine, *Two Months Under the New Federal Rules of Criminal Procedure* (1946) 7 FED. BAR J. 369, 376. The Federal Rule reads: "Pleadings in criminal proceedings shall be the indictment and information, and pleas of not guilty, guilty, and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules." FED. RULES CRIM. PROC. (1946) Rule 12(a). The substance of this rule has been on the statute books of Delaware since 1925. DEL. REV. CODE (1935) § 5318. From this Delaware source came the proposal of the American Law Institute made in 1930, which would leave to the defendant only the motion to quash, to raise defenses available other than by a plea of not guilty. AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) § 209. The Supreme Court of Arizona adopted the American Law Institute proposal verbatim in its rules of criminal procedure in 1940. ARIZ. RULES CRIM. PROC. (1940) § 207, published in ARIZ. CODE (1939) § 44-1003. Such a provision became the law of Utah in 1943. UTAH CODE (1943) § 105-23-2. The Illinois state bar has sought adoption of the Institute proposal by the General Assembly. See Fisher, *A Proposal for a Penal Code* (1944) 39 ILL. L. REV. 97, 113; Beardsley, *The Pending Revision of the Illinois Criminal Code* (1937) 3 JOHN MARSHALL L. Q. 154; Thompson, *Pleading Under the Proposed Criminal Code* (1936) 24 ILL. BAR J. 305, 307; (1935) 30 ILL. L. REV. 226, 232. The Federal Rule found its pattern in the American Law Institute provision.

preliminary defenses must be raised, the waiver of objections not timely raised, the determination of preliminary issues by the court or by the jury, the grounds for preliminary defenses and objections, and the effect of determination of preliminary objections and defenses will be considered with particular relation to Texas procedure.

FORM: THE SINGLE MOTION

Technical pleading of defenses and objections raised before trial became obsolete in the federal courts with the adoption of Rule 12, which substitutes for formal pleading a simple motion for the desired relief. Pleas in abatement, demurrers, special pleas in bar, and motions to quash are terms now archaic to the federal practitioner.

Thus helpful both to defense attorney and to prosecutor by eliminating controversy over the correct titling of a plea and focussing attention upon its merits, the new Rule has yet other advantages. Its simplicity makes lighter the task of the defense counsel in preparing his motion; its unity permits the prosecuting attorney to study all preliminary defenses and objections together as one, and to make but one reply. The court is aided in a similar manner in hearing and disposing of these preliminaries. Thus it is not surprising that enthusiastic approval of the Rule in actual practice has been reported from United States Attorneys over the nation.[2]

To Texas law, what has this change to offer? Like the federal procedure which was superseded by the new Rule, Texas procedure provides for the raising of defenses and objections before trial by the motion to quash,[3] the exception,[4] the special plea in bar,[5]

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[2] See Strine, *supra* note 1, at 368.

[3] TEX. CODE CRIM. PROC. (1925) art. 505, sub. 1.

[4] *Id.*, sub. 3.

[5] *Id.*, sub. 2. Another statute enumerates only former conviction and former acquittal as grounds for special plea in bar. TEX. CODE CRIM. PROC. (1925) art. 508. The courts, however, have added other grounds. Pizano v. State, 20 Tex. App. 139 (1886) (former jeopardy); Blandford v. State, 10 Tex. App. 627, 641 (1881) (jurisdiction); Camron v. State, 32 Tex. Crim. Rep. 180, 22 S. W. 682 (1893) (agreement not to prosecute).

and the plea in abatement.[6] Under the former practice in the federal courts, because of the serious prejudice which could result from an erroneous choice of titles,[7] the defense attorney sometimes would file both a plea in abatement and a motion to quash directed to the same point.[8] But as a matter of practice in the Texas courts, it seems doubtful whether the title of a plea is a matter of controversy.[9] Nevertheless, the ease of preparation and lack of technicality made possible by Rule 12 would facilitate the task of the defense attorney in raising preliminary objections and defenses. Because of the simplicity and unity of presentation provided for, preliminary motions could be read more quickly, studied more thoroughly, and answered with greater ease by the prosecutor, even though he might receive them at the last moment before trial.[10]

TIME

The power to force long delays in reaching trial upon the merits, during which time the jurors and the witnesses are kept waiting, is a "weapon of surprise" in the hands of the defense attorney,

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[6] The non-statutory plea in abatement may be used to present constitutional or other fundamental objections to the trial. Jaurez v. State, 102 Tex. Crim. Rep. 297, 302, 277 S. W. 1091, 1093 (1925) (discrimination in selection of grand jury presented by plea in abatement); Dominguez v. State, 90 Tex. Crim. Rep. 92, 100, 234 S. W. 79, 83 (1921) (jurisdiction of defendant's person); Carlisle v. State, 138 Tex. Crim. Rep. 530, 532, 137 S. W. (2d) 782, 783 (1940) (agreement not to prosecute).

[7] Ford v. United States, 273 U. S. 593, 606 (1926); Lee v. United States, 156 Fed. 948 (C. C. A. 9th, 1907). See Holtzoff, *Reform of Federal Criminal Procedure* (1944) 12 GEO. WASH. L. REV. 119, 127.

[8] United States v. Lehigh Valley R. Co., 43 F. (2d) 135, 137 (M. D. Pa. 1930); United States v. Goldman, 28 F. (2d) 424 (D. Conn. 1928). See Holtzoff, *loc. cit. supra* note 7.

[9] Where a defendant presented a "plea to the jurisdiction," subsequently presenting the same facts in a "plea in bar of the prosecution," the court considered both as "special pleas." Bowden v. State, 1 Tex. App. 137, 139 (1876). Discrimination in the selection of a grand jury may be raised by a "motion to quash" or by a "plea in abatement." Jaurez v. State, 102 Tex. Crim. Rep. 297, 302, 277 S. W. 1091, 1093 (1925). Agreement not to prosecute was presented by "plea in bar of the prosecution" in Camron v. State, 32 Tex. Crim. Rep. 180, 22 S. W. 682 (1893), and by "plea in abatement" in Carlisle v. State, 138 Tex. Crim. Rep. 530, 532, 137 S. W. (2d) 782, 783 (1940). In Texas, the state may except to a special plea only for substantial defects, and if the exception is sustained, the plea may be amended. TEX. CODE CRIM. PROC. (1925) art. 535.

[10] See *Report of Committee on Criminal Law and Procedure* (1940) 3 TEX. BAR J. 328.

under present Texas procedure. The defendant's counsel may file his pleadings at any time before the case is called for trial,[11] and both the motion to quash and the exceptions must be heard and decided "without delay" before the trial is begun.[12] Thus the defense counsel may, after weeks of preparation for the trial, file a dilatory motion on the morning of the day for which trial is set, and after the jurors and witnesses are all present. The harried prosecutor who probably has had no forewarning of the contents of the motion must extemporize an answer as best he is able.[13] The delay resulting from the necessity of hearing motions at such an inauspicious time causes considerable loss of time to those attending court as jurors and witnesses, prolongs the period during which the accused must be maintained at public expense, and results in inestimable needless loss to the taxpayers who must bear the expense of inefficient administration of justice. Such procedure has been denounced by a Texas bar committee as an unfair advantage to the defendant with no just reason in its support.[14]

To require filing of the motion at a reasonable time in advance of the day set for trial on the merits would seem a likely way to prevent these costly delays. The Texas Bar Committee on Criminal Law and Procedure proposed in 1940 that the motion to quash be filed at least five days prior to the first setting of the case.[15] A Texas judge has recommended that all dilatory pleas and motions be filed at least seventy-two hours prior to the date on which trial of the case has been set.[16] The new Federal Rule, offering a somewhat different solution, requires the defendant to present his dila-

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[11] TEX. CODE CRIM. PROC. (1925) art. 516.

[12] *Id.*, arts. 522, 523. All issues of fact presented by a special plea must be tried by a jury (art. 510) and must be submitted and tried with a plea of "not guilty" (art. 525).

[13] See *Report, loc. cit. supra* note 10. Generally the overcrowded dockets found in metropolitan areas make it necessary for the prosecutor to spend the major part of his time in actual trial rather than in investigation and other preparation which might prevent surprise.

[14] *Report, loc. cit. supra* note 10.

[15] *Ibid.*

[16] Williams, *Speed Up the Trial* (1946) 9 TEX. BAR J. 389.

tory motion at arraignment[17] and have it determined before the case is set for trial on its merits.[18] The defendant who fails to present his motion at the proper time does not entirely lose his rights, for the court may permit the motion to be filed within a reasonable time thereafter.[19] Though the provision of the Federal Rule operates to alleviate the element of surprise and the resulting hurried preparation of the district attorney with no resulting prejudice to the defendant, the lack of a requirement of arraignment in Texas except upon an indictment for a capital offense[20] makes the application of the federal provision impracticable in this state, and a change such as that suggested by the Bar Committee would appear more feasible.

WAIVER

Federal Rule 12(b)(2) groups all defenses and objections which must be raised by the motion under Rule 12(a) or be waived. Thus all objections and defenses that are based on defects in the institution of the prosecution, or in the indictment or information, other than lack of jurisdiction or failure to charge an offense, are waived unless presented by timely motion. Illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, and other irregularities in grand jury proceedings are among these waivable defects.[21] All other defenses and objections capable of determination without a trial of the general issue may be raised at the defendant's option by motion before trial but are not waived by his failure to raise them. These are grouped

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[17] FED. RULES CRIM. PROC. (1946) Rule 12(b) (3). See Rule 10.

[18] *Id.*, Rule 12(b) (4).

[19] *Id.*, Rule 12(b) (3). The court is given discretion to defer determination of the motion for submission with the general issue. See Rule 12(b) (4).

[20] TEX. CODE CRIM. PROC. (1925) art. 491.

[21] See NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1945), note to subdivision (b)(1) and (2) of Rule 12; also to be found in New York University School of Law's FEDERAL RULES OF CRIMINAL PROCEDURE, WITH NOTES AND INSTITUTE PROCEEDINGS (1946) 24.

in Rule 12(b)(1) and include former jeopardy, statute of limitations, immunity, lack of jurisdiction, and failure to state an offense.[22] On the other hand, under the Code of Criminal Procedure of the American Law Institute, all objections presentable by the motion, except failure to charge an offense or absence of jurisdiction over the offense, are deemed waived by failure to move at the proper time;[23] but a motion based on later discovery of the defendant's former jeopardy or immunity may be heard at the court's discretion at any time before verdict.[24]

From the requirement in Texas that objections based on defects in the prosecution or in the indictment or information must be presented before trial[25] or else be waived,[26] have been excepted only substantial defects in the indictment[27] and want of jurisdiction over the offense.[28] The Texas courts have found the existence of substantial defects available to the defendant, even after trial, in the instance of failure to charge essential elements of the offense,[29] filing of the information by an unauthorized person,[30] deviation from the constitutionally-prescribed form of beginning and conclusion of the indictment,[31] indictment by a grand jury empanelled without proper authority,[32] and an information based on a defective complaint.[33] It would seem possible that some of these "sub-

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[22] *Ibid.*

[23] AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) § 220.

[24] *Ibid.*

[25] See TEX. CODE CRIM. PROC. (1925) art. 522, 523.

[26] See *e. g.*, Dobson v. State, 65 Tex. Crim. Rep. 637, 146 S. W. 546 (1912).

[27] TEX. CODE CRIM. PROC. (1925) art. 763.

[28] Lott v. State, 18 Tex. App. 627, 630 (1885).

[29] Phillips v. State, 89 Tex. Crim. Rep. 483, 231 S. W. 400 (1921) (failure to allege that property stolen was "fraudulently" taken); Swink v. State, 32 Tex. App. 530, 24 S. W. 893 (1894) (failure to negative consent of unknown owner of cattle alleged stolen); Ranch v. State, 5 Tex. App. 363 (1879) (name of person assaulted omitted).

[30] Moore v. State, 56 Tex. Crim. Rep. 300, 119 S. W. 858 (1909).

[31] Alvarado v. State, 83 Tex. Crim. Rep. 181, 202 S. W. 322 (1918); Cox v. State, 8 Tex. App. 254 (1880).

[32] Enloe v. State, 141 Tex. Crim. Rep. 602, 150 S. W. (2d) 1039 (1941).

[33] Thomas v. State, 107 Tex. Crim. Rep. 474, 296 S. W. 894 (1927); Thomas v. State, 107 Tex. Crim. Rep. 405, 296 S. W. 310 (1927); Smith v. State, 9 Tex. App. 475 (1880); Lanham v. State, 9 Tex. App. 232 (1880).

stantial defects" amount to no more than obscure technicalities in the institution of the proceedings, discovered by a diligent defense attorney and bearing little relation to substantial justice. Public policy, because of the serious nature of a criminal charge and its effects on a defendant's life, reputation and business, may demand that such a charge be not lightly founded on another man's whim or prejudice, and this policy may support the requirement of strict compliance with the prescribed procedure for institution of a criminal proceeding. But where the indictment or information sufficiently charges an offense over which the court has jurisdiction, and of which the defendant has been found guilty by a jury after a full and fair trial, why should he be permitted to take advantage of a technicality in the manner in which the charge was brought against him, when such defense was fully available to him before the expense, delay and arduous efforts of a trial? Should the state be forced to repeat its labors and to undergo the added expense of a second trial, simply because the indictment recites that it is brought "In the name and authority of the State of Texas" and omits the all-important words "by the" before "authority"?[34] Of what consequence to substantial justice is the repugnancy found, after a full and fair trial, in a jurat dated in advance of the date of the offense charged in the complaint which the jurat purports to verify?[35] Can a charge against a man, who is thereafter duly convicted by a jury after a fair trial on that charge, be said to have been lightly founded? Surely public policy should support the provision of the Federal Rule. Texas would do well to make the failure of the indictment to charge an offense or to show jurisdiction in the court the only defects available to the defendant to require re-institution of the prosecution after trial of the general issue has begun. Waiver of other "substantial defects" not raised before trial, except where good cause is shown for the failure

[34] See Alvarado v. State, 83 Tex. Crim. Rep. 181, 202 S. W. 322 (1918).

[35] See Lanham v. State, 9 Tex. App. 232 (1880).

to make timely objection, seems fair both to the defendant and to the public.

A step has been proposed which seems to go even further than the Federal Rule in the direction of requiring timely objection. This suggestion urges that among those defects which must be raised before trial there should be included the failure of the indictment or information to charge an offense. It is suggested that the defendant be given no further opportunity to present objections not raised before trial except by his motion in arrest of judgment after a verdict of guilty.[36] Under this proposal, the trial, once begun, would proceed to verdict on the assumption that the indictment was sufficient. By closing that question of law until after verdict, the court and jury may, during the trial, proceed to determine only whether the evidence offered establishes the offense charged. The author of this proposal points out that, by the present procedure of permitting the failure to charge an offense to be noticed by the court at any time, the defense counsel may interrupt the process of fact-finding at a time most prejudicial to the exercise of reason, as at some moment of heated argument, and so unbalance the judicial mind by the swiftness of his motion that the court might direct an unjustifiable but unappealable verdict of acquittal.[37] The elimination of the question of law from this fact-finding period would make possible a more discriminating trial procedure: and the separate determination of the question of law, by the motion in arrest of judgment, would be completely fair to the defendant, according to the originator of this suggestion. The defendant in whose favor the question is decided on motion in arrest has no defense of former jeopardy available on re-indictment and re-trial,[38] having waived such defense by taking advantage of the motion in arrest.[39]

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[36] Steffen, *Concerning Double Jeopardy and The New Rules* (1945) 7 FED. BAR J. 86, 91.

[37] *Ibid.*

[38] *Id.* at 93.

[39] See 1 BISHOP, CRIMINAL LAW (9th ed. 1923) § 998 (5).

METHOD OF DETERMINATION

Jury trial of fact issues raised by the preliminary motion is made discretionary with the court by Federal Rule 12(b)(4), unless a jury trial is required under the Constitution or and act of Congress.[40] The American Law Institute's Code of Criminal Procedure proposes that all issues of law or fact under the motion be tried by the court, though a necessary exception is recognized where state constitutional objections arise.[41]

The determination by the court of fact issues raised by the motion, constitutional objections absent, undoubtedly would tend to eliminate delay and expedite the time when trial of the general issue would begin. Texas procedure leaves solely to the court the determination of fact issues raised by a non-statutory plea of agreement not to prosecute, so that the defendant is not entitled to submit such issues to the jury.[42] But in the case of a plea of former jeopardy, issues of fact are saved for submission to the jury on trial of the merits.[43] It is suggested that the facts necessary to the determination of such a plea are of a technical nature requiring legal analysis of the situation for proper determination and are so interwoven with the question of law involved that the court would be better qualified to determine such facts than a jury of laymen. Ordinarily the facts involved would be predominantly matters of judicial record, and it would be possible to give the appellate court full power to review the trial court's findings of fact as well as of law on such questions. Thus the defendant would be protected, when he has saved his exceptions, from any faulty analysis of the situation that might be made by the lower court. A preliminary determination of the question in the defendant's favor would operate to end the case, saving the expense and delay of an unnecessary jury trial on all issues. Trial by the court of all

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[40] FED. RULES CRIM. PROC. (1946) Rule 12(b) (4).

[41] AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE (1930) § 216 and note.

[42] Camron v. State, 32 Tex. Crim. Rep. 180, 22 S. W. 682 (1893).

[43] TEX. CODE CRIM. PROC. (1925) art. 525.

fact issues raised by preliminary motion would eliminate confusion and delay and operate to the advantage of both the public and the individual defendant. Giving the court discretion to order jury trial when considered advisable would be helpful where non-technical questions of fact are so controverted and of such importance that the court would prefer to pass the responsibility for decision to the jury.

GROUNDS

Grounds for the single motion before trial, under a provision similar to Federal Rule 12, would include the same defects in the institution of the proceedings or in the indictment or information as those which have always been proper grounds for a motion to quash, an exception, a special plea in bar, or a plea in abatement, and would be further expanded to include, as permissive grounds, all other defenses and objections capable of determination without trial of the general issue.[44] As previously observed in the consideration of the question of waiver, failure to show jurisdiction in the court or to charge an offense would be proper grounds for the motion under Federal Rule 12, although such defects would not be lost to the defendant by his failure to include them in the motion before trial.

The lawyer familiar with the various defenses and objections which may be raised before trial by preliminary pleas and motions under the present Texas criminal procedure would find this working knowledge of value in determining what must be included in the single motion as prescribed in any provision similar to Federal Rule 12, although acquaintance with technical forms would be no longer necessary.

EFFECT OF DETERMINATION

Federal Rule 12(b)(5), section 207 of the American Law Institute Code of Criminal Procedure, and article 537 of the Texas

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[44] See FED. RULES CRIM. PROC. (1946) Rule 12(b) (1).

Code of Criminal Procedure all provide that the defendant whose preliminary motion is overruled may immediately plead to the general issue if he has not previously done so.

Under the Federal Rule and section 218 of the American Law Institute Code, if the motion is granted, the court may order that the defendant be held or his bail continued in order that a new indictment may be filed where further prosecution is not barred. In Texas, however, the defendant in a misdemeanor case must be released from custody,[45] although in a felony case he may be immediately recommitted by order of the court,[46] unless the statute of limitations bars re-indictment.[47] If the exception is sustained for failure to charge an offense, he must be fully discharged unless an affidavit, commonly called a felony complaint, is filed accusing him of the commission of a penal offense.[48] In any event, if the prosecution has not been re-instituted within ten days, the defendant must be discharged until re-indicted.[49] In a misdemeanor case where proceedings have been re-instituted after the information is quashed, the defendant who objects cannot be tried under the new information without first being discharged and re-arrested.[50] Such a requirement would appear to be a mere technicality where the re-institution of the prosecution has been prompt, and there seems to be no valid reason for the distinction between the procedure for holding the defendant pending re-institution of the prosecution in felony cases and the procedure in misdemeanor cases where the information is filed anew within a certain limited period from the time of the order quashing the old information. The defendant, of course, might reasonably be expected to seek his moment of freedom, perhaps to flee the jurisdiction, while the wheels of justice spin.

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[45] TEX. CODE CRIM. PROC. (1925) art. 527.

[46] *Id.*, art. 528.

[47] *Id.*, art. 529.

[48] *Id.*, art. 530.

[49] *Id.*, art. 531.

[50] Turner v. State, 21 Tex. App. 198, 18 S. W. 96 (1886).